

2775

THE HUMAN DIGNITY TRUST
THE LAW SOCIETY
HERBERT SMITH FREEHILLS
LONDON, 21 APRIL 2015

CAN THE COMMONWEALTH SURVIVE?
A DISMAL STORY OF HUMAN RIGHTS AND
HUMAN WRONGS

The Hon. Michael Kirby AC CMG

THE HUMAN DIGNITY TRUST
THE LAW SOCIETY
HERBERT SMITH FREEHILLS
LONDON, 21 APRIL 2015

CAN THE COMMONWEALTH SURVIVE?
A DISMAL STORY OF HUMAN RIGHTS AND HUMAN
WRONGS

The Hon. Michael Kirby AC CMG*

THE COMMONWEALTH AND ITS EPG

The Commonwealth of Nations is a voluntary association of 53 states. It was formed from a nucleus created by dominions and colonies previously linked, for the most part, as parts of the British Empire. Commonwealth members constitute more than 25% of the membership of the United Nations; nearly 40% of the World Trade Organisation; more than 35% of the Organisation of American States; and just under 40% of the African union. The represent 26% of the South East Asian Association for Regional Cooperation; around 90% of the Caribbean Community and Pacific Islands Forum and over 20% of the Organisation of Islamic Countries.

Originally, the glue that bound together the British Empire and the original British Commonwealth was allegiance to the Crown of the United Kingdom. However, when it became clear that India, and other

* Justice of the High Court of Australia (1996-2009); Member of the Eminent Persons Group on the Future of the Commonwealth (2010-11).

newly emerging independent countries, wishes to sever the bonds of allegiance, consideration was given to continuation of a link but without that requirement. The solution was hammered out by the respective Prime Ministers of India (Jawaharlal Nehru) and the United Kingdom (Clement Atlee) at a meeting of Commonwealth Prime Ministers in London in 1949. The King would be recognised as the Head of the Commonwealth. But republics and other newly independent countries agreed to by the remaining membership, could also join. This was the new body to be named the Commonwealth of Nations. On the death of George VI, Queen Elizabeth II was seamlessly accepted as Head of the Commonwealth. So she is to this day. Her service to the Commonwealth has been a distinctive signature of her reign. On the occasion of her 89th birthday, we should reflect upon her faithful service to the Commonwealth and its diverse peoples.

The intimate meetings of the Prime Ministers of the British Empire gave way to the Commonwealth Heads of Government Meetings (CHOGM) convened in Commonwealth countries at two yearly intervals. At the close of each CHOGM, statements were issued claiming the commitment of the Commonwealth to certain core values such as an opposition to racism in all its forms; assistance to each other in transitioning to multi-party democracies; the promotion of universal human rights; a particular support for small and island nations; encouragement to economic co-operation and equity; and promotion of world peace.

Unfortunately, as time progressed, a number of very serious crises faced the Commonwealth, mostly concerned with aspects of the suggested failure of some member countries to observe wholeheartedly the

foregoing principles. Criticisms were expressed, the Commonwealth was strong on wordy declarations but weak on performance. Anxious about this trend, the CHOGM held in 2009 in Port of Spain, Trinidad, agreed to establish an Eminent Persons Group (EPG). Its task was to explore the future of the Commonwealth and to suggest ways in which the organisation could be rescued, modernised and made true to the values that were said to bind it together.

Most importantly, the EPG was tasked with establishing machinery that would rescue the Commonwealth of Nations from what some feared was a terminal decline. With the advent of many multilateral organisations coinciding with the expansion of the Commonwealth beyond the cosy intimate club of white dominions, the need for a complete reinvigoration was apparent. That need was ultimately recognised in the report of the EPG which was produced in time for the succeeding CHOGM held in Perth, Western Australia in October 2011.¹

The EPG report proposed adoption of a *Charter* of the Commonwealth. Time ran out for the completion of that document. However, the idea was endorsed by the EPG. It proposed a process of consultation and the preparation of such a document. I prepared the first draft to start the process of dialogue. That draft was annexed to the report of the EPG. The idea was endorsed by the CHOGM in Perth in 2011. Eventually a charter was created by officials delegated with that task. Some of the ideas contained in my draft were adopted. Others were watered down. In the end, in March 2013, the Queen, as Head of the Commonwealth, solemnly and publicly signed the *Charter*. But how is this instrument to

¹ 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).

be enforced? How were complaints from the departures of values to be investigated? Would this simply be another ineffective statement, honoured in the breach rather than the observance?

To overcome that danger, the EPG proposed that a commissioner should be appointed to supplement the functions of the Secretary-General. Perhaps unwisely, the EPG proposed that the commissioner be titled, “the Commissioner for Democracy, the Rule of Law and Human Rights”. Whilst this accurately described the three primary tasks envisaged for the commissioner, the ungainly title left the office open to opposition. Such opposition became apparent at the Perth CHOGM.

Although throughout the debates of the EPG, the Secretary-General of the Commonwealth (Mr Kamanesh Sharma) led the EPG to believe that he shared their view that a commissioner should be created, when asked his opinion on the office in Perth, he indicated that he did not see why it was required. This announcement came as a shock to members of the EPG who had been invited to attend that session of the Perth CHOGM that considered its report. Effectively, the Secretary-General’s negative opinion torpedoed the proposal for a commissioner. It was not amongst the proposals that were ultimately endorsed by the Commonwealth Foreign Ministers to whom follow up of the EPG report was delegated. In the result, the Commonwealth received its *Charter*. But the machinery essential to enforce the *Charter* was not adopted. Commonwealth human rights initiative established in New Delhi, declared that this was “the missing link”. It undermined the value and utility of the *Charter* itself.²

² 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

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?

It is true that good work is done in the Commonwealth, including by its Secretariat. Given that the entire personnel of the 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 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 and politicians 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

described in the EPG Report at 129 as the "largest Commonwealth entity outside London with around 40 permanent staff... headquartered in New Delhi".

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 human rights involved. 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 very 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.³ 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 that 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

³ 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).

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; intolerance of dissent; intimidation of the media; inaction in the face of extremist attacks on minorities; and the illegal impeachment of the Chief Justice.⁴ Even when the Prime Minister of Canada warned that he 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 new Prime Minister of India (Mr Narendra Modi) 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 members were not granted visas to attend the side events to review the Commonwealth's (and Sri Lanka's) record on human rights since 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.⁵ What a contrast is here to the steadfast support and principle shown by the Commonwealth and its then Secretary-General against the apartheid regime in South Africa.⁶ Instead of standing up for human rights and the rule of law in Sri Lanka, the Secretary-General endorsed a

⁴ 'Sharma preventing Navi from addressing CMAG' (2013), *Colombo Telegraph*.

⁵ S. Mole, "Negotiating with Apartheid: The Mission of the Commonwealth Eminent Persons Group 1986" (2012) 101 *The Round Table*, 3.

⁶ Statement by Jose Ramos –Horta and Benedict Rogers, *The Guardian* (UK), London, 18 March 2015.

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 economic development is attained.

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 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, with 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 their pleas.

Maldives: More recent have been the hopelessly 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 former President Maumoon Abdul Gayoom. However, he 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 procured 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".⁷

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

⁷ 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'".

governing courts. Now Nasheed is back in prison where he earlier spent 13 years struggling for democracy.

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:

“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 of 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 were 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.

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. The issues are intertwined because the evidence gathered by the World Health Organisation, UNAIDS and United Nations Development Programme (UNDP)⁸ clearly demonstrates that 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 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.

⁸ UNDP, *Global Commission on HIV and the Law, Risks, Rights and Health*, July 2012.

The UNDP report on *HIV and the Law*,⁹ in which I had also been a participant, 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 conduct are frightened. They are placed outside the protective messages about AIDS prevention. They are at 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 of 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 the vulnerable Commonwealth countries from the loss of protection in foreign and international aid, based on the raw criterion of gross domestic product per capita.¹⁰ The Secretary-General was encouraged to mount a high level mission to advocate review of this inequitable criterion. No so mission has been instituted. I know this because I am currently serving on a Global Fund high level panel

⁹ Ibid, 46 (comparative tables of African and Caribbean countries that criminalise same-sex sexual activity and levels of HIV prevalence).

¹⁰ EPG Report, 101 (RR 57, 58, 59).

examining specifically the criteria that, years earlier, had engaged the attention and concern of the EPG.¹¹

Returning specifically to address the continuance of the criminal laws that discriminate against, and oppress, LGBT citizens of Commonwealth countries, the EPG in strong language concluded:¹²

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

¹¹ 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 positive outcome.

¹² EPG Report, 100.

“discriminatory law”. Within the Secretariat, the Secretary-General made a few, rare and usually understated pronouncements on these subjects. 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 unanswered.

What a contrast there is to the strong statements and actions of the Secretary-General of the United Nations (Ban Ki-moon).¹³ 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 – a Commonwealth citizen) have all strongly and repeatedly endorsed the United Nations Secretary-General’s call for action, our Commonwealth Secretary-General 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 MSM¹⁴ was invalidated by a two

¹³ 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.

¹⁴ *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).

judge bench of the Supreme Court of India¹⁵ with reasons that cannot stand with another decision, 5 months later by a differently constituted bench, upholding the rights of transgender citizens.¹⁶ 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.

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 new anti-homosexual laws. In Uganda, after a court overturned an earlier anti-gay statute on procedural grounds, a new *Prohibition of Unnatural Sexual Practices Bill* was introduced to replace the invalidated *Anti-Homosexuality 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, a TPG woman was attacked by 15 people, armed with stones and clubs, on 19 January 2015. 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;¹⁷ Kenya;¹⁸ Malaysia;¹⁹ and Australia.²⁰ Yet for every little ray

¹⁵ *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.

¹⁶ “Transgender Rights in India – A Welcome Ruling by the Nation’s Supreme Court Assures Fundamental Protections”, *International New York Times*, 26 April 2014, 10.

¹⁷ “Gaberone High Court Ruled in Favour of LGBABIBO Barred from Registration by Department of Labor & Home Affairs” 14 November 2014.

¹⁸ Court is considering an application the National Gay & Lesbian H.R. Group to be registered as a NGA, Kenya..

of light on this front, there are many disappointments, as in Singapore²¹ and Belize.²² 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 unmarried couples because of their marriage status and indirect discrimination against them because of sexual orientation.²³

Tiny glimmers can be seen in a few Commonwealth countries. However, this has not been because of anything the Commonwealth or its Secretary-General have done, in invoking the *Charter*. The stimulus to action has invariably followed strong moves taken by the United Nations Office of High Commissioner for Human Rights. And 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* sanctioning “unnatural” non procreative sexual conduct, but only by opposite sex parties on the ground that they breached 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.

¹⁹ Court of Appeal of Malaysia, 7 November 2014, *Khamis v State Government of Negeri Sembilan and Ors* (Prohibition on cross-dressing held void).

²⁰ *Registrar of Births, Deaths and Marriages v Norrie* (2014), 250 CLR 490; [2014] HCA 11. (non-specific gender).

²¹ 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.

²² The Belize courts have reserved since May 2013 a challenge to homosexual offences. The litigations was supported by the Human Dignity Trust.

²³ *A and B v Director of Child and Family Services and Attorney-General*, supreme Court of Bermuda (Hellman J) February 2015.

Fiji (lately readmitted to the Commonwealth) adopted constitutional provisions in 2013 prohibiting discrimination on the grounds of 'sexual orientation, gender identity and gender expression'.²⁴ 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.²⁵ A minor amendment was made in Samoa by the *Crimes Act* 2013 deleting 'indecent 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.²⁶ Papua New Guinea, Solomon Islands and Tonga remain resolutely opposed to United Nations arguments for reform. Solomon Islands still faces a significant HIV crisis. And, once again, the Commonwealth Secretariat is silent.

Ironically, two countries of the Commonwealth which have stood against the gathering logjam and the widespread failure of legislators throughout the Commonwealth to act have been countries which, exceptionally, did not have a history of British colonial rule. I refer to Rwanda where the President terminated 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.²⁷ The colonial tradition of Mozambique had been Portuguese. Whereas sodomy was not a crime

²⁴ 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.

²⁵ *Loc cit*.

²⁶ *Loc cit*, 29.

²⁷ Human Dignity Trust website describing action of the National Assembly of Mozambique, July 2014.

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 done by 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,²⁸ the Commonwealth, at the highest levels, has 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”. According to the Human Dignity Trust website, 8 persons were arrested under the new law after November 2014, including a 17 year old boy. President Jammeh, who originally came to office following a coup d’état, 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. The Secretary-General, instead of taking the opportunity to express hopes for the country’s return, to the Commonwealth should have insisted, in a clear voice, that the nation’s laws were an affront to the *Commonwealth Charter* and to universal human rights. He should have rejected the inflammatory, ignorant and

²⁸ 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.

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 Jammeh: “Good riddance”. A light continues to burn for the return of that country and its people, 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 against a Christian mother of five Asia Bibi. Human Rights Watch says that the blasphemy law has long been unduly misused, to target religious minorities;²⁹
- * 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 antagonistic protest against the Government but used now for contemporary means of control;³⁰ and
- * The complaints in the UN Human Rights Council against the alleged refoulement by Australia of Sri Lankan refugee

²⁹ *The Australian*, 13 February 2015, 8 (“Pakistan to Defend Blasphemy Accused”).

³⁰ 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.

applicants arriving in recent years by boat. These steps were part of a legal regime to which the refugee applicants have been subjected, under successive governments, to “enhanced screening process”.³¹

No country of the Commonwealth has a perfect human rights record, including my own. Australia’s earlier laws and practices were grossly discriminatory against indigenous people 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

³¹ 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.

longer but are respected in reverse proportion to their length and their content and courage.³²

The problem is essentially a functional or an institutional one. Secretaries-General cannot possibly perform the hard yards of investigating, evaluating and advocating every detailed 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 within the meagre resources likely to be made available and the realities that would demand prudence and judgment in the selection of themes, subjects and countries suitable for visitation.

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 judicial and administrative traditions that are characteristic of English-speaking people. The strongest of these traditions upholds a democratic legislature and an independent judiciary. However, 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

³² Sanders, above n.37, 1.

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.