THE CARIBBEAN ASSOCIATION OF JUDICIAL OFFICERS

SECOND CAJO CONFERNCE

NASSAU, THE BAHAMAS

6 OCTOBER 2011

BUILDING ON GLOBAL LINKS – LAW, THE JUDICIARY, THE COMMONWEALTH OF NATIONS AND THE UNITED NATIONS

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LINKS OF INTERESTS AND AFFECTION

Teachers and humanity: It is a great privilege for me, until recently a long-serving judicial officer in faraway Australia, to be invited to participate in this conference in the Bahamas.

I pay a tribute to the judicial officers in this part of the world. I bring greetings from judicial colleagues in my country. Although some of the participants at this conference are from non-common law countries, most share with Australia a link to the common law of England and the high tradition of the judiciary and legal practice inherited from that place.

It was a pleasure to hear the Youth Choir of the Bahamas open this conference. What most participants could not see, but the head table could clearly observe, was the loving direction of the teacher who

[**] Justice of the High Court of Australia (1996-2009); President of the NSW Court of Appeal (1984-96); Judge of the Federal Court of Australia (1983-84); Chairman of the Australian Law Reform Commission (1975-84); President of the Court of Appeal of Solomon islands (1995-6); President of the International Commission of Jurists (1995-8).

conducted the choir. By looks, whispered words and hand motions, she took her charges through the National Anthem and the rhythmic song that followed. Seeing her reminded me or my own first teachers and the debt that I owe to them to this day[1]. There is no judge in this room, however high, who has fully redeemed the obligations owed to our teachers. Let us all reflect upon where we have come from; and the common link of humanity that binds us together in quest for knowledge, law and justice.

I wish to pay special thanks to Justice Peter Jamadar, Justice of Appeal of Trinidad and Tobago, who led us in the opening prayer. Rarely have I heard an invocation so inclusive and generous. Not only for its acknowledgement of different faiths. But also for its extension to creatures great and small which, with humanity, share this beautiful blue planet. In times of vulnerability to global changes, it is right that we should begin with a reminder of the biosphere and of our obligations to it.

I thank Sir Michael Barnett, Chief Justice of the Bahamas, for the welcome he has extended to us. I will take his advice and make sure that, when I leave, sand from this beautiful place will remain between my toes, to beckon back to the Caribbean in years to come.

My remarks, like Caesar's Gaul, are divided into three parts. First, I will say something of the linkages that bind us in Australia to you in the Caribbean. Secondly, I will report to you on work in which I have been engaged in the Eminent Persons Group of the Commonwealth of

[1] See e.g. A.J. Brown, *Michael Kirby: Paradoxes/Principles* (Federation Press, Sydney, 2011) p23 ff; M.D. Kirby, *A Private Life: Fragments, Memories, Friends* (Allen & Unwin, Sydney, 2011) ch1, My Early Teachers, pp1-22.

Nations (EPG). Because the EPG will be reporting to the upcoming meeting of the Commonwealth Heads of Government (CHOGM), taking place in Perth, Western Australia, at the end of this month, this portion of my talk will, literally, be breaking news. And then, I will say something of another international body in which I am serving: the Global Commission on HIV and the Law of the United Nations Development Programme (UNDP). These latter remarks will be an introduction to the session, later today, organised by UNDP, to brief the judiciary of this region on the very serious, existential threat, occasioned by the human immuno-deficiency virus (HIV) that causes Acquired Immuno-Deficiency Syndrome (AIDS). As I will show, this is not purely a medical challenge. It is also a challenge for lawyers and for the judiciary.

Early judicial links: First, then, to the linkages. I was reminded of these when, yesterday, in preparation for this conference, I visited Christchurch Cathedral in Nassau, for reflection and prayer. There are churches of that kind in the major cities of Australia. Memorials to a faded Empire, recount our links of colonial times. The Australian colonies were only established because of the need for a new place to deposit prisoners from Britain. The American Revolution denied access to those settlements that became the United States of America. That Revolution had a profound effect, as well, on the Caribbean. By and large, it remains a stronghold of loyalty to the Crown. Its culture and law are marked by that fact. The same is true of Australia. Neither of our societies changed by revolution. We are all the product of a generally peaceful evolution in the law and its institutions. That evolution is continuing. It never ends.

From the beginning of the Australian colonies, there were connections to personnel in the Caribbean. The first Chief Justice of New South Wales was Sir Francis Forbes (1784-1841). He was the grandson of Dr. George Forbes who had settled in Bermuda. He went to school there and was greatly influenced by the ideas spread from the American Revolution as he was growing up. He eventually came from high judicial office in Newfoundland to Sydney Cove in 1824. He was an excellent judge and lawyer, well trained in these parts.

The third Chief Justice of New South Wales also had such a connection. He was Sir Alfred Stephen (1802-1894). Born in 1802 at Basterre, St. Christopher (St. Kitts) in the West Indies, Stephen returned to England with his mother in 1804. However, in 1815, he came back to St. Kitts and was articled to his father, serving also as a lieutenant in the local militia. Eventually, he ended up in Imperial service in Hobart Town, in the then Van Diemen's Land and late in Sydney. He was appointed to the Supreme Court of New South Wales in 1839 and became the third Chief Justice in 1845[2]. He was an outstanding judge, lawyer, law reformer and political leader. There are doubtless many other professional links of this kind. They have continued into the modern age, enhanced by the contemporary technology of travel, and stimulated by the linkages of language, sport, trade and personal friendships.

Within the law and the judiciary, we also have many present things in common. Our courts, legal rules, conventions and practices remain remarkably similar. A number of Australian judges have served for periods in the courts of the Caribbean. Earlier, I did the same in the

[2] M.D. Kirby, Book review of J.M. Bennett, *Sir Alfred Stephen: Third Chief Justice of New South Wales 1844-1873 (*Federation Press, Sydney, 2009) (2010) 33 *Australian Bar Review* 181.

Court of Appeal of Solomon Islands. Such service is facilitated, and encouraged, by the familiarity we feel because of shared bedrock in the common law, the traditions, habits, language and court dress. In a world of so many divisions, we must preserve and strengthen these links.

The Privy Council: Australian judges and lawyers have watched with great interest the creation of the Caribbean Court of Justice whose new President (the Rt. Hon. Sir Dennis Byron) graces this opening ceremony and one of whose judges (Justice Adrian Saunders) is chairman *pro tem* of the Caribbean Association of Judicial Officers. The objective of the Caribbean Court of Justice is to replace the expensive procedures of the Privy Council and to provide a court of integrity and excellence that is more accessible to the litigants, laws and values of this region. I will not stray into the sensitive questions that surround national accession to the Caribbean Court of Justice. Except to say that we in Australia went through a somewhat similar process of replacing the Privy Council with an entirely local judicial system. It did not happen overnight. Nor did it generally occur with acrimony or any lack of appreciation for the contributions which the Privy Council had made, when it was part of the Australian judicature.

As it happens, I presided in the Court of Appeal of New South Wales in the last appeal ever taken from Australia to their Lordships in the Privy Council[3]. Happily, the appeal was dismissed. The process of ending Privy Council appeals in Australia occurred in four stages. First, in 1901, the Constitution of the Commonwealth of Australia included, upon Imperial insistence, a provision preserving Privy Council appeals but limiting appeals to it from the High Court of Australia upon certain

[3] *Austin v Keele* (1987) 10 NSWLR 283 (PC).

constitutional questions and permitting the Australian Parliament to make laws "limiting the matters in which ... leave may be asked" to appeal to the Privy Council[4]. Eventually, three further statutes were enacted to achieve this "limitation", to the point of ultimate extinction of Privy Council appeals. The *Privy Council (Limitation of Appeals) Act* (Cth) 1968 began the process by limiting appeals from decisions in federal jurisdiction. Then, the *Privy Council (Appeals from the High Court) Act* 1975 (Cth) limited, by way of abolition, direct appeals from the High Court of Australia. This use of the "limitation" power was upheld by the Australian courts[5].

Finally, in 1986, the last of the appeals to the Privy Council, from state courts, were terminated by concurrent legislation of the United Kingdom and Australian Parliaments[6]. In this way, more than 150 years of Privy Council supervision of the Australian courts was ended. Now, in all matters, the High Court of Australia is the final court of appeal for our continental country.

This process of change does not mean that Australia has closed down its links to the distinguished courts and judges of the United Kingdom, any more than with those of other Commonwealth countries. To this day, great respect is paid to the decisions on analogous questions by the Supreme Court of the United Kingdom and the Privy Council. But those decisions are not binding on us. Nor are we limited to them. We can, and do, draw on the jurisprudence helpfully collected and reported in that magnificent series *Law Reports of the Commonwealth*. Now we use with equal appreciation the decisions of courts in Canada, South

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4 Australian Constitution, s74.

5 *Kirmani v Captain Cook Cruises Pty Ltd [No.2]; Ex Parte Attorney-General (Qld)* (1985) 159 CLR 461.

6 *Australia Acts* 1986 (UK) (Cth), s11(1).

Africa, Singapore, the Caribbean and elsewhere in the Commonwealth. Indeed, we also draw on the opinions of judges in Ireland, the United States and other lands. But the final say is committed to Australian judges, appointed by our elected officials and close to the people whose laws they interpret and declare.

I have always thought that the Privy Council played a most important role in the emergence of Australian jurisprudence. Whilst it was part of our judicial hierarchy, it helped to rescue us from the risks of parochial satisfaction and introspection[7]. Still, the time came for taking local responsibility for the content of all the law and that includes the interpretation of local constitutions; the exposition of local statues; and the declaration of the local common law. In some vital matters, this evolution has probably proved greatly beneficial to the Australian legal scene. In particular, the belated recognition in 1992 in *Mabo v Queensland [No.2]*[8] of the native title rights of Aboriginal and other indigenous Australians, reversed 150 years of colonial and later judicial exposition, including a decision of the Privy Council[9]. It is open to doubt that such a change would have occurred, or would have happened so decisively, if the Privy Council appeals had remained in place. However that may be, reasons of principle, convenience and effectiveness ultimately led Australians to bring to a close the distinguished contributions which the Privy Council made to our law. This is a question that still remains before the legislatures, courts and people of the Caribbean.

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7 F.C. Hutley, "The Legal Traditions of Australia as Contrasted to those of the United States" (1981) 55 *Australian Law Journal* 63 at 69 ["In a relatively provincial country (though very litigious) such as Australia, the tendency to lapse into self-satisfaction has been restrained by the continual presence of a major legal system, not as a distant exemplar, but as a continual force for change"].

8 (1992) 175 CLR 1.

9 *Cooper v Stuart* (1889) LR 14 App Cas 286 at 291 (PC). See also *Attorney-General v Brown* (1847) 1 Legge 312 at 316-318; *Williams v Attorney-General (NSW)* (1913) 16 CLR 404 at 439.

COMMONWEALTH EMINENT PERSONS GROUP

I now propose to describe another development which is taking place as we meet, concerned with updating the relationship, of great benefit, that exists between the member countries of the Commonwealth of Nations. That body grew out of the British Empire and the earlier British Commonwealth, which were bound together by the principle of allegiance to the Crown.

Under the *London Declaration* of 1949, in acknowledgment of the fact that some former colonies and dominions wished to establish a republican form of government, a new international association was created. No longer was allegiance the criterion of membership. Henceforth, the Commonwealth was to be a wholly voluntary association of independent nations that willingly accepted their relationship and freely recognised the monarch as the symbolic head of the Commonwealth. This is a role which Queen Elizabeth II has fulfilled with great devotion to duty.

The Queen's Diamond Jubilee, marking 60 years of her reign will, in 2012, focus attention on the future of the Commonwealth. Indeed, that consideration has been foreshadowed by a decision made at the last CHOGM meeting of Heads of Government in Port of Spain, Trinidad and Tobago, in November 2009. That meeting resolved to create a broadly representative group of Commonwealth citizens, to be known as the Eminent Persons Group (EPG). Its task was to report to the next ensuing CHOGM meeting on a number of questions relating to the future of the Commonwealth.

In July 2010, following a nomination by the Australian Government, I was appointed by the Secretary-General of the Commonwealth of Nations (Mr. Kamalesh Sharma) to be a member of the EPG on the future structure of the Commonwealth. This body was established to investigate the future of that worldwide body. The Chair of the EPG is Tun Abullah Badawi, former Prime Minister of Malaysia. The Group comprises eleven members from different continents, professions and backgrounds[10].

Some of the matters referred to the EPG are technical, including the provision of advice on ways in which a greater level of co-ordination and co-operation within the Commonwealth could better "bring together our citizens, academia and others". However, the central focus of the EPG's work is upon the core institutions of the Commonwealth. These include the Commonwealth Ministerial Action Group (CMAG), which is declared to be by earlier CHOGM declarations to be "the custodian of the Commonwealth's fundamental political principles". CMAG itself was asked to "explore ways in which it could more effectively deal with the full range of serious or persistent violations by such member states and to pronounce upon them as appropriate"[11]. Its investigation is proceeding in parallel with the work of the EPG.

Unlike the United Nations, the Commonwealth is not established by a treaty or even by domestic statute. It is a purely voluntary association of its member states. It grew out of developments that had even preceded the *London Declaration* of 1949. Admission requires the consensus of

[10] *Trinidad and Tobago Affirmation of Commonwealth Values and Principles* (2009.

[11] *Trinidad and Tobago Affirmation* (2009), para.8.

all other members. Save for three cases (Cameroon, Mozambique and most recently Rwanda), the common element in membership of the Commonwealth is the shared experience of one-time allegiance to the British Crown, either directly in the case of most colonies or indirectly, as in the case of the former Australian territories of Papua New Guinea.

Not all the countries that once owed such allegiance to the British Crown are members of the Commonwealth. Thus, Burma at its independence as a republic in 1948 did not seek continued membership. Two countries are currently effectively excluded or suspended, although they were formerly members, namely Zimbabwe (1994) and the Fiji Islands (2009). Other countries (such as the United States of America) have never joined. Ireland was a British dominion, and thus a member of the Commonwealth, between 1931 and 1949. However, before the new dispensation, Ireland left the Commonwealth on becoming a republic. Several other countries once governed by Britain (Palestine, the lands of Israel, Aden, Yemen) have reportedly applied for, or explored the possibility of, membership of the Commonwealth. This has not so far been granted.

Queen Elizabeth II attends CHOGM meetings every second year. She there meets all of the Commonwealth Heads of Government. To some extent, the Commonwealth "family" has been a congenial club, led by mostly elderly male politicians. Seemingly, they have found their meetings useful and congenial. The meetings are specially helpful to small nations. More than 30 of the [presently] 54 member states are small nations. Many of them are islands. Most exist in the developing world. But five member states are also members of the G20 group of nations (the United Kingdom, Canada, Australia, South Africa and India).

The G20 are probably the most important meeting of national political leaders now operating. One hope of the smaller, poorer countries of the Commonwealth is that the G20 will provide them with a platform through which to engage with the economically powerful countries of the G20 concerning the issues of economic development that constitute very important issues in lands affected by poverty and by denials of universal human rights.

The challenges before the EPG were difficult and numerous. This is not the occasion to review them all. However, high on the list was the perception, and reality, that the Commonwealth has not been effective in responding to cases of human rights abuses affecting Commonwealth citizens. All too often, the Commonwealth has been passive, inert and silent, despite the existence of widespread evidence of abuses of human rights, contrary to the repeated declarations agreed upon at the conclusion of Commonwealth Heads of Government Meetings[12]. Protecting human rights and securing justice for all people of the Commonwealth appears a legitimate concern of the organisation. Thus, the challenge before the EPG is to recognise and preserve the "voluntary" character of the association, but at the same time, to improve its effectiveness by sanctioning serious and persistent breaches and assisting those in breach to repair the wrongs and to bring human rights and justice to their people and to those for whom they have responsibility.

This is not an occasion to examine all of the abuses of human rights that are in urgent need of attention within the Commonwealth of Nations.

[12] For example, *Singapore Declaration of Commonwealth Principles (*1971); *Harare Commonwealth Declaration* (1991); Millbrook Commonwealth Action Programme on the Harare Declaration (1995); *The Coolum Communiqué* (2002) all published by the Commonwealth Secretariat, London.

However, two inter-related categories stand out as being in need of steady improvement. One is ensuring access by Commonwealth citizens to essential health care[13]. Another is to respect the civic equality of particular groups at special risk of infection with the human immuno-deficiency virus (HIV). It is that virus that causes the usually fatal condition of acquired immuno-deficiency syndrome (AIDS).

Since its first identification in the 1980s, AIDS has resulted in the deaths of 32 million people in the world. Approximately 33.3 million are now living with the virus. The United Nations Development Programme (UNDP) had suggested that the presence of AIDS is a specific Commonwealth problem. Infections in Commonwealth countries comprise over 60% of those living with HIV in the world, whereas such countries comprise only about 30% of the world's population[14]. In this sense, HIV/AIDS is a particular and specially urgent Commonwealth problem. Recognition of this fact demands special attention to access by those infected by the anti-retroviral drugs now available as therapy to treat (but not to cure) the infection. Yet, given the costs of such drugs and the recent global financial crisis, there is an equally urgent challenge to prevent new infections from occurring. At the moment, new infections with HIV comprise about 2.6 million people each year[15]. Inferentially, more than half of them are in Commonwealth countries.

Securing a reduction in infections with HIV necessitates strategies addressed to awareness and self-protection amongst the groups particularly vulnerable to infection with the virus. These groups include

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[13] Provided for in Universal Declaration of Human Rights (1948), Art.25.1; International Covenant on Economic, Social and Cultural Rights (1976), Art.12 ["The right of everyone to the enjoyment of the highest attainable standard of physical and mental health"]; 993 UNTS 14531.

[14] http://www.unaids.org/documents/20101123_GlobalReport em.pdf

[15] UNAIDS, Special Report, *Outlook* (2010).

sex workers, drug users, men who have sex with men (homosexuals) and disempowered women. Legal barriers sometimes exist to the empowerment of populations in these groups. This fact has attracted special attention on the part of the EPG.

A particular feature of the criminal law in Commonwealth countries has been the penalisation and other stigmas addressed to sexual minorities, particularly homosexuals. In France, in 1806, Napoleon's codifiers deleted such criminal offences from the French *Penal Code*. In consequence of this reform, anti-sodomy offences have generally not existed in countries colonised by civil law powers, including France, The Netherlands, Spain, Portugal, Germany and Russia. Such offences have been a special legacy of British rule. They are still found in the laws of most Commonwealth countries.

Although, in the last half century, following the Wolfenden Report in the United Kingdom[16], such criminal offences have generally been repealed in developed countries of the Commonwealth, including Australia[17], the same is not true of developing member states. In 42 of the 54 member countries of the Commonwealth, adult, private, sexual conduct involving participants of the same sex is still a serious criminal offence. Advocacy of reform has so far fallen on deaf ears.

Although the reasons for resistance to reform of these criminal laws are complex and involve considerations of religion, culture and lack of political leadership, the presence of the inherited criminal laws

[16] United Kingdom, Royal Commission Report, *Homosexual Offences and Prostitution*, Command Paper 247, HMSO, 1957 (Wolfenden Report).

[17] *Sexual Offences Act* 1967 (UK). Cf. *Croome v Tasmania* (1998) 191 CLR 119 where the *Criminal Code (Tas)*, ss122(a) and (c) and 123 were the last remaining such provisions in Australia (since repealed).

throughout the Commonwealth has proved a major source of division. It has been a serious cause of violence towards members of sexual minorities. According to international human rights law, such violence is forbidden by basic principles of equality and non-discrimination on the ground of sex or other suspect causes. It constitutes, as well, the denial of respect for privacy[18].

Many examples exist, some of them highly publicised, of such violence and unequal treatment:

- In 2009, the principal of a school in Belize denied access to the school to a student, Jose Garcia, because of his sexual orientation and gender identity;
- In Uganda, in 2010, a bill was introduced into parliament proposing imposition of the death penalty for certain homosexual acts. The bill still awaits consideration;
- In Malawi, also in 2010, a male couple were sentenced to 14 years imprisonment and only released following the intervention of the Secretary-General of the United Nations;
- Also in Uganda, in 2010, a newspaper published an alleged list of gay citizens, suggesting a need for civic retaliation against them. A short time after, a civil society advocate of law reform, David Kato, who was named in the newspaper, was brutally murdered in his home; and
- Many countries of the Commonwealth even voted for deletion of sexual orientation and gender identity from forbidden grounds on

[18] *Toonen v Australia* (1994) 1 *Int Hum Rts Reports* 97 (No.3) (UNHRC). This decision was followed by the *Human Rights (Sexual Conduct) Act* 1994 (Cth).

extra-judicial violence, inferentially on the basis that they considered this to be tolerable[19].

How can an international body persuade or influence a country to change its laws, policies and attitudes on such matters? How can such change be achieved when justification of the applicable laws is often given on the footing that they are supported by the Bible or as part of Shariah law in Islam? How can law reform be rendered persuasive when even an advanced, developed, Commonwealth member state, like Singapore, has maintained in place the provisions of the *Penal Code* inherited from colonial times? Although an enquiry by the Law Society of Singapore recommended deletion of this law from the Singapore penal cold, in conformity with modern knowledge about human sexual variations in nature, and although the population of Singapore is not predominantly Christian or Islamic, an appeal to 'social conservatism' led to rejection of the proposed reform in Parliament, albeit with a promise that the law would not be vigorously enforced[20].

By decision of the current Commonwealth Chair-in-Office (the Prime Minister of Trinidad and Tobago), the report of the EPG has not been released in advance of the Perth CHOGM meeting. This is despite the recommendation by the EPG that the report should be released, as had earlier occurred with the report of the previous EPG into apartheid in South Africa. This makes it difficult for me to outline, in detail, the

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[19] United Nations, General Assembly, 21 December 2010. Vote on the United States amendment to add sexual orientation to the UN Resolution on extra-judicial summary and arbitrary executions.

[20] Law Society of Singapore, *Report on Proposed Amendment to the Singapore Penal Code*, 2008. United Nations Development Programme, *Legal Environments, Human Rights and HIV Responses Among Men Who Have Sex with Men and Transgender People in Asia and the Pacific: An Agenda for Action* (J. Godwin), UNDP, July 2010.

important recommendations which the EPG has included in its report for the CHOGM meeting. Suffice it to say that a number of proposals for reform will require attention. These include:

- Adoption of a *Charter of Commonwealth Values*, reflecting the values shared by Commonwealth member states and commonly expressed in the declarations hitherto made at the close of CHOGM meetings;
- Improvement in the effectiveness of CMAG so that it can respond more quickly and visibly to serious or persistent abuses of Commonwealth values in member countries;
- Creation of an office of Commissioner of Electoral Democracy, the Rule of Law and Human Rights, so as to stimulate the institutions of the Commonwealth and to afford vigilance where member states are seen to depart the accepted values of the organisation;
- Urgent attention to the issue of global warming, which endangers the safety and even existence of the many small island states that make up the majority of member countries of the Commonwealth;
- The creation of a Commonwealth Youth Corps;
- A fresh strategy to address the serious problems of gender inequality in Commonwealth countries, including the special problem of forced child marriages based on alleged customary practices but contrary to universal human rights;
- New initiatives to remove the discriminatory laws that still exist in many Commonwealth countries and which impede the effectiveness of the response to the special Commonwealth problem of HIV and AIDS;
- The provision of a particular role to the proposed Commissioner to scrutinise any applicants for membership of the Commonwealth,

so as to ensure that they truly respect the Commonwealth's values of electoral democracy, the rule of law and human rights;

* Establishment of an investigation to consider easing and simplifying the visa requirements for the movement of Commonwealth citizens from one member country to another; and
* Improvement and endorsement of the professional linkages that exist throughout the Commonwealth, including those that relate to the judiciary and the legal profession and the supply of professional information to our profession and others, made simpler by the internet and the universal usage of the English language.

I hope that Caribbean judges and citizens will familiarise themselves with the EPG report when it is released. The Commonwealth has reached a critical turning point. It cannot continue, in a very different world, without significant changes in its institutions, methodologies and expressed values. I trust that Caribbean judges, as opinion-leaders in their communities, will support the thrust of the EPG's recommendations and ensure a constructive and affirmative consideration of them by officials and citizens in this part of the world.

UNDP GLOBAL COMMISSION ON HIV AND THE LAW

In June 2010, the Administrator of the United Nations Development Programme (UNDP), Helen Clark, a past Prime Minister of New Zealand, appointed me a Commissioner of a new Global Commission created by that body, with a mandate to investigate and report on legal impediments to the present global response to HIV. The President of the new Commission is Mr. Fernando Henrique Cardoso, past President of Brazil. In addition to the 14 member Commission, comprising political

leaders, judges, scientists and civil society personnel, UNDP has also established a Technical Advisory Group (TAG). I am co-chair of that Group. Its task is to provide scientific, legal and other technical advice to the Global Commission, so as to afford it a strong empirical and evidence-based foundation for its conclusions and recommendations.

In contrast to the EPG of the Commonwealth of Nations, the UNDP Global Commission has a mandate which is at once narrower and wider. It is narrower in the sense that it is focused exclusively on HIV/AIDS and the considerations that add to its spread or impede its containment. But it is broader in that the UNDP Global Commission is addressed to the whole world. It is not confined to nations of any particular constitutional or historical experience or linguistic tradition. Of about 200 nations admitted to membership of the United Nations, approximately 80 have laws criminalising homosexual conduct. More than half of these (42) are Commonwealth countries. Many of the others are Islamic states that have derived these laws from different historical sources.

The UNDP Commission has a more explicit function to address the suggested defects in the law rather than organisational, institutional and representative issues of the kind presently before the EPG. Thus, whilst discrimination against sexual minorities is mainly raised in the Commonwealth enquiry as it concerns an inadequate response to human rights abuses, within the Global Commission it is central because vital to the legal obstacles that impede the global struggle against the spread of HIV.

Other law reform issues on the agenda of the UNDP Global Commission include:

(1) An improvement in the legal and social disempowerment of women as relevant to the vulnerability to HIV. A majority of those infected with HIV have been women;
(2) A response to a number of groups specially vulnerable to pertinent discrimination: sex workers; injecting drug users and children; and
(3) The impediments caused by global intellectual property law affecting the costs of anti-retroviral drugs; the duration of patent protections; restrictions on the manufacture of generic drugs; and the influence of bilateral free trade agreements.

Each of the foregoing categories, identified for the Global Commission by the TAG, presents major difficulties for securing reform. Religious, historical and cultural barriers stand in the path of reforms of the laws concerning women, sexual and other vulnerable groups. Economic forces and the inertia concerning new and rational global regimes for intellectual property law, stand in the way of progress on that topic.

International attempts to persuade member states to change their laws and policies on these subjects mostly fall on deaf ears. However, this fact has resulted in an increasing number of appeals to the courts, seeking to secure relevant changes that have not been forthcoming from elected legislatures. An instance of this development involves the removal of laws criminalising homosexual acts. In some cases, court decisions have led to subsequent legal reforms either because of treaty obligations[21] or because of the influence of such treaties on political resistance[22]. Sometimes, by invoking constitutional norms of equality, privacy or otherwise, court decisions have had a direct effect, by

[21] *Dudgeon v United Kingdom* (1982) 4 EHRR 149; *Norris v Ireland* (1991) 13 EHRR 186; *Modinos v Cyprus* (1993) 16 EHRR 485. Contrast *Roma v Evans* 517 US 620 (1996).
[22] *Croome v Tasmania*, above n17.

invalidating the offending criminal legislation, either in whole[23] or in part[24].

The 2009 decision of the *Naz Foundation* case in the Delhi High Court, although still under appeal to the Supreme Court of India, derived its chief importance from the fact that the judges invalidated the legislation as it applied to consenting adults in private in constitutional terms that might find reflections or parallels in many other Commonwealth countries. The provision so affected (the Indian *Penal Code* 1860, s377) are reproduced in virtually exact identity in the 42 jurisdictions of the Commonwealth that still maintain these offences. In due course, the Indian court decision may therefore influence judicial opinions in many other countries.

The Government of India did not appeal against the ruling in the Delhi High Court. Remarkably, in the High Court, representatives of that government appearing for the Ministry of Home Affairs, which defended the validity of the legislation and the Ministry of Health which opposed it and drew attention to the adverse affect on the struggle against HIV/AIDS, a point picked up in the Court's reasons[25]. The Delhi High Court drew on a line of authority in India holding that the right to health inhered in the fundamental right to life provided for in the Indian Constitution[26].

Securing progress for sometimes unpopular and stigmatised minorities will frequently take time if it is necessary to gather the support of

[23] *Lawrence v Texas* 539 US 558 (2003). See also *Nadan v The State* (2006) 3 LRC 166; decision of Nepalese Supreme Court, unreported, 21 December 2007; *Leung v Secretary of Justice* [2008] HK

[24] *Naz Foundation v Delhi* [2009] 4 LRC 838.

[25] [2009] 4 LRC 838 per A.P. Shah CJ and Muraldhar J.

[26] [2009] 4 LRC 838 at 868-872 [60]-[71].

nervous, elected politicians. This is where appeals to fundamental human rights and the justice of equal treatment of all persons in such respects can occasionally expedite the pace of change. To those who then complain about a lack of democratic legitimacy involved in such court rulings, it needs to be pointed out that similar complaints were earlier advanced in respect of every major change designed to introduce notions of human equality: including, in Australia, the notions of female electoral suffrage; the removal of the legal entrenchment of White Australia; the abolition of the constitutional and other legal burdens on Aboriginals and the deletion of unsentenced impediments to prisoner rights[27].

THE CHALLENGE AND OPPORTUNITIES FOR JUDGES AND LAWYERS

It is too early to say whether either the EPG on the Commonwealth or the UNDP Commission will succeed in responding worthily to their challenging mandates. In both cases, the resistance to any recommendations may prove strong, at least for the immediate future. The forces of religious opposition; social conservatism; cultural distaste; and political fragility may stand resolutely in the way of change and equal justice for all. They may defend the current laws and policies. They may prove indifferent to complaints that such laws and policies offend fundamental principles of human rights and equal justice. Formalists will then doubtless declare that the will of the majority of the people has prevailed and that those who want change must give up their efforts as futile or work harder and longer until their causes are seen as a political 'priority'. Such responses can be tolerable unless seen through the eyes of a person already infected with HIV or AIDS or

[27] *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 406 [142] referring to the 1967 amendment to the Australian Constitution, s51(xxvi).

seriously disadvantaged because she is a vulnerable woman or because he is a member of a vulnerable sexual group, deprived of dignity and equal justice under law.

The urgencies of the HIV epidemic can be empirically demonstrated. So can the serious obstacles that the present laws occasion. Thus, one report provided by UNDP to its Global Commission[28] indicates the much higher levels of HIV infection that exist in those Caribbean countries that continue to criminalise homosexual conduct when compared to other countries in that region which do not. Being a picture, the graph told a vivid story. It is now before both the UNDP Commission and the EPG on the Commonwealth[29]: A copy of the graph is set out at the end of this article.

Australia's national experience in the 1980s showed that the law can be a help in the struggle against HIV. It can support in access to essential health care as a fundamental human right. But, equally, the law can be an obstacle[30]. My purpose in devoting this keynote lecture to the challenges being addressed by the two bodies mentioned has been threefold. First, to demonstrate that life continues after judicial retirement.

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[28] *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 174 [8] per Gleeson CJ, referring to the legislative repeal of disenfranchisement of Roman Catholics, by the *Roman Catholic Relief Act* 1829, (10 Geo.IV, Ch7).

[29] *HIV Prevalence Against MSM in Caribbean Countries*, UNAIDS, 2008. See graph produced at the end of this paper.

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

Secondly, I have sought to evidence some of the difficulties that arise in the real world of international values and international human rights law and policy.

Thirdly, I have attempted to show that the struggle for global human rights and justice is often messy and very frustrating. But when the new world order was established with the United Nations *Charter* in 1945, nothing less was contemplated. The new body of international human rights law presented novel demands as well as brave expectations.

In the six decades since 1945, there have been many failures. But also a number of successes including the termination of much racial inequality and political disadvantages of colonial peoples. Judges and lawyers have played an increasingly important part helping the world to build effective scaffolding for universal human rights. Given the injustice and inequality that preceded the present age, and the human resistance to change the achievements have actually been substantial. Nowadays, individuals and civil society organisations know that fundamental human rights exist. Human beings are not condemned to unending injustice. They can look in hope and expectation to greater justice in a more equal world. In many cases, the individuals work with confidence to the judiciary to safeguard and uphold their fundamental rights within the law. All of us, as citizens, but especially judges, have a part to play in securing improvement and in ensuring that the discipline of law becomes an instrument for equality, human rights and justice. Throughout the Commonwealth of Nations. Throughout the world.

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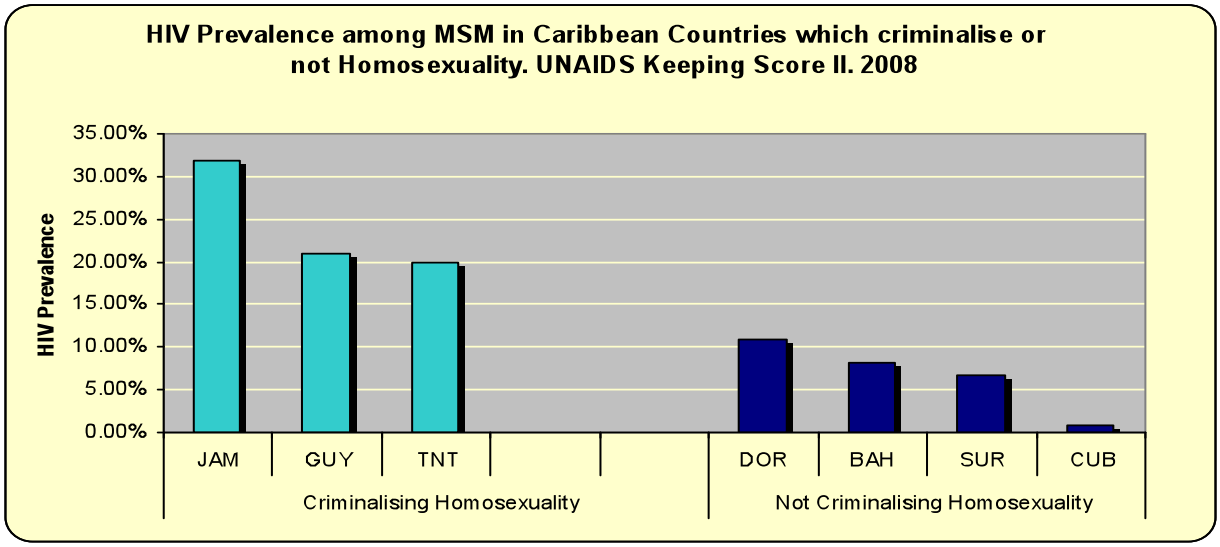
HIV Prevalence among MSM in Caribbean Countries which criminalise or not Homosexuality. UNAIDS Keeping Score II. 2008
HIV Prevalence
35.00%
30.00%
25.00%
20.00%
15.00%
10.00%
5.00%
0.00%
JAM
GUY
TNT
DOR
BAH
SUR
CUB
Criminalising Homosexuality
Not Criminalising Homosexuality