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THE CHALLENGES TO JUSTICE IN A PLURAL SOCIETY

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UNIVERSAL LAW AND LEGAL PLURALISM

Most of the countries of the Commonwealth of Nations went through an historical period of British rule. Mozambique is the exception. Not every former British colony has sought membership of the Commonwealth. The United States of America, the Republic of Ireland and Burma/Myanmar are notable absentees. But for the most part, the first link that binds Commonwealth countries together is a shared historical experience.

With the history came the English language, English sports and customs and habits. To a large extent, these phenomena, and the personal interchanges that they encourage (more than formal rules or even shared values) explain the survival of the

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2.

Commonwealth into a world quite different from the days of the British Empire.

With the Empire also came, in differing degrees, elements of the common law of England. Its penetration into some societies (such as South Africa, Zimbabwe and Sri Lanka) was less extensive than in others. But for most colonies, whatever their precise relationship with Great Britain, a point was marked on the calendar for the reception of the relevant portions of English common and statute law.

Law is an inescapable necessity of modern government. Law was necessary for the maintenance of British governmental power. It was essential to resolve disputes, civil and criminal, between the armed forces and officials of the imperial power (Britain) and the inhabitants of the colony in question. After the arrival of British power, those inhabitants included the British rulers themselves. But they also included colonists, settlers and merchants who had followed the flag. Also included were people already living in the territory concerned, engaged in daily contact with the British. Indigenous people, the so-called "natives" of the territory, sometimes lived in remote or isolated parts of the colony. The indigenes soon learned that wisdom and the preservation of life, limb and dignity lay in keeping a distance both from the British rulers and from the "modern" society that grew up around them.

3.

The British observed different principles for the systems of government and law that they brought to different lands. With some, where there was what to their eyes seemed a higher stage of "civilisation" and social organisation, they negotiated treaties. These were, in most respects, unequal treaties, given the respective military power of the British and of the local rulers. However, the treaties, with sultans, rajahs, chiefs and other rulers allowed the British, in varying degrees, to delegate the making and enforcement of law. In such a big Empire, covering a quarter of the world's surface and population, the British governors relied heavily on indirect rule. Indirect rule became a vehicle for legal pluralism¹. British officials were happy to allow two or more bodies of legal norms to develop, and to leave the regulation of some "native" affairs to be carried on within that paradigm.

In other territories, normally in temperate geographical zones, without developed local societies and with indigenous peoples who did not constitute a challenge to the imported government, different rules were imposed. An example is Australia. There, claims of sovereignty by the British Crown were made over successive portions of the continent until sovereignty was asserted over the whole land mass. Such claims were accompanied by the assertion of British dominion and law. This assertion was upheld by the

¹ G R Woodman, "Legal Pluralism and the Search for Justice" (1996) 40 *Journal of African Law* 152 at 157.

naval power of Great Britain, the occupying military forces and the support of the settlers who came to the new land under the promise of legal protections for themselves, modelled on those of Britain.

New South Wales, the original Australian colony, was at first governed in accordance with Royal Instructions given to the first Governor of the penal settlement, Captain Arthur Phillip RN. So far as law was concerned, Phillip carried with him a document, then referred to as the "Charter of Justice" of April 1787. This document purported to create courts of civil and criminal jurisdiction. It was subsequently replaced by a second set of Letters Patent in 1814. They established a Supreme Court. However, since these instruments lacked statutory authorisation, doubts soon arose as to the validity of the legal system being introduced into the fledgling Australian colony. These doubts led, in turn, to the enactment by the Parliament at Westminster of an Act known as the *New South Wales Act* 1823 (Imp)². This was later continued by an Act of 1827³. These statutes permitted the introduction into the colony of the law of England, so far as that law was suitable to the local conditions.

Earlier Blackstone had said⁴:

² 4 Geo IV c 96.

³ 7 and 8 Geo IV c 73.

⁴ Blackstone 1 Comm 107.

"It hath been held that, if an uninhabited country be discovered, and planted by English subjects, all the English laws then invented, which are the birthright of every English subject, are immediately there in force ... But this must be understood with so many and very great restrictions. Such colonists carry with them only so much of the English law as is applicable to the condition of an infant Colony; such, for instance, as the general rules of inheritance and protection from personal injuries. The artificial requirements and distinctions incident to the property of a great and commercial people, the laws of police and revenue (such especially as are enforced by penalties) the mode of maintenance of the established Church, the jurisdiction of spiritual Courts, and a multitude of other provisions are neither necessary nor convenient for them, and therefore are not in force".

This, then, was the test recognised not only in territories regarded as "uninhabited" but also in other territories which already had a developed system of government and law and which (in the ways of those times) might already have experienced rule by some other European colonial power. Such was the case in the Malay peninsular. By the sixteenth century, Malacca was already a thriving Muslim sultanate. It was successively occupied by the Portuguese in 1511 and the Netherlands in 1641. The British occupation began from the second half of the eighteenth century. It was Colonel Francis Light's occupation of Penang Island, in 1786, that marked the beginning of British rule in what is now Malaysia. In this sense, Malaysia was an almost exact contemporary of the establishment of British rule in Australia. So it is interesting to see the way in which the two systems developed.

The Royal Charter of Justice of 1807, applicable to the British colony of Penang, provided authority for the introduction of English law⁵. Yet from the start, it was recognised that some aspects of English law would have to adapt to the distinct religions, manners and customs of the local inhabitants of Malaya. This was the interpretation of the provisions of the Royal Charter adopted by Chief Justice Maxwell in *Choa Choon Neo v Spottiswood*⁶:

"In this Colony, so much of the law of England as was in existence when it was imported here, and is of general (and not merely local) policy, and adapted to the conditions and wants of the inhabitants is the law of the land; and further, the law is subject in its application to the various alien races established here, to such modifications as are necessary to prevent it from operating unjustly and oppressively to them. Thus, in questions of marriage and divorce, it would be impossible to apply our law to Mohammedans, Hindoos and Buddhists, without the most absurd and intolerable consequences, and it is therefore held inapplicable to them".

As in the Indian subcontinent, and elsewhere in the British Empire, the preservation and enforcement of personal laws received judicial recognition. Such laws were subsequently ordinarily guaranteed by imperial and local legislation. In this way, in some matters, the law quite early became pluralistic. Some

⁵ J Wu, "Towards Legal Pluralism in Australia? The Malaysian Experience" (1992) 51 *Australian Journal of Public Administration* 234 a 238.

⁶ (1869) 1 Ky 216 at 221.

subjects were governed by a single common law. But particular subjects were governed by special legal systems, commonly associated with the religious or like beliefs or racial communities into which a person was born.

Of course, such elements of pluralism, and the recognition of indigenous customary law that sometimes also followed⁷, frequently gave rise to problems at the borderline. What was to be done where a person desired to escape such classifications or to renounce such religion? What was to be done where a person in one category wished to marry a person in another? What was to be done to the classification of the children of such unions? What was to be done when a member of an indigenous community asserted rights under the general law different from those that would prevail under customary law? Where there is unity of law, there is no ultimate difficulty of finding the single rule that applies. Thus, in Australia, it has been held that there is a single common law, applicable throughout the nation, in all subnational jurisdictions. It is ultimately discoverable through the decisions of the High Court⁸. But where there is diversity of law, it is necessary to provide for the interface of distinct legal systems, either by legislation or by

⁷ See eg *Sharip v Mitchell and Endain* (1877) *Leicester's Report* 466 quoted in Wu, above n 5, at 239.

⁸ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 563-565.

judicially devised rules akin to those governing international conflicts of laws⁹.

In a sense, the diversity of races and religions in the territories that now make up Malaysia forced the creation, from early colonial days, of legal solutions to the problems thereby presented by dealings and relationships between members of the different social groups that made up society. Australia developed in a different way. It attempted to mimic the substantially unitary approach to law which existed in each of the separate parts of the United Kingdom. In England, Scotland and Ireland (until the last was partitioned) there was but a single discoverable law. It was applicable to all persons. That was the way law in Australia developed. The federal system, introduced with the Constitution of 1901, divided the nation into different governmental areas, defined by geography. But within each area, as in Great Britain before it, there was a single law applicable to everyone and ultimately discoverable and binding on all courts and people¹⁰.

In recent times, it has been realised that this centralist ideology of law, whilst having a logical attractiveness and

⁹ Compare in Australia *Regie National des Usines Renault SA v Zhang* [2002] HCA 10.

¹⁰ *Commonwealth of Australia Constitution Act* 1900 (Imp), s 5 (63 and 64 Vict c 12).

advantages of simplicity and clarity, sometimes results in injustice. Commonly, the injustices have been addressed by legislation. That is proper. Australia is a democratic society whose political leaders are regularly rendered accountable to the electors and quite frequently changed by them.

I do not intend to speak about legislative change for that is a complex and detailed subject. Instead, I wish, by use of a few illustrations, to indicate the ways in which the legal profession and the judiciary in Australia, and elsewhere, have sometimes been able to respond to the dynamic forces of pluralism in society.

Important changes in the law have come through decisions of the courts. This process is not alien to the system of the common law. On the contrary, it is part of the genius of the common law, which always adapts to the environment in which the law in question operates. From the beginning of the reception of the common law, right up to the present day, countries of the Commonwealth, whether they began as settler societies like Australia or conquered sultanates like the Malay states, adapt the incorporated law, derived ultimately from England, to the "conditions and wants of the inhabitants ..." ¹¹.

¹¹ Maxwell CJ in *Choa*, above n 6.

ABORIGINALITY

Take, first, the position of the Aboriginal people of Australia. Governor Arthur Phillip, who established the first settlement in Sydney in 1788, had royal Instructions to maintain peaceful and friendly relations with the native inhabitants. By force of the acquisition of sovereignty, such indigenes immediately became British subjects, although few, if any, originally knew or cared. They were entitled to the protection of English law. However, the reality was often very different¹². The settlers regarded the Aboriginals as "primitive", if not subhuman. Their unequal struggles to defend their own societies were met, as in other settler communities, by reprisals, punitive expeditions and martial law¹³. No lawful treaties were concluded with the Aboriginals of Australia either by the British or by local colonial authorities. As early as 1836, the Full Court of the Supreme Court of New South Wales held that it enjoyed jurisdiction to try one Aboriginal for the murder of another¹⁴. The need to deal with the matter under a single, universal system of law was explained by Justice Stephen¹⁵:

¹² Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (ALRC 31), 19 [23].

¹³ *Ibid*, 20 [24].

¹⁴ *R v Jack Congo Murrell* (1836) 1 Legge 72.

¹⁵ *Ibid* at 73.

"If the offence had been committed on a white, he would be answerable ... but the Court can see no distinction between that case and where the offence had been committed upon one of his own tribe. Serious cases might arise if these people were allowed to murder one another with impunity, our laws would be no sanctuary to them".

The basic reason why, in colonial times, the law in Australia was found to reflect the settlers' low opinion of the indigenes was a conclusion that Australia had been "settled" as, basically, an empty place. It was thus not subject to the different rule of international law, observed by civilised societies including Britain, when a land having its own civilisation was conquered.

This distinction was explained in the Australian context by Justice Blackburn in his well-known decision in *Milirrpum v Nabalco Pty Ltd*¹⁶:

"There is a distinction between settled colonies, where the land, being desert and uncultivated, is claimed by right of occupancy, and conquered or ceded colonies. The words 'desert and uncultivated' are Blackstone's own; they have always been taken to include territory in which live uncivilised inhabitants in a primitive state of society. The difference between the lands of the two kinds of colony is that in those of the former kind all the English laws that are applicable to the colony are immediately in force there upon its foundation. In those of the latter kind, the colony already having laws of its own, that law remains in force until altered".

¹⁶ (1961) 15 FLR 141.

In *Cooper v Stuart*¹⁷, the Privy Council concluded that New South Wales was to be regarded as a "tract of territory, practically unoccupied, without settled inhabitants or settled land, at the time when it was peacefully annexed to the British dominions"¹⁸. This classification of the society, and of the indigenous peoples of Australia, effectively consigned them, until the last quarter of the twentieth century, to a subordinate legal position. Their laws, practices, customs and rules were not given recognition in Australian law. Most especially, their strong social and spiritual connection with their traditional lands and waters was given no such recognition.

In this respect, the law in Australia developed in a way that was significantly different from that of Malaya. There the courts established by the British recognised Malay customary land tenure providing for the payment of one tenth of the annual produce on the basis that it was a "good and reasonable custom" appropriate to recognition and enforcement by the common law as a principle of reasonableness and justice¹⁹. There was nothing similar in Australia. However, from the latter part of the 1960s, gradually the injustice of this unitary and centralist approach to the law, as it

¹⁷ (1889) 14 App Cas 286.

¹⁸ *Ibid*, at 291.

¹⁹ Wu, above n 5, at 239.

affected the indigenous peoples of Australia, began to trouble the conscience of the nation and specifically its judges and lawyers. A signal of what was to come was the overwhelming passage of a constitutional referendum in May 1967 amending the Australian Constitution to empower Federal Parliament to enact special laws with respect to people of the Aboriginal race²⁰. These powers were soon to be used.

In response to the decision of Justice Blackburn in the *Milirrpum Case*, a federal commission of inquiry was established with a view to providing land rights to the Aboriginal people of the Northern Territory of Australia²¹. As well, the judges began to approach more sensitively and differentially the legal treatment of Aboriginal people coming before the courts.

Thus, tribal marriages were found to fall within statutory references to "husband and wife"²². Special rules were laid down

²⁰ Australian Constitution, s 51(xxvi). Section 127 of the Constitution was also amended. The referendum passed with an affirmative vote of 89.34% of the electors. Only 9.08% of the electors voted against. The history and relevance of the referendum is discussed in *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 381-383 [90]-[94], 406-408 [142]-[147], 413 [157].

²¹ This led to the enactment of the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth).

²² *Roberts v Devereux*, unreported, Supreme Court of the Northern Territory (Forster CJ), 22 April 1982 noted ALRC 31, 60 [74].

for police questioning of Aboriginal suspects in order to reflect the concern of the courts about the frequent disadvantage which some Aboriginals suffered in understanding the English language and in dealing with accusations in an alien environment²³. In 1977, the Australian Law Reform Commission, of which I was then chairman, was asked by the Federal Attorney-General to report on whether, and in what manner, existing courts dealing with criminal charges against Australian Aboriginals should be empowered to apply Aboriginal customary law and practices in the trial and punishment of such citizens. Later a substantial report on that subject was produced²⁴. To this day it remains largely unimplemented.

Then, in 1992, in one of the most important decisions it has ever given, the High Court of Australia in *Mabo v Queensland [No 2]*²⁵ held that the common law in Australia did, in certain circumstances, recognise the continued right of indigenous peoples to enjoy native title to their lands and other like entitlements. That right would be lost in the event of any incompatible action on the part of the Crown or of the legislature to grant or recognise an

²³ *R v Anunga* (1976) 11 ALR 412. The decision laid down rules requiring the presence, during police interrogation of Aboriginal suspects, of a "prisoner's friend", legal adviser or some other representative. The provision of refreshments was required and no questions were to be asked when the accused was ill, drunk or tired.

²⁴ ALRC 31, above n 12.

²⁵ (1992) 175 CLR 1.

inconsistent title. But where there was no such inconsistency, the native title that had subsisted according to its own laws, could in some circumstances be recognised and upheld by the Australian common law.

An important step in the reasoning of Justice Brennan to this conclusion (in an opinion that attracted the support of a majority of the Court) was his reference to international human rights norms. It was this consideration that encouraged Justice Brennan to conclude that previously centralist or universalist understandings of the common law concerning native title in Australia had been erroneous. He said²⁶:

"The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organisation of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands".

²⁶ (1992) 175 CLR 1 at 42.

As a consequence of the decision in *Mabo* there has been a flurry of State and federal legislation²⁷. This process was stepped up by a second important decision of the High Court in 1996 in *Wik Peoples v Queensland*²⁸. There, by majority, the Court upheld the possibility that native title could co-exist with pastoral leases granted under the *Land Acts* of Queensland. Since *Mabo* and *Wik*, native title litigation has occupied a great deal of the time of the courts. Now such cases are concerned with the construction and application of the legislation which has been enacted to govern the subject.

Australia is not alone in struggling towards a new legal regime to govern the rights of indigenous peoples. This is a common feature of settled societies, adjusting the originally unequal treatment of indigenous peoples, inherited from colonial times, to contemporary notions of fundamental human rights and human dignity²⁹. The issue is not even limited to legal systems such as those imported from England in the days of the British Empire. When I was Special Representative of the Secretary-General of the United Nations for Human Rights in Cambodia, I discovered communities of indigenous peoples in Cambodia, living

²⁷ Most especially the *Native Title Act* 1993 (Cth).

²⁸ (1996) 181 CLR 1.

²⁹ *Yarmirr v The Commonwealth* (2001) 75 ALJR 1582; 184 ALR 113.

in remote areas, who complained of legal inequality and deprivation of human rights in much the same way as Australia's Aboriginals do. The issue is thus a universal one. Doubtless there are manifestations of it in parts of Malaysia and in other countries where ancient tribal societies continue to live in accordance with traditional rules and are suddenly confronted by modern communities, governed by sophisticated laws, propelled into the interface by the dynamics of economics.

What is unique about the development in Australia in this respect is, I believe, the creditable role which the judiciary and lawyers played in repairing the established injustice of the old law. In *Milirrpum*, Justice Blackburn painted the portrait of an indigenous society which was undoubtedly one governed by its own laws, although they were not recognised and enforced as such by Australia's legal system. In *Mabo*, the High Court, reversing more than a century and a half of settled law, provided the means by which the common law could recognise native title rights. By doing so, the Court provided a catalyst for legislative action, which quickly followed.

At the heart of the foregoing judicial decisions was a recognition of the special needs and obligations of the Australian community to uphold, by law, certain basic right of the indigenous people which, until then, had been denied by law. To say that everyone was subject to the single system of land law, imposed by

the law equally, bought with or made for, or by, the settlers, was seen as unjust to those whose claims to land and other rights rested on a legal foundation tracing its source to times before the settlers and their laws arrived. Unlike Malaysia, it took a long time for the Australian legal system to adjust to the necessity of pluralism. The process of adjustment is not yet complete. But adjustments have certainly been made. And lawyers and judges played an honourable part in the process.

RACE

Few countries have so radically altered the fundamental racial assumptions on which they were created so quickly, peacefully and successfully as Australia has done. Apart from the policy of substantially ignoring the Aboriginal people and subsuming them under laws of universal operation, another pillar of the Australian legal system in colonial times (and at the time of federation) was the White Australia policy. This was an immigration policy based on the exclusion of "non-white" people from permanent residence in Australia. The policy was in force in Australia for more than a century. In fact, the colonial Parliament in Victoria had passed a law in 1855 restricting the entry of Chinese into the colony. Under that law a poll tax was payable to enforce the policy. The object of such laws was to uphold the racial integrity of a generally homogenous community of people of British or at least European stock who were considered more civilised than other races.

The object of such laws and policies, by no means confined to Australia or to people of British or European derivation, was to preserve the unity of the fledgling society by substantially limiting its membership to people similar in race, culture and religion to the colonists who had claimed possession of the continent. Not only were those colonists content to ignore Aboriginals, or to drive them to the peripheries of their expanding dominion. They also wanted to exclude people of different races. Such people would not "fit in". They might not have the same political or religious beliefs as the existing colonists. Moreover, there were so many of them, especially in Asia, that the policy drew on, and reinforced, the fear of the so-called "yellow peril".

During colonial times there were difficulties within the British Empire in condoning such a racially based restriction on immigration. The British government was extremely sensitive to the feelings on such topics of the great majority of the subjects of the Crown within the Empire who, racially, were not themselves of British stock. An inter-colonial conference in 1896 concluded that settler colonies such as South Africa and Australia, should be entitled to apply to all "non-white" races restrictions of the kind introduced by law in Victoria in 1855. However, the British Secretary of State for the Colonies balked at this proposal. Instead, a stratagem or sleight of hand was suggested. This was that a dictation test should be introduced. It could be administered

to prospective immigrants as a means, in effect, of sifting "white" from "coloured" entrants.

The dictation test was administered in Australia under immigration laws enacted at the beginning of the Commonwealth³⁰. The dictation test was required by the applicable legislation to be conducted in "an European language"³¹. In a case that involved a national of Czechoslovakia (not an immigrant of non-European origin) the High Court of Australia applied an enlightened interpretation of the meaning of this phrase. The applicant, in a scene that must have rivalled any that Frans Kafka wrote, was subjected to a dictation test in the Scottish Gaelic language. The Court held that such language was not a European language, not being a standard form of speech recognised as the received and ordinary means of communication amongst inhabitants of a European community.

Discomfiture with the immigration law, upholding White Australia continued to trouble many Australians. Reform was postponed during the Second World War but revived in the rapid expansion of the nation's population after that conflict. In the end, the law was swept aside. This was not done by judicial decision but

³⁰ In *Migration Act* 1901 (Cth) and *Pacific Island Labour Act* 1901 (Cth).

³¹ s 3(d) of the *Migration Act* 1901.

by administrative and later legislative authority. After 1958 a non-racial immigration policy was gradually introduced. The thin veneer to the racially based immigration policy, upheld by the dictation test that had been modelled on a Natal law, became part of history. Now, Australia is a multi-racial society, more so than most other countries of the world. The introduction of migrants from so many differing ethnic communities, including Asia, has been remarkably successful, rapid and eventually acquiesced in, or embraced, by other citizens. The newcomers are subject to the general law. There are no separate regimes of law, personal to them.

Occasionally issues arise, in the application of the general law, as to whether it is proper to take into account the differing ethnic backgrounds of persons whose forebears come from countries and cultures other than the British Isles. Thus, in cases involving self-defence, a question has been raised as to whether it is proper to consider the response by the accused to an affront that would be appropriate to the accused's place of origin³². So far, Australian law has resisted this idea³³; but the matter cannot be regarded as finally settled.

³² cf *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645; *Masciantonio v The Queen* (1995) 183 CLR 58 at 72-74 per McHugh J; Yeo, "Sex, Ethnicity, Power of Self-Control and Provocation Revisited" (1996) 18 *Sydney Law Review* 304.

³³ *Stingel v The Queen* (1990) 171 CLR 312 at 329; *Green v The Queen* (1998) 191 CLR 334 at 368, 401-406.

No society is free of xenophobia. When I served in Cambodia, I discovered strong antipathy in some circles towards the ethnic Vietnamese minority. In Australia, today, racial antipathy sometimes manifests itself in respect of claimants for refugee status. Under Australian law, a refugee is entitled to a protection visa. The *Migration Act* 1958 (Cth) incorporates into domestic law the international Refugee's Convention³⁴. The sight of boatloads of persons, claiming to be refugees, sailing towards Australia when the seas are calm, for fees paid to "people smugglers", has caused adverse reactions amongst some members of the general population. This was a consideration that was significant prior to, and during, the Australian federal election at the end of 2001. It produced legislation aimed to tighten up the procedures for determining refugee claims³⁵.

GENDER

The position of women in plural societies has long been seen as "an important aspect of the responsibility of the judiciary"³⁶. One

³⁴ The Act, s 36. The Refugees Convention 1951 is applied as part of Australian domestic law: see *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 232, 250.

³⁵ *Migration Legislation Amendment (Transitional Movement) Act* 2001 (Cth).

³⁶ "The Judiciary in Plural Societies - Some Conclusions - The Suraj Kund Report" in N Tiruchelvam and R Coomaraswamy

distinguished group of judges, lawyers and legal academics from the Asian region concluded:

"Women often are the most victimised group in any country. The sexist bias of the Bench and the Bar has historically prevented women from receiving equal justice. Increasing numbers of women's groups have, however, forced some Courts in Asia to rethink important issues. Though it was recognised that Courts have a long way to go in redressing the grievances of women in the economic, social and cultural spheres, new changes of attitude are welcome as an important beginning for judicial activism *vis-à-vis* women's rights. The position of women under systems of customary law, which is often an integral part of ethnic identity, is particularly delicate as Courts have allowed ethnic groups to maintain their traditional system of family relations, which in a large number of cases discriminate against women in the home and in society".

The coming into force in 1996 of the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) has given an impetus to legislation and judicial decision-making that is more respectful of the full equality and true dignity of women in society. It has turned the focus of the international community on such issues as violence against women, female genital mutilation, sati (widow burning), punishment according to religious law and other practices that are particular to certain

(eds) *The Role of the Judge in Plural Societies*. (1987) 179 at 181.

cultural communities and which appear to fall short of universal human rights³⁷.

The establishment of large numbers of non-governmental organisations or civil society organisations has been important in the advancement of women's right under the law. In Cambodia, one of the most impressive legacies of the UNTAC period, which preceded my service, was the establishment of many NGOs, commonly led by, and involving large numbers of, women. Such bodies have been advancing in many countries the principles established in Article 18 of the *Vienna Declaration and Programme of Action*. This states³⁸:

"The human rights of women and of the girl-child are an inalienable, integral and indispensable part of universal human rights. The full and equal participation of women in political, civil, economic, social and cultural life, at the national, regional and international levels, and the eradication of all forms of discrimination on the grounds of sex are priority objectives of the international community ... The human rights of women should form an integral part of the United Nations human rights activities, including the promotion of all human rights instruments relating to women".

³⁷ R Coomaraswamy, "Reinventing International Law - Women's Rights as Human Rights in the International Community" (1997) 23 *Commonwealth Law Bulletin* 1249 at 1250.

³⁸ Quoted *ibid*, at 1253.

In Australia, legislation has been enacted to give effect to these general principles of human rights³⁹. But in the courts the judges have also expressed the community's recognition that laws and practices in the past have unjustly discriminated against women. And that such discrimination must end.

Take one instance. The common law traditionally reflected a view that rape was legally impossible as between married persons⁴⁰. Even in the nineteenth century, some enlightened judges doubted that there was such an absolute rule⁴¹. But the majority opinion was that, by virtue of her marriage, a wife gave an irrevocable consent to sexual intercourse with her husband whatever the circumstances. This view was accepted as part of the Australian common law for one hundred and fifty years. Statutes were apparently drafted on the footing that the common law was such. Gradually legislation was amended in some States to reverse the position. But then in *The Queen v L*⁴², the High Court of Australia held that the universal rule of spousal consent was a

³⁹ *Sex Discrimination Act* 1984 (Cth); cf *Ralevski v Dimovsky* (1986) 7 NSWLR 487.

⁴⁰ Sir Matthew Hayle, *The History of the Pleas of the Crown* (1736) Vol 1, 629; cf *Reg v R* [1992] 1 AC 599 at 603-604.

⁴¹ *Reg v Clarence* (1888) 22 QBD 23 at 33 per Willes J; 52 per Field J.

⁴² (1991) 174 CLR 379.

fiction and no longer part of Australian common law. The Court said⁴³:

"... Even if the respondent could, by reference to compelling early authority, support the proposition that is crucial to his case ... this Court would be justified in refusing to accept a notion that is so out of keeping with the view society now takes of the relationship between parties to a marriage. The notion is also out of keeping with recent changes in the criminal law of this country made by statute, which draws no distinction between a wife and other women in defining the offence of rape. It is unnecessary for the Court to do more than to say that, if it was ever the common law that by marriage a wife gave irrevocable consent to sexual intercourse by her husband, it is no longer the common law".

This is a good illustration of the way in which judges, who are the guardians and expositors of the common law, can develop its principles by reference to changing social mores. They can be assisted, in this regard, by drawing upon international human rights law⁴⁴.

RELIGION

In many societies religion, race and culture are closely inter-related. In Australia, the normal religion of the overwhelming

⁴³ *Ibid*, 390, per Mason CJ, Deane and Toohey JJ.

⁴⁴ *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42; cf *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 417-419 [166]-[167].

majority of the population, whose ethnicity is from various European countries, has been Christian. In recent years, there has been a steady rise in those answering the national census form to the effect that they have "no religion". There has been a considerable fall-off in church attendance in recent years. In some ways Australia now presents as a post-religious society. One of the fastest growing religions in the country is Islam, although the percentage is still quite small. Many Australians are concerned about extremism in religion. Sectarian differences between Roman Catholic and Protestant traditions of the Christian religion were evident well into the second half of the twentieth century. But that affliction has, happily, largely died out.

The increasing number of Islamic citizens in Australia has begun to present questions to the courts as legislation and rules of the common law, expressed in language apt for a Christian society, are invoked for the new circumstances of adherents to Islam.

In *Canterbury Municipal Society v Moslem Alawy Society Limited*⁴⁵, a question arose as to whether a building, used for prayer and the reading of the Holy Koran by members of an Islamic religious sect, to which the public had no access, was a "place of public worship" within the meaning of a town planning ordinance.

⁴⁵ (1995) 1 NSWLR 525.

That law governed planning in the district. The evidence disclosed that the members of the religious society comprised 65 male persons and that, in all, there were no more than 300 members of the sect in Australia. The prayer involved was private prayer. There were no organised religious services nor ceremonies such as funerals or weddings held on the premises. Only Alawys were allowed to use the premises. The majority of the New South Wales Court of Appeal held that the premises was nonetheless a "place of public worship".

Although the case turned on its own facts, Justice McHugh, now a Justice of the High Court of Australia, analysed the history of "public worship" under British and Australian legislation. That history was concerned with Christian worship with its distinct, although varied, traditions. The judge said⁴⁶:

"... Australian courts should be slow to adopt an interpretation of a legislative instrument which would have the effect of preventing the use of premises in a neighbourhood by some of those who wish to practise their religion whilst at the same time allowing others to practise their religion in the same neighbourhood. The preservation of religious equality has always been a matter of fundamental concern to the people of Australia and finds its place in the Constitution, s 116".

⁴⁶ *Ibid*, at 543-544.

He cited what Justice Mason had earlier said in the High Court⁴⁷:

"... Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society".

It was on this basis that the majority judges held that the purposes of the town planning ordinance were best served by interpreting the expression "places of public workshop" as involving places where people gathered for congregational worship. Access by members of the *general* public was not anecessary attribute of such a place. Accordingly, the Alawy Society facility was upheld as within the town planning ordinance. This is another illustration of the way in which judges can adapt universally applicable laws to distinct sections of a plural society.

SEXUALITY

One of the least fortunate of the importations of British rule was the criminal law directed against adult homosexual acts. That law has been abolished in England from whence it came. It has been repealed in many parts of the common law world as representing an over-reach of the criminal law and an

⁴⁷ *Church of the New Faith v Commissioner of Payroll Tax* (1983) 154 CLR 120.

impermissible intrusion of the state into the private bedrooms of adult citizens. Yet it remains in place in countries such as India, Malaysia and Singapore. A challenge to the constitutionality of the law in India is now before the Delhi High Court. Doubtless it will be on its way to the Supreme Court of India.

The criminalisation of homosexual acts, even when performed in private by consenting adults reflected, in part, understandings of religious texts. But it also reflected a general ignorance about the causes and incidence of homosexuality in every society. After the research of Alfred Kinsey and other scientists in the 1940s and 1950s⁴⁸, it became evident that, in the human species, as in other mammals, a small proportion of the population is irreversibly and exclusively homosexual by sexual orientation. The percentage is probably about 4% in males, somewhat less in females. It is not a "choice" or a "lifestyle", selected by a few stubborn people to defy society. It is part of the person's being: just as skin colour, gender or other imprints of nature⁴⁹.

⁴⁸ A Kinsey, W Pomeroy, C Martin, *Sexual Behaviour in the Human Male* (1948); *Sexual Behaviour in the Human Female* (1953); W H Masters and V E Johnson, *Human Sexual Response* (1996).

⁴⁹ R D Mohr, *Gays Justice - A Study of Ethics, Society and Law* (1988) 39; J Murdoch and D Price, *Courting Justice*, (2001).

The past thirty years have seen important alterations in many countries both in community attitudes and legal provisions affecting homosexual people. Changes are more difficult and slow in coming in societies which, for religious or cultural reasons, adhere to prejudice and religious dogma and reject advances in scientific knowledge. But eventually all societies will accept what science teaches, just as earlier they accepted the inherent worth and equality of people of every race and of both sexes and the fact that the earth is not the centre of the universe and was not created in seven days.

Judges must apply the law⁵⁰. Sometimes the law continues to reflect the injustice towards homosexual people that preceded the advances in scientific knowledge about sexual orientation. Major changes in the law in this regard require legislation, approved by elected parliaments⁵¹. It is in this way that the laws governing homosexual offences in Australia were eventually repealed and re-expressed in all parts of the country. Similarly, laws relating to superannuation and pensions, workers'

⁵⁰ D Rivera, "On Straight Laced Judges: The Legal Position of Homosexual Persons in the United States" (1979) 30 *Hastings Law Journal* 799.

⁵¹ eg *Sexual Offences Act* 1967 (UK); cf M Ruse, *Homosexuality - A Philosophical Inquiry* (1988) 239.

compensation entitlements and other benefits have been enacted that protect homosexual people against unequal treatment⁵².

This is not the occasion to examine the entire range of the statutory amendments enacted in many countries⁵³. Nor is it opportune to examine the administrative changes that have sometimes introduced such reforms. In Australia, for example, the migration programme has been adapted to permit citizens who can establish an "inter-dependant" relationship with a person of the same sex to sponsor that person as a migrant⁵⁴.

Sometimes issues of protection of homosexual people arise for judicial determination, based on nothing more than the general words of legislation. Thus in *R v Immigration Appeal Tribunal; Ex party Shah*⁵⁵, Lord Millett, in a case involving refugees, said that:

"Given the hostility encountered by all homosexuals in such a society the obvious problems the applicant would have in satisfying his tormenters of his own sexual

⁵² M D Kirby, "Same-Sex Relationships: Some Australian Legal Developments" in *ibid, Through the World's Eye* (2000) 64 at 73-75.

⁵³ R Wintemute and M Andenaes, *Legal Recognition of Same-Sex Partnerships - A Study of National, European and International Law* (2001).

⁵⁴ Kirby, above n 52 at 73 referring to the Australian Migration Regulations.

⁵⁵ [1999] 2 WLR 1014 at 1044.

abstinence, I doubt that the difficulty [of establishing that a fear of persecution was well founded] would be a real one".

It is well established that homosexuals can qualify for protection under the Refugees Convention depending on the persecution they suffer in their country of nationality⁵⁶.

Similarly, questions of civil entitlements can arise. In *Fitzpatrick v Sterling Housing Association Ltd*⁵⁷ a question arose in the House of Lords as to the meaning of "family" under the *Rent Act* 1919 (UK). A majority of their Lordships held that the phrase was broad enough to include a long-term domestic companion of the same sex as the deceased tenant who thereby acquired rights of protection under the Act. Clearly, this would not have been intended by Parliament enacted the Act in 1919. Such a relationship was then stigmatised and its incidents punished by the criminal law. But this is an indication of the way in which judges can bring the enlightenment of civilisation and modern scientific knowledge to the construction of legislation that includes of an ambiguity, to ensure that universal laws operate justly in a pluralist society to people who are homosexual or bisexual.

⁵⁶ *Applicant A v Minister for Immigration and Multicultural Affairs* (1997) 190 CLR 225 at 304, fn 296.

⁵⁷ [2001] 1 AC 27.

I have myself suffered discrimination on the ground of my sexuality. I do not intend to make a big thing of it. Others in other countries have suffered much worse, including death, imprisonment and lifelong stigmatisation. However, my position, as a member of a minority has helped me to realise the importance, in a pluralist society, of judges upholding the law for all people. Equal justice under law means exactly what it says.

HIV STATUS

Inevitably judges are leaders of their community. They are invariably educated above the average. They are expected to know more about the features of discrimination and alienation that exist in society. A large and growing cohort in this regard is HIV status⁵⁸.

Of course, in particular cases, judges will need evidence which can be tested by both sides to a case. However, appreciating that there is an issue to be addressed in a plural society that upholds the dignity of all of its members, is the first step towards just judicial outcomes in particular cases.

⁵⁸ M D Kirby, "The Role of the Judiciary and HIV Law in D C Jayasuriya, *HIV Law, Ethics and Human Rights*, UNDP, New Delhi (1995), 312.

Early in the HIV epidemic in Australia, questions began to present to the courts as to how they should deal with people with HIV or AIDS. Thus in *R v Smith*⁵⁹ a question arose as to whether a person living with HIV should have that factor taken into account in criminal sentencing. At the time the case was before the court, 1987, there was little medication that would alleviate the usually rapid and fatal course of the infection. In this situation, Chief Justice King in the South Australian Court of Criminal Appeal said:

"The state of health of an offender is always relevant to the consideration to the appropriate sentence for the offender. The courts, however, must be cautious as to the influence which they allow this factor to have upon the sentencing process. Ill-health cannot be allowed to become a licence to commit crime ... Generally speaking, ill-health will be a factor tending to mitigate punishment only where it happens that imprisonment will be a greater burden on the offender by reason of his state of health, or where there is a serious risk of imprisonment having a gravely adverse affect on the offender's health".

This principle was built upon by later judges. Thus in *R v McDonald*⁶⁰, the New South Wales Court of Criminal Appeal said:

"The very nature of the confinement [of the prisoner with HIV] in the assessment unit imposes hardships, including the lack of opportunity that would exist in

⁵⁹ (1987) 44 SASR 587; 27 A Crim R 315 (SACCA).

⁶⁰ (1998) 38 A Crim R 470 (NSWCCA).

other sections of the prison for the appellant to determine who his associates would be. He is necessarily confined with other AIDS sufferers ... While so confined, the applicant would have reduced opportunities for courses of education ... A further consequence of confinement ... is the loss of opportunity for remission".

These considerations are held to be reasons for mitigating the sentence imposed on the prisoner. The foregoing are illustrations of the way in which judges, as guardians of the common law that upholds justice and fairness in constantly changing social conditions, ensure, where they can, that the law adapts to those who are subject to it.

CONCLUSIONS

This essay does not pretend to provide an exhaustive list of those groups in society that challenge stereotypes and require of a modern judiciary an enlightened and informed approach to the exposition and application of law. Nor does it pretend to cover all of the issues of constitutional, statute and common law that arise in a plural society. Every society comprises a myriad of minorities. Virtually every human being is a member of some minority or other. In respect of some minorities, the law has little to say. But others have long suffered discrimination and disadvantage - whether on the grounds of indigenous status, race, religion, sex, sexuality, HIV status or other like grounds.

The judiciary in a modern plural society must constantly strive to educate itself about the way laws fall unequally upon different groups in the community. Judicial officers should endeavour to see the law through the eyes of those whom the law governs. They should be alert and sensitive to the inequality of legal protection. To the best of their ability, within the governing laws, they should attempt to protect minorities from inequality of treatment and unjust discrimination. They should thereby equalise the impact of law in a plural society so that the boast about "equal justice under law" is not just empty rhetoric.

In part, this judicial obligation rests on implications or express provisions for equality of treatment in national constitutions and human rights statutes. In part, it derives strength from universal principles of human rights which now inform the legal system of every country. In part, judges realise that equal treatment is essential if society is to avoid inflicting unjust alienation on some of its members.

The judiciary upholds the cohesive and efficient operation of societies in which the majority respect and uphold the rights of minorities. Law is the cement that ensures social cohesion. Especially today, in the age of mass travel, telecommunications and the Internet, it is not possible to suppress the truth for long amongst free people. The wrongs to particular groups in the past, which were based on prejudice and ignorance, are giving way to

enlightenment and justice. The major responsibility to ensure that this happens devolves upon elected leaders and legislators. But judges are not free to renounce their own obligation in lawmaking when deciding the cases that come before them in the courts.

In a pluralist society judges are the essential equalisers. They serve no majority; nor any minority either. Their duty is the law and to justice. They do not bend the knee to governments, to particular religions, to the military, to money, to tabloid media or the screaming mob. In upholding law and justice, judges have a vital function in a pluralist society to make sure that diversity is respected and the rights of all protected.

COMMONWEALTH SECRETARIAT

JUDICIAL CONFERENCE KUALA LUMPUR, MALAYSIA

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THE CHALLENGES TO JUSTICE IN A PLURAL SOCIETY

The Hon Justice Michael Kirby AC CMG