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THE UNIVERSITY OF MELBOURNE
CHANCELLOR'S HUMAN RIGHTS LECTURE 2004
MELBOURNE, 3 NOVEMBER 2004

**HUMAN RIGHTS AND GOOD GOVERNANCE - CONJOINED TWINS
OR INCOMPATIBLE STRANGERS?**

The Hon Justice Michael Kirby AC CMG

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The Hon Justice Michael Kirby AC CMG*

CONTEXT AND TIMING

I have been coming to the University of Melbourne for almost fifty years; ever since I took my first tentative steps in student activities at Sydney University in the 1950s. This is one of the great universities of Australia, indeed of the world. From the start, in 1850, it has been a leader in ideas essential to the progress of humanity. I am thankful for the chance to give this lecture in such a renowned seat of learning.

Recently, at a conference to mark the centenary of the institutions of industrial conciliation and arbitration in Australia, I came upon an influential lecture given at this University by Henry

* Justice of the High Court of Australia. One-time Special Representative for the Secretary-General for Human Rights in Cambodia and President of the International Commission of Jurists.

Bournes Higgins¹, one of the founders of the Australian Commonwealth. He had graduated Master of Arts and Bachelor of Laws of the University. On 13 July 1896, a hundred and eight years ago, he delivered a lecture to the Historical Society of the University. Higgins, like so many of the founders, was a product of this place. In receptiveness to new and bold ideas, there has been no institution in Australia more welcoming than the University of Melbourne.

In his talk, Higgins, the product, like me of Protestant Ireland, embraced notions that had been propounded by Pope Leo XIII in his Encyclical, *Rerum Novarum*². I am sure that I do not have to tell you that, for a person derived from Ulster, this was no small thing. The Pope had addressed himself to "poverty and suffering [in this world, not] ... joy and glory hereafter. ...[I]n place of telling the masses that whatever they suffer is of God's will, and that they should submit patiently, he enter[ed] into an elaborate discussion of the social question and the means of dealing with it ... [He proposed] that a State could, if it adopted the right means and without distribution of doles, alter the economic condition of the poor".

¹ H B Higgins, *Another Isthmus in History*, Creswick, Melbourne, 1896.

² Pope Leo XIII, Encyclical *Rerum Novarum*, 1891.

This papal idea was founded in concepts of natural law. Much of its reasoning would be explained today in terms of notions of the inherent dignity of the human person, and the human rights and fundamental freedoms that are the consequence. Leo XIII's ideas struck a chord with Higgins who had been trained at Melbourne University in the English common law and in the rules of equity, which always reflected precepts of natural law. In the young Higgins' mind a marvellous alchemy arose, marrying the natural law ideas of the Popes and the notions of fairness and reasonableness of the English common law. Add a little economics and some political theory (together with history to keep his audience's attention) and Higgins was well on the path to the constitutional concept of industrial conciliation and arbitration.

In the event, this famous graduate was to play a key role in the Constitutional Convention held in Melbourne³ which adopted the constitutional power to permit the proposed Federal Parliament to make laws on this subject. As a member elected to that first Parliament from a constituency in Melbourne, Higgins was to play a vital part in the debates that led to the statute that was finally nearing adoption exactly a century ago⁴. Later, as a Justice of the

³ H B Higgins, *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 27 January 1898 at 182.

⁴ M D Kirby, "Industrial Conciliation and Arbitration in Australia - A Centenary Reflection", unpublished address for the Centenary Convention on Conciliation and Arbitration in Australia, Melbourne, 22 October 2004. The *Conciliation and Arbitration*

High Court of Australia, Higgins was to have important functions in clarifying the provisions, and constitutionality, of that Act. As second President of the Commonwealth Court of Conciliation and Arbitration, he was to prove innovative and influential in implementing a new province of law and order in the industrial scene⁵.

All of this is simply to demonstrate that great things sometimes come from lectures given at this University. Looking back on Higgins' 1896 effort, we would now describe it as a notable contribution to securing individual human rights and good governance in Australia. Certainly, the system of industrial justice for which he worked, and which he helped inaugurate⁶, was to become one of the three economic pillars of Australia's federal story during the nation's first century⁷. By century's end, industrial arbitration, the White Australia policy and high tariffs had declined or disappeared. Such is the cyclical character of ideas. Lecturers do well to remember the transience of ideas, even large ones.

Act 1904 (Cth), received the Royal Assent on 15 December 1904.

⁵ cf J Isaac and S Macintyre (eds), *The New Province for Law and Order* (2004), Cambridge.

⁶ As in the *Harvester* judgment: *Ex parte H V McKay* (1907) 2 CAR 1.

⁷ M D Kirby, "Human Rights and Industrial Relations" (2002) 44 *Journal of Industrial Relations* 562 at 563.

The present lecture, named for the Chancellor, celebrates Fay Marles' contribution to human rights. It was inaugurated at her behest. The Chancellor has a long-standing commitment to human rights. As Victoria's first Equal Opportunity Commissioner, she made notable contributions both to the principles and practices of human rights protection - specifically in the rights of women, indigenous Australians and other groups disadvantaged by discrimination or exclusion.

Most Australians are, or have family or friends who are, members of some minority group. I myself - a constitutional officeholder - know what it feels like. As a member of a sexual minority, I have been on the receiving end of discrimination, prejudice, calumny and hatred. In these times of enlightenment, it is astonishing that it should still be so. Astounding that misunderstood passages in Holy Books should be used in the twenty-first century, against all of the knowledge that is now available to humanity, and often at the instigation of people pretending to religion and spiritualism, to stigmatise homosexual people.

Some recent comments in Australia have, sadly, evidenced prejudice⁸. Those who sow discord and animosity bear a heavy

⁸ "Christians attack gays", *Sydney Star Observer*, 7 October 2004, 1.

responsibility for the violence, suicides, denigration and low self-esteem that ensue. It seems remarkable to me that such ignorance exists and stubbornly survives in the face of so much contemporary science about the universal and natural occurrence of sexual variation in the human as in other species. A society of human rights and good governance will provide effective institutions, laws, education, leadership and redress to combat the demons and ignorant superstitions that some people stir up.

I honour the Chancellor for the work that she has done to make human rights and good governance a reality in this country. It is by science, research, teaching and the spread of knowledge that the veil of ignorance and hatred will eventually be lifted. Recent events suggest that we still have a long way to go. Bishop Desmond Tutu once declared that everyone hates discrimination so much that they try to pass it down the line to someone else. Many people, it seems, need someone they can look down on. This infantile disorder will not be cured overnight. It will only be overcome by the effective protection of human rights and the creation and maintenance of strong institutions that believe in, and give effect to, the principle of equal justice under law. That is the principle for which the judges of this nation stand. I believe it is a principle of our Constitution. But, in Australia, and elsewhere in the world, it is a principle that needs constant reinforcement. We can never take it for granted.

A DECADE OF PROGRESS

The years 1995-2004 were designated as the United Nations Decade for Human Rights Education. The decade is therefore drawing to its close. One feature of the decade has been the growing appreciation, including in Australia, that talk about human rights and fine international instruments, are not enough. It is essential to address the institutions, theory and practical implementation of human rights⁹. This realisation has directed increasing attention to the issue of good governance. Governance and good governance have attracted many definitions. But the notion remains a "contested concept"¹⁰. Why is this so?

The United Nations Development Programme (UNDP) has defined the word "governance" broadly as "the exercise of economic, political and administrative authority to manage a country's affairs at all levels. It comprises the mechanisms, processes and institutions through which citizens and groups

⁹ Australian Parliament, Joint Standing Committee on Foreign Affairs and Trade, *Human Rights and Good Governance Education in the Asia Pacific Region* ("Joint Standing Committee Report"), June 2004.

¹⁰ Joint Standing Committee Report, 11; cf T Weiss, "Governance, Good Governance and Global Governance. Conceptual and Actual Challenges" (2000) 21 *Third World Quarterly* 5. Weiss mentions 8 definitions.

articulate their interests, exercise their legal rights, meet their obligations and mediate their differences"¹¹.

A shift to placing emphasis on good governance, both in the rhetoric and the conduct of foreign affairs and in institutional aid policy has been a marked feature of the strategy of the present Australian government. Thus AusAID, the agency that delivers Australia's foreign aid programme, adopted a definition of "governance" similar to that of UNDP. It described "good governance" as the "competent management of a country's resources and affairs in a manner that is open, transparent, accountable, equitable and responsive to people's needs"¹².

In placing this emphasis on "good governance", Australia is reflecting moves that occurred earlier both within the Organisation for Economic Cooperation and Development (OECD), in the United States administration and in agencies of the United Nations responding to these concerns. Thus, the United Nations High Commissioner for Human Rights in 2002 expressly linked the

¹¹ United Nations Development Programme, *Governance for Sustainable Human Development* (UNDP Policy Document), 1997, Ch 1.

¹² AusAID, *Good Governance: Guiding Principles for Implementation* (2000), 3.

realisation of human rights with improvements in national governance¹³:

"Governance is the process whereby public institutions can conduct public affairs, manage public resources and guarantee the realisation of human rights. Good governance accomplishes this in a manner essentially free of abuse and corruption, and with due regard for the rule of law. The true test of "good" governance is the degree to which it delivers on the promise of human rights: civil, cultural, economic, political and social rights".

This shift to a new institutional emphasis on "good governance" came to a head within the organs of the United Nations on 21 April 2004. At the 57th meeting of the Commission on Human Rights, a resolution¹⁴ was adopted, without a vote, on the subject of "The Role of Good Governance in the Promotion of Human Rights".

This resolution recited the universality of human rights and the adoption by the United Nations Millennium Declaration of a commitment to good governance in promoting human rights. It noted that "transparent, responsible, accountable and participatory government ... is the foundation on which good governance rests"

¹³ Joint Standing Committee Report, 13 [para 2.16] quoting United Nations High Commissioner for Human Rights, *What is Good Governance?* (2002).

¹⁴ Doc E/CN.4/RES/2004/70.

and that, as such, it was indispensable to the full realisation of human rights and the building of "effective democratic institutions". The Commission resolution went on to say that "good governance practices necessarily vary according to the particular circumstances and needs of different societies". In its substantive part, the resolution called upon member states to provide governance responsive to the needs and aspirations of the people in order to achieve the full realisation of human rights, to eradicate poverty and to build international cooperation on development. It requested on the High Commissioner for Human Rights to convene an international meeting on this subject and to gather ideas and practices for the furtherance of this notion throughout the world.

On 15-17 September 2004, the proposed meeting took place in Seoul, Republic of Korea. The new High Commissioner for Human Rights (Madame Louise Arbour, a past Justice of the Supreme Court of Canada) attended. At her invitation, so did I. In the course of my attendance, I became aware of some of the controversies over this notion of "good governance". The purpose of this paper is to identify some of the strengths of this new idea; but also to mention some of its controversies. Be sure that, in the years ahead, we will hear more about "good governance". It is, it seems, an idea whose time has come.

The difficulties of the notion of good governance were identified very soon after the opening of the Seoul seminar. A

participant from a well-respected non-government organisation (NGO) in India referred to recent reports ascribing to the President of the World Bank (Mr James Wolfensohn) the assertion that the Bank preferred to talk in terms of "good governance" rather than human rights because talk of human rights made its donors "nervous". Why does human rights talk make financial donors "nervous"? Why is "good governance" a softer option and should that be a matter of concern?

To some participants from developing countries gathering in Seoul, the idea of "good governance" was simply the latest attempt of developed countries to impose on the developing world their notions of governance, whatever the culture, needs and capacity of poorer nations. In short, talk of "good governance", in practice, could, according to this viewpoint, be seen as a Trojan horse for institutions and laws that would require of developing countries a machinery of "governance" considered suitable to the developed world and protective of the interests and power of the developed world. Instead of promoting human rights and nation-building, "good governance", according to this viewpoint, is the means of ensuring obedience to the rules imposed on the developing world by the World Trade Organisation (WTO) and, through bilateral trade agreements, the means whereby the richest countries shore up their economic advantages when compared to the poor.

From this approach¹⁵, so-called "good governance" is simply another mechanism to reinforce protection of flows of capital and finance around the world to the enormous advantage of rich nations and their investors¹⁶. Critics of the idea of "good governance" point out that, increasingly, economic power has shifted from governmental organs, and even regional groupings of nations, to multinational corporations which bestride the world and dictate in significant ways how the world will be governed, naturally to their own benefit. Tony Evans, in a critical article, has explained¹⁷:

"At the global level, the increasing authority of global institutions, and the activities of trans-national corporations, suggest that democratic representation and participation are less achievable in the post-Cold War world than many commentators argue. The creation of a global free market, backed by the creation of new global institutions with international standing, described by some as the 'new constitutionalism', favours the interest of capital above the interests of all others. This is seen in the activities of the World Bank, the WTO and regional economic unions, all of which are designed to impose a market discipline that favours corporate and financial interests. Rather than taking a wider view of development that includes human rights, security and dignity, 'new constitutionalism' confers privileges, rights of citizenship and representation on corporate capital, while constraining the democratisation process that has

¹⁵ T Evans, "If Democracy, Then Human Rights?" (2001) 22 *Third World Quarterly* 623 at 635 (hereafter "Evans").

¹⁶ Evans, 640.

¹⁷ Evans, 639-640.

involved struggles for representation for hundreds of years"¹⁸.

I have, by now, sketched the contours of this debate. Given the importance which the Australian government, and other bodies, attach to the notion of "good governance", what should we think about it? Is it truly an indispensable support for the attainment of human rights? Or is it, as such critics assert, simply an attempt of neo-liberalism and the international economic market to debase human rights in the unending pursuit of the global economic advantage of the already wealthy? The answer to these questions is important that the world today, including the world concerned about the protection of human rights.

GOOD GOVERNANCE ON AUSTRALIA'S AGENDA

That there is an emphasis on "good governance" in the foreign affairs strategy of Australia cannot be doubted. Indeed, it would be right to say that it is one of the highest priorities which the government, and Mr Alexander Downer especially, have emphasised, particularly in relation to the region of Asia and the Pacific to which Australia must chiefly relate.

¹⁸ Quoting S Gill, "Globalisation, Market Civilisation, and Disciplinary Neo-Liberalism" (1995) 24 *Millennium: Journal of International Studies* 339 at 413.

In August 2000, the Minister authorised the publication of *Guiding Principles for Implementation of Good Governance*¹⁹. In his foreword, Mr Downer stated that Australia had a central role to play as an advocate of good governance. Australia was a sponsor of the resolution of the Commission on Human Rights on the subject which was "ground-breaking" and heralded "new international thinking on the connections between human rights and transparent, accountable and participatory government"²⁰. He pointed to this country's long and robust liberal-democratic tradition and its position as a strong, stable and significant regional power as reasons why Australia's relationship with its neighbours would place increasing emphasis on governance issues. He cautioned about the need to tailor solutions to governance problems "individually", recognising that it was inappropriate to adopt an approach of "one size fits all". The principles of good governance endorsed by the Minister included some strategies related to politics; some to economics; and some to study of the theory and practice of good governance.

We can readily see the shift in direction of Australia's foreign assistance towards each of these special targets.

¹⁹ AusAID, above n 12.

²⁰ *Ibid*, Foreword, 1.

Take politics and governance as a first example. In the Indonesian general election of 1999, the first fully free election in that country since 1955, Australia provided an experienced team of electoral observers and a \$15 million electoral assistance package. This was governance help. The Australian Electoral Commission, which has an unblemished record at home²¹, helped its Indonesian counterpart to rekindle electoral democracy in our neighbour. The 2004 presidential election, and the peaceful transitions of the presidency in Indonesia, suggest that democratic principles have widespread popular backing. Most of the credit must be given to the Indonesian people themselves. Clearly, however, the building of electoral democracy (for all of its faults) is an important component in safeguarding human rights. Without democracy, it is arguable that human rights, even if supported by a government, are merely revocable privileges, "granted" by those in power. They are not asserted *rights*, claimed as an entitlement by the people to whom they properly belong²².

Secondly, building an economy necessitates improving the rule of law as an assurance for investors that disputes, when they arise,

²¹ M D Kirby, "Upholding the Franchise- Contrasting decision in the Philippines, United States and Australia: (2001) 21 *Australian Bar Review* 1 and 10.

²² A J Langlois, "Human Rights Without Democracy? A Critique of the Separationist Thesis" (2003) 25 *Human Rights Quarterly* 990 ("Langlois").

will be determined not by corrupt deals or sheer power but by expert judges, based on pre-existing rules explained and justified in a public process. Here too, Australia has been involved with neighbouring countries. It has assisted in the establishment of a commercial court in Indonesia and in the training of its judges and officials. It has provided specialised academic courses to strengthen the Indonesian judicial system. It has arranged training of Indonesian officials in such subjects, pertinent to good governance, as intellectual property law, human rights law, environmental law, town planning and international trade law and practice²³.

More basic assistance has been given in East Timor, following its independence. It has had to start, virtually from scratch, in creating a legal and judicial system of its own. For many years, Australian judges, or retired judges, have provided assistance to the courts of the Pacific countries. I did so myself when I served as President of the Court of Appeal of Solomon Islands between 1993-1996. But now the institutional assistance is more intensive. It is supplemented by support from, and to, community based organisations²⁴. These are practical measures of good governance.

²³ AusAID, above n 12, 9.

²⁴ *Ibid*, 9.

A major governance project in the Pacific has been the Policy and Management Reform (PMR) initiative. This has promoted a harmonised system of tariffs; a reduced tariff structure following the lines of Australia's own earlier reduction of tariff barriers; public service reform including enhanced protection against corruption; and the placement of selected Australian public servants as mentors and instructors in key government departments. Thus, in Samoa, Australian officials are working closely with the Treasury, the Public Service Commission and the Department of Trade and Customs to advance the government's economic and public sector reform agenda²⁵.

In order to improve the workings of the private sector, assistance is being given to fairly basic projects in Pacific countries. These include review of the laws governing directors; the introduction of courses on corporate conflict of interest, ethics, duty of care and due diligence, the provision of audit trails, board effectiveness, statutory duties and so forth²⁶.

The participation of Australian police in United Nations peacekeeping work has a long history. Lately, the cooperation has been more direct and bilateral. Thus, Australia has been helping East

²⁵ *Ibid*, 11.

²⁶ *Ibid*, 12.

Timor and Solomon Islands to strengthen policing as a prerequisite to upholding the rule of law and safeguarding conditions of peace in which alone human rights will be respected²⁷.

Similarly, Australia has been a lead supporter of the struggle against HIV/AIDS in developing countries. Recently, when I was in South Africa, I found that small specialised projects have been initiated in Africa supported by AusAID to supplement the many initiatives Australia has taken in countries geographically closer²⁸. Building on Australia's own institutional response to the HIV/AIDS epidemic, AusAID has contributed substantial funds both to bilateral and multilateral initiatives aimed at reinforcing national infrastructures so that they can respond effectively to the epidemic.

Two special subjects have been given priority in Australia under the auspices of "governance" initiatives. One has been addressed to poverty alleviation. The other involves an initiative to respond to the danger of terrorism in the region. Recent events in Bali and Jakarta have demonstrated that the dangers of terrorism are close and real. They are not theoretical. In the provision of aid to neighbouring countries, a realistic linkage has been acknowledged by

²⁷ Australian Development Cooperation Programme of AusAID (November 2003), 9.

²⁸ *Ibid*, 6; cf *Meeting the Challenge: Australian International HIV/AIDS Initiative* (July 2004).

Australia between terrorist risks and poverty. In a recent treatment of this subject, AusAID observed²⁹:

"Sustainable reductions in poverty can only be achieved in stable environments and growing economies. Terrorism destroys lives and properties, exacerbates instability and has significant economic consequences. The threat of terrorism results in less confidence, reduced investment and disrupted services - all of which suppress economic growth, making the challenge of tackling poverty more difficult. It also undermines personal security particularly for the poor who are most vulnerable".

What might have been added is that terrorism, and strengthening counter-terrorist capacity, is not purely a matter of poverty or security resources. Terrorism commonly grows out of ideas. Those ideas will often be seen as justified by their proponents. Mahatma Gandhi and Nelson Mandela (who at different times were incarcerated in the same prison in the centre of Johannesburg) were for a long time "terrorists" so far as the governments that they confronted were concerned. Affixing the label of terrorism, and thinking that its challenge can be met solely by law enforcement, would be hopelessly naïve. We need great subtlety of mind, and flexible strategies, to respond to the challenges that are now labelled as "terrorist".

²⁹ AusAID, *Counter Terrorism and Australian Aid* (2003), 4.

This is why the third governance strategy of the Australian government should be noted. It involves promoting study of the theories and practices that underpin good governance and teaching human rights to specialised groups. The Australian government has established the Centre for Democratic Institutions (CDI) within the Australian National University in Canberra. CDI provides support to developing countries through training, placements, networking and information exchange. It conducts workshops for overseas Parliamentarians; orientation for new judges; leadership courses for non-governmental organisations; media courses for journalists; support of the Ombudsman and activities designed to address anti-corruption³⁰. Other universities, including Melbourne University, are engaged in relevant work. For example, Griffith University, through its Key Centre for Ethics, Law, Justice & Governance and its Governance Research Network, is a leading actor. It is instituting a series of cross-cultural dialogues on governance in Buddhist countries of Asia. Without a theory, and cultural awareness, even well-meaning practical gestures may be ineffective and ill-targeted.

From this short review, it can be seen that an important change has occurred in Australia's strategy to promote human rights through foreign aid. There is now an increasing attention to systemic and institutional issues. There is increasing

³⁰ AusAID, *Good Governance*, above n 12, 9.

acknowledgment of the essential role that key players in the legislature, the judiciary, the media and civil society play for the defence of human rights. This is as true in Australia as it is internationally.

Some observers have drawn attention to what they see as an ambivalence in Australia's strategy in the provision of foreign aid. For instance, we strongly support the inclusion of a Bill of Human Rights in the interim constitution for Iraq. Yet most of our political leaders, on both sides of federal politics, are opposed to the adoption of a Bill of Rights for Australia. This would be more understandable if it could be said with conviction that Australia's legislative process is always effective in defending the basic human rights of minorities. Sadly, it is not always so, whether those minorities are Aboriginals³¹; refugees³²; prisoners³³; electors in unequal constituencies³⁴; the physically disabled³⁵; sexual minorities³⁶ and so forth.

³¹ N Pearson, "Land is Susceptible of Ownership" in P Cane (ed) *Centenary Essays for the High Court of Australia* (2004) 111, 124; cf *Yarmirr v Northern Territory* (2001) 208 CLR 1; *Western Australia v Ward* (2003) 213 CLR 1; *Yorta Yorta Aboriginal Community v Victoria* (2003) 214 CLR 422.

³² cf *Minister for Immigration, Multicultural and Indigenous Affairs v B* (2004) 78 ALJR 737 at 766-768 [160]-[169] and *Al-Kateb v Godwin* (2004) 78 ALJR 1099.

³³ *Muir v The Queen* (2004) 78 ALJR 670; cf *Cameroon v The Queen* (2002) 209 CLR 339.

³⁴ *Attorney-General (WA) v Marquet* (2003) 78 ALJR 320.

A PERSONAL EXPERIENCE: CAMBODIA

So what is the response that Australia should give to the recent insistence of the rich countries, like our own, that more attention should be paid to issues of governance? Is this truly a diversion because the world of global finance gets uncomfortable at the mere mention of human rights? Is governance just a stalking horse for the effective protection of financial interests and the unimpeded flow of capital that reap ever-rich rewards for developed countries at the cost of the poor? Or is it an essential prerequisite for the effective protection of individual human rights to have strong governmental institutions in place to help do the job?

Between 1993 and 1996, I had to consider these puzzles when I served as Special Representative of the Secretary-General of the United Nations for Human Rights in Cambodia. The office was provided for in the 1991 Paris Peace Agreements. I was one of about 30 United Nations Special Rapporteurs and Special Representatives, reporting to the Commission on Human Rights and the General Assembly on particular countries or themes. The post

³⁵ *IW v City of Perth* (1998) CLR 1; *X v The Commonwealth* (1999) 200 CLR 177.

³⁶ The reference is to the provision of equal superannuation and like benefits and the uniform provision of property and other protections.

gave me a rare opportunity to see the translation of the noble language of the United Nations human rights instruments into actuality. Emerging from two decades of violence, revolution, genocide and war, Cambodia needed more than talk about human rights. It needed to identify exactly what "human rights" means to ordinary people in such a profoundly disadvantaged environment. It needed to build the institutions that would deliver human rights to its citizens - in effect, the institutions of good governance.

In my role as Special Representative, I had no blue helmets to enforce the recommendations in my reports. Initially, all of the soldiers of the UNTAC Peacekeeping Force had withdrawn by the time I arrived. My only sanction was the published reports delivered in New York and Geneva in which I described candidly the achievements and failings of the Royal Cambodian Government, measured against the standards of the United Nations human rights instruments.

In performing this function, I quickly noticed the interaction between economic growth and the improvement of human rights. I saw how, although economic development is not necessarily an assurance of improvement of human rights, it is difficult to provide the environment for respect for many human rights without the basic necessities that a modern economy affords to the people³⁷. This

³⁷ R Croome, Address to a Union Congress, Hobart, 2003.

insight concerning the inter-relationship of economic progress and human rights reinforced the accuracy of the statement in the *Vienna Declaration on Human Rights* of June 1993:

"All human rights are universal, indivisible and inter-dependent and inter-related ... While the significance of national and regional peculiarities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms".

It was in my work as United Nations Special Representative that I threw off any lingering belief that human rights were effectively, and only, about what happened in police stations, polling booths and courthouses. Obviously, these are involved. But for most Cambodians, the urgent questions that they addressed when speaking to me of human rights were issues concerned with the protection of women and girls, including in education; the access of all to drinking water; the provision of basic healthcare; and the removal of landmines. Such fundamental human rights issues cannot be addressed without the establishment and maintenance of institutions of good governance. It is simply not possible.

Corruption in various forms was endemic in Cambodia after the breakdown of government. But it is a complex issue. Corruption cannot be eradicated by enacting only punitive laws. For example, the underpaid soldiers, living on a salary pittance, took to charging informal "tolls" on the roads that they were guarding. The amounts

charged were comparatively small. In a society of efficient governance, the tolls would doubtless be levied with the authority of Parliament, paid into a consolidated revenue fund and disbursed towards proper military salaries. Were these informal exactions corruption? By the letter of the law they were. The soldiers, after all, had guns. Yet looked on in another way, they were an interim self-help means of making the "user pay". "User pays" is an idea Western societies now embrace, although they do not normally back it up, as such, with guns.

The rigidities and inflexibility of governance in many developing countries are a reason why corruption flourishes. When I studied undergraduate economics, I was taught that sometimes, where laws are out of date, harsh and inflexible and practically incapable of being changed, corruption can be justified economically as a means of market substitution for a breakdown in the governance process. It seemed an odd theory. Yet I have no doubt now that many gay clubs in Australia when I was young were probably maintained by the passing of money to police who turned a blind eye. Such instances demonstrate the need to tackle questions of human rights and governance together.

ANOTHER PERSONAL EXPERIENCE: TASMANIA

The inter-connection between protecting human rights and good governance has also been brought home to me, in Australia, by

the remarkable way in which the defence of human dignity and fundamental freedoms has sometimes been reinforced by institutional initiatives. Putting it bluntly, it is not enough to enact fine laws and to proclaim worthy sentiments. These must be followed up by institutional and attitudinal changes. Law is important. But it is not enough.

A case in point, demonstrating the link between human rights and good governance, can be found closer to home in the treatment of homosexuals in Tasmania. By the early 1990s, that State was the last bastion resisting attempts in Australia to reform the old colonial criminal laws targeting sexual minorities.

At that time, support for the decriminalisation of adult homosexual conduct in private was 15% lower in Tasmania than the national Australian average³⁸. Yet, by the time decriminalisation occurred in that State in 1997, because of a sustained campaign of civil society organisations, it had risen to 15% above the national average. It was even higher in Hobart than in Sydney, sometimes described as the "gay capital of the Pacific". Who would ever have thought this of Hobart? And in such a short interval?

³⁸ R Croome, "Tasmanians Together". See
[http://www.rodneycroome.id.au/othermore/9 02 0 m2/](http://www.rodneycroome.id.au/othermore/9%200%20m2/)

The way reform was achieved was itself a story about good governance. Citizens of different sexual orientation campaigned publicly and in the media for change in the criminal law. Their efforts were at first ridiculed. Premier Robin Gray declared that homosexuals were not welcome in Tasmania. Arrests, public vilification, censorship and direct discrimination were much in evidence. It looked as if change had reached a dead-end. Even attempts to link decriminalisation with legislation to address the new and urgent problem of HIV/AIDS failed to pass the Tasmanian Upper House.

It was at this stage that two advocates for law reform, Rodney Croome and Nicholas Toonen, telephoned me. They said they were thinking of taking the case of Tasmania to the United Nations Human Rights Committee³⁹. They asked whether this was a good idea. I was then a judge in New South Wales which had repealed all such laws years earlier. I told them not to waste their time. They politely thanked me; and totally ignored my advice. In the struggle to achieve human rights, progress often belongs to the courageous and the imaginative.

³⁹ *Toonen v Australia* (1994) 1 *Int Human Rts Reports* 97 (No 3) reproduced in H J Steiner and P Galston, *International Human Rights in Context* (Clarendon, 1996), 545-548.

Rodney Croome and Nick Toonen took Australia to the United Nations Committee established under the *International Covenant on Civil and Political Rights*. The Committee found that, in the criminalisation of private conduct by homosexual people, Australia in Tasmania was acting in breach of the *International Covenant*⁴⁰. This finding led to the passage through the Federal Parliament of legislation over-riding the Tasmanian law, based on Australia's treaty obligations⁴¹. The constitutional validity of that legislation was raised in the High Court⁴². But then, reflecting the shifts of public opinion, the Tasmanian Parliament repealed the old laws. The legislation now has an undiscriminating law punishing unconsensual sexual conduct, whatever the gender of the perpetrator and the victim⁴³.

Interestingly, following these changes in the law, publicity about them and greater openness by homosexual people themselves, attitudes began to change. Recent polls in the northern rural communities of Tasmania, such as Deloraine, La Trobe and Ulverstone have showed support for equality in the treatment of

⁴⁰ *Human Rights (Sexual Conduct) Act* 1994 (Cth).

⁴¹ See *Croome v Tasmania* (1997) 191 CLR 119.

⁴² *Criminal Code Act* 1924 (Tas), s 123 (repealed). See now s 185.

⁴³ Croome, above n 37.

same-sex couples to be as high as 70%⁴⁴. Good governance in Australia has contributed to such changes.

One of the first governmental agencies to tackle internal antagonism against people on the grounds of their sexuality was the Tasmania Police. Its stance changed in 1992, possibly because of new leadership and stimulated by the work of the State Equal Opportunity Commission. The police initiatives were soon joined by others in the Department of Education. In 1999, the Health Department established its own committee, followed in 2001 by a forum of Tourism Tasmania. Nowadays, school-based anti-homophobia poster competitions and the provision of resources to teachers in the State has helped turn attitudes around.

It is in homes, in schools and in the media that phobic attitudes against Asian Australians and people of colour, including indigenous people, were altered in earlier decades. Tackling discriminatory attitudes against women, refugees, homosexuals, disabled people and other vulnerable groups is work-in-progress. The point to be noticed is that turnaround is possible. It can be achieved in a relatively short time. But it needs a commitment to human rights, leadership in politics and the engagement of the institutions of governance.

⁴⁴ Croome, "From Worst to Best" [Spring 2004] *Refresh*.

In 1994, in Tasmania, the Secretary of the Department of Education issued two memoranda banning materials on, and discussion of, homosexuality in public schools throughout the State. Three months later, he issued another memorandum granting an exception from the first; but only to permit promotional materials from organisations that promised to "convert" students' sexuality from homosexual to heterosexual⁴⁵. Shortly after the *Criminal Code* of Tasmania was reformed, the Education Secretary resigned. His repressive memoranda were revoked by his successor.

In their place new educational policies were instituted. A course, originally developed in Victoria for Grade 9 and 10 students, "Pride and Prejudice", was introduced in Tasmania ⁴⁶. It is now being trialed for introduction as a compulsory element in Tasmanian school education. It has proved popular with teachers and students. It shows what can be done, in fewer than twenty years, to turn a most repressive State into a leader in enlightenment and defence of equality for all citizens. The Government of Tasmania has adopted a goal of entirely eliminating homophobic discrimination as a State objective. Tourism Tasmania now advertises in the gay media.

⁴⁵ *Ibid*, 3.

⁴⁶ *Human Rights Act* 2004 (ACT). See J Debeljack, "A Significant, Yet Incomplete, Step Towards the Domestic Protection and Promotion of Human Rights" (2004) 15 *Public Law Review* 169.

What a change a decade makes. This kind of change on an important issue can only occur by a change in governance. Hundreds of learned lectures by earnest lecturers pointing to the irrationality and ignorance of discrimination against people on grounds of their indelible nature - whether gender, race, skin colour or sexuality - will not have the impact that leadership and example in good governance - the legislature, politics, the judiciary and administration - will attain. That is why good governance is important and can be beneficial. Well deployed, it can be a vital protection of human rights of all and a guarantee against the abuse or neglect of basic rights.

THE RESIDUAL ISSUES

My experience in Cambodia and Australia's experience in responding to homophobia in Tasmania does not mean that the recent embrace of good governance as a national and foreign policy goal is without dilemmas that we must address. There are at least five.

The first is the occasional ambivalence that we have, as a nation, in the way in which we preach good governance goals for others that we are not willing to accept fully for ourselves. I have mentioned the local resistance to the incorporation of the broad principles of human rights and values into the Australian constitutional and legal system. Such incorporation has happened

recently in Canada, South Africa, New Zealand and, since 1998, even in the United Kingdom from which we inherited our suspicions of a bill of rights. A modest experiment with a human rights statute has been initiated in the Australian Capital Territory⁴⁷. In due course, this may lead to other Australian experiments including, eventually, at the federal level. Time will tell. Australia is now one of the very few countries without a human rights charter. This does not mean that we are wrong. But it does give us reason to consider our uniqueness.

Foreigners who hear of Australia's commitment to fundamental human rights as an attribute of "good governance" may contrast this with the occasional incapacity of Australia's institutions to defend basic human rights when valid legislation appears to override fundamental rights and derogate from our obligations assumed under United Nations human rights treaties. This question arose recently in the case of children detained in mandatory immigration detention in Australia⁴⁸ and in the case of an indefinite detention of a stateless person who could not (despite his request) be deported to another country willing to receive him⁴⁹. When such cases arise in

⁴⁷ *Human Rights Act 2004 (ACT)*; G Williams, *The Case for an Australian Bill of Rights* (2004).

⁴⁸ *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 78 ALJR 737; *Re Woolley; Ex parte Applicant M* 276/2003 [2004] HCA 49.

⁴⁹ *Al-Kateb v Godwin* (2004) 78 ALJR 1099.

Australia's own governance, we should not be surprised if others, on whom we urge "good governance", accuse Australians of double standards and suggest that we need to address the weakness in our own governance whilst we are about helping others to overcome theirs.

Secondly, we should retain a healthy scepticism concerning some of the "governance" talk. Occasionally, it is simply a demand of more power for the bureaucrat. As the case in the Education Department of Tasmania in the 1990s shows, not all firm, and even honest, governance is necessarily "good". Not all "governors" are necessarily devoted to human rights and fundamental freedoms.

This point was made in a recent address given by Chief Justice J J Spigelman of New South Wales to the Convocation of the University of Sydney⁵⁰. He descried a Soviet practice of applying corporatist language across society's differing institutions (including Universities) and how it had to be watched closely. According to the Chief Justice, the "measurement of the unmeasurable" is a danger inherent in unthinking references to "governance". The demand for "performance indicators", common in governance dialogue, is open to easy manipulation. Chief Justice Spigelman used a vivid example of a⁵¹:

⁵⁰ Reported in the *University of Sydney News*, 1 October 2004, 2.

⁵¹ *Ibid.*

"Soviet five year plan for the factory production of nails, measured in tons. Result: large amounts of large nails, but inadequate numbers of more-difficult-to-produce small nails. Problem recognised: performance indicator changed to a measurement by quantity. Result: excessive numbers of small nails produced, and no large nails".

Thirdly, it is essential to respect the differing structures of governance in different countries while insisting upon the universality of international human rights law. The dominant Western notions of democracy are themselves the product of a lengthy evolution. When we look at the huge sums expended in modern electoral campaigns, the power of media interests to run a biased editorial line, the external backing for particular parties and candidates and the decline of actual membership of political parties (not to say the institutional problems that arose in *Bush v Gore*⁵²) we can realise that Western electoral systems are imperfect and cannot be viewed as the last word on democratic governance⁵³. On the other hand, human rights without an effective democratic form of governance rests on a flimsy foundation⁵⁴. As Anthony Langlois has remarked⁵⁵:

⁵² 531 US 98 (2000)

⁵³ See Evans, above n 15.

⁵⁴ Langlois, above n 22.

⁵⁵ Langlois, 1018-1019.

"Until the people of those States live in a democracy, ... they cannot be confident of owning these standards or norms as fully fledged rights. Rights cannot be infringed without recourse. Standards or norms can be given or taken away depending on whim, or more charitably put, depending on the international or domestic strategic interest of the State in question ... China and other such states engage in such activities to the extent that they do - not out of respect for human rights, not because they have become liberals who believe in the individual's freedom, choice or autonomy, or the need for economic and political environment. On the contrary, they adopt such human rights standards as they must in order to achieve certain political, economic and strategic interests".

Fourthly, it is important to pay attention to the criticism of the Western insistence on "good governance" by those in developing countries who say that it is a paradigm that has been overtaken to some extent by events. The events to which they point include the growing power of global corporations that operate across a number of State borders and the growing power of regional and international organisations in which effective accountability to the individual who is affected by their decisions is remote and problematic.

In such exchanges, mutual hypocrisy is never far away. The attacks on the present composition of the United Nations Security Council and on multinational corporations are sometimes offered by autocratic States in the hope of masking their own bad governance and undemocratic regimes simply seeking a diversion. Nonetheless, there is an element of truth in the criticism of developing nations of the notion that "good governance" rhetoric today usually involves

only the governance of nation states. In the contemporary world, governance is necessarily a larger concept. Gaining good governance in the global corporate sector and more accountable governance in regional and international organisations is unquestionably a vital issue for the twenty-first century. As we address and encourage notions of "good governance" at the national level, including in neighbouring states, Australia would be well advised to concern itself with how to tackle effectively the governance issues of large corporations⁵⁶ and the new international and regional bureaucracies. How can we make these newly powerful institutions accountable to the people they affect so profoundly?

Fifthly, there is the connected criticism that "good governance" is sometimes demanded only as a mask for the protection of market power and is equivalent to the intrusion into human rights discourse of notions defensive of finance and capital movements that may not always coincide with the defence of individual human rights. An instance of the tension here can be seen in the WTO demand for observance of the international patent regime of the TRIPS Agreement sometimes at a cost of the cheap

⁵⁶ P von Nessen, "Corporate governance in Australia: Converging with international developments" (2003) 15 *Australian Journal of Corporate Law* 189.

availability of generic drugs to combat the diseases that afflict individuals in the developing world⁵⁷.

The involvement of large corporate interests in the national delegations of important Western nations has sharpened this anxiety in developing countries about "good governance" talk. This concern was expressed by Tony Evans in his recent essay in *Third World Quarterly*⁵⁸:

"The close relationship between WTO delegations and representatives of global business and finance suggests that the interests of the poor are of little concern. ... Christian Aid notes that Cargill, a company that controls half the global trade in grains, 'was heavily involved in preparations for the US negotiating position on agriculture before the last round of trade talks ... with some commentators claiming that the company wrote the first draft of the US negotiating position' ... Similarly, business groups were extensively canvassed by the European Union during the process of drafting a proposal for an investment agreement, although other interest groups were excluded. In a further case, the Australian delegation included eight representatives of business but rejected all attempts by NGOs and trade unions to gain a seat⁵⁹."

⁵⁷ Kirby, "Intellectual Property and the Human Genome" (2001) 12 *Australian Intellectual Property Journal* 61; M D Kirby, "Playing God? Owning God? Patenting and the Human Genome" (2003) 26 *University of NSW Law Journal* 770.

⁵⁸ (2001) 22 *Third World Quarterly* 623 at 635.

⁵⁹ Citing Christian Aid, "Fair Shares. Transnational Companies, the WTO and the World's Poorest Countries" (1999), *A Christian Aid Report*.

The experience of developing countries with the power of capital and finance in WTO negotiations - specifically concerning the TRIPS Agreement and exceptions for generic drugs for the treatment of HIV/AIDS, tuberculosis and malaria - understandably make some such countries, and their NGO supporters (such as Christian Aid), bristle at the talk of "good governance". For them, "good governance" often represents code words for the protection of the financial interests of global corporations associated with large economies, insufficiently attentive to the basic rights of individuals in the Third World.

When I held my United Nations post in Cambodia, I endeavoured to interest the World Bank in the funding of judges' salaries, as a prerequisite to the building of the judiciary, an institution of governance essential to social and economic revival. At the time, the World Bank refused, declaring that it did not want to get sucked into the "black hole" of Cambodia's national budget. Now, the World Bank and other economic institutions are showing interest in such questions, in the name of "good governance". Critics are sometimes suspicious that the turnaround has happened for less than wholly idealistic reasons.

CONCLUSIONS

I do not agree with the conspiracy theory about governance. Certainly on the international level, good governance is today a twin

theme with human rights. I have given two reasons from my own experience, one abroad in Cambodia and one at home in the rights of sexual minorities in Tasmania, that show that these notions are linked. However, like the ripples in a pond, the linked notions are, in turn, connected with still wider issues of governance more generally.

How do we reform the United Nations to make it more accountable? How do we make international regional institutions more answerable to those whom they serve and more respectful of the human rights principles that they proclaim? How, above all, can we render powerful transnational corporations more accountable in their governance to the communities and individuals around the world that they affect, beyond the shareholders and investors whom they serve and reward?

The last issue is the hardest because UNDP estimates that of 40,000 such corporations currently operating in the global economy, the top 100 control a fifth of all such corporate assets. Furthermore, a third of all world trade is *within* such corporations and a further third of world trade is *between* such corporations⁶⁰. To say the least, the decisions of such corporations have a much larger impact on human rights globally than the decisions of most nation states and inter-governmental bodies. In today's world, to

⁶⁰ Evans, (2001) 22 *Third World Quarterly* 623 at 638.

focus attention only on national good governance may miss the main game. Australia should not give up on transnational corporate governance and international institutional governance because they are harder for it to pick on or to influence.

Human rights are more than the proclamation of splendid international instruments and indulgence in fine rhetoric. Good governance and institutional reform within each nation are vital to the effective delivery of human rights. Yet they are not enough. Countries like Australia, which are committed to good governance, must practise at home what they teach abroad. Otherwise, their instruction will be discounted and may be dismissed as involving double-standards. Australia should also become engaged in the wider issues of international governance affecting both international institutions and multinational corporations. As the United Nations Secretary-General Kofi Annan said recently "Simply put, our post-War institutions were built for an international world, but we now live in a global world"⁶¹.

When Australians talk of "good governance" they must take its lessons upon themselves. They must constantly test their own

⁶¹ Report of the Secretary-General, *Role of the United Nations in Promoting Development in the Context of Globalization and Interdependence* A/54/358 (15 September 1999) quoted in A F M Maniruzzaman, "Global economic governance and the challenge facing international law in the 21st century" (2004) 54 *Amicus Curiae* 10 at 11.

institutions, their democracy and their defence of the human rights of minorities by the world's best practice. And they must be willing to apply the notions of good governance beyond the nation state to the world as it now is; not as it once was.

Westphalian national sovereignty is gradually being eroded by global forces. We need leaders on the world stage with the insights of the founders of the Australian Commonwealth, such as H B Higgins, to chart afresh our course for the century ahead - taking the good ideas of the past and adapting them to the very different world of the future. This was done by Higgins at this University in 1896, in his lecture with profound consequences for governance and individual rights in Australia in the century that followed. Good governance, in its widest sense, is an idea now affecting the whole world and all of its people. It is an idea of large potential for the century to come.