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# COMMONWEALTH LAWYERS' ASSOCIATION

## COMMONWEALTH LAW CONFERENCE,

## GLASGOW, SCOTLAND, UK,

## 16 APRIL 2015

# THE COMMONWEALTH OF NATIONS AND ITS VALUES – BOUND TO DISAPPOINT?

The Hon. Michael Kirby AC CMG

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## *INESCAPABLE HISTORY*

The Commonwealth of Nations is a voluntary association of 53 countries whose links began in history, specifically (in almost all cases) the history of the British Empire.[1] Today, its links rest on values said to be held in common, and, according to the rhetoric common interests and self-interest.

Long before the formal structures of the present Commonwealth came into existence, human beings dreamt of worldwide cooperation between peoples that would establish peace founded on shared human values and beliefs. In the heyday of the British Empire, Alfred Tennyson, later Poet Laureate to Queen Victoria, looked forward to a kind of global

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[1] The chief exceptions are Cameroon, Mozambique and Rwanda which had never been British colonies but were admitted to the organisation on the nomination and vote of members.

federation. This was long before the dreams of the League of Nations (1919) or the United Nations (1945) arose.[2] They were British dreams:

> "*Til the war-drum throb'd no longer, and the battle flags were furl'd*
> *In the Parliament of man, the federation of the world*
> *Where the common sense of most shall hold a fretful realm in awe*
> *And the kindly earth shall slumber, lapt in universal law"*

Partly because of worldwide British dominion, achieved by conquest, treaty and submission to the Crown, people in the countries that, for the most part, now constitute the Commonwealth of Nations always had a more internationalist outlook than most others. They were aware of, and thought about, the many lands with which they were associated by the forces of history, economics, culture and geopolitics. Above all, by the unifying operation of the English language, with its literature and political theories that questioned oppression and favoured the ideals of democracy, the rule of law and what we now call universal human rights. One has only to visit the United States of America, the other global model created by English-speaking people, to realise the difference between the substantially introspective American outlook and the transnational experience and perspective that is common to Commonwealth countries.

The word "Commonwealth" had been used by Oliver Cromwell and his fellow regicides to describe their type of government during the brief republican period of English history (1649-1659). Partly for that reason, Queen Victoria did not approve the choice of the word by the Australian

[2] Alfred Tennyson, *Locksley Hall* (1842), 1.115. Cf Paul Kennedy, *The Parliament of Man*, Random House, 2006.

colonists when they resolved to constitute the colonies of Australia as an "indissoluble Federal Commonwealth under the Crown of the United Kingdom…".[3] However, the Australian colonists persisted with the word in 1900. And so did the other former settler societies in 1926 when the Dominion prime ministers of United Kingdom, Canada, Newfoundland, Australia, New Zealand, South Africa and the Irish Free State agreed to constitute a free association of autonomous communities "equal in status, in no way subordinate one to the other in any aspect of their domestic or external affairs, although united by a common allegiance to the Crown".[4]

This free association they called "the British Commonwealth of Nations". It reflected an insistence on a high measure of political independence for the British Dominions beyond the seas, following the great sacrifices all had made in the First World War and the special status asserted by both South Africa and the Irish Free State encouraging the others to do likewise. Arising out of this free association, the Imperial Parliament, in December 1931, in the *Statute of Westminster,* renounced any legislative authority over Dominion affairs, except by the consent, and at the request, of the Dominion concerned.[5] The *Statute of Westminster Adoption Act* 1942 (Cth) was enacted in Australia to remove any doubts as to the war powers of the Australian Government. Until then, it had not appeared important enough to warrant parliamentary time.

[3] *The Commonwealth of Australia Constitution Act* 1900 (Imp), 63 & 64 *Victoria* c12; Preamble.
[4] *The Balfour Declaration* of 1926 was named after Arthur Balfour, Earl of Balfour, Lord President of the Council (UK) and former Prime Minister of the United Kingdom.
[5] P. Marshall, "The Balfour Declaration and the Establishment of the Commonwealth" (2001) 90 *The Round Table*, 941-3; The *Statute of Westminster* 1931 (Imp) is 22 & 23 *Geo 5* c4- an Act of the United Kingdom Parliament.

The British Commonwealth continued to evolve. By 1949, it was recognised, in the *London Declaration,* that the glue that bound the association together could no longer be a common allegiance to the British Crown.[6] Republics (initially India) could also become members by consent of the others. The monarch would assume a symbolic role as the "Head of the Commonwealth". These changes became essential as a result of the decolonisation of many lands formerly ruled by the United Kingdom. Very few countries that achieved independence did not wish to join the Commonwealth: the Irish Free State and Burma (Myanmar) went their separate ways. But most saw a value in maintaining the link.

By 1971, a question was presented whether the "Commonwealth of Nations", as the association was now named, was any more than an historical recognition of past links through the United Kingdom. Because of the strong feelings enlivened at that time by the governments of South Africa and Rhodesia, a declaration (the *Singapore Declaration* 1971) asserted that the Commonwealth was, by then, an association bound together by subscription to certain key values. Those values were defined as world peace, liberty, human rights, equality and free trade.[7]

Although in the 60 years following 1949, countries joined, left and later some rejoined the Commonwealth, and although the four yearly Commonwealth Games were regularly successful, although Commonwealth Heads of Government met regularly and signed admirable (but increasingly wordy) declarations and although good

[6] S.A. de Smith, "The London Declaration of the Commonwealth Prime Ministers" (1949) 12 *Modern Law Review* 351.
[7] *The Singapore Declaration of Commonwealth Principles*, 1971, available at thecommonweath.org, Commonwealth Secretariat, 22 January 1971.

works were commonly performed at a professional level, by 2010, very serious problems came to face the Commonwealth "family".

There were problems that went to the heart of the utility of the organisation. They raised questions about the value of continuing even the modest administrative arrangements found in the Commonwealth Secretariat, housed in a royal palace in London (Marlborough House) donated for that purpose by the Queen. Increasingly, Heads of Government were not attending the Commonwealth Heads of Government Meeting (CHOGM). Many were sending senior ministers as substitutes. At CHOGM, the formerly intimate "retreat", at which only current heads of government met together with the Commonwealth Secretary-General, grew into very large gatherings involving officials. This threatened to destroy the intimate personal character of the association.

Increasing numbers of Commonwealth countries engaged officially in, or turned a blind eye to, grave abuses of fundamental human rights. At least they did so as that expression was being defined at the same time by the United Nations bodies charged with that function. Sadly, in the Secretariat in London, the reaction to this perceived decline was not a strong resolve to insist on forthright adherence to the asserted values and principles of the Commonwealth. Instead, it was the embrace of a so-called "Commonwealth way".[8] Effectively, this meant doing nothing substantive when a serious breach of agreed values was alleged and attracted widespread coverage in the global media. The wringing of hands and earnest appeals for action, expressed in terms of pious regret, replaced firm action by the CHOGM and the Secretary-General.

[8] The words used in the *Commonwealth Charter*, available *loc cit*.

The newly established institutional machinery, such as the Commonwealth Ministerial Action Group (CMAG) proved incapable of strong action.

Most concerning of all were two developments mentioned in widely covered reports in the media. One was a poll conducted by the Royal Commonwealth Society in 2009 (to mark the 60th anniversary of the modern Commonwealth). This sampled public opinion in seven Commonwealth countries (Australia, Canada, India, Jamaica, Malaysia, South Africa and the United Kingdom). Worryingly, it found that most people in those countries were ignorant of the Commonwealth's activities, apart from the Games. Intensely worrying was the fact that the polls showed that most people surveyed were largely indifferent to its future. The lowest level of support was recorded in the United Kingdom. Yet the United Kingdom, Canada, Australia and New Zealand were substantially the main financial backers of the Commonwealth and its Secretariat. The "new Commonwealth" states, including prosperous countries like Singapore and increasingly successful economies like India and Nigeria, contributed a pittance towards the cost of preserving the association.[9]

Coinciding with these dispiriting developments, were increasingly restive assertions by civil society (and some governments) in Commonwealth countries to the effect that the Commonwealth was a weak and insipid body which, when its serious values were challenged, contented itself with platitudes. In October 2010, a memorandum from the present Secretary-General (Kamalesh Sharma) instructed staff not to speak out

[9] Royal Commonwealth Society, *An Uncommon Potential – Final Report of the Commonwealth Conversation*, London, 2010.

on human rights.[10] A genuine debate began to surface in many Commonwealth countries suggesting, for the first time, that it would be better if the organisation suspended or expelled for a time member countries that were in serious breach of its essential values. Only in this way, would the association retrieve its reputation for a serious commitment to the values nominally espoused. If this meant that "the Commonwealth way" had to change, civil society bodies insisted that a smaller and leaner organisation which genuinely stood for well-known values would be more likely to preserve the institution in an increasingly sceptical age.

The present Secretary-General does not share that approach. He has alternated between worried media releases, quiet diplomatic dialogue and the endemic secrecy reflecting the bureaucratic culture that Indian officials learned from Imperial Britain in the days of Empire. On the other hand, politicians have a nose for danger, and especially for the serious danger of terminal collapse of institutions. This was the reason why, at the 2009 Port of Spain CHOGM in Trinidad, the leaders of the Commonwealth resolved to establish a Commonwealth Eminent Persons Group (EPG) to investigate, and report on, the future of the Commonwealth of Nations. I was appointed to serve on that body.

*THE EPG AND ITS PROPOSALS*

A former Prime Minister of Malaysia (Tun Abdullah Badawi) was designated the Chairperson of the EPG. The other members came from every continent and from countries of hugely disparate sizes, economic strengths, racial and religious composition, with differences also, in

[10] guardian.co.uk. A report in October 2015 contained the leaked memorandum.

gender and personal background.[11] The EPG held meetings in the United Kingdom and Malaysia. It received over 300 submissions from organisations and individuals. It swiftly came to the conclusion that there were urgent challenges facing the Commonwealth. Its main danger was not attack from without but indifference and a sense of irrelevance within. The EPG accepted that one of its number (Sir Ronald Sanders, Guyana) an experienced diplomat and old Commonwealth hand, should act as its rapporteur. With active input from all members, the EPG brought in its report unanimously, within budget and on time. Its letter of transmittal to the Secretary-General declared: [12]

> "*The Commonwealth must speak with greater unity in the international community in [the] areas of common values. Such commonality will only be attained through a strong Commonwealth – one that is supported and enhanced by the policies and actions of each of its governments, and in which governments work more effectively to reach consensus on global issues. We do not pretend that consensus is possible on every issue. However, we are certain that it is possible on many of them: allowing the Commonwealth to exercise an influence for individual and social betterment, for peace and for security within its member states and in the global community."*

The EPG recommended that its report be released to coincide with the CHOGM in Perth in October 2011. However that CHOGM meeting and

[11] The other members of the EPG were Dr Emmanuel Akwetey (Ghana); Ms Patricia Francis (Jamaica); Dr Asma Jhangir (Pakistan); Mr Samuel Kavuma (Uganda); Sir Malcolm Rifkind QC (United Kingdom); Sir Ronald Sanders (Guyana); Senator Hugh Segal (Canada); Sir Ieremia Tabai (Kiribati) and the author (Australia).
[12] Commonwealth Secretariat, Report of the Eminent Persons Group to Commonwealth Heads of Government, *A Commonwealth of the People – Time for Urgent Reform* (October 2011) (hereafter EPG Report), 15. M.D. Kirby, "The Commonwealth of Nations today: Historical Anachronism or Focus For Universal Values?" (2011) 37 *Commonwealth Law Bulletin*, 39.

the release of the report, were extraordinary in several ways, as I will explain.

This is not the occasion to recount all of the 106 recommendations on which the EPG agreed. The report is available online.[13] The first recommendation arose out of an idea raised at the very start of the meetings of the EPG in London, by our chairperson. Tun Badawi recommended that we should work towards a *Commonwealth Charter* to express the central features of the Commonwealth. He was, I believe, suggesting a framework document similar to the *Charter* of the United Nations of 1945. In the result, his proposal morphed into a charter of a different kind. Whilst there were a few institutional amendments to the Commonwealth proposed by the EPG, the priority that it saw in a *Charter* was for a statement of values and aspirations that could convey the ideals and objectives of the association and provide an appeal to the citizens of the member countries who are the "people of the Commonwealth" in whose name the *Charter* was to be expressed.

When this character for the *Charter* was agreed upon by consensus, the recommendation of the EPG was that a process of consultation should be established that would lead to the text of the eventual *Charter*. However, I was mindful of the insight attributed to the Russian leader, V.I. Lenin. He declared that the blank page was the greatest enemy to action. A first draft of any important document can provide a powerful stimulus. It can shape what follows. Accordingly, on one of the long flights back to Australia from London, I began to ward off sleep by drafting a possible charter on paper napkins provided by the airline. When this rough draft was typed up, in Sydney, I shared it with my

[13] EPG Report available on the Commonwealth Secretariat website.

colleagues on the EPG. I later donated the napkins to the archives. My colleagues agreed that the draft had value. They decided to append it to the EPG report. They suggest that it "might be used as a basis for the Commonwealth-wide consultation proposed in the previous paragraph". They pointed out, correctly, that it substantially derived from the many statements issued at the end of Commonwealth heads meetings since 1949.[14] The EPG also drew to attention the eventual possibility of a broader charter, expressing the organisational framework and rules of the Commonwealth of Nations. That possibility has not been taken up. On the other hand, the charter drawn by me appears as Annex 2 to the EPG report.[15]

The final form of the eventual *Charter of the Commonwealth* was prepared by Commonwealth officials, following a referral of the EPG's recommendation to that effect at the Perth CHOGM. The ultimate text is more wordy. If I say so, it lacks some of the elegance and simplicity of the text noted by the EPG. It deletes reference to the proposal of the EPG for an "enlarged role [be established] for… the Commonwealth Secretariat for promoting and upholding the Commonwealth's values". Specifically, it did not contain, as adopted, any reference to a key proposal of the EPG[16] that a "Commonwealth Commissioner for Democracy, the Rule of Law and Human Rights" should be appointed to provide "well researched and reliable information" simultaneously to the Secretary-General (SG) and the Chairperson of CMAG on "serious or persistent violations of democracy, the rule of law and human rights in member states".

[14] EPG Report, 34.
[15] Ibid, 180-188. Annex 2 contains "A Draft Charter of the Commonwealth".
[16] Id, 154 (recommendations R2 and R3).

The EPG envisaged that this Commissioner would "indicate approaches for remedial action" and be an alternative to the "non-public 'good offices' approach to reports of serious or persistent violations of the Commonwealth's core values".[17] The Commissioner was to have been the central machinery which the EPG envisaged for the carrying into effect of the *Charter.* It was a vital institutional design to revamp and renew the Commonwealth's institutional arrangements. We hoped that it might stimulate a more effective response to derogations from core values; and ensure that the Commonwealth would, in future, be truly a 'values based' organisation: not merely on paper.

In the end, the *Charter of the Commonwealth,* drafted by officials, was approved by the Heads of Government in the interval following the Perth CHOGM. This happened by consultation between meetings and not by deliberation at the succeeding CHOGM which was to be held in Colombo, Sri Lanka. Having obtained the requisite approvals, the *Charter* was transmitted to the Queen, as Head of the Commonwealth. On 11 March 2013, Her Majesty signed the document at Marlborough House signifying, with solemnity and publicity, its coming into force. Its core provision opposes "all forms of discrimination whether rooted in gender, race, colour, creed, political belief or other grounds."

The text of the *Charter*, as adopted, is different in many respects from the provisional draft appended to the EPG report. That draft had declared:

[17] Ibid, 154 (recommendation R3).

*"5.We believe in universal human rights and that they are applicable to all persons throughout the Commonwealth in accordance with the principles of international law;*

*5.1 We reaffirm our commitment to the Universal Declaration of Human Rights and to human rights covenants and instruments that declare the universal rights of all;*

*5.2 We believe that equality and respect for the protection and promotion of civil, political and economic, social and cultural rights for all, without discrimination on any grounds, are foundations for the creation and maintenance of a peaceful, just and stable society; and*

*5.3 We believe that all these rights are universal, indivisible, interdependent and inter-related and that they may not be implemented or denied selectively."*

The provisional draft transmitted by the EPG also stated:

*"11. We believe in human diversity and human dignity and we oppose all forms of discrimination whether it be based on race, ethnicity, creed or gender or other like cause. We believe in freedom of thought, conscience and religion and oppose discrimination on any such ground."*

The form of the *Commonwealth Charter* brought into operation in 2013, is an improvement on the largely unknown and unknowable resolutions adopted in a hurry at the end of successive CHOGM meetings. However, a wordy document, drafted by 50 officials, is hardly likely to set the pulse of Commonwealth citizens beating faster. There is no evidence that the *Commonwealth Charter,* in its present form, has been read with excitement, or at all, by its intended audience. Yet if they do pick it up, they will find, as with the more elegant language of the

*Universal Declaration of Human Rights* (UDHR) of 1948,[18] that it prudently leaves open the categories of impermissible discrimination. It opposes "all forms of discrimination." It does so not only on the specific grounds mentioned but on "other grounds". These remain to be elaborated, just as they have been in the equivalent language in the UDHR.[19]

When the *Commonwealth Charter* was signed by the Queen, the media, in the United Kingdom, India, and other Commonwealth countries obviously took the 'catch all' phrase, in the prohibition on discrimination, as referring to impermissible discrimination on the grounds of sexual orientation and gender identity.[20] In preparing the draft of the *Commonwealth Charter* for the EPG, I did not include express reference to sexual orientation or gender identity. I knew, from discussions at the table of the EPG, relating to that topic, that any such express reference was likely to be disallowed. After all, every one of the EPG members had derived their own basic values in their respective homelands. Most of us had to return to our homes, where we might be tackled for what we had done and written in the EPG. Some EPG members were possibly content to allow the matter to be picked up by the generality of its language, as the *Commonwealth Charter* itself did and the views of member countries of the Commonwealth continued to evolve. But some were not comfortable. Indeed, they might have been fearful that, if such

[18] *Universal Declaration of Human Rights* (adopted by the UN General Assembly, Resolution 217A (III), 10 December 1948).
[19] Ibid, article 2: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction *of any kind*, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or *other status*.
[20] "Queen to Sign New Charter Backing Equal Rights for Gay People Across the Commonwealth" *standard.co.uk*, 11 March 2013; "Commonwealth Charter to Focus on Gay Rights", *The Times of India*, 11 March 2013.

grounds were spelt out, they could effectively torpedo the adoption of the *Charter* and possibly of the whole report of the EPG.

I do not doubt that similar thoughts went through the minds of Eleanor Roosevelt, René Cassin, H.V. Evatt, John Humphrey and their colleagues when they were considering the contents of the UDHR in 1947 and 1948. In drafting international texts, the key to progress is often found in the choice of opaque, ambiguous language that does not alert potential opponents to the ambit that lies in wait to be discovered later. In this respect, I think the *Commonwealth Charter* adopted an appropriate strategy. So far so good.

*THE COMMISSIONER IS REJECTED*

The EPG was certainly convinced that the values expressed in the *Charter*, and other reforms recommended in its report[21] required practical implementation and that this depended on adoption of the proposal for a Commissioner. The post was explained as being needed to fill a gap demonstrated in the Commonwealth's present institutional arrangements. Full-time attention was not being paid "to determine whether serious or persistent violations of the Commonwealth's political values, particularly infringements of human rights, may have started to occur". Moreover, all too often the Secretary-General's "good offices" were failures. The plain fact was that the so called "Commonwealth way", especially during the term of Secretary-General Sharma, had

[21] Such as the effective operation of the Commonwealth Ministerial Action Group (CMAG) to deal with serious or persistent violations of the Commonwealth's core values (RR4, 5, 6, 7); strengthening democratic culture and practices (RR 11-17); action on climate change and environmental threats (RR 37-43); dealing with HIV/AIDS as a Commonwealth problem (RR 57-61); spreading the face of the Commonwealth (R84); making engagements of governments and civil society meaningful (R91); raising the Commonwealth's profile (RR 95-100); and facilitating border-crossing by Commonwealth citizens (R101).

failed to tackle effectively arguable contraventions of Commonwealth values although they merited description as “serious” or “persistent” breaches of those values.

The EPG concluded that remedial action was imperative.[22] The record spoke for itself. CMAG had “only shown real interest, and responded, when there had been a coup d'état or military seizure of power in a member state”. Attention to reports of and complaints about human rights abuses had been pitiful. Especially so when contrasted with the strong stance that the Commonwealth had earlier shown, as an organisation, in responding to apartheid in South Africa and racism in Rhodesia. Heads of Government, being politicians in office, could understand well enough the impermissibility of ousting one of their Commonwealth colleagues illegally from office. But when it came to understanding, and responding to, complaints about human rights abuses or about disregard for judicial orders directed at politicians (rule of law questions) they invariably did nothing. And, on the face of the record, the Secretary-General had repeatedly gone along with this approach. Sometimes, reportedly, the Secretary General even promoted, excused or defended such passivity, as he did in the case of Nigeria under military government and later Sri Lanka under the Rajapaksas.

Functionally, what was required was therefore the creation of an independent officeholder who was not so close to the politics of the governments of member countries. A person who, like similar officeholders in our home jurisdictions, had the function and authority to investigate, make findings and recommendations and to speak up. A

[22] EPG Report, 36.

person who would have the reputation and integrity to do that and who enjoyed guaranteed independence in and after office, to discharge that function.

It is not entirely the Secretary-General's fault that (at least for some political officeholders) taking such a stance would be uncomfortable. That is why organisations need to build into their institutions a stimulus – a burr under the saddle. The chief executive of the institution can then excuse, and properly support, the institutional critic and encourage cooperation with that critic's endeavours. The Secretary-General would, remain to some extent at least, above the fray. The institutional guardian would have to operate within the secretariat, of which he or she must be a member; but with standards provided by the *Charter* and with independence from day to day political command or influence.

Proposing a human rights commissioner was not a particularly novel or brave step for the EPG to take. It followed well established institutional theory. It parallels what has been done in many Commonwealth countries themselves. The stimulus can sometimes be uncomfortable. It will sometimes be attacked by politicians.[23] However, the institutions, political and non-political, operate as they should in symbiosis. Indeed, this is the essential basis of the principle of the separation of constitutional powers. Separation is mandatory in the case of the judiciary. That was a lesson that President Rajapaksa of Sri Lanka never fully understood yet he suffered no real Commonwealth sanction. However, it is also extremely important in the case of executive officers with independent responsibilities.

[23] As has recently occurred in Australia in the case of Government criticisms of the President of the Australian Human Rights Commission (Professor Gillian Triggs) in respect of the timing of a Commission Report on detention of child refugee applicants.

This institutional requirement has been understood in the context of the United Nations by Secretary-General Ban Ki-moon and his predecessors. He has to live with independent officeholders who are constantly criticising the action, and lack of action, by member states and by politicians – even of the United Nations itself. He does so in respect of long-term officeholders (such as the High Commissioners for Human Rights and for Refugees) and also short term mandate holders (such as human rights special rapporteurs and special representatives). He respects and values their independence. They help him to remain true to his own independent duties. When heads of an institutional secretariat get too close to the politicians they tend, like the chameleon, to take on the colours of their surroundings. Their empathy and sense of duty become loyalty to, or support for, those whom they regard as their stakeholders, equals or masters. They develop an indifference, even hostility, towards those who complain of breaches of human rights, democracy and the rule of law. Effectively, they ignore or frustrate their work.

During the many meetings that the EPG held at Marlborough House, the Secretary-General, was present, by invitation of the EPG. As the EPG came inevitably to its proposal for the appointment of a commissioner, the Secretary-General held his tongue. Never once did he criticise, argue against or express his personal reservations about the commissioner proposal. I was led (and I believe all members of the EPG were led) to the conclusion that he could see the institutional sense

of what we were proposing. He did not appear to have any reservations – least of all serious objections.[24]

During the Perth CHOGM, when the EPG Report came up for consideration by the Heads of Government, the members of the EPG who were present in Perth[25] were, as a courtesy, permitted into the room where the meeting was proceeding. Absent express invitation, they did not have a right to intervene. They were invited to observe the proceedings. They were there to answer any questions and to respond to any invitation which they received to speak. The session on the EPG report was chaired successively by Australia's Foreign Minister (and past Prime Minister) Hon. Kevin Rudd MP and by the Australian Prime Minister at the time, Hon. Julia Gillard MP.

At a certain point in the debate a question was directed to the Secretary-General by Prime Minister Stephen Harper of Canada. In effect, the question asked what the Secretary-General thought of the proposal for a commissioner. To the astonishment of the members of the EPG present in the meeting, Secretary-General Sharma stated that he could not see any reason for creating the post of commissioner. He felt that the Secretary-General could adequately fulfil the duties expected of the commissioner in the EPG Report.

[24] In a written comment on this paper dated 17 April 2015, Secretary-General Sharma states that he "did not hesitate to advise the EPG clearly that the [Commissioner] proposal had no prospects of being adopted and to caution on the divisiveness it would entail. This was also discussed separately and acknowledged by the EPG's Chair." This comment does not accord with the recollection or notes of the EPG members. He also states "… I also warned the EPG about its proposals for the reform of [CMAG] whereas inter-government reform and strengthening process was underway (and which happily reached fruition). My essential consideration was to respect fully the EPG in its views and recommendations; to advise if along the way of what the membership would be likely to bear at the political level but I had no remit to veto its proposals; and to implement the decisions taken by member governments." He went on to defend the so-called "Commonwealth Way". His understanding of that "Way" is exemplified in this paper.

[25] Tun Badwai, Dr Akwetey, Mr Kavuma, Sir Malcolm Rifkind, Senator Segal and the author.

Interestingly, in the light of the events that were later to unfold, it was the President of Maldives at the time (Hon. Mohamed Nasheed), before he was later removed irregularly from the post to which he had been elected, who explained why he thought that an independent commissioner was a good idea and should be supported. President Nasheed had earlier tasted abuse of his own human rights during a 20 year struggle for democracy that resulted in his being elected President of Maldives in 2009. Today, he is back in prison once again. But his short interval of freedom saw him at CHOGM in Perth. He recalled powerfully how, in the long years that he was detained in prison in the Maldives, he had written repeatedly to the Secretary-General of the Commonwealth. He had never received a reply. He hoped that, if there were a Commonwealth commissioner for human rights, people in his position in Commonwealth countries might at least secure a response. There was a silence after this intervention. It conjured up historical memories of earlier independence leaders of Commonwealth countries in the early days. They had likewise been imprisoned, but usually by British or colonial officials not by their own people. Images of Gandhi, Nehru, Kenyatta and Mandela crossed my mind.

Perhaps it was because of this intervention that the question of whether the office of commissioner should be created was not immediately determined. It was sent off to the graveyard of bold proposals: a meeting of officials appointed by the political governments of the Commonwealth countries. If many of the political leaders might have had reasons to be cautious over the creation of a truly independent guardian of democracy, the rule of law and human rights within the Commonwealth, officials had even more reason to avoid the adoption of such a proposal. Especially given that the Secretary-General himself

had stated that he could himself perform the tasks as effectively as a commissioner and at no additional cost.

Following the Secretary-General's intervention in Perth, it was not specially surprising to the EPG members later to hear that the idea of a commissioner, to scrutinise, report on and make recommendations about compliance with the *Charter* and other basic norms, had been rejected. During the Perth CHOGM, we received a further hint of the true reaction to our proposals after the formal presentation of our report and prior to our departures from Perth. The EPG was scheduled to hold a news conference in the building at the venue of the CHOGM. Dutifully, we turned up to answer questions from the international and national media about how we were proposing that the Commonwealth could be revamped and made more relevant to the modern age. A difficulty was immediately presented that we did not have copies of the EPG report to distribute to the media. We were told that the report itself was still under embargo because it was still formally being considered by the Heads of Government. How could we explain the 106 urgent recommendations that we were making without tabling our report or at least providing the list of recommendations?

My own 35 year service as a judge made me reluctant to breach the embargo of which we had been informed. However, one of our number (Sir Malcolm Rifkind, a past British Foreign Secretary) suspected that the failure to have sufficient copies of the report, over which we had laboured for the Perth CHOGM, was designed to undermine the acceptance of the arguments that we had expressed in favour of the reforms in the areas of human rights, democracy and the rule of law. Because these were essential, in our view, to the future success of the

Commonwealth, he criticised this failure as a "disgrace". He told the media conference:[26]

> *"The Commonwealth faces a very significant problem. It's not a problem of hostility or antagonism; it's more a problem of indifference. It purpose is being questioned. Its relevance is being questioned and part of that is because its commitment to enforce the values for which it stands is becoming ambiguous in the eyes of many member states. The Commonwealth is not a private club of the Governments or the Secretariat. It belongs to the people of the Commonwealth."*

With these words, the speaker made his own entire copy of the report available to the news media. Eventually other EPG members followed his lead, as I did. In subsequent press coverage in Australia and internationally, reports were written outlining the EPG's recommendations and recording some of the reasons expressed by it in favour of the commissioner. However, the strategy of containment worked well enough with the Heads of Government. They agreed in principle to the idea of a *Charter* expressing the values of the Commonwealth. However, they did not endorse the creation of machinery to give that *Charter* any teeth. They sent the proposals off to officials. In the end, the proposal for a commissioner was not accepted. Once again, a Commonwealth CHOGM had ended with the machinery necessary for crucial reform not accepted. Yet again, a Commonwealth CHOGM had ended with a document in bold language expounding values. But with no adequate machinery to ensure that those values would be fulfilled.

[26] Sir Malcolm Rifkind, member of the EPG, reported from Perth in the *Sydney Morning Herald*, October 2011.

*DENOUMENT ON THE COMMISSIONER AND EPG*

All of those who were in the know about the institutional inadequacies of the Commonwealth lamented the failure of the Commonwealth to address its institutional weaknesses when it came to upholding its oft repeated assertion that it was a "values organisation".

First, and in advance of the Perth CHOGM, the head of the Human Rights Division at the Commonwealth Secretariat (Dr Purna Sen), on 14 July 2011, tendered her resignation. She wrote a letter to the Secretary-General which later became public. It recounted some of the frustrations that she felt about the failure of the organisation to address recommendations for institutional reform and even to mention to the EPG her unanswered concerns, to the effect that urgent action was needed to enhance the Secretariat's engagement with human rights in Commonwealth countries and beyond.[27] According to Dr Sen, there was some good news, such as the assistance which the human rights unit gave to smaller and poorer Commonwealth countries in fulfilling their duties at the UN Human Rights Council's new system of Universal Periodic Review (UPR). However, she argued that: "the top leadership of the Organisation [should] give a greater airing to the human rights mission of the organisation, including the oft overlooked fact that human rights as well as gender and youth, is a cross-cutting theme for all its work, as per the Strategic Plan".[28]

Secondly, after the Perth CHOGM in 2011, when the final rejection of the proposal for a commissioner became known, many civil society

[27] Letter of Purna Sen to Secretary-General Sharma, 22 July 2011, in records of the author.
[28] Ibid.

organisations and individuals raised their voices in criticism of the decision. Specifically, when it became known that the idea of the commissioner had been referred by the Secretary-General to CMAG, which reported back to a foreign ministers meeting in September 2012, and when that meeting did not place the commissioner amongst the accepted proposals that went to the Heads of Government, criticism arose in the Commonwealth Human Rights Initiative (CHRI). This is an independent non-partisan, international non-governmental organisation created by several Commonwealth professional associations in 1987. The central objective of CHRI has been to ensure that human rights are actually realised in Commonwealth countries and greater emphasis is given to the asserted "shared values" and to the binding legal principles from which those values derive.[29]

The CHRI is set up in New Delhi. In 2013, it published a report with the title: *The Missing Link – A Commonwealth Commissioner for Human Rights.*[30] This report bluntly declared that:[31]

> *"[T]he Commonwealth finds itself in a crisis of conscience… The [EPG's proposed] Commissioner recommendation was dropped since no consensus could be reached. We are informed that the matter is dead, off the table and cannot be considered further. However, events of the last 2 years, between CHOGMs, make it clearer than ever that the Commonwealth must once again consider, and this time agree, to create*

[29] The description of the Commonwealth Human Rights Initiative (CHRI) is contained in CHRI, *The Missing Link – A Commonwealth Commissioner for Human Rights*, (CHRI, 2011 Report) Frontispiece, i. The CHRI was described in the EPG Report at 129 as the "largest Commonwealth entity outside London with around 40 permanent staff… headquartered in New Delhi".
[30] *The Missing Link*, n28 (ed Maja Daruwala et al, New Delhi, 2013).
[31] Ibid, Foreword by Dr Yashpal Ghai, CHRI, *The Missing Link*, New Delhi, iii.

*an independent specialist who can monitor, investigate and advise on human rights."*

The report of the CHRI declared that human rights standards in the Commonwealth continued to be "a cause for alarm".[32] It said that "Commonwealth mechanisms continue to be insufficient for responding to human rights violations".[33] It cited the removal of the Chief Justice of Sri Lanka from office, despite still pending proceedings in the courts and the clear requirements of the Constitution of Sri Lanka that due process be accorded to judges under threat of purported impeachment.

Far from intervening to uphold the rule of law for the people of Sri Lanka and the human right to fair process belonging to the Chief Justice under the Constitution and also international human rights law, the Secretary-General contented himself with generalisations. This was a course that was to continue throughout the presidency of Mahinda Rajapaksa.[34] In an extraordinary course of events, the Secretary-General sought, and obtained, independent legal opinions on the constitutional validity of the removal from office of Chief Justice Bandaranaike. However, when those opinions from Professor Sir Jeffrey Jowell QC and former South African Chief Justice Pius Langa were provided to him (and as later published) they were strongly condemnatory of the actions of the then Government of Sri Lanka). Yet the Secretary-General not only failed to follow them and act in accordance with their powerful critique. Astonishingly, he even withheld the opinions concerning the impeachment from the CMAG, the Commonwealth's new mechanism

[32] Ibid, 3.
[33] *Loc cit.*
[34] See Ibid, Statement by Secretary-General Kamalesh Sharma on the conclusion of the official visit to Sri Lanka, 13 February 2013, Commonwealth Secretariat.

mandated to respond when Commonwealth values were threatened.[35] Needless to say, the reports were also withheld from the citizens of the Commonwealth, including in Sri Lanka

On this remarkable turn of events. The CHRI concluded:

> *"This demonstrated the lack of cooperation which will cripple the Commonwealth's ability to uphold its values. The Secretary-General, in practice, remains largely unaccountable and his approach to behind the scenes diplomacy has allowed human rights abuses to repeatedly violate Commonwealth values while the Commonwealth looks on silently."*

I should acknowledge that the CHRI was critical (probably with justification) of the EPG's proposal to give the intended Commissioner the unwieldy title of "Commissioner for Democracy, the Rule of Law and Human Rights".[36] The CHRI states, correctly, that the inclusion of the wider ambit of the rule of law appeared to have been adopted "to soften the focus of the presence of someone mandated to monitor human rights compliance". As the CHRI pointed out, this made the report, on this issue, "an easy target for those against the Commissioner, as traditionally there were working mechanisms within the association able to address deficits in the rule of law and governance". The real value of the proposed Commissioner was that such an officeholder would become an independent guardian of Commonwealth values, by upholding universal human rights. In retrospect, I think the EPG should have bitten the bullet. It should have presented the institutional reform as addressing the one very clear area in the Commonwealth's machinery

[35] *The Missing Link*, 2.
[36] Ibid, 6.

where the institutions were seriously defective: the protection of the fundamental human rights of Commonwealth citizens. That includes a right to an independent and impartial judiciary.[37]

With all respect to Secretary-General Sharma, who is an intelligent, graceful, charming and courteous man, his handling of the issues of human rights during his incumbency has been profoundly affected by his experience as a diplomat in the conservative tradition of the Indian Civil Service (now the Indian Administrative Service)[38]. He has invariably been risk adverse. Virtually never has he been bold and defensive of the individual human rights of Commonwealth citizens. He has been on the side of authority rather than the side of the individual, just as former President Nasheed of Maldives stated in Perth, recounting memories of his unanswered complaints from prison.

All this was known by members of the EPG. The possibility that the proposal for a commissioner would be taken up in Colombo, in a meeting over which President Rajapaska was presiding, was highly improbable. He and his Government had proved themselves deeply antagonistic to human rights. Before being ousted unexpectedly in a general election in January 2015, President Rajapaska and his government, especially the Minister for Foreign Affairs, repeatedly attacked the United Nations investigations into human rights in Sri Lanka and denied them entry. There was no feasible possibility that the idea of

[37] Judicial independence and impartiality are recognised as fundamental human rights in the *Universal Declaration of Human Rights* (1948), art. 10 and the *International Covenant of Civil and Political Rights* (1977), art 14. They are also recognised in the *Commonwealth Charter*. J.M. Nganunu, "Judicial independence and economic development in the Commonwealth (2014), 40 *Commonwealth Law Bulletin*, 431 at 432.

[38] Jawaharlal Nehru, first independence Prime Minister of India and the joint inventor (with Clement Attlee) of the formula allowing republics to join the Commonwealth that saved it from dismemberment, said in 1949 that the Indian Civil Service "with which we are unfortunately still afflicted in this country is neither Indian, nor civil, nor a service": J. Nehru, *Glimpses of World History* (Lindsay Drummond, 1949), 94.

a Commonwealth human rights commissioner would be revived in Colombo or during Secretary-General Sharma's term. The hope of revival must lie in the future. It must be initiated out of a belated appreciation of the gravity of the institutional challenges identified by the EPG. As the CHRI said in its report:[39]

> *"The only way the Commonwealth will thrive is to reassert the moral authority it once had. This may mean more countries withdrawing, but a smaller more effective Commonwealth is better than one that stays silent simply to keep the club together."*

Fundamentally, Secretary-General Sharma disagreed with that notion. Yet the EPG said that it was essential for the long-term survival of the Commonwealth as an institution.

Thirdly, following the Colombo CHOGM one of the members of the EPG who had played the largest part in drafting its report, Sir Ronald Sanders, delivered a report at the University of London, also with a telling title: "The Commonwealth After Colombo: Can It Become Meaningful Again?".[40]

In his analysis, Sir Ronald Sanders described the Commonwealth as being "in crisis".[41] He suggested that "all is not well in the Commonwealth now". He presented evidence of this fact:

[39] Ibid, 13.
[40] R. Sanders, "The Commonwealth After Colombo: Can It Become Meaningful Again?" (2014) *The Round Table*, 1.
[41] Ibid, 2.

*"A north-south divide has developed centred on the comparative importance of upholding democracy, human rights and the rule of law as against the imperative of economic and social development… There is a general lack of knowledge about the Commonwealth in its member states – even among government ministers and officials – and little or nothing is being done to explain and promote it. The media considers it to be of such little relevance that it gets coverage only in the case of some dramatic event such as the unheralded announcement by the President of The Gambia, just weeks before the Colombo CHOGM, that he has withdrawn the country from the Commonwealth."*[42]

At the heart of this analysis, and on several grounds, Sir Ronald pointed to the fact that the Commonwealth was basically a club, having its origins in history.[43] Yet every club must have rules. Membership is voluntary. Governments can choose to withdraw at any time. But to secure entry, and to remain part of it, the members must be expected to conduct themselves according to rules that are embodied in the core instruments of the organisation.

In its report, the EPG insisted that "silence", in the face of serious or persistent breaches of human rights, "is not an option". It also stated that rights are "universal, indivisible, interdependent and inter-related and cannot be implemented selectively". Yet this is precisely what the Commonwealth has been doing. It is true that, at home, national laws will be upheld against any expressed Commonwealth values or even (in

[42] Id, 2-3.
[43] Id, 13.

many instances) against the requirements of international law. However, Sir Ronald concluded:[44]

> *"But with respect to being a member of the Commonwealth club, the Charter and many declarations of the Commonwealth are conditions of membership. They are the rules of the club, and if governments do not want to abide by them, they have the choice not to join the club. But if, having joined, they find the rules burdensome or restrictive, they have the choice to leave. South Africa did so in 1961, as did Pakistan in 1971 and Zimbabwe in 2003."*

Correctly, in my view, Sir Ronald Sanders sees it as vital to attempt to revive the features of the Commonwealth that made it so successful in its earlier days. Ensuring a greater adherence to principle. Agreeing that only Heads of Government can participate in CHOGMs and certainly in the retreats. Ensuring the selection of a new Secretary-General in Malta in 2015 who will understand the dangers of continuing down the present path and the necessity to implement the vital recommendations of the EPG that the current Secretary-General, without notice disfavoured.[45]

*HUMAN RIGHTS: ROOM FOR IMPROVEMENT*

But do these issues amount to a storm in a teacup? Do they represent a disproportionate complaint about an institution which emerged from the unpromising injustices of colonialism so that it is a miracle that it exists; not that it is imperfect in the eyes of human rights advocates?

[44] Id, 14-17.
[45] CHRI, *The Missing Link*, above n.28, 9.

It is true that good work is done in the Commonwealth, including by its Secretariat. Given that the entire personnel of the Commonwealth Secretariat in London is smaller than the cafeteria staff at the United Nations Headquarters in New York, it would be unreasonable to expect the Commonwealth, overnight, to become a vigorous, activist, protective organisation. The United Nations' universal character and the overwhelming advantages of membership (as well as dangers from non-membership) ensure that even powerful countries have to tolerate criticisms by the High Commissioner for Human Rights and other United Nations human rights guardians. Would the Commonwealth fall apart if its voluntary character were put to the test by a vigorous but professional human rights commissioner? Would such a commissioner be duplicating the work of the United Nations human rights machinery, which is itself imperfect? As Sri Lanka, under its former government, ignored and denounced the UN's human rights mandate holders, should we be surprised that autocrats in Commonwealth countries do likewise? Is this simply a feature of our world as it is? Is the most that can be hoped for in the Commonwealth that its Secretary-General whispers friendly advice and conducts "good offices", with the aspiration of procuring improvement by consensus?

The answers to these questions is uniformly in the negative.

Let us recall some of the matters, over recent years since the EPG report where, to say the least, the Commonwealth's response to "serious or persistent human rights abuses" has been unacceptably weak and insufficiently sensitive to the serious human rights at stake. We should reflect on the possibility that the appointment of an effective

commissioner might have better helped defend the asserted values of the *Charter* and given hope to prisoners and others looking to the Commonwealth to be what it claims to be: an organisation that takes seriously arguable violations of the fundamental human rights of Commonwealth citizens.

*SILENCE ON HUMAN RIGHTS*

*Sri Lanka:* The CHRI viewed the situation in Sri Lanka over the past decade as a real test for the Commonwealth.[46] It is true that, since that opinion was written, the situation in Sri Lanka has radically changed as a result of the election in January 2015 which ousted President Rajapaksa from power. However, that outcome was no thanks to the Commonwealth or to any vigilant intervention by it or principled disclosure of human rights abuses in the country. Such disclosure as occurred depended on other international bodies (the United Nations Human Rights Council), and non-governmental organisations (the International Commission of Jurists; International Bar Association and the Public Interest Advocacy Centre, Australia).

Nothing effective was done by the Commonwealth concerning the former Sri Lankan government's alleged entrapment and murder of civilians caught up in the closing phases of the civil war; its intolerance of dissent; its intimidation of the media; its inaction in the face of extremist attacks on minorities; and the illegal impeachment of the Chief Justice.[47] Even when the Prime Minister of Canada warned that he

[46] See especially the statements of the UN Secretary-General's Expert Panel on Sri Lanka. See also statement by the UN High Commissioner for Human Rights, Navi Pillay on 31 August 2014 ("Sri Lanka heading in 'authoritarian direction', says UN Human Rights Chief, UN News Centre, Geneva).
[47] CHRI, *The Missing Link*, above n28, 9

would not attend the 2013 CHOGM, the Secretary-General was reportedly overheard on a sensitive microphone telling the Sri Lanka Government not to be worried as the Canadians had already 'booked their hotels'. Prime Minister Harper, at least, was true to his word. He, and the Prime Minister of India (Mr Manmohan Singh) and the Prime Minister of Mauritius did not travel to Colombo.

Despite assurances, and a developing practice of CHOGM conferences, several human rights bodies and then members were not granted visas to attend the side events in Colombo, to review the Commonwealth's (and Sri Lanka's) record on human rights following the Perth meeting. The Secretary-General was reported to have blocked an offer by the UN High Commissioner for Human Rights to brief members of the CMAG concerning her visit to Sri Lanka.[48] What a contrast is here to the steadfast support for principle shown by the Commonwealth and its then Secretary-General against the apartheid regime in South Africa. [49] Instead of standing up for human rights and the rule of law in Sri Lanka, the Secretary-General endorsed a chorus, led by some of the human rights oppressors in the Commonwealth, calling for the association to concentrate its attention upon economic development. However, human rights and the rule of law are closely inter-related with economic and social development. To suggest otherwise is a kind of skin coloured intellectual apartheid. It suggests that the human rights of black and brown people are not a high priority and that they have to be postponed until full economic development is attained.

[48] 'Sharma preventing Navi from addressing CMAG' (2013), *Colombo Telegraph.*

[49] S. Mole, "Negotiating with Apartheid: The Mission of the Commonwealth Eminent Persons Group 1986" (2012) 101 *The Round Table*, Commonwealth Secretariat, Human Rights Unit, "Historical overview of human rights in the Commonwealth: successes, challenges and the way forward" (2014) 40 *Commonwealth Law Bulletin* 421 at 421 describing the stand taken by Secretary-General S. Ramphal and UK Prime Minister James Callaghan in 1977 on the abuses of Uganda's leader, Idi Amin, directed at racial minorities.

The new government of Sri Lanka will be polite about the Commonwealth and its Secretary-General. But one can imagine the contempt they must feel for the association and its executive leader, for their silence during their time of trial. It would be a feeling akin to that expressed at the Perth CHOGM by then President Nasheed when he recalled his unanswered letters to the Commonwealth Secretariat.

One can also imagine the attitude of the judiciary of Sri Lanka towards the gross neglect and flagrant breach of the Commonwealth *Charter* provisions about the rule of law. And the attitude of the Bar and citizens of Sri Lanka who stood steadfastly, through difficult times, supporting the constitutional objections of Chief Justice Shirani Bandaranayke in the face of what the Rajapaksa government was doing to remove her from office in defiance of the Constitution. People who are ignored when they appeal to others to comply with their asserted values, can be forgiven for thinking that those others are just hypocrites. They bend the knee to power, wring their hands in despair and ignore appeals for action.

*Maldives*: More recent have been the tepid responses of the Secretary-General to the overthrow of President Mohammed Nasheed of Maldives. This is the same man who spoke up for a commissioner at the Perth CHOGM in 2011. His election in 2009 ended two decades of a family dictatorship of the former President, Maumoon Adbul Gayoom. However, President Nasheed was, in turn, overthrown in 2012 by a coup d'état orchestrated by Gayoom. Nasheed asserts that he was forced to resign the Presidency at gunpoint. Hamid Abdul Ghafoor, spokesman for Nasheed's Maldivian Democratic Party declared: "Democracy is dead in the Maldives. In its place we have thuggish authoritarian rule."

In 2013, fresh elections were held in Maldives. Nasheed was able to contest them. However, when his party effectively won the elections, the authorities invalidated the result and called for a rerun. Again, in the rerun, Nasheed received the largest vote in the first round. But he lost in the second round to an opponent, Abdulla Yameen, who is Gayoom's brother. Gayoom's daughter, Dunya, is now the Foreign Minister. As Nobel Laureate, José Ramos-Horta has said: "The family dictatorship is back in business". [50]

Not content with such abuse of power, Yameen procured a charge of terrorism to be brought against Nasheed. Allegedly, he was repeatedly denied legal representation. Reportedly, the court refused to hear evidence from his own defence witnesses. Judges appeared as witnesses for the prosecution. One of the judges has a criminal record. Court hearings were held late at night. Nasheed was physically mistreated. He was dragged into court by police. He was convicted and sentenced to 13 years in jail. On his appeal, the High Court refused to hear the case in open session, violating a constitutional requirement governing the courts. Now Nasheed is back in prison where he earlier spent 13 years struggling for democracy. [51]

So what did the Commonwealth Secretary-General do about this? In what must amount to the weakest response to a grave human rights issue in the history of the Commonwealth, he declared:[52]

[50] Statement by Jose Ramos –Horta and Benedict Rogers, *The Guardian* (UK), London, 18 March 2015.
[51] See also statement by the UK, The Conservative Party Human Rights Commission, "Fiona Bruce MP calls for Release of Former President Mohamed Nasheed in the Maldives and an end to 'sham trial'".
[52] Statement by the Commonwealth Secretary-General (Kamalesh Sharma) on the situation in the Maldives

> *"The Commonwealth has taken note of the verdict released by the Criminal Court of Maldives on 13 March 2015… The verdict is a significant one and at this stage, is part of an ongoing judicial process which the Commonwealth will continue to follow closely. We urge restraint by all concerned in reacting to the verdict. Differences of view in Commonwealth societies are resolved in a lasting way through peaceful means, including dialogue and in accordance with democratic principles and the rule of law."*

Instead of taking action to investigate on the spot, transparently and publicly, this apparently grave series of oppressive acts – or to interview President Nasheed in a cell near the prison's rubbish dump, - with toilet facilities condemned by earlier inspections carried out by the Red Cross and Red Crescent Societies and by the United Nations Human Rights machinery – the response of the Secretary-General was a four paragraph exercise in platitudinous generalities. If ever an instance was required to demonstrate the need of a Commonwealth human rights Commissioner, the Maldives surely provides it. At least Mr Nasheed knows that he need not bother writing to the Secretary-General. Even if his letter were forwarded (which is doubtful) he knows that there would probably be silence at the other end of the line. Commonwealth Heads of Government know that too. For it was said to them by one of their number in the Perth CHOGM in 2011.[53]

*GLBT Rights and Violence:* An important section of the report of the EPG in 2011 addressed the intertwined issues of HIV/AIDS and the criminal laws against sexual minorities in Commonwealth countries. The

[53] After this paper was written and distributed the Secretary-General reportedly arranged an urgent Commonwealth mission to Maldives to report on the detention of Former President Nasheed.

issues are intertwined because evidence gathered by the World Health Organisation, UNAIDS and United Nations Development Programme (UNDP)[54] clearly demonstrates that identified vulnerable groups are most susceptible to HIV infection. These groups include men who have sex with men (MSM), transgender persons (TGP), sex workers (CSW) and people who use drugs (PWUD).

MSM are specially vulnerable in Commonwealth countries because 43 of the 53 countries of the Commonwealth retain the 'sodomy' offence in their criminal codes, introduced by their erstwhile British colonial rulers. That offence was abolished in revolutionary France in 1793. As a consequence, the French *Penal Code,* and the codes derived from it (German, Netherlands, Belgian, Spanish, Portuguese and Scandinavian Codes), did not contain this offence. The criminalisation of so-called "unnatural" offences was a particular feature of British colonial rule and its aftermath.

The UNDP report on *HIV and the Law*,[55] in which I had also participated as a commissioner, demonstrated, in words and graphs, the exact parallels between HIV in Caribbean countries and the existence or absence of criminal laws against MSM. Those of the British colonial tradition, where such laws continue, have high levels of HIV. The continuing operation of the British colonial criminal laws appears to be a distinct risk factor for the spread of HIV/AIDS. The reason is simple. People who are criminalised for private, adult, consensual sexual

[54] UNDP, *Global Commission on HIV and the Law, Risks, Rights and Health,* July 2012.

[55] Ibid, 46 (comparative tables of African and Caribbean countries that criminalise same-sex sexual activity and levels of HIV prevalence).

conduct are frightened. They are placed outside the protective messages about AIDS prevention. They are at forced into a category of high risk.

In its report, the EPG, using the UNDP data which it accepted, called attention to the fact that the HIV epidemic was a special problem for Commonwealth countries. The EPG therefore recommended that the subject should be on the agenda of all relevant Commonwealth meetings. It proposed that the Secretary-General should work with UNAIDS, WHO and UNDP to develop an effective programme and to protect vulnerable Commonwealth countries from the loss of protection by foreign and international aid, based on the raw criterion of gross domestic product per capita.[56] The Secretary-General was encouraged to mount a high level mission to advocate review of this inequitable criterion. No such mission has been instituted. I know this because I am currently serving on a high level panel of the Global Fund against AIDS, Tuberculosis and Malaria examining specifically the criteria that, years earlier, had engaged the attention and concern of the EPG.[57]

Returning specifically to the continuance of the criminal laws that discriminate against, and oppress, LGBT citizens of Commonwealth countries, the EPG in strong language concluded: [58]

> *"These [criminal laws that penalise adult consensual private sexual conduct between people of the same sex] are a particular historical*

[56] EPG Report, 101 (RR 57, 58, 59).
[57] This is the Global Fund Against AIDS, Tuberculosis and Malaria, High Level Panel on *The Equitable Access Initiative* (Chair: Pascal Lamy). The Panel met in Geneva on 23 February 2015. Its existence was drawn to the attention of the Commonwealth Secretariat with no response.
[58] EPG Report, 100.

*feature of British colonial rule. They have remained unchanged in many developing countries of the Commonwealth despite evidence that other Commonwealth countries have been successful in reducing cases of HIV infection by including repeal of such laws in their measures to combat the disease. Repeal of such laws facilitates the outreach to individuals and groups at heightened risk of infection. The importance of addressing this matter has received global attention through the United Nations. It is one of concern to the Commonwealth not only because of the particular legal context but also because it can call into question the commitment of member states to the Commonwealth's fundamental values and principles including fundamental human rights and non-discrimination."*

The EPG's recommendations in this regard were referred by the Perth CHOGM to officials. The terms in which the recommendations were considered laid emphasis upon the fact that it was for each Commonwealth country to decide for itself what was, and was not, a "discriminatory law". Within the Secretariat, the Secretary-General made a few, rare and usually understated pronouncements on these subjects as he has since done before the UN Human Rights Council. But there was no sustained and substantial leadership and follow-up. There was no human rights commissioner to make this a special Commonwealth project, as the EPG suggested it should be. Under instructions not to speak out on human rights issues, the Secretariat staff basically held their collective tongue. Dr Purna Sen's complaint was that there was no effective Commonwealth human rights strategy on the issues of sexual orientation and gender identity. That complaint continues to be valid.

What a contrast there is to the strong statements and actions of the Secretary-General of the United Nations (Ban Ki-moon).[59] Repeatedly he has called for the repeal of the laws against LGBT people, saying that they are contrary to universal human rights and, as well, an impediment to effective public health measures. Whereas the head of UNDP, Helen Clark, a past Commonwealth Prime Minister, (New Zealand), together with the Head of UNAIDS and the High Commissioner for Human Rights (then Navi Pillay of South Africa – also a Commonwealth citizen) have all strongly and repeatedly endorsed the United Nations Secretary-General's call for action, our Commonwealth Secretary-General's voice has been muted. He knows that talking about homosexuality is very upsetting to a number of Commonwealth countries and their leaders. Progress on this topic around the Commonwealth has virtually ground to a halt.

In India, an important decision of the Delhi High Court invalidating the criminal offence against MSM[60] was invalidated by a two judge bench of the Supreme Court of India[61] with reasons that cannot stand with another decision, 5 months later, by a differently constituted bench, upholding the rights of transgender citizens.[62] In the meantime, the legislature in India does nothing. The Commonwealth, with a Secretary-General, who is himself a prominent Indian and well positioned to express his views, is effectively silent.

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[59] Ban Ki-moon, United Nations Secretary-General, Statement to the Human Rights Council, 7 March 2012, available at http://www.un.org/sg/statements/?nid=5900 (accessed 24 April 2012). See UNDP Report 48.

[60] *Indian Penal Code*, s377. See *Naz Foundation v Union of India* [2009] 4, LRC 838 (Delhi High Court, per A.P. Shah CJ and S. Muralidhar J).

[61] *Koushal v Naz Foundation* 2013, (15) SCALE 55: (2014) 1SCC 1. See M.D. Kirby, *Sexual Orientation & Gender Identity – a New Province of Law for India* (Tagore Law Lectures), Universal, New Delhi, 2015, 3.

[62] "Transgender Rights in India – A Welcome Ruling by the Nation's Supreme Court Assures Fundamental Protections", *International New York Times*, 26 April 2014, 10.

In other Commonwealth countries, the years since the EPG report have been marked not by reform, as the UNDP and EPG reports recommended, but by the adoption of further anti-homosexual laws. In Uganda, after a court on 1 August 2014 overturned the *Anti-Homosexuality Act* 2014 on procedural grounds, a new *Prohibition of Unnatural Sexual Practices Bill* was introduced to replace the invalidated the Act. In states of Nigeria, new laws have been enacted to prohibit "promotion" of homosexuality. These laws would probably be broad enough to catch anyone who was so unwise as to carry a copy of the EPG report urging reform of the law on this topic. In Cameroon, on 19 January 2015, a TPG woman was attacked by 15 people, armed with stones and clubs. Her story is recorded on the Human Dignity Trust Persecution Alerts. It is a melancholy record of oppression and violation of basic human rights in a Commonwealth country.

The same source records a small number of courtroom successes in Botswana;[63] Kenya;[64] Malaysia;[65] and Australia.[66] Yet for every little ray of light on this front, there are many disappointments, as in Singapore[67] and Belize.[68] In February 2015, the Supreme Court of Bermuda found in favour of a same-sex couple who complained about their inability jointly to adopt a child whom they were raising together. The Supreme Court of Bermuda held that the case was one of direct discrimination against

[63] "Gaberone High Court Rules in Favour of LGBABIBO Barred from Registration by Department of Labor & Home Affairs" 14 November 2014.
[64] The High Court upheld an application the National Gay & Lesbian H.R. Group to be registered as a NGO, Kenya..
[65] Court of Appeal of Malaysia, 7 November 2014, *Khamis v State Government of Negeri Sembilan and Ors* (Prohibition on cross-dressing held void).
[66] *Registrar of Births, Deaths and Marriages v Norrie* (2014) 250 CLR 490; [2014] HCA 11. (non-specific gender).
[67] The Singapore Court of Appeal rejected a challenge to S 377A of the *Singapore Penal Code* in Tan Eng Hong, Lim Meng Suang/Kenneth Chee Mun Leon, 29 October 2014.
[68] The Belize courts have reserved since May 2013 a challenge to the constitutional validity of homosexual offences. The litigations was supported by Human Dignity Trust.

unmarried couples because of their marriage status and indirect discrimination against them because of sexual orientation.[69]

Such tiny glimmers of light as have lately occurred in Commonwealth countries have not been because of anything the Commonwealth or its Secretary-General have done, whether in invoking the *Charter* or otherwise. The stimulus to action has usually followed strong moves taken by the United Nations Office of High Commissioner for Human Rights. For every advance there have been setbacks. These have included a ruling of the Singapore Court of Appeal rejecting a challenge to the provisions of the *Singapore Criminal* Code that punishes "unnatural" non procreative sexual conduct (but only by opposite sex parties) on the ground that they breach the human rights provisions of the *Singapore* Constitution. The Singapore courts have almost never upheld a validity of an appeal based on the fundamental rights in the Singapore Constitution. Again the Commonwealth and its Secretary-General have remained silent.

Fiji (lately readmitted to the Commonwealth) adopted constitutional provisions in 2013 prohibiting discrimination on the grounds of 'sexual orientation, gender identity and gender expression'.[70] In the Cook Islands, a dependency of New Zealand, a newly amended *Crimes Act* has been prepared (although not yet enacted). It deletes the explicit prohibitions against same-sex sexual activity.[71] A minor amendment was made in Samoa by the *Crimes Act* 2013 deleting 'indecency

[69] *A and B v Director of Child and Family Services and Attorney-General*, supreme Court of Bermuda (Hellman J) February 2015.
[70] M.D. Kirby, "Human rights, race and sexuality in the Pacific: regarding others as ourselves (2015) 13 *HIV Australia*, no. 1, 28 at 29 (Sir Moti Tikaram Lecture) the lecture will be published in *Commonwealth Law Bulletin*, 2015, forthcoming.
[71] *Loc cit.*

between males' from the *Crimes Ordinance* 1961. The same amendment in 2013 removed the previous offence of a 'male impersonating a woman'. However, sodomy, itself reportedly remains a crime contrary to UN and EPG recommendations.[72] Papua New Guinea, Solomon Islands and Tonga remain resolutely opposed to United Nations arguments for reform. Papua New Guinea and Solomon Islands still face a significant HIV crisis. And, once again, the Commonwealth Secretariat is silent.

Ironically, two countries of the Commonwealth that have stood against the gathering logjam, and the widespread failure of legislators to act, have been countries which, exceptionally, did not have a history of British colonial rule. In Rwanda, the President rejected a Bill to introduce a sodomy crime saying that it was not part of that country's legal tradition (which had been Belgian). Similarly Mozambique adopted a new *Penal Code* in July 2014. This removed a previous provision criminalising same sex sexual conduct even though between consenting adults.[73] The colonial tradition of Mozambique had been Portuguese. Whereas sodomy was not a crime in metropolitan Portugal, the offence somehow slipped into the law of a number of the overseas colonies of Portugal. The hard work for removal was performed by members of the local legislature after local civil society organisations sought reform, supported by the United Nations. There was no report of any supporting activity from the Commonwealth. Instead of affording leadership in this significant time of important changes within the United Nations,[74] the

[72] *Loc cit*, 29.
[73] Human Dignity Trust website describing action of the National Assembly of Mozambique, July 2014.
[74] On 26 September 2014, the UN Human Rights Council adopted a resolution expressing 'grave concern' about acts of discrimination against individuals because of their sexual orientation and gender identity.

Commonwealth, at the highest levels, has effectively been hostile. In the Secretariat, it has been silent.

Perhaps the most virulent opposition to the EPG recommendations on HIV/AIDS and sexuality came from The Gambia. On 9 October 2014, President Yahya Jammeh signed into law an amendment of the *Criminal Code Act* 2014 introducing life imprisonment for a broad and vaguely worded offence of "aggravated homosexuality". He described homosexuality as "satanic behaviour". He promised laws "stricter than those of Iran." He said he would "cut off the head" of LGBT people found in The Gambia and gave a "final ultimatum" to those "vermins" to leave. There are reports of many other abuses of human rights. According to the Human Dignity Trust website, 8 persons were arrested under the new law against homosexuality after November 2014, including a 17 year old boy.

President Jammeh, who originally came to office in 1994, following a coup d'état but was elected in 2001, 2006 and 2011, claimed in January 2015, that LGBT people and supportive Western nations, like the United States of America, were parts of an "evil empire". Of one development, however, we can take satisfaction. Just prior to the 2013 CHOGM, President Jammeh announced that he was taking Gambia out of the Commonwealth. Instead of taking the opportunity to express unqualified hopes for the country's return to the Commonwealth, the Secretary-General should have insisted, in a clear voice, that his nation's laws were incompatible with to the *Commonwealth Charter* and universal human rights. He should have rejected the inflammatory, ignorant and unscientific assertions of its leader. Properly, Gambia should long since have been suspended from the Commonwealth of Nations. Some will

think it shameful that its recent removal was by its own action. Others, lamenting the predicament of the people, condemned to live under such oppressive rule, will say under their breath of President Jemmeh: “Good riddance”. A light continues to burn for the return of that country and its people to the Commonwealth in due course when, one hopes, a stronger Secretariat in London will stand up for, and support, the human rights of all Gambian people.

*Other Issues:* Not a week goes by but reports are published concerning serious human rights violations in Commonwealth countries. These include:

- The imposition by the State of Punjab High Court in Pakistan of the death sentence upon a Christian mother of five Asia Bibi. Human Rights Watch says that the blasphemy law has long been misused to target religious minorities in Pakistan;[75]

- The about turn of the Prime Minister of Malaysia, following an earlier promise to introduce repeal of that country’s *Sedition Act*, a legacy of colonial rule, adopted first to deter protests against the Government but still used, with other new laws, as a contemporary means of civic control;[76] and

- The complaints in the UN Human Rights Council against the alleged refoulement by Australia of Sri Lankan refugee applicants arriving in recent years by boat. These steps were part of a legal regime to which the refugee applicants

[75] *The Australian*, 13 February 2015, 8 (“Pakistan to Defend Blasphemy Accused”).
[76] BBC News, Asia, 2 July 2013 (“Malaysia PM Najib Razak makes sedition pledge” but see “Malaysia’s creeping authoritarianism”, *Wall Street Journal*, 17 March 2015, 12.

have been subjected, under successive governments, to "enhanced screening process".[77]

No country of the Commonwealth has a perfect human rights record, including my own. Australia's earlier laws and practices were grossly discriminatory against its indigenous peoples and 'non-white' immigration. The migration laws were ultimately changed after 1966, partly because of international pressure, some of it applied to Australia in the councils of the Commonwealth of Nations. Racial discrimination and electoral malfeasance are still subjects that the Commonwealth responds to with comparative speed and resolution. However, as I have shown, on many other subjects, and for many other countries, the voice of the Commonwealth is silent in the land.

*REVIVAL OF A COMMISSIONER*

The lesson of this story of efforts to renew the Commonwealth of Nations is of an opportunity lost by the CHOGM meetings held in Perth in 2011 and Colombo in 2013. When the Commonwealth leaders gather in Malta, late in 2015, they should return to the EPG recommendations that remain unimplemented. Specifically they should establish the office of Commissioner for Human Rights, so named, to give effectiveness to the *Commonwealth Charter*. The CHOGM has an established track record of adopting language in concluding statements that grow ever longer but are respected and implemented in reverse proportion to their length and in proportion to their content and courage.[78]

[77] E. Howie, "Understanding Australia's Opposition to the Investigation by the Human Rights Council of Sri Lanka's War Crimes", CHRI, Newsletter (2014) Vol. 21, no. 2, 5.
[78] Sanders, above n.38, 1.

The problem is essentially a functional or institutional one. Secretaries-General cannot possibly perform the detailed work of investigating, evaluating and advocating every challenge to human rights, democracy and the rule of law that crosses their desk. Neither could a Commissioner appointed (or elected) by CHOGM to perform those duties do so within the meagre resources likely to be made available. The realities would demand prudence and judgment in the selection of themes, subjects and countries suitable for visitation, evaluation and technical assistance.

All of us in the Commonwealth are beneficiaries of the traditions of the English law. The days when we could be pulled into line by the Judicial Committee of the Privy Council are now long gone for most of us. But we speak the tongue that Shakespeare spake. We share the broad judicial and administrative traditions that are characteristic of English-speaking people. The strongest of these traditions upholds a democratic legislature and an independent judiciary. Another tradition upholds the value for elected lawmakers of the stimulus of independent professional guardians, performing their functions by reference to basic principles respected by all civilised countries. Functionally, the Commonwealth needs to adopt such a mechanism to better protect the human rights of its citizens.

The urgency of taking this step has increased since the acceptance of the *Commonwealth Charter*. The Secretary-General certainly has functions to uphold, advocate and, where necessary, insist upon conformity to the *Charter*. But he needs a high official to bear the brunt of that work and to be a visible advocate, critic and guide for the Commonwealth family. The days of silence in the face of serious or

persistent human rights violations must indeed end. Yet the answer is not more half page media releases with a photograph of a worried looking Secretary-General and banal remarks.

What is needed is a respected Commonwealth citizen of strength, experience and manifest integrity and judgment, with only one term in office, to restore the reputation of the Commonwealth of Nations as a values based organisation. If this is not done, the Commonwealth's destiny will continue to be frustrated. Its opportunity may be lost forever. That is why all eyes must be on Malta. We must hope that the Commonwealth leaders will choose a bold and creative spirit as Secretary-General to rescue the organisation. Presently it seems bound always to disappoint. Its survival in an era of many international links is not assured.

It behoves good citizens of the Commonwealth to arrest the slide. The EPG report shows how.