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THE COMMONWEALTH OF NATIONS TODAY: HISTORICAL ANACHRONISM OR FOCUS FOR UNIVERSAL VALUES?

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The Hon. Michael Kirby AC CMG*

INTRODUCTION

The British Empire, precursor to the Commonwealth of Nations, grew out of decisions, most of them made in London. It is a city that never ceases to surprise the visitor. Walking yesterday through Leicester Square, I came upon a landmark that I had never previously noticed. In the centre of that public space, circling a statue, is a series of indicators, pointing in the directions of the countries of the Commonwealth. The pointers occupy every segment of the circle, indicating that members of this unique family of nations, and their people, can be found in every corner of our world.

I am a member of the last generation that grew up in the era of the British Empire. In my school days in Australia, every 24 May was celebrated as Empire Day. In 1954, at my high school in Sydney, I

* Justice of the High Court of Australia (1996-2009); President of the Court of Appeal of Solomon Islands (1995-6); Independent Co-chairman of the Malawi Constitutional Conference (1994); member of the ILO Mission to South Africa (1991-2). After this lecture was given, it was announced that Michael Kirby was appointed to the Eminent Persons Group on the future organisation of the Commonwealth of Nations.

addressed the school assembly on the theme: 'The Empire and You'. The school journal records that I did with my 'customary fire and vigour'[1]. As usual, the hymn "Recessional" was sung to Kipling's words proclaiming that the Empire held 'dominion over palm and pine'. Ironically, the day of the celebration had been the birthday of the long dead Queen Empress, Victoria. I believe that Empire Day was not generally celebrated in Britain. On the whole, the Empire never held the same fascination for Britain as Britain held for its Empire.

In the intervening six decades since that school assembly, much has changed in the world and in the Commonwealth. My remarks address how the changes came about; the activities that the Commonwealth performs well; the values that it proclaims that it holds in common; the new initiative that it has lately taken; and some of the problems that it must face as it adjusts to a very different era of global relationships and challenges.

My conclusion will be that the Commonwealth is not an anachronism but a useful international association of independent nations with links of history, language, law, education, science and civil communities. However, recent instances indicate a need for the Commonwealth to be more active in upholding the oft proclaimed commitment of its members to the core values that define the essential reasons for its continued existence. Those values include a commitment to democracy, to human rights, to tolerance, respect and understanding, and to principles of

[1] Fort Street Boys' High School, Sydney, Australia, *The Fortian*, December 1954, p.27.

governance largely inherited from the tradition that originally developed here in London[2].

It is sometimes said that the British Empire was acquired by Britain 'in a fit of absence of mind'. Certainly, for the most part, its member countries were collected according to no well-planned strategy to dominate the world. The disparate members of the Commonwealth were acquired for varying reasons, including trade, settlement and exploration, rivalry with other empires and sometimes through deliberate conquest or for convenience. In the result, the Commonwealth, like the empire before it, covers about a quarter of the world's land surface and more than a quarter of its population.

To understand where the Commonwealth is and where it may be going, we must start with its origins. Many of its essential links are historical, for with the history came connections of language, institutions and interests.

THE CREATION

Fifty-four independent nations freely associate in the Commonwealth of Nations. All but two of them (Mozambique (1954) and Rwanda (2009)) were at some stage, bound together in varying forms of allegiance to the British Crown.

The admissions of Mozambique and Rwanda wre exceptional. And yet, not every past colony or possession of Britain is a member of the Commonwealth. Thus, Hanover (and if one goes back further, parts of

[2] CHOGM, Port of Spain, 29 November 2009: *Trinidad and Tobago Affirmation on the Commonwealth's Fundamental Values and Principles* (2009) published in Commonwealth Foundation*, Partnership for a More Equitable and Sustainable Future* (2009).

France) were once historically bound in allegiance to the British monarch. Yet they are not part of the Commonwealth and never have been. Nor is the United States of America, which, in 1781, prevailed in its War of Independence against Britain: upholding the right of its people to enjoy basic liberties in its territories that were enjoyed by British subjects at home. That war was the have a profound influence on the long-term evolution of democracy and civil rights in the countries of the Commonwealth of Nations. The British Crown learnt, sometimes slowly and reluctantly, from its mistakes.

Other lands over which the Union Jack once flew have either opted out of membership of the Commonwealth (such as Burma); have not seen the idea advance to decision (such as Palestine, modern Israel and Yemen); or have not so far pursued the idea (such as the one time Anglo-Egyptian Sudan, Jordan, Aden etc.).

Two countries of the Commonwealth have witnessed their membership suspended because of democracy or human rights defaults (Zimbabwe (1994) and the Fiji Islands (2009)). One hopes that one day, on proper terms, they will rejoin. Also to be hoped is a restoration of the membership of Ireland, which was associated as a dominion of the Crown between 1931 and 1949. As the pain of past history is softened by time, the restoration of Irish membership would be an important achievement.

The Commonwealth as it is today evolved with the advance of British domestic constitutionalism. Coinciding with the Reform Bills in the nineteenth century and the extension of the franchise in the United Kingdom, came ideas for a greater freedom for the dominions and

territories of the Crown. There is no doubt that the demands of the American colonists, in the revolution of 1776, left a profound impact on the minds of British statesmen. The first dominion to achieve substantial independence was Canada (1867)[3]. It was followed by the Commonwealth of Australia (1901)[4], the Union of South Africa (1909)[5], and New Zealand (1910)[6]. And in 1931, the *Statute of Westminster* was enacted (22 Geo 5 Ch 4) stating that "the Crown is the symbol of the free association of the members of the British Commonwealth of Nations ... united by common allegiance to the Crown".

The slow moves towards representative democracy in India began in 1909. India came to full independence in 1947 with partition of the sub-continent into India and Pakistan[7]. The speed with which, eventually, almost all of the former colonies and territories of Britain achieved full independence was undoubtedly hastened by the impact of the two world wars and their drain upon the manpower, treasure and will of the British people to maintain their vast imperial sway. Coinciding with these developments was the creation of the United Nations Organisation in 1945 by a *Charter* that proclaimed notions of self-determination of peoples and fundamental human rights[8].

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3 *British North America Act* 1867 (UK).

4 *Commonwealth of Australia Constitution Act* 1900 (UK).

5 *Union of South Africa Act* 1909 (UK). See *Harris & Ors v Minister of the Interior* 1952 (2) SA 428 (Appellate Division).

6 Under the *New Zealand Constitution Act* 1852 (UK) and *New Zealand Constitution (Amendment) Act* 1947 (UK). See G. Palmer and M. Palmer, *Bridled Power: New Zealand Government Under MMP* (OUP, 3rd Ed, 1997), 3.

7 *Indian Independence Act* 1947 (UK). See H.M. Seervai, *Constitution of India* (4th ed., 1991), Vol I, 278-9.

8 *Charter* of the United Nations, articles 1.3, 55, 73.

The adoption of the *Universal Declaration of Human Rights* in 1948[9] coincided with the passage of the *Republic of Ireland Act*[10]*.* The latter allowed Ireland to terminate the allegiance of its citizens to the British Crown. This was a step that was eventually taken on 18 April 1949, just four days before the summit of Commonwealth Prime Ministers was convened in London, to include for the first time Prime Ministers Jawaharlal Nehru (India), Liquat Ali Khan (Pakistan) and D. Senanyake (Ceylon).

The decision of Ireland to renounce allegiance to the Crown of Great Britain was thought in many circles (including in Ireland) to be an automatic conclusion of that country's membership of the Commonwealth. Ireland did not therefore attend the 1949 Commonwealth meeting. India had, by this stage, made it clear that it too intended to move to a republican form of government. An important question on the table at the meeting in 1949 was whether such a step would indeed terminate India's association with other Commonwealth countries.

Fortunately, a few imaginative legal steps, taken with the concurrence of King George VI, saved the Commonwealth from effective dissolution or diminution. The formula that was adopted was first negotiated between Nehru, Clement Atlee (United Kingdom), Lester Pearson (Canada) and the other Commonwealth leaders. Those leaders included also Ben Chifley (Australia), Peter Fraser (New Zealand) and D.F. Milan (South Africa). The leaders agreed in the *London Declaration of 1949.* This concluded that India could remain a member of the Commonwealth,

[9] *Universal Declaration of Human Rights* 1948. Adopted 10 December 1948; GA Res 217A (III). UN Doc A/810 at 71.

[10] *Republic of Ireland Act* 1948 (UK).

although a republic, on the basis of “free association” and “equality”, with complete political and legal independence. It could do this by accepting the British monarch “as a symbol of the free association of independent members nations, and as such, Head of the Commonwealth”. When King George VI died in February 1952, the Commonwealth heads of government accepted his daughter and heir, Queen Elizabeth II, as his successor in the role of Head of the Commonwealth. Since that time, the Queen has fulfilled her duties in that office by engagement and support, but without any inappropriate interference or intrusion.

One of the many practical contributions of the Queen, as Head of the Commonwealth, was the gift of Marlborough House, a royal palace in London, to house the Secretariat of the Commonwealth. This body is itself a microcosm of humanity comprising about 300 officers. By the standards of most international bodies, the Secretariat’s budget is tiny. It has been led successively by five Secretaries-General: Arnold Smith (Canada, 1965); [Sir] Shridath Ramphal (Guyana, 1975); Chief Emeka Anyaoku (Nigeria, 1990); [Sir] Donald McKinnon (New Zealand, 2000); and Mr. Kamalesh Sharma (India, 2005).

The links of history and the bond of the English language have been reinforced by professional, sporting, scientific, trading and political associations amongst members of the Commonwealth. Up to the establishment of the office of Secretary-General in 1965, it was hoped, in some quarters, that a more effective system of appellate review of high judicial decisions would be achieved within the Commonwealth. Commonwealth countries had the experience, and example, of the Judicial Committee of the Privy Council. For more than a century, that distinguished tribunal, sitting in London, had provided a link that set very

high standards of judicial integrity, maintained the essential unity of common law legal doctrine, upheld constitutional principles and frequently defended basic civil rights. Suggestions were made at various stages for the enhancement of the judicial institution, so as to build a true Commonwealth-wide international court which would include judges from all or most Commonwealth countries. However, although this idea was toyed with, it never had much support in Britain. Commonwealth judges took only a minor role in the work of the Privy Council.

The opportunity to create a major Commonwealth court, or regional panels of such a court, passed. It is now too late to revive it. In the place of this form of association, improvisations have grown up. These include the personal participation of Commonwealth judges in the courts of Commonwealth countries pursuant to individual commissions. (I myself served as President of the Court of Appeal of Solomon Islands concurrently with my Australian judicial offices in 1995-6). Further, publications and scholarships have retained the links of information and doctrine. The publications include the *Law Reports of the Commonwealth*, the *Commonwealth Law Bulletin,* and *CommonwealthNet*, an initiative of Interights - as well as other legal series. I am proud to be associated with all of these publications.

Certain regional courts have also been created, including the Caribbean Court which is still to be fully realised. Such institutions carry on the distinguished inter-jurisdictional judicial traditions. And within the parliamentary institutions, so does the Commonwealth Parliamentary Association. Links of this kind are a useful and still continuing heritage.

We do well to preserve them and to continue to learn from each other within them.

SOME THINGS DONE WELL

Professional and societal organisations: In a recent speech to the Commonwealth Legal Forum, Sir Sridith Ramphal said that the most celebrated links within the Commonwealth of Nations were centred on language, learning and law. Certainly, these are the fields in which, over my professional life, I have come to know and appreciate the work of the Commonwealth, and specifically of its Secretariat in London.

More than 90 associations have been established that have the word "Commonwealth" in their title. This is an indication of the very large number of civil society organisations, of an international character, that involve links of a Commonwealth kind. The professional associations cover a vast spectrum of human activities. In my own profession, the law, they include the Commonwealth Lawyers' Association and the Commonwealth Magistrates' and Judges' Association that bring together lawyers who continue to share many substantial links of an institutional, doctrinal and practical kind.

Many other professional bodies exist, such as the Commonwealth Nurses' Association; the Association of Commonwealth Universities and the Commonwealth Local Government Forum. In a world of so many divisions, it is a natural thing for people who share a common language and bonds of history and social organisation, to find utility in maintaining their associations through such bodies. Sharing experience obviates needless reinvention of the wheel. It stimulates new and creative thinking. It helps to avoid complacency. Above all, it emphasises the

commonalities of human experience. It saves us from self-satisfaction and from seeing the world only through the prism of the familiar and the comfortable. In an age of many global challenges, it is highly desirable that we should maintain such professional and institutional associations.

Moreover, the associations extend to bodies that lie at the very heart of core objectives of the Commonwealth. The Commonwealth Parliamentary Association, for example, taps the deep reservoir of experience of the legislatures of Commonwealth nations. Given that one of the core values of the Commonwealth is accepted to be electoral democracy, it is natural that we, who continue to follow traditions partly derived from the British parliamentary legacy, should find utility in an ongoing conversation between parliamentarians in Commonwealth nations.

The Trinidad and Tobago Affirmation, agreed at the CHOGM conference in 2009, declares a Commonwealth "belief in the inalienable right of the individual to participate by means of free and democratic processes in shaping the society in which they live"[11]. It recognises "that parliaments and representative local government and other forms of local governance are essential elements in the exercise of democratic governance". Of course, today such legislatures have the Inter-Parliamentary Union (IPU) with its broader membership base and global operation. However, there is something specially comfortable and friendly in judges, magistrates, lawyers and parliamentarians severally meeting together with Commonwealth colleagues. In such meetings there is, inevitably, a wider span of shared traditions and interests: often unspoken and sometimes even unconscious.

[11] Above n2, p12.

Virtually all such Commonwealth organisations organise conferences; provide services; engage with members; and publish journals that spread the wisdom and experience of colleagues in countries of great diversity. A feature of British colonial experience, from early days, was commonly a large devolution of power and a tolerance of a measure of diversity of governance and administration that was not always a feature of, say, French colonial experience, or that of other European powers. So large was the British imperial community that the manpower, and the inclination, were not there to impose strict uniformity of control. This means that, in nations of many racial, religious, cultural and other diversities, contemporary experience extends to both commonalities and differences. It is this feature of diversity in a context of shared experience that makes the Commonwealth such a special international community. The concurrent emergence of the English language as a virtual international language is itself, in part, a product of the intercontinental character of the Commonwealth of Nations.

In addition to the specific professional and governmental bodies, and the regular meetings of ministers of Commonwealth nations who hold similar governmental portfolios, some of the civil society organisations that have flourished within the Commonwealth have a broad general focus that lays emphasis on shared experience. Thus, the Royal Commonwealth Society (RCS), in whose premises this lecture is given, plays an important function in stimulating and maintaining the links that exist within the Commonwealth. Most importantly, in recent times, the RCS has taken a lead in exploring attitudes of Commonwealth citizens, and their knowledge, concerning the Commonwealth; their criticisms of

present arrangements; and their suggestions for ways in which the Commonwealth links might be strengthened[12].

The outcome of the extended "Commonwealth Conversation", which was conducted by the RCS, is a hard-hitting, candid, disparate and impressive dialogue concerning what is wrong in the Commonwealth and how Commonwealth citizens should go about trying to improve it. A repeated feature of the comments that emerged from the Commonwealth Conversation was a criticism that "the Commonwealth is just too timid; that's the problem"[13]; "that the Commonwealth isn't serious about human rights"[14]; and that it must be more articulate and forthright in declaring what its values are and in establishing frameworks to hold member nations and their citizens to the obligation of upholding the standards that are proclaimed at the regular meeting of heads of government[15].

I cannot think of another international organisation that would welcome, encourage, support such a critical and public introspection about the strengths and weaknesses of its own organisation. In the published version of the RCS Commonwealth Conversation, the Secretary-General of the Commonwealth is quoted as welcoming the enterprise. Mr. Kamalesh Sharma is noted as saying[16]:

> "I support the Commonwealth Conversation. It is extremely important that discourse takes place about the Commonwealth, so that it is no longer seen as working along rigid paths or as being something belonging to the past, rather than something which

[12] Royal Commonwealth Society, *Common What? Emerging Findings of the Commonwealth Conversation* by Joanne Bennett et al. (Royal Commonwealth Society), November 2009.

[13] *Ibid,* 20.

[14] *Ibid*, 23.

[15] *Ibid*, 24.

[16] *Ibid,* 6. Also see the very candid conversations in the Report of the Commonwealth Round Table Conference. See *The Round Table, A Great Global Good?* Esp. Anwar Choudhury, p23.

> belongs to the future. A future that is being shared. A future that is being shaped through discourse about expectations and possibilities."

This vision represents a fresh approach, most unusual in an international body. It has been welcomed by participants in the Conversation. There must be more of it[17]. In this approach lie the seeds of renewal of the Commonwealth and of its Secretariat as an effective global institution.

In addition to the work of the RCS, the Commonwealth Foundation, also based in London, has been foremost in working with not-for-profit groups, charities, professional networks and other such organisations to encourage initiatives on development issues that are now presented by modern notions of universal human rights. The freest societies in the world rejoice in providing an environment that encourages civil society organisations (NGOs) and promotes the participation of citizens in their own governance and social life. Strengthening civil society within the Commonwealth is a major aspect of the work of the Commonwealth Foundation. As I discovered, in work I performed for the United Nations in Cambodia, civil society bodies can sometimes be a great nuisance to autocrats and even to democratically elected rulers. However, they represent the means whereby individuals flourish and achieve a maximum interaction with fellow citizens and with people living in other countries. Because especially of the linguistic link that exists amongst the citizens of Commonwealth countries, the commonalities are easier to explore and celebrate within Commonwealth nations than in any other inter-continental, or even regional, body of nations.

[17] RCS *Common What?* Above n12, 6.

A small example of how Commonwealth countries can be distinguished from others may be mentioned in my own field of expertise, the law. Because of the American Revolution, the lawyers of the United States were substantially cut off from the ongoing legal traditions of the United Kingdom and of the judicial traditions to which more traditions gave rise. In Commonwealth countries, the link to the Privy Council encouraged a general acceptance of legal comparativism. Lawyers throughout the Commonwealth had English judicial reports on their shelves. Their judges constantly referred to decisions of the Privy Council and of other English courts. Increasingly, in more recent decades, the higher courts of Commonwealth countries have also referred to decisions of courts in other lands of the common law. The links of language, institutional traditions, values and professional culture encouraged such citations.

If one looks at the *Law Reports of the Commonwealth* for example, they are filled with unself-conscious references to the decisions of courts throughout the Commonwealth and also, to a lesser extent,(mainly) Anglophone national courts such as those in the United States of America and Ireland[18]. Although similar citation is not uncommon in Ireland, in the United States the citation of such authority has often proved controversial. Some judges, politicians and commentators are extremely critical of any reference whatever to legal authority outside the United States, and especially in constitutional adjudication. Here, there is a large cleavage of attitude and of settled legal culture[19]. The Commonwealth link promotes a more internationalist outlook. In my view, this is a strength of that link. It is one that we should defend and

[18] See M.D. Kirby, Foreword for the 100th Volume of the *Law Reports of the Commonwealth* [2009] 2 LRC iii.

[19] M.D. Kirby, "International Law – The Impact on National Constitutions" (2006) 31 *American University International Law Rev* 327.

foster. Each country maintains its own total legal independence. Yet none is so proud as to deny the occasional utility of securing good ideas and useful analogies from other lands, especially where these are shared in a way that invites comparison and resists narrow xenophobia. The same process occurs in parliamentary and professional associations.

Electoral observers: Because electoral democracy is a core principle of the Commonwealth of Nations, it is natural that the Commonwealth Secretariat has played an important role in encouraging and safeguarding real choice amongst the citizens of the Commonwealth concerning those who will serve in their government.

The Commonwealth was an early leader in the provision of electoral observance. Thus Commonwealth observers have played a most useful part in upholding the integrity of the franchise and securing the restoration of electoral democracy where this has been interrupted. Reference can be made to the recent electoral observer missions in Nigeria, Cameroon, Zanzibar, Kenya and Zimbabwe. Recent national elections in Ghana (2008) and Sri Lanka (2010) have strengthened the opportunity for achieving democracy and upholding integrity.

Commonwealth electoral observers of the last national election in Ghana, held in December 2008, played a very useful role in ensuring confidence in the electoral process and in achieving an ultimately peaceful outcome. This was the more important when the opposition presidential candidate won the election in a tense and closely fought contest that required two rounds of voting. The very presence of a Commonwealth electoral mission and the moral power and authority that

it deployed, made it more difficult for recalcitrant leaders to cling to power when electoral integrity requires the opposite outcome[20].

It is true that many other international bodies have lately become involved in international electoral observance. These include the European Union, the Council of Europe, the Carter Foundation in the United States and various agencies of the United Nations. Still, the Commonwealth observers play a specially useful role because the shared language and history encourages, and facilitate, an element of trust and mutual respect that may be harder to secure in other bodies with different members, however useful they may be.

In 1993, it was my privilege to serve as one of the two independent co-chairs of the Malawi Constitutional Conference. That Conference ultimately secured agreement on the amendments to the Malawi Constitution necessary to remove the provisions respecting life presidency and to provide for a substitution of multi-party democracy. The initiative on that occasion was taken by the United Nations Development Programme (UNDP). It was not without significance that, in looking outside for Malawi for an independent co-chair, the contesting factions agreed to my participation, as a Commonwealth citizen.

The Commonwealth Secretariat encouraged the return of multi-party democracy in Uganda. It has worked to defuse tensions between the government and opposition in Guyana and in several countries of Africa. It has provided expert support for institutional underpinning in Cameroon, including by the development of a new electoral commission.

[20] M. Neuhaus, "Ties That Bind: The Commonwealth and our Common Values", address, Canberra, 16 May 2010 (hereafter M. Neuhaus "Ties"), p5. To his credit, the defeated President of Ghana has since participated in electoral observances missions helping to bring democracy to Africa.

It has also supported the Solomon Islands with expert advisors. After the serious conflict in Kenya, following its national elections, the Commonwealth Secretariat supported the negotiations conducted by another Commonwealth citizen, Kofe Annan (Ghana), the past Secretary-General of the United Nations. The Secretariat has also been heavily engaged in the restoration of democratic governance in Pakistan and in a response to the situation in Fiji[21]. All of these initiatives indicate the role that the Commonwealth, and its Secretariat, can play in promoting and supporting the core principle of democracy in practical ways, strengthened by a strong articulation of basic principles.

Good offices: In addition to these electoral initiatives, the environment of the Commonwealth has proved helpful for the resolution of internal and international conflict by the use of specially appointed missions of good offices, designed to ease tensions and to promote a peaceful resolution of conflict.

Within the Commonwealth Secretariat, a Good Offices Section has been established. It has deployed distinguished Commonwealth citizens to provide mediation, dialogue and impartial advice that, in many cases, have proved critical to the success of their missions. Amongst recent instances of special envoys, provided by the Commonwealth, have been:

- *Guyana*, led by the former Anglican Archbishop and Governor-General of New Zealand, Sir Paul Reeves;
- *Maldives*, led by Tun Musa Hitam, former Deputy Prime Minister of Malaysia;

[21] M. Neuhaus, "The Commonwealth At Sixty", address to the RCS, Canberra, 16 March 2009, at pp5-6.

- *Cameroon*, led first by Christine Stewart, and then by former Prime Minister Joe Clark, both from Canada;
- *Tonga*, led by Sir Douglas Graham of New Zealand;
- *Swaziland*, led by Professor Adefuye of Nigeria; and
- *Zanzibar*, also led by Professor Adefuye[22].

The instance of Maldives is a good illustration of the utility of the quiet measures of diplomacy and assistance that the Commonwealth can provide. The President of Maldives for 30 years, President Gayoom, had occasioned the arrest of the leader of the opposition, Anni Nasheed. He had been held as a political prisoner because of his struggle against the autocracy of the regime. Eventually, interventions by the Commonwealth persuaded President Gayoom to release Mr. Nasheed and to work with him towards new constitutional arrangements, more consistent with the proclaimed values of the Commonwealth. This led, in turn, to the adoption of constitutional changes providing for greater political freedom and multi-party democracy.

Sharing the same Islamic spiritual tradition as the President, the Commonwealth special envoy helped procure new constitutional provisions by mid-2008. At the last minute, President Gayoom baulked at approving the changes and at clearing the way for fresh elections. Ultimately, however, the elections were held. After his long rule, President Gayoom accepted that the time had come for him to make way to a new generation. The result was the election of President Nasheed. Not the first time a one-time political prisoner and accused

[22] M. Neuhaus "Ties", 3-4.

rebel ascended to government in a Commonwealth country, walking the same path as Gandhi and Mandela[23].

These may not be greatly publicised activities. In many countries of the world, including in the Commonwealth, they may be unknown. But they have large importance for the Commonwealth citizens in the countries primarily affected. Moreover, in the case of Maldives, they represented a significant symbolic achievement of electoral democracy in an Islamic country, in which previously, for a long time, autocracy had prevailed. Although the situation remains fragile, a peaceful change of leadership was achieved.

The foregoing does not exhaust the useful activities of the Commonwealth of Nations, its Secretariat and the designated experts who have played an important role in upholding core Commonwealth values. But it does show the usefulness of this international body in vivid and practical ways. In a world of conflict and often seemingly intractable differences, such achievements deserve to be appreciated and celebrated.

THE AGREED CORE VALUES

For such a diverse collection of nations, with sometimes profoundly different social features, religious traditions and stages of economic development, it is remarkable and heartening that, even if only in writing, much concurrence has been achieved over the “core values” that are felt to inform the Commonwealth experience.

[23] The story is told in Neuhaus, “Ties”, pp.4-5.

I say 'if only in writing', out of a recognition that rhetoric is comparatively easy to secure in international discourse. Gaining a truthful and whole-hearted adherence to shared values is much more difficult. In a speech to the United Nations Human Rights Council, Secretary-General Sharma observed, after citing the Port of Spain *Affirmation on Commonwealth Values and Principles* agreed by the Heads of Government in November 2009[24]:

> "We know full well that there can be sobering distinctions between rhetoric and reality. But these words are most certainly the foundation upon which our reality is built ... I convey our great respect for the work of the UN High Commissioner for Human Rights, with whom, tomorrow, I shall sign a joint declaration to enhance co-operation and partnership between our two organisations on human rights."

Accepting that rhetoric and reality can sometimes take different paths, the fact is that the Commonwealth of Nations, in a series of statements, has repeatedly embraced commitments to values that deserve strength precisely because of the shared language, history and institutional experiences.

Thus, in 1971, the Statement of the Singapore CHOGM affirmed a very strong stand against racism and, in particular, apartheid. It was this stand that united the Commonwealth nations and led to concerted action that ultimately bore fruit in the abandonment of apartheid in South Africa, the creation of a true multi-party democracy in that country and its return to full membership of the Commonwealth. Many people look back on those years as the 'glory days' of the Commonwealth. Truly, there was a high level of unity of purpose and, eventually, of action and achievement.

[24] Secretary-General Sharma, address to United Nations Human Rights Council, 1 March 2010.

The principles expressed in Singapore were subsequently re-affirmed and enlarged at the CHOGM meeting in Harare in 1991. It contained an assertion of the centrality of:

> "Democracy, democratic processes and institutions which reflect national circumstances, just and honest government and fundamental human rights, the rule of law and the independence of the judiciary, freedom of expression and the enjoyment of such rights by all individuals regardless of gender, race, colour, creed or political belief."

In 1995, these statements were followed by the Millbrook Declaration, adopted during the Auckland CHOGM of that year. This declaration, in turn, accepted the responsibility of Commonwealth countries to ensure that the core principles were not simply committed to declarations, but were carried into effect by the machinery of the Commonwealth and faithfully observed by its members.

Other declarations that have been adopted at later CHOGM meetings came together in the *Affirmation* accepted by the CHOGM conference at Port of Spain in 2009. That *Affirmation* proclaims the desire of the leaders to make the Commonwealth an "even stronger and more effective international organisation" so that it would be and remain "relevant to its times and people in future"[25].

The Port of Spain *Affirmation* commits Commonwealth countries to work together to strengthen the values and principles accepted in the foregoing statements over nearly 30 years. In particular, the *Affirmation* urges all Commonwealth organisations to subscribe and adhere to

[25] R. Iniyan Llango, "CHOGM 2009, Detour or Dead End?", (2010) 17 Commonwealth Human Rights Initiative *Newsletter*, 2.

Commonwealth principles and values and to act in conformity with the letter and spirit of the decisions of the Commonwealth Ministerial Action Group (CMAG).

This body, an innovation, is described as the "custodian of the Commonwealth's fundamental political values"[26]. Most notably, the *Affirmation* accepts a specific commitment on the part of the Commonwealth of Nations to universal human rights as a core value of the Commonwealth. It does so in these terms[27]:

> "Re-affirming our commitment to the *Universal Declaration of Human Rights* and human rights covenants and instruments; and recalling our belief that equality and respect for protection and promotion of civil, political, economic, social and cultural rights for all without discrimination on any grounds, including the right to development, are foundations of peaceful, just and stable societies, and that these rights are universal, indivisible, interdependent and inter-relation and cannot be implemented selectively."

It would be hard to state a commitment to human rights in more emphatic, comprehensive and universal terms. On the face of things, therefore, the documents of the Commonwealth, and its statements of values, are in good order. They are expressed, re-expressed, confirmed and re-affirmed by succeeding meetings of all the successive political leaders of the Commonwealth over at least the last three decades.

NEW INITIATIVES

Periodic human rights review: There are many new initiatives that have been taken by the Commonwealth Secretariat that are practical, useful and designed to reinforce its values. One of them, to which the

[26] *Affirmation*, above n2, pars.8 and 10. See also 2010-2 High Level Review reporting to the Coolum CHOGM of 2002.

[27] *Affirmation*, par.5.

Secretary-General has attached importance is the practice of universal periodic review by Commonwealth countries, in the context of the United Nations, in their compliance with universal human rights[28]. Mr. Sharma has declared that this amounts to "important ... exercises in honest and self-critical assessment". So far, the process has involved 112 countries of the United Nations, including 27 that are members of the Commonwealth. These 27 were all assisted by the Commonwealth Secretariat, in a project financially supported by the governments of the New Zealand and the United Kingdom.

The process of universal review involves each country preparing a report on its own human rights institutions, treaty membership, observance and compliance. The reports are submitted to scrutiny by the human rights organs of the United Nations and by civil society. The purpose is to ensure that adherence to human rights treaties is increased; compliance enhanced; and the process of human rights conformity released from paper documentation into active discussion in the media and civil society. Important reports of the Commonwealth Secretariat, edited by Dr. Purna Sen, indicate the progress that has been made in enlarging the reportage of Commonwealth countries on their own human rights record[29].

Of course, such scrutiny, alone, does not ensure human rights compliance in practice. Moreover, acute differences of view can sometimes be found in perceptions of what are fundamental rights, as for example, in the division of opinion within the Commonwealth of Nations about the maintenance of capital punishment. Nevertheless, the

[28] Secretary-General Sharma, above n27, p2; J. Matiya, "Repositioning the International Human Rights Protection System: The UN Human Rights Council" (2010) 36 *Commonwealth Law Bulletin* 313 at 319.

[29] Purna Sen (ed), *Human Rights in the Commonwealth: A Status Report*, 2008.

beginning of genuine civil dialogue about what human rights mean and how they apply, or do not apply, in Commonwealth countries is a step in the right direction. To some extent, this is a bureaucratic process. But it is an endeavour to move beyond documentation and to encourage critical national and international examination of real human rights problems and issues deserving of attention.

Youth initiatives: An important priority of Secretary-General Sharma has been a concentration on youth within the Commonwealth. Correctly, he sees the importance of young citizens as critical to the survival of the Commonwealth as a body relevant to the next generation. Mr. Malcolm Fraser, past Prime Minister of Australia and long-time supporter of the Commonwealth, has repeatedly emphasised the importance of engaging that new generation. Although the Youth Forum has a tiny budget, amounting only to £GBP2.5 million. The acceptance of the need to consult and involve young people and to treat them with full dignity and respect and secure their ideas and opinions deserves recognition.

Women's equality: Likewise, the significance of gender equality in the Commonwealth is recognised by the Commonwealth *Plan of Action for Gender Equality*, adopted in 2005[30]. The Plan of Action addresses the many disadvantages that exist in every Commonwealth country for women and girls. The Plan recognises that gender differences do not exist in a vacuum but intersect with a number of other factors such as class, caste, race, age, religion, disability and sexual orientation[31]. At successive meetings of CHOGM, targets have been set for the

[30] Commonwealth Secretariat, *The Commonwealth Plan of Action for Gender Equality 2005-2015*, Secretariat, 2005.

[31] *Ibid*, [2.11], p23.

participation of women in high-level decision-making in political, public and private sectors within the Commonwealth. Generally speaking, a target of 30% of female decision-makers has been adopted[32]. As the record of Commonwealth documents shows, the current attainment falls far short of the objectives. Some countries, such as Mozambique, New Zealand and South Africa, have reached the target fixed, at least so far as elected members of the national legislature. However, other countries and sectors fall far short of the target which remains a goal and a useful check and criterion for all Commonwealth countries. Having targets gives a focus to debate and stimulates local discussion and political action.

New and different issues: Many issues have been raised by the Commonwealth Secretariat to engage citizens and civil society organisations in future topics of importance for the Commonwealth. These include the protection of the environment and an effective response to climate change[33]; the adoption of an information technology portal so as to allow full access in developing countries to information that would otherwise be unavailable there[34]; the integration of the Millennium Development Goals (MDG) of the United Nations into the objectives of the Commonwealth so that human rights are not seen only as a reflection of civil and political rights but as involving the need to address the challenges of development and economic equality[35]; and a more specific recognition that poverty and economic vulnerability are critically involved in the core values of human rights within the Commonwealth.

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[32] *Ibid*, [3.3], p25.

[33] See Commonwealth Secretariat, Discussion Paper 5, "Human Rights and Climate Change: An Approach that Puts People in the Forefront of the Debate" (2009).

[34] The information portal is a repeated theme in speeches of the Secretary-General.

[35] Gender Equality, above n33, p60.

SOME OF THE PROBLEMS

Projection and image: Although the foregoing review shows that the Commonwealth and its Secretariat, perform useful functions (some of them quite sensitive and difficult, and not easily transferable to other bodies) there is no doubt that the Commonwealth struggles to get media and popular coverage of its existence, let alone its activities.

In the report of the RCS Commonwealth Conversation, one Canadian student observed, bluntly[36]:

> "If their actions are not noticeable enough to garner the attention of international media, perhaps they aren't doing enough or the right things."

Some of the blame for this lack of projection is placed squarely by the respondents upon lack of focus (or lack of Secretariat skill) in projecting knowledge about the Commonwealth. Thus, the following remark reflects what is often said[37]:

> "The Commonwealth was an organisation which could influence world affairs but has so far found it difficult to establish a clear and meaningful purpose on the twenty-first century national scene."

And why should this be so?[38]

> "We need to co-ordinate better. Civil servants need a clear message – they will not take notice of a lot of long-winded documents and neither will the public."

And as one senior official from the Caribbean is recorded as saying[39]:

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36 RCS, Common What?, above n12, p16.
37 *Ibid*, 36.
38 Ibid, 31.
39 Ibid, 26.

> "Commonwealth communiqués include everything except the kitchen sink. There is no attempt to focus in on priorities."

Lack of focus is a recurring theme[40]:

> "Governments have been let down again and again by the Secretariat. Time and again we have asked them to prioritise and cut back their activities. Yet they have failed to listen."

That these are not simply complaints of older officials from developed countries is reflected in the widespread ignorance about the Commonwealth revealed by Commonwealth citizens in response to public surveys. Asked who was the Head of the Commonwealth, 85% of Australian respondents correctly named the Queen. But the figure was lower in other countries. In the United Kingdom, 70%; Canada 61%; Malaysia 54%; and India 41%. In Jamaica, 50% got the answer right. But their response was somewhat damaged by the fact that 25% of Jamaicans think that President Barak Obama was Head of the Commonwealth[41].

There are similar divergences in answers addressed to identifying whom the next head of the Commonwealth should be. In Australia, 49% of respondents answered a member of the British Royal family. In Canada, 36%; in South Africa, 29%; in Malaysia, 24%; and in India, 20%. Rotation of the office was favoured by only 23% of Australian respondents; whilst in India and Malaysia, that figure was closer to 50%. One young respondent from Maldives said that only people who knew about the Commonwealth could take advantage of its facilities. This is the essence of the problem. Publicity is important not only to encourage

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[40] Ibid, 26 (attributed to a senior official of a developed country).

[41] Royal Commonwealth Society, Results From Commonwealth Polls, 20 July 2009.

participation. It is vital to stave off feelings of cynicism, disillusionment or indifference.

One cannot lay all of the blame about the lack of media attention to the Commonwealth at the doorstep of the Secretariat. Although, in a Christmas broadcast, the Queen devoted almost her entire talk to her activities in Commonwealth countries as Head of the Commonwealth, the only news item that attracted the British media was a passing royal comment on the British forces in Afghanistan[42]. Sadly, citizens are dependent on international news media for much of their information. All too often, those outlets have their own agendas that alternatively manipulate us in the glossy world of infotainment or the divisive world of conflict journalism. Doing useful things does not normally get treated as newsworthy.

Still, the lack of clear messages and the lack of an effective projection of the Commonwealth to the young citizens who thirst for an international body they can admire, is clearly an urgent problem in need of attention. A more effective engagement with all forms of media is obviously an essential part of the solution to this problem.

Leadership and organisation: A reflection on the many recent examinations of the future of the Commonwealth indicates that the highest priority must be given to improving the performance of the Secretariat. This was reflected in the inclusion in the Port of Spain *Affirmation* of a demand for[43]:

> "... efforts to improve the Secretariat's governance, its responsiveness to changing priorities and needs, and its ability to

[42] Commonwealth Round Table, *A Great Global Good?* (January 2010), p.5.

[43] *Affirmation*, above n2, par.14.

> enhance the public profile of the organisation. We commit ourselves to supporting the Secretariat in this endeavour. We also underline the importance we attach to intensifying the Secretariat's commitment to strategic partnerships with other international organisations and partners in order to promote the Commonwealth's values and principles."

An obvious strength of the Commonwealth Secretariat is its comparatively small size (by international standards) and its diversity of background and experience. However, many observers complain about the variable quality of work performance and the inordinate delays that can often attend securing responses to enquiries and requests. Some have attributed these complaints to the relatively low levels of salary paid to most junior officers of the Secretariat, when compared to other international organisations. But others blame more systemic causes.

Whatever, the reasons, the need for improvement in Secretariat performance is a repeated theme of virtually every institutional examination of the future of the Commonwealth at this time. The inability, in the RCS poll of two-thirds of those interviewed to name a single activity that the Commonwealth undertakes was especially discouraging[44]. Members of the Secretariat must be concerned about this ignorance because institutional survival depends upon a conviction that the institution is worth preserving. The sharp criticisms at the parallel civil society meetings in Port of Spain, and similar criticisms before and since have led some commentators to conclude that the CHOGM leaders have heard the repeated castigation of "the Commonwealth's fading relevance and effectiveness"[45]. But translating

[44] Llango, above n28, p2.

[45] *Ibid*,2.

that appreciation into a Secretariat-wide shake-up is easier said than done.

The ways forward are suggested by many of the commentators, although it must be conceded that some of them urge conflicting and different initiatives and others point to action running in opposite directions. Yet, amongst the most common calls for change are those that emphasise:

- The need for the Commonwealth to prioritise its activities and not to attempt to do things that are more effectively being done by other international or regional bodies;
- In fixing the priorities, the need to concentrate on those activities which the Commonwealth does best and to be guided in this respect by the "core values" that have been repeatedly enunciated from Singapore, through Harare, Milbrook and Coolum, to Port of Spain. Governance, rule of law, human rights. These appear to be the central core values of the Commonwealth. Other issues, however important, unless brought under this umbrella, can better be examined in other global institutions which are more generously funded and apt for their resolution;
- In particular, it is delusional to think that the Commonwealth can be at once a global fulcrum of political, business, educational, economic human rights and developmental activities;
- There is a need for the Commonwealth's Secretariat bureaucracy to embrace greater openness and for its style to be more democratic and transparent. In a sense, the Commonwealth Secretariat suffers from the remnants of the old imperial traditions of bureaucracy. High integrity, large talent but secrecy and

caution. It needs to be more inclusive and open. As one senior from the Caribbean told a consultation event of the RCS[46]:

> "The Commonwealth says one of its founding principles is the promotion of democracy. But there is absolutely no democracy in the way the Commonwealth itself operates."

And one think tank director is recorded as observing[47]:

> "There is a lack of openness about the way in which the Commonwealth works; a lot is done behind closed doors. If the Commonwealth is supposed to stand for democracy and transparency, this needs to change."

The Port of Spain *Affirmation* appears to reflect these thoughts by reiterating the commitment of the Commonwealth to "the core principles of consensus and common action, mutual respect, *inclusiveness, transparency, accountability, legitimacy and responsiveness*."[48]

Whilst it would be naive to consider that the Commonwealth could now pluck from the embers a single unifying theme, of the kind that apartheid fulfilled 30 years ago, the germ of the best idea is already before us. What made the Commonwealth strong in those days was a moral cause, based on essential notions of human dignity. This is why, for the foreseeable future, concepts of truly upholding fundamental human rights, shared values and institutions are going to be the essence of the remedy that saves the Commonwealth from a "dead end"[49].

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46 RCS, *Common What?,* above n12, p32.

47 *Ibid*, 32.

48 *Affirmation*, above n2, par.6. See also Llango, above n25, p3.

49 Llango, above n28, p2.

Compatible or incompatible goals: In her 2009 speech as Head of the Commonwealth to the CHOGM meeting in Port of Spain, the Queen cautioned that today's leaders must not take the continued existence of the Commonwealth for granted. In a sense, I read this as a royal acknowledgement, however prudently worded, that continuing along the present path of decline is likely to prove fatal for the Commonwealth. Especially in times of financial stringency, it cannot be expected that sharing the global language and features of history and tradition alone will sustain a body such as the Commonwealth for a further 60 years. Something more useful will be necessary to ensure survival. But what will that be?

The Commonwealth CHOGM conference is a comparatively friendly club made up mostly of middle to older aged gentlemen (only the Head and one head of government in Port of Spain was a woman). According to reports that trickle down to Commonwealth citizens, the heads of government enjoy the CHOGM meeting. The meetings are usually more congenial than most such international occurrences. There is a royal presence which has endured over most of the history of the institution and which is honoured and appreciated. The smaller countries get to rub shoulders with the larger. They do so on a basis of at least formal equality. There are no 'permanent members' in the Commonwealth of Nations leadership. In the Commonwealth Ministerial Action Group (CMAG), created to be a kind of executive for the Commonwealth, no nation is assured of a place, even the United Kingdom[50].

[50] Krishnan Srinivasan, "Principles and Practice: Human Rights, the Harare Declaration and the Commonwealth Ministerial Action Group"in James Mayall (ed.) *The Contemporary Commonwealth – An Assessment 1965-2009*, (Routledge, 2010, London) 65 at 72.

So how is this congenial ‘club’ to be preserved, given that, if it remains no more than a congenial gentlemen’s club, its utility will not be demonstrated and the costs will not be justified? Here is the tricky question that lies at the heart of the dilemma over the future of the Commonwealth. If the organisation, its CMAG and the Secretariat, were to become more active on the ‘core values’ proclaimed by successive CHOGM meetings, would this strike at the heart of the congeniality? Would it frighten away the autocratic states which are at risk of criticism for persistent departure from the core values, and in particular from the protection of the fundamental rights of their citizens? We must remember that President Gayoom of Maldives was one of the most assiduous of attendees at CHOGM and other Commonwealth meetings over his 30 year rule. Congeniality, and a good attendance record are not sufficient.

I say that this is the ‘tricky question’ because there is an equation at work. Unless the Commonwealth, and especially CMAG, can be made more effective in the defence of fundamental values, the moral justification of the Commonwealth as a global upholder of good governance and human rights will disappear. The utility of CHOGM meetings will increasingly lie in the side meetings, concerning global issues. The repeated proclamation of ‘core values’ will be seen as empty rhetoric, with the worse-than-useless consequence of giving an appearance of a great moral purpose where, when it is tested, the reality is missing.

An instance of the apparent paralysis, or inability, of the Commonwealth to rise to the protection of the fundamental rights of identifiable Commonwealth citizens can, arguably, be seen in recent events that

have happened in Commonwealth countries in parts of Africa affecting sexual minorities. I refer to the Anti-Homosexuality Bill 2009 of Uganda and the even more recent sentencing of two young men in Malawi to the maximum sentence of 14 years' imprisonment on conviction of sodomy. That sentence followed an event described as a symbolic wedding which led to a charge and conviction of the crime of violating the "order of nature".

The Commonwealth Lawyers' Association (CLA) criticised both of these measures[51]. Its executive had earlier unanimously called for the repeal of the applicable laws. So did leaders of individual Commonwealth countries, including the United Kingdom, whose colonial administrators had imposed the anti-sodomy law throughout the Empire, but whose own legislators had repealed that law 40 years ago[52]. Civil society organisations explained how such laws were in breach of universal human rights. Leading counsel of Doughty Street Chambers in London prepared an opinion for the Commonwealth Lawyers' Association on the Uganda Bill. That opinion concluded[53]:

> "We are of the clear view that the enactment of the [Bill] in its current form would place Uganda in flagrant breach of its international obligations. Furthermore, if the Uganda Courts were to take the same approach to issues of this nature as has been taken by a series of other domestic and international courts, they would be likely to treat the [Bill] as being contrary to the Constitution of Uganda in a series of respects."

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[51] See e.g. Commonwealth Lawyers' Association condemns Malawi gay couple imprisonment, statement of Mr. Mohamed Husain, CLA President, 20 May 2010.

[52] *Sexual Offences Act* 1967 (UK) following the report of the Royal Commission *Homosexual Offences and Prostitution* (Cmd. 247, HMSO, London,, 1957) (Wolfenden Report).

[53] Opinion for Commonwealth Lawyers' Association by Mr. Timothy Otty QC, Judith Farbey and Gemma Hobcroft, 9 March 2010.

As the world knows, in the end, the President of Malawi exercised the prerogative of pardon and released the two Malawian prisoners from their sentence. But he did so indicating reluctance; expressing his disagreement; and insisting on the separation of the men. So why did he act as he did?

It was certainly not because of any public pressure of the Commonwealth of Nations. There was no public statement of CMAG or of the Commonwealth Secretariat or of its human rights officials. Some private representations may earlier have been made. But it was not such interventions that caused a shift in Malawi's response.

Instead, it was the forthright, public action of the Secretary-General of the United Nations (Ban Ki-moon) in travelling to Lilongwe to meet the President of Malawi; to address the parliament of that Commonwealth country; and to urge the critical need for legal change and action, not only for the prisoners, but for the national and regional response to the HIV/AIDS epidemic.

The High Commissioner for Human Rights (H.E. Navi Pillai, herself a Commonwealth citizen) spoke of her shock and dismay at the news of the treatment of the Malawian prisoners. She condemned the law that was applied which, he said, "dates back to the colonial era and has lain dormant for a number of years – rightly so because it is discriminatory and has the effect of criminalising and stigmatising people based on perceptions of their identity". She declared that "if this was replicated worldwide, we would be talking about the widespread criminalisation of millions of people in consensual relations and the rampant violations of

privacy". She then spoke with clarity and moral force on a fundamental question of human rights[54]:

> "Laws that criminalise people on the basis of their sexual orientation are by their nature discriminatory, and as such are in apparent violation of a number of key international treaties and instruments, including the *African Charter on Human and People's Rights*. ... The trend should be towards getting rid of them, as is the case in other forms of discrimination. Instead, some countries, including Malawi, seem to be heading in the opposite direction ... It is a question of fundamental rights ... Not one of geography, history or disparate cultures. The protection of individuals against discrimination is pervasive in international human rights law. Why should it be suspended for this one group of human beings?"

In the outcome, it was therefore organs of the United Nations that responded with action and plain speaking. This, in turn, encouraged the African Commission on Human and People's Rights, meeting in Banjul, The Gambia (another Commonwealth country)[55] to establish a committee on the protection of people living with HIV and AIDS and those at risk, and specifically to address the integration into the struggle against HIV of a gender perspective and to give "special attention to people belonging to vulnerable groups, including ... men having sex with men".

Throughout the worldwide outcry over this human rights challenge, the Commonwealth's response was a deafening silence.

In fairness, the Secretary-General of the Commonwealth, in an earlier statement in March 2010, addressed to the United Nations Human Rights Council on what he saw at the approach of the Commonwealth,

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[54] Statement of UN High Commissioner for Human Rights, Navi Pillai, Geneva, 21 May 2010.

[55] 47th Ordinary Session of the Commission, 26 May 2010.

traditionally one involving education, systematic procedures, and only rarely "taking a stand"[56]:

> "... Action to criticise and sanction is rare, and not in fact, in the nature of an association which seeks to affirm and to help. We as a Commonwealth seek to advance our defence of human rights and we, as a peer group, seek to support each other, and where necessary, sensitise each other in that process. This makes us an organisation given more to engagement than pronouncement. We recognise that as independent member states, the bulk of our membership is only a few decades old. ... This is why we see greater value in raising a helping hand, than in raising a wagging finger. I sometimes give an analogy that the Commonwealth is more of a coach, engaged by the team, than a referee on the sidelines armed with a whistle and a red card."

One must acknowledge this viewpoint from the chief officer of the Commonwealth Secretariat. However, there was an earlier time when, in the face of earlier discrimination, on the same continent, against Commonwealth citizens on an indelible basis of their humanity, the Commonwealth blew the whistle. It raised the red card. It made its pronouncements. It pointed a wagging finger. And it united Commonwealth citizens in disparate lands to uphold the fundamental human dignity of other Commonwealth citizens and their human rights. We must never forget that, then too, the defenders of apartheid appealed to religious scripture to justify the gross discrimination against people on the basis of their race. They were said to be outcast descendants of the sons of Noah.

So this is the point that has been reached in this evolution of the Commonwealth of Nations. I recognise that the human rights aspects of sexual orientation are still controversial in some quarters. But so far as the international and regional organs of human rights in the world are

[56] Statement of Secretary-General Sharma to Human Rights Council, above n27, p3.

concerned, they increasingly speak with a clear and single voice[57]. Serious and persistent violation of the 'core values' and principles of the Commonwealth invites action on the part of CMAG. A failure of action, particularly if it is persistent, and in the face of other worldwide condemnations, makes the Commonwealth look spineless, ineffective, irrelevant and even lifeless. Once that point is reached, the questioners and the doubters will hold sway. The future of the Commonwealth will be imperilled.

I do not under-estimate the difficulties facing this diverse worldwide family of nations if it is to survive. Nor do I minimise the importance of respecting that diversity and honouring the differing historical, cultural and religious elements that make up the family of nations and peoples that we call the Commonwealth. Still, some crucial decisions need to be made. Fuzzy communiqués of obfuscating generality will no longer do. Young Commonwealth citizens, in particular demand something more. They thirst for international institutions that are effective guardians of universal values and protections of the future of all humanity.

The leaders of the Commonwealth themselves appear to have recognised that need. In the *Port of Spain Affirmation*, they called for the creation of an Eminent Persons Group to address the methodologies of the Commonwealth that lie at the heart of its future and to report to the 2011 CHOGM in Perth, Australia. They said[58]:

> "We call for the creation of an Eminent Persons Group to undertake an examination of options for reform in order to bring the Commonwealth's many institutions into a stronger and more

[57] See e.g. *Toonen v Australia* (1994) 1 *Int Hum Rts Reports*, 97 (No.3) (a decision of the UN Human Rights Committee). There are many other international, regional and national decisions collected in the opinion of Mr. Otty QC. See above n53.

[58] *Affirmation*, above n2, par.15.

> effective framework of co-operation and partnership. We are committed to securing a greater level of co-ordination and collaboration between all Commonwealth contributors and stake-holders, particularly including governments, civil society, business, the diversity of Commonwealth professional and other associations that bring together our citizens, academia and others."

For the sake of the survival of the Commonwealth of Nations and for the sake of the citizens of the Commonwealth, we must realise and understand the important moment we have reached. It must be hoped that the Eminent Persons Group will succeed in the noble mission that has been entrusted to it.

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