

**THE UNIVERSITY OF SYDNEY**

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**HERBERT VERE EVATT, THE UNITED NATIONS AND THE  
UNIVERSAL DECLARATION OF HUMAN RIGHTS AFTER 60 YEARS**

**The Hon Justice Michael Kirby AC CMG\***



**AN AUSTRALIAN ACHIEVER**

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\* Justice of the High Court of Australia.

I can boast of several links with Herbert Vere Evatt. Like me, he attended Fort Street Boys' High School in Sydney, the oldest public school in Australia. That school has long provided special educational opportunities to talented pupils within an ethos of public education: free, compulsory and secular. These values marked out the early public education policies of the Australian colonies. They influenced my attitudes and those of Evatt.

Amongst the talented ex-pupils – Sir Edmund Barton, Sir Douglas Mawson, Sir Percy Spender, Sir Garfield Barwick, Sir Alan Taylor and many others (a goodly number of them lawyers and judges) – Evatt stood out. He did so especially because of the leadership role he played in the formation of the United Nations Organisation and in the adoption of its *Charter* in 1945. He was then elected the third President of the General Assembly. He was in the chair in December 1948 when it voted to adopt the *Universal Declaration of Human Rights* (UDHR)<sup>1</sup>.

It is 60 years since that resolution of 10 December 2008. Even in the imagination of immature schoolchildren in the 1940s and '50s, the Hiroshima cloud was imprinted on our consciousness. We knew then

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<sup>1</sup> Universal Declaration of Human Rights, UN General Assembly resolution 10 December 1948. See *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 657-659 citing H Hannum, "The Status of the Universal Declaration of Human Rights in National and International Law", (1996) 25 *Georgia Journal of International and Comparative Law* 287.

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(perhaps more than Australians do today) how important it was for the survival of the human species that the United Nations be effective, including in its new *Universal Declaration*.

When I arrived at Fort Street in 1951, Evatt was no longer a judge or Federal Minister. He had become the Leader of the Opposition in the Federal Parliament. His nasal, flat-toned voice was familiar to us from the daily broadcasts of the Federal Parliament. Evatt was the alternative Prime Minister to Mr Robert Menzies. Both of these men were impressive figures. Each presented a different vision of Australia and the world. Each spoke for different values and, to some extent, different ideals.

I had a second, more personal, reason for feeling connected to Evatt. By the time I commenced at Fort Street High, my grandmother had remarried. Her new husband was the national treasurer of the Australian Community Party, Jack Simpson. After Mr Menzies' return to government in December 1949, a Bill was introduced into the Federal Parliament in fulfilment of an electoral commitment of the Coalition government. This Bill sought to dissolve the Australian Communist Party and to impose various civil disabilities upon communists<sup>2</sup>. It

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<sup>2</sup> The Bill became the *Communist Party Dissolution Act 1950* (Cth). The main provisions of the Act appear at (1951) 83 CLR 1 at 6-9 in the case stated by Justice Dixon for the opinion of the Full Court of the High Court.

promised direct and personal consequences for someone who, effectively, was a new member of our family.

As counsel, Evatt led the court challenge to the constitutional validity of the legislation. In one of its most important decisions, *Australian Communist Party v The Commonwealth*<sup>3</sup>, Evatt's submissions were substantially upheld by the High Court. Against all odds, and with initial polls showing an 80 per cent support for the proposal, Evatt then led the ensuing campaign against the attempt of the government to amend the Australian Constitution to overcome the High Court decision. In a referendum held on 22 September 1951 a majority of the electors in three States (Queensland, Western Australia and (only just) Tasmania) favoured the proposal. But the majority national vote of electors was 49.85 per cent against, with 48.75 per cent in favour<sup>4</sup>. There was no majority of States in favour of the referendum proposal. It therefore failed to pass. Although at the time I did not understand the full ramifications of the court decision and the referendum, being then only 12 years of age, I appreciated that a most significant contest about liberty in Australia had been won. In large part, it was won because of the courage and foresight of Evatt.

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<sup>3</sup> (1951) 83 CLR 1.

<sup>4</sup> Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (3rd ed, 2002), Federation Press, Sydney, 1305.

In recent years, I have read extracts from Jack Simpson's national security file. One such entry records how he was closely observed at the Sydney Taronga Park Zoo, in company with three young schoolchildren. Perhaps those conducting the surveillance were concerned about the potential communist corruption of young minds. If so, they need not have bothered. Those schoolboys were myself and my brothers. One became a leading Sydney solicitor. Another is now a judge of the Supreme Court of New South Wales. I was the eldest.

After the Hungarian uprising in 1956, Jack Simpson came to question his earlier political philosophy. To the end he was idealistic, even if misguided. Australia's highest Court and then its electors, upheld, in effect, the principle that he was entitled to his political opinions, however foolish the majority thought them to be.

Because of Evatt's faith in Australia's institutions and confidence in the wisdom of its democracy and because of his leadership at the United Nations that gave birth to the UDHR, Evatt in my childhood was a hero. This was so despite faults that were constantly called to notice and were sometimes all too evident. In the big picture of Evatt's colossal achievements, his defects are of much less significance, especially with the hindsight of 60 years. Now we can see that he was one of the most influential Australians of the 20th century. We do well to remember his astonishing contributions to the Commonwealth and to the world.

### THE CAREER OF HV EVATT

Evatt was born in East Maitland, New South Wales, on 30 April 1894. His admission to Fort Street High School, then situated in the old school building at Observatory Hill in the shadow of where the Sydney Harbour Bridge now stands, occurred in 1911. In his years at the school, before his matriculation in December 1911, Evatt displayed intellectual gifts that were to continue throughout his university studies. The headmaster of Fort Street High, AJ Kilgour, was, unusually, himself a law graduate. He made it his business to encourage young pupils of talent to aspire to be lawyers, that being an occupation that Kilgour saw as the preferable avenue towards social engagement and community improvement. At the school, Evatt won prizes that I was later to win or aspire to. His intellectual prowess was second to none.

In 1912, Evatt arrived at Sydney University and won a scholarship to attend St Andrew's College. Without the scholarship, he would not have been able to afford university education. His father, a publican in East Maitland, had died when he was seven years of age. With outstanding results in the senior examinations of 1911, Evatt was prox acc to the top matriculant of the State of New South Wales. These results won him also a bursary to the University of Sydney, as mine did in 1955. They provided him free tuition and textbooks and an allowance of £20 per annum in his case, £100 in my own.

St Andrew's College awarded Evatt the Horn Scholarship, valued at £50 per annum. It provided him with free board and lodgings. The scholarship lasted three years. Forty years later, an award allowing me to attend Wesley College, within Sydney University, was snatched from me at the last minute, in accordance with the conditions of the trust. This was because of late competition from a Methodist minister's son whose father's vocation trumped my better grades. Perhaps, like Evatt, I should have applied to St Andrew's College. He faced no such similar challenge. He was admitted to the College and proceeded to university results of the highest order, including the Bachelor of Arts degree with first-class honours and the University medal in 1915 and the Bachelor of Laws degree with medal in 1918. In 1916, Evatt was appointed associate to Chief Justice Cullen of the Supreme Court of New South Wales.

According to a biography of Evatt by Ken Buckley, Barbara Dale and Wayne Reynolds<sup>5</sup>:

“At the Presbyterian St Andrew's College, Evatt discovered not only the benefits of communal life, with its ‘domestic supervision, systematic religious instruction and efficient tutorial assistance’, but also ‘intellectual competition, athletic sport, and Union, Club and Society activity, those qualities of influence, self-reliance and leadership [which] have not failed to find suitable and honourable expression’. Yet despite the camaraderie of dining hall and common room, debates committee and cricket field ... there was a hint that Evatt's life-long battle against unwarranted privilege was

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<sup>5</sup> *Doc Evatt*, Longman Cheshire, 1994, 7-8 (hereafter Buckley et al)

about to begin. In December 1914, when editor of *St Andrew's College Magazine*, he argued against the abortive proposal for the formation of army companies based on the GPS [private] schools.”

Evatt, a product of public schools, regarded this proposal as an initiative based on “snobbishness of a certain grade of society, which is continually revealing its imperfections in the pitiful struggle to convince itself that it is not bourgeois at best”.

Evatt eventually spent seven years in residence at St Andrew's College. In 1916 he became the College tutor in English and philosophy, without fee. In fact, he continued to live at the College until he was admitted to the Bar of New South Wales towards the end of 1918<sup>6</sup>. In 1915 Evatt had been elected President of the Undergraduates' Association (the forerunner to the Students' Representative Council) and in 1915-16 he became the first undergraduate to be elected President of the Sydney University Union. In the 1960s, I was one of his successors in both of these posts and like him I later served as a Fellow of the University Senate. It was therefore perhaps natural, with such school and university links and many common interests and values, that I felt a closeness to Evatt although I never knew him, save from afar.

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<sup>6</sup> *Ibid*, 8.

Although headmaster AJ Kilgour had regarded Evatt as "the manliest boy ever to pass through Fort Street School"<sup>7</sup> (a reference to his vigour, courage and idealism) it cannot be said that at school, or at university, Evatt was popular. According to a biographer:

"Evatt at St Andrew's was not generally popular. He had a small group of gifted friends but he was formidable to the less brilliant. His habit of rushing to the window and ostentatiously breathing in clear air was as unfavourably regarded as his treading down of opposition with heavy foot. He seemed to think dullness a crime. He had a prissy attitude to blue jokes and talk about sex. The Evatt family humour did not go beyond leg-pulling, terrible nicknames and amiable jeering. More sensitive undergraduates found Evatt's sarcasm wounding. His politics at the time of fervency for England and the Empire were suspect."

His reputation at the College was to survive into later years<sup>8</sup>:

"I remember going to an old boys' dinner at St Andrew's", one of his associates relates.<sup>9</sup> "Evatt was there – a judge of the High Court at the time – but he left early. As soon as he went the knives were out for him. The men there were rising men, career men. They looked on Evatt as a traitor. If you had his abilities, you should be with the right people, keen to do what right people did. Otherwise you were an enemy."

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<sup>7</sup> Kylie Tenant, *Evatt – Politics and Justice*, Angus and Robertson Ltd, 1970, 20. Evatt was dux of Fort Street School in 1911. He retained close links with the school and established an essay prize, still awarded, in memory of two brothers, Ray and Frank Evatt, who were killed during active service in the First World War.

<sup>8</sup> Tennant *Ibid*, 20-22.

<sup>9</sup> *Ibid*, 20.

By the 1920s, Evatt established a political association with the Australian Labor Party. He was already carving for himself a brilliant career as a barrister. In 1924 he wrote the thesis for which Sydney University awarded him the degree of Doctor of Laws. The thesis was later published as *The King and his Dominion Governors*.<sup>10</sup> It was a brilliant examination of the law of constitutional monarchy and of the reserved powers of the monarch, as exercised throughout the British Empire by vice-regal representatives. It was a book that was to prove important and influential in respect of the dismissal of two Labor Governments, namely that of JT Lang by the New South Wales Governor Sir Philip Game in 1932 and that of EG Whitlam by the Governor-General, Sir John Kerr, in 1975. Evatt's title of "Dr", that accompanied him throughout his political and public life, was earned by his legal writing. It was not honorary. From the 1920s he was commonly known as "The Doc".

In 1925 Evatt was elected to the New South Wales Parliament as the Labor member for Balmain.<sup>11</sup> In 1927 he was re-elected as an Independent. Unusually, this did not result in the loss of the good opinion he had won in the Labor Party. In 1929 he was appointed King's Counsel. In the following year, at the age of 36, he was appointed a

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<sup>10</sup> His doctoral dissertation was titled "Certain Aspects of the Royal Prerogative: A Study of Constitutional Law". It was described as "simple and direct, eminently readable": *ibid*, 104.

<sup>11</sup> *Loc cit*, 45-46.

Justice of the High Court. He was the 12th appointee to the Court. He remains the youngest person ever appointed to the office. Years later, in 1975, I was appointed a Deputy President of the Australian Conciliation and Arbitration Commission at the age of thirty-five. But it was not until 1996, at the age of fifty-seven, that I followed Evatt onto the High Court and was the fortieth Australian so appointed.

As a High Court judge, Evatt was brilliant and often innovative. He displayed a willingness to contemplate the growing role that Australia would play in international affairs and the growing impact of that engagement upon the powers of the Federal Parliament, especially the power to make federal laws to give local effect to international treaties<sup>12</sup>. He was innovative in matters of private law as, in 1937, in foreshadowing the need of the common law to recognise a right to privacy, hitherto denied by the common law of England<sup>13</sup>. He wrote judicial opinions marked by their compassion, foresight and inventiveness<sup>14</sup>. He was often in agreement with the other formidable jurist in the Court in the 1930s, Justice Owen Dixon. With Dixon, Evatt wrote a number of important joint opinions<sup>15</sup>.

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<sup>12</sup> *R v Burgess; ex parte Henry* (1936) 55 CLR 608.

<sup>13</sup> *Victorian Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 at 519.

<sup>14</sup> See, for example, *Chester v Waverly Municipal Council* (1939) 62 CLR 1 at 18, citing Joseph Furphy (Tom Collins), *Such is Life*.

<sup>15</sup> See, for example, *R v Federal Court of Bankruptcy; ex parte Lowenstein* (1937) 57 CLR 675; *R v Burgess; ex parte Henry* (1936) 55 CLR 608.

For a man of such broad intellectual interests, service on the High Court in the 1930s was rather constricting. Things would not have been made easier by the studied rudeness exhibited to him (and to Justice McTiernan) by his colleague on the Court, Justice Hayden Starke.<sup>16</sup> Evatt tended to give as good as he received but he sank himself into judicial and extra-curial writing. He published several books during his High Court service, including *Injustice Within the Law* (1934); *Rum Rebellion* (1938); and *Australian Labor Leader: The Story of W A Holman and the Labour Movement* (1940). On a visit to Harvard Law School in October 1938, Dean Irwin Griswold, later Solicitor-General of the United States, then a junior member of the academic staff, recalled that he was "very much impressed by [Evatt] at the time ... He seemed to have a flexibility and a breadth of outlook which was not always found in British judges, including some Australians".<sup>17</sup>

In 1940, after the outbreak of the Second World War, Evatt resigned from the High Court to re-enter politics. When John Curtin formed the war-time Labor Government, he quickly took steps to harness Evatt's talents and energies. In 1941, Evatt was appointed not only Federal Attorney-General but also Minister for External Affairs,

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<sup>16</sup> Clem Lloyd, "Not Peace but a Sword – The High Court of Australia under JG Latham" (1987) 11 *Adelaide Law Review* 175; Roger Douglas "Judges and Politics on the Latham Court" (1969) 4 *Politics* 20.

<sup>17</sup> Quoted in Buckley et al, *Doc Evatt*.

posts he held in the three successive Labor Governments of the 1940s. It was because of these posts that Evatt was able to continue his engagement with legal issues, now on a wider stage.

### EVATT AND THE UNITED NATIONS ORGANISATION

As the war progressed towards its end, Evatt took a leading role on behalf of the smaller nations in the design of the post-war organisation intended to establish the new world order. The widespread hope was that the United Nations would help replace the chaos of war, the brutality of the fascist dictatorships, the horrors of genocide and protection against the newly realised dangers of nuclear annihilation. Rarely, if ever, in human history had there been such an opportunity for a brilliant lawyer, former judge and convinced internationalist, to play such a role in the shaping of the global institutions.

At the San Francisco conference, convened to consider the *Charter* of the United Nations Organisation, and indeed before, Evatt was closely involved as the leader of the Australian delegation in a number of projects aimed to shape the new body and the role of nation states within it. By 1944, Evatt had been endeavouring to promote a goal of full employment as an essential attribute of a just post-war settlement. In effect, this goal evidenced a realisation of the importance that economics would play to the attainment not only of individual rights and dignity but also of international peace and security.

At this time there were many both at home and abroad who resisted Evatt's endeavour to get the international community involved in the issue of full employment. Critics suggested that this was entirely a matter of domestic jurisdiction and not properly a subject of international concern. Evatt rejected that view, such was his broad conception of international concerns. In a sense, Evatt was foreshadowing the role that the International Labor Organisation (first established by the *Treaty of Versailles* and then an agency of the League of Nations) would play in the post-1945 world. He was also perceiving, perhaps unconsciously, the role that growing world trade, the later World Intellectual Property Organisation, World Trade Organisation and economic changes would play in the global scene, as it was to develop.

Under the leadership of Evatt, the Australian delegates at the preparatory meetings of the United Nations supported the idea of a UDHR. The UDHR, as ultimately adopted, included in its statement of fundamental human rights, "economic and social principles"<sup>18</sup> which had not previously been generally regarded as part of fundamental human rights at all, certainly in English-speaking countries. The UDHR was to include rights to own property (art 17); to work under reasonable conditions of work (arts 23 and 24); to have the protection of social security (art 22); to enjoy an adequate standard of living (art 25); and access to education (art 27); and to freedom of association (art 20).

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<sup>18</sup> Annmarie Devereux, *Australia and the Birth of the International Bill of Human Rights 1946-66*, Federation, Sydney, 2005, 28.

Such a perception of the inter-relationship of economic and social rights, as part of the enjoyment of human rights more widely conceived, was, for some Australians, an outcome of the social philosophy which the Australian Constitution had itself recognised in its provision for the conciliation and arbitration of interstate industrial disputes<sup>19</sup>. In Evatt's time, that constitutional provision, was to be, with s 92 of the Constitution, the one that most engaged the High Court of Australia and obliged consideration of the values and aspirations that s 51(xxxv) of the Constitution enshrined. Not until 2007 was the central importance of that provision for Australia's national institutions and its values doubted, and then in the divided decision of the High Court in the *Work Choices Case*<sup>20</sup>. In Evatt's day, such a decision would have been unthinkable, given the history and language of the Constitution and the common assumptions of all those who had adopted its provisions and then worked to implement its terms.

Other projects of importance to Evatt in the post-war settlement included his attempt to advance the interests of smaller, less powerful, nations so that those interests would not be overwhelmed by the powers assigned by the *Charter* to the Security Council, with its primacy in the

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<sup>19</sup> Constitution, s 51(xxxv).

<sup>20</sup> See eg *New South Wales v The Commonwealth (Work Choices Case)* (2007) 229 CLR 1 at 185 [432], 186-189 [434]-[442], 374 [894].

protection of international peace and security designed to repair the failures of the League of Nations in that regard. Evatt's leadership of the smaller nations won him the support and admiration of those states, including countries in Latin America with which Australians to that time had relatively few connections. It also won him the criticism and sense of annoyance of the great powers, including the United States of America and the United Kingdom<sup>21</sup>.

Despite Evatt's support for small nations, when it came to the colonial question, he often evinced inconsistent views. He was foremost in asserting Australia's quasi-colonial involvement in the former League of Nations mandated territory of New Guinea. Neither he, nor the Australian delegation under his leadership, contemplated complete political independence for New Guinea or indeed for Papua. In this respect, Evatt followed the perceptions of Australia's national interests that had first been voiced at Versailles, following the First World War by Prime Minister WM Hughes<sup>22</sup>.

The United Nations *Charter* envisaged from the start that human rights would be one of the intellectual and political foundations of the

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<sup>21</sup> WJ Hudson, "Dr HV Evatt at San Francisco" (1991) *The Monthly Record* (Department of Foreign Affairs and Trade), April 1991, 162 at 170-171.

<sup>22</sup> Alan Renouf, *Let Justice be Done: The Foreign Policy of Dr HV Evatt*, Uni of Qld Press, St Lucia, 1983, 259.

Organisation<sup>23</sup>. Probably because of Evatt's background as a lawyer and a judge, his generally liberal and often idealistic instincts and his commitment to building a better world on firmer foundations, he indicated a commitment by Australia to the United Nations playing a leading role in the protection of fundamental human rights throughout the world. It was this that led Evatt to express strong support for the drafting of a universal instrument on human rights. Such an idea had been propounded in 1945, in the belief that a bill of rights of some kind should be incorporated in the *Charter* of the United Nations or should at least be adopted at the same time.

In the rush of events in 1945, incorporation did not prove possible. Nevertheless, the Australian delegation, under Evatt's leadership, accepted that steps should be taken to adopt a *Universal Declaration* as a non-binding statement that was nevertheless to be taken seriously as an expression of the general criteria of human rights against which Australian law and policy would henceforth be measured. Evatt went so far as to call for a binding international statement of human rights that could be given effect by an international court of human rights. Weighed against that aspiration, the adoption of the non-binding UDHR would have seemed a more modest achievement.

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Several fundamental difficulties arose in Australia's taking too vigorous a stance in support of a binding treaty of human rights or securing the creation of an international court with power to enforce such provisions. The first was Australia's position as a minor power in a world already deeply divided by the Cold War in which Australia's strategic interests lay generally with the Western powers (the United States and Britain) upon whom Australia relied for its ultimate security. The second was the interest Australia felt at the time for the maintenance of its colonial and quasi-colonial interests in Papua-New Guinea. No Australian politician, mindful of the then recent evidence of dangers of invasion from that the North, could contemplate surrender of the Australian interest in the trusteeship of New Guinea and in the future governance and control of that territory and of Papua. Thirdly, Australia's internal policies at the time, including the White Australia migration policy and the disadvantageous position of Aboriginals, were such as to make any excessive Australian claims of commitment to fundamental human rights appear less than convincing in the eyes of at least some of the other delegates in San Francisco and later New York.<sup>24</sup> As WJ Hudson wrote on "Dr HV Evatt at San Francisco"<sup>25</sup>:

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<sup>24</sup> Renouf, above n 22, 283. FD Roosevelt, like Woodrow Wilson, was unenthusiastic about colonial regimes (including Australian) and willing to tolerate few exceptions (mostly American). See Renouf, 224. The exclusion of indigenous peoples from enjoyment of the rights expressed in international principles of human rights was often justified domestically in Australia on the basis that such people were "wards of the State, in need of guardianship" who would cease to be wards when they demonstrated an ability to "assume the full citizenship to which they are entitled." See Paper on Aboriginal Policy (Commonwealth and State Conference on Native Welfare,

"[It is difficult to convey] to ... younger readers, the nature of the times in which Evatt worked in the 1940s. Seen through 1990s' eyes, the intellectually more adventurous men and women of the 1940s can look incredibly naïve and, on issues like White Australia, wrong-headed. And so in some ways they were. But the more self-confident advocate of progressive views in the 1990s does well to remember that his grandchildren will boggle that he ever found such views tenable. The need is not for judgment but for understanding".

What Evatt and those about him brought to the Australian approach to human rights in the mid-1940s was a sense of intellectual excitement, emotional commitment and aspirational idealism for a step towards the institutional improvement of the human condition. As Professor Manning Clark described then the times were "heady ... [with the idea that] the great dreams of humanity were about to come true"<sup>26</sup>. If Australia had inconsistencies in its position, it was not alone in that deficiency.

Evatt saw the United Nations *Charter*, negotiated at San Francisco, as a temporary document suited to a transitional phase of international affairs which was itself the outgrowth of the then undeclared war being between the Western nations and the Soviet

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September 1951), in Evatt Collection, Flinders University, cited Devereux, above n 18, 13.

<sup>25</sup> Hudson, cited in Hudson, above n 21, 162 at 163.

<sup>26</sup> Manning Clark, cited in Hudson, above n 21, 164.

Union<sup>27</sup>. No doubt Evatt's views concerning the aspirations of human rights had within them the seeds of sometimes inconsistent and incompatible opinions. These were, in turn, exacerbated by Evatt's brilliant mind and his capacity and inclination to pursue a dozen objectives and lines of argument, some of them contradictory, at the one time. Neater and more ordered minds (like those of Alan Watt and Paul Hasluck) found the chaotic condition of policy development under Evatt "slightly mad"<sup>28</sup> and Evatt's conduct as apparently manic on occasions. Yet in a way, Evatt was simply displaying capacities he had learned as a barrister with a quicksilver mind, working on difficult cases. He was at ease in accommodating inconsistent opinions so long as they all ultimately led to his conception of the common goal.

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<sup>27</sup> From the start, Evatt regarded a non-binding declaration alone (as distinct from a treaty) as unsatisfactory and pressed the United Nations to go further. When the Commission on Human Rights began its deliberations, Evatt was strongly in favour of proceeding simultaneously towards the preparation of a declaration and a binding treaty. His urgings were unsuccessful. See Renouf, above n 22, 117.

<sup>28</sup> Hasluck quoted in Hudson, above n 21, 160. According to Kylie Tennant, one of the most able members of the Australian delegation at the United Nations was Mr (late Sir) Paul Hasluck. A Western Australian, he was a protégé of John Curtin, the war-time Prime Minister of Australia. "He was exact, a master of detail, neat and somewhat rigid. He prided himself on his objectivity ... There was confusion and Hasluck could not bear confusion, whereas Evatt was used to working through it. Evatt never minded doing ten things at once but the juggling with loads of political dynamite possibly tried Hasluck's nerves." Hasluck, with the old school diplomat Colonel Hodgson, represented Australia at the General Assembly and on the Security Council during 1946. When Dr John Burton became Permanent Secretary of External Affairs in 1947, Hasluck resigned. He was appointed Reader in History at the University of Western Australia before securing a seat in the Federal Parliament in the interests of the Liberal Party. He later became Foreign Minister and subsequently Governor-General. See Tennant, above n 7, 211-212.

During the 1950s and 60s, when Evatt was in Opposition and then after he had left politics, there was an increased governmental and bureaucratic resistance in Australia to the development of international civil and political rights, reflecting a comparatively low level of philosophical debate over the basic purposes of the international human rights system. According to Annemarie Devereux, political pressures helped to produce such divergencies. As the finalisation of the *International Covenant on Civil and Political Rights* (ICCPR) approached in 1966, Australia abstained, or voted against, a number of its provisions. It did this too in respect of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). At the time the reaction of the Australian government to these treaties was “lukewarm”.<sup>29</sup>

Evatt's vision of an international human rights court was then sidelined as unattainable and, in the view of some, undesirable. However, events occurring since 1948 have shown that the creation of international human rights courts was by no means impossible. The growth and significance of the jurisdiction of the European Court of Human Rights, hearing cases arising from Galway to Vladivostok, is an illustration of the fact that Evatt's dream was not, ultimately, unrealistic. Likewise, the creation of the Inter-American Court of Human Rights and the African Court of Human and People's Rights shows what can be

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<sup>29</sup> See Devereux, above n 18, 237

achieved. If there is no such court in Asia or the Pacific – Australia's own world regions as dictated by its geography – this may simply indicate the need to close the circle in creating further regional human rights courts as steps towards the ultimate goal of achieving Evatt's dream of enforceable international human rights everywhere.

Even without such courts, the later development of the international treaty system and the creation of treaty bodies, such as the United Nations Human Rights Committee established under the ICCPR, indicate the way in which treaties can be given effect and can influence events without the necessity of there being binding court orders<sup>30</sup>. Certainly, it is too early to dismiss Evatt's idea of an international human rights court as a pipedream. The institutional progress made in this field in the past 50 years is nothing short of astonishing when the preceding human history is considered<sup>31</sup>.

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<sup>30</sup> A good example is *Toonen v Australia* (1994) 1 *Int Hum Rts Reports* 97 (No 3): cf. *Croome v Tasmania* (1998) 191 CLR 119. See also the recent Views of the United Nations Human Rights Committee in Communication No 1347/2005, *Dudko v Australia*. Cf E Wilhelm, "Australia's Racial Vilification Laws found Wanting?: The 'Nigger Brown' Saga: HREOC, the Federal Court, the High Court and the Committee on the Elimination of Racial Discrimination" (2003) *Asia-Pacific Journal on Human Rights and Law* 86 in relation to *Hagan v Australia* CERD/C/62/D/26/2002, para 8 (2002).

<sup>31</sup> The creation of the International Criminal Court under the Rome Treaty and of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda are also examples. There are others.

The proposal for an international human rights court had effectively been shelved by 1946. Nevertheless, the proposal to create what was at first called an "International Bill of Human Rights" made much speedier progress. In April and May of 1946, the Economic and Social Council of the United Nations regarded itself as "being charged ... under the *Charter* with the responsibility of promoting universal respect for, and observance of, human rights and fundamental freedoms". The Council therefore established a Commission on Human Rights. It mandated the Commission "first of all to come up with a recommendation and report regarding ... an international Bill of Rights".<sup>32</sup>

#### DEVELOPMENT AND ADOPTION OF THE UDHR

Having received its mandate, the Commission worked on the project between January 1947 and December 1948, two productive years. It was this work that produced the UDHR<sup>33</sup>.

Seventeen nations were elected to serve on the preparatory committee. They were chosen "pay[ing] due regard to equitable geographical distribution and to personal qualifications of the nominees

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<sup>32</sup> Resolution E/248 of the United Nations Economic and Social Council.

<sup>33</sup> J Morsink, *The Universal Declaration of Human Rights, Origins, Drafting and Intent*, Uni of Pennsylvania, Philadelphia, 1999, 4.

for service on the Commission"<sup>34</sup>. In addition to experts from the five permanent members of the Security Council, Australia was selected to serve on the Committee. There is little doubt that this selection grew out of Dr Evatt's popularity and well-known personal enthusiasm for the project.

Mrs Eleanor Roosevelt (USA), under the wartime president of the United States, was elected to chair the Commission on Human Rights. She, in turn, selected a small executive body. She appointed Mr (later Professor) John P Humphrey, a Canadian academic, to be the director of the Division on Human Rights within the United Nations Secretariat. She promptly summoned the drafting committee to meet her in her Washington Square apartment and to begin work on the UDHR at once. The drafting group asked John Humphrey to prepare a first draft of the proposed *Declaration*. His task was not easy because he had to reconcile the differing philosophies that manifested themselves from the very beginning in the drafting group's work.

Mr [Peng-chun] Chang of China suggested that Mr Humphrey should set aside all other duties and spend six months studying Chinese philosophy "after which [he] might be able to prepare a text for the Committee". This was an indication of the magnitude of the problem that he faced. The successive drafts prepared by John Humphrey are now

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<sup>34</sup> J Humphrey cited Morsink, above n 33, *ibid*, 5.

deposited in the University Library of McGill University in Montreal, Canada. They evidence remarkable brevity in expression, conceptual clarity and linguistic eloquence. The final product was an astounding achievement, recognisable as such particularly by anyone who has ever attempted the drafting of an international consensus on sensitive topics negotiated between people of different linguistic, legal and social traditions.

In the 1990s I served as a Commissioner of the International Commission of Jurists. One of the Commissioners of that body was Professor John Humphrey of Canada. By then, he was an Emeritus Professor, full of years and honours. Whenever he began to describe his functions in preparing the early drafts of the UDHR, his eyes would light up as he told of how it was done. Of how, following much reading and consultation, he would begin to put pen to paper. Of how ideas came to him on the bus journeys to the United Nations Secretariat building, then at Lake Success. Of how he would jot his ideas on scraps of paper and subsequently link them together as drafts for the proposed *Declaration*. John Humphreys' account bore out once again the aphorism of VI Lenin: the enemy to much important action in life is the blank page. Progress is often made by individual human effort. In this case that effort began with John Humphrey. It was scrutinised by Eleanor Roosevelt and her drafting group. It was then examined in the heated debates of the successive meetings of the Commission on Human Rights. Eventually it was considered by the Economic and Social Council and, ultimately, approved by the General Assembly.

John Humphrey's drafts were generally regarded as excellent. He, in turn, paid tribute to the assistance he had received from various international and national organisations, including the International Parliamentary Union, the World Federation of United Nations Associations and the American Law Institute. The draft provided by that Institute was described by him as being of special value. The objective was to draw up a document that would be acceptable to all participating states. This was an extremely challenging task, especially given the stage by then reached in the Cold War. In the end, there was a broad consensus in favour of the draft UDHR. At the vote, there were six abstentions from the members of the Soviet Block; an abstention by Saudi Arabia; an abstention by South Africa and various other criticisms. However, none of these abstentions, nor the criticisms, detracted from the general appeal of the UDHR. Especially in the time available, it was a magnificent achievement by the drafters and the infant organs of the United Nations bodies.

The first recorded question asked by an Australian delegate at the Commission on Human Rights, during the debate concerning the draft UDHR, concerned jurisprudential issues. The Australian representative on the Commission, Colonel R Hodgson, asked John Humphrey to identify what was the “underlying philosophy” of the draft UDHR<sup>35</sup>. The

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<sup>35</sup> A Devereux, above n 18, 114.

fact that an Australian delegate should have asked that question appears remarkable. It was to be the only occasion during the drafting process on which Australia initiated a question on jurisprudential issues. Perhaps unwittingly, Colonel Hodgson had touched a raw nerve as the subsequent internal debates between the Chinese representative (PC Chang) and the Lebanese representative (Dr Charles Malik) indicate.

Those who have studied the instructions given to the early Australian delegates, working on the draft, conclude that the "overwhelming sense" emanating from those documents was that "debates concerning the genesis or nature of human rights were [regarded as] an unnecessary diversion from the pressing task of drafting internationally binding instruments. As such, Australia generally sought to short-circuit such discussions". Doubtless it did so because of Dr Evatt's feeling that philosophical and theoretical discussions would inevitably lead nowhere<sup>36</sup>.

Repeatedly, in the Commission and in the drafting group, Mrs Roosevelt, as chair, felt it necessary to remind those who were criticising the draft and suggesting changes that "[the need is for] a clear, brief text which could be readily understood by the ordinary man and woman". As Mrs Roosevelt put it, the proposed UDHR was "not intended for philosophers and jurists but for the ordinary people"<sup>37</sup>. Fortunately, most

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<sup>36</sup> *Loc cit*, 115.

<sup>37</sup> E Roosevelt cited in Morsink, above n 33, 34 (fn 72).

of the participating delegates were of the same opinion. Usually, simplicity was best served by brevity.

The recorded debates in the drafting group and in the Commission indicate that, overwhelmingly, the drafters thought of themselves as directing their attention to all members of the human race. This was demonstrated, in turn, by the operative paragraph of the opening words of the UDHR, as finally approved:

"NOW THEREFORE THE GENERAL ASSEMBLY proclaims this UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of the Member States themselves and among the peoples of Territories under their jurisdiction".

When eventually the Declaration was adopted by the General Assembly, Evatt, the representative of Australia, was in the chair as the President. In declaring the UDHR adopted, Evatt observed that this was:

"the first occasion on which the organised community of nations had made a declaration of human rights and fundamental freedoms. That document was backed by the body of opinion of the UN as a whole and millions of people, men, women, and

children all over the world would turn to it for help, guidance and inspiration"<sup>38</sup>.

The General Assembly endorsed the UDHR at about midnight on 10 December 1948. The vote was 48 in favour, with no votes against and with the eight abstentions previously mentioned. The closing words of the debate were voiced by Abdul Rahman Kayala, the representative of Syria. He noted that "civilisation had progressed slowly through centuries of persecution and tyranny until finally the present Declaration had been drawn up". The Declaration was not, he said:

"The work of a few representatives in the Assembly or in the Economic and Social Council; it was the achievement of generations of human beings who had worked towards that end. Now at last the people of the world would hear it proclaimed that their aim had been reached by the United Nations"<sup>39</sup>.

For Evatt it was self-evident that human rights, in operation, went far beyond the spiritual or moral sphere and beyond honorary language into the political sphere. For Evatt, human rights were an important element in re-defining the relationship between the nation state, the community and the individual.

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<sup>38</sup> HV Evatt quoted in Morsink, above n 33, 12 (UN General Assembly record, 934).

<sup>39</sup> AB Kayala (Syria) *ibid*, UN General Assembly record, 922.

As President of the General Assembly in 1949, in sending a message to the President of the French Republic on the inauguration of UNESCO in Paris, Evatt described the UDHR as<sup>40</sup>:

"... [A] solemn pronouncement by the governments that the power exercised by governments is to be used by them in trust for the benefit of those they govern".

We now know from official records that not all of the Australian delegates who participated in the drafting and adoption of the UDHR were as supportive of the idea of the UDHR as was Evatt. In this respect, there were divisions in the delegation as there still are in the Australian community, including the legal community, concerning the role that broad statements of fundamental rights can play in promoting and upholding such rights.

For example, Sir Frederick Eggelston, an academic and occasional diplomat, considered that some of the rights expressed in the UDHR were "meaningless". He argued that the only way to secure a worthwhile social and international order was by "the disinterested effort of millions of human beings willing to make sacrifices for their objectives". But even Egelston did not reject the notion that certain fundamental human rights exist. He simply doubted that, drafted in such

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<sup>40</sup> Cablegram, Australian Department of External Affairs to Australian Embassy Paris, 28 September 1949; Cables, Paris, 1946-49. Evatt Collection, Flinders Uni of South Australia. See A Devereux, above n 18, 120.

a broad fashion, they could give rise to any effective protection. Notwithstanding such doubts, the Australian delegation supported the draft and it was Evatt who pronounced that it had been adopted.

In her monograph, *Australia and the Birth of the International Bill of Human Rights 1946-66*, Annemarie Devereux concludes<sup>41</sup>:

"Australian delegates during Evatt's period consistently supported the international and domestic legal enforcement of human rights. ... [I]t seems likely that Evatt's vision of an international order of human rights was most responsible for this commitment and conceptualisation. There was little in the Labor Party platform that made adoption of these stances inevitable, though it is conceivable that the Labor tradition of engaging in a struggle against state and employers for better conditions for workers increased receptiveness to viewing the individual as a claimant against the state. The key factor, however, seems to have been the personal political philosophy held by Evatt and his supporters. Once Evatt departed and Spender and Fred Whitlam emerged as the major decision-makers, significantly new assumptions emerged".

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<sup>41</sup> *Ibid*, 121. In Australian domestic politics, divisions quickly emerged between those who favoured in the multilateral United Nations system and those, like RG Menzies, who in 1946, described the UN as "an experiment" which left great power relations untouched. Mr (later Sir) Percy Spender attacked Evatt as relying too much on the United Nations and urged instead Australian efforts to strengthen the "British Commonwealth" and to foster closer cooperation with the United States of America. These were to become recurring themes in Australian domestic politics. Perhaps in response to the criticisms, Evatt sometimes tended to exaggerate the United Nations' achievements and was often inclined to place excessive faith in the United Nations Organisation. See Renouf, above n 22, 253.

According to Devereux, after the electoral defeat of the Labor government in December 1949 and the formation of the Menzies government, there was, to some extent, an element of flux in Australian policy about the UDHR. A lack of consensus quite often surrounded the attitude of Australian delegations concerning the values underpinning human rights in the successive drafts of the ICCPR and ICESCR. This was probably, in part, a reflection of the absence of a general bill of rights in the Australian Constitution and of the legal tradition that inherited the approach of “British justice” to such notions up to that time<sup>42</sup>.

The peculiarities of the UDHR, from the point of view of “Anglo-Saxon jurisprudence”, were later noted by Mr Fred Whitlam, a member of the Australian Mission to the United Nations. In reporting in 1950 on the Fifth Session of the Commission on Human Rights, Fred Whitlam said that:

“in terms of Anglo-Saxon jurisprudence, the draft Covenant (developing the UDHR) has some unusual features ... [including] a tendency to turn to rather vague and impressive language ... and a desire to utilise institutions of law beyond the limits normally set to them in Anglo-Saxon jurisprudence.”<sup>43</sup>

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<sup>42</sup> See Devereux, above n 18, 114.

<sup>43</sup> Memorandum of HFE Whitlam, cited Devereux, above n 18, 122.

The story of those developments is for another time. However, it is timely to remember the story of Evatt's leading role, both nationally and internationally, in supporting, advancing and promoting the UDHR. It is a story relevant to the national consultation which the Australian nation will shortly embark upon concerning the effectiveness of the nation's current legal protections of fundamental human rights.

### DENOUEMENT

At the end of the Pacific War, like most Australian schoolchildren, I received a medal celebrating the victory of the Allied powers in the Pacific. At the time, at my primary school in Sydney we saw a constant stream of Red Cross ambulances taking injured veterans to the Repatriation General Hospital at Concord which Mrs Roosevelt had herself visited during a brief stopover.

Early in 1949, Australian schoolchildren received another gift, one even more precious than the VP medal. It was a small pamphlet-sized copy of the UDHR. This gift was memorable because it bore the global imprint of the then newly familiar emblem of the United Nations, which we were taught was the hope of the world. It was also unusual because it was printed on airmail paper, doubtless so that it could be sent in huge numbers from New York to far-away classrooms. Carefully, our teacher explained the purpose of the UDHR and its general contents. A large poster-sized copy of the UDHR was displayed in the classroom. I doubt that today's Australian students receive copies of the UDHR. It would be

no bad thing if the practice were revived. The gift certainly made an impression on me at the time. That impression has remained with me ever since.

In the same year as I received my copy of the UDHR a peaceful change of government occurred and the Australian electors discarded Mr Chifley, Dr Evatt and their colleagues in favour of Mr Menzies and Mr Arthur Fadden. The Coalition Parties had promised to "put value back in the pound" and to end petrol rationing. Some topics in Australian politics never seem to change.

In June 1950, forces from North Korea invaded the Republic of Korea to the south. The new Australian government introduced into the House of Representatives the Communist Party Dissolution Bill 1950 (Cth). Its suggested urgency is indicated by the fact that only 20 pages of the statute book precede this measure when it was passed. The Bill had an unusually long preamble concerning the dangers and techniques of communism. In part, it was by this preamble that the Menzies government sought to establish the constitutional facts upon which to ground its reliance on the nominated heads of federal constitutional power needed to uphold the Bill's validity. The Bill secured passage through both Houses of the Federal Parliament. It was given the Royal Assent on 20 October 1950.

At the same time, somewhat similar legislation was being enacted both in the United States (the *Smith Act*), in South Africa and elsewhere.

The South African legislation was later to be adapted as the statute that reinforced the laws of the apartheid state. The United States Act was upheld as constitutionally valid by the Supreme Court<sup>44</sup>.

Evatt repeatedly described the legislation and the later proposed amendment of the Australian Constitution as a "totalitarian blot" on the notion of "British justice" which he considered was upheld by the Constitution.<sup>45</sup> To a large extent Australians have Evatt to thank for the fact that Australia avoided acquiescence in the amendment to its Constitution that might potentially have become a vehicle for diminished liberty.<sup>46</sup>

After his successes in the High Court and at the referendum, it was widely expected that Evatt would ascend to the office he most prized: Prime Minister of Australia. This was not to be. The decisions about the communism legislation eventually caused a split in the Australian Labor Party, the formation of the Anti-Communist Labor Party

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<sup>44</sup> *Dennis v United States* 341 US 494 (1951). See also *Yates v United States* 354 US 268 (1957).

<sup>45</sup> *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1; cf MD Kirby, "HV Evatt: Libertarian Warrior" in *Seeing Red*, Evatt Foundation, Sydney, 1992, 1 at pp 11-12. G Winterton, "The Community Party Case" in HP Lee and G Winterton (eds) *Australian Constitutional Landmarks*, Cambridge UP, Cambridge, 2003, Ch 5, p 108.

<sup>46</sup> MD Kirby, in *Seeing Red*, *loc cit*, 12-18. See also EA Evatt, "Referendum 1951: A View from the Media" in *Seeing Red*, 38 at 43-45.

(subsequently the Democratic Labor Party) and repeated defeats for the Australian Labor Party in federal elections halted only by the return of the Whitlam government in December 1972.

In his declining years Evatt was appointed Chief Justice of New South Wales, mainly to provide a dignified office that would remove him from federal political office. By this stage a serious mental decline tarnished his reputation, particularly within the judiciary and legal profession.<sup>47</sup> In 1962, he was given leave of absence from his duties as Chief Justice. He never returned to public life. Just the same, the achievements of Evatt's earlier days cannot be doubted. On the world stage, those achievements loom large, whereas the political events in Australia are probably unknown or, if once known, long since forgotten.

When Evatt died on 2 November 1965, his death was recorded by the General Assembly of the United Nations. The members of the Assembly stood to honour his memory and the contributions he had made to the design of the *Charter*, and to the adoption of the UDHR. His presidency of the Assembly is the sole inscription appearing on his tombstone in Canberra. Later generations of Australians do well to remember Evatt's contributions as an internationalist. Especially so on the 60th anniversary of the UDHR.

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<sup>47</sup> See eg R P Meagher, "Evatt and Civil Liberties" in *Seeing Red*, 179 at 186; G Henderson, "Evatt: canonisation or cannonade?" *Sydney Morning Herald*, 29 December 1992, 9.

As an institution, the United Nations has many weaknesses. Some of them were stamped on its organs from birth, as Evatt at the time warned. Nonetheless, the initial enterprise of the UDHR led to a very large system of international human rights law. The struggle to ensure a proper protection of basic human rights goes on, including in Australia. That struggle requires perpetual vigilance on the part of courts and citizens.<sup>48</sup>

Between 1993 and 1996, it was my duty, as Special Representative for Human Rights in Cambodia, to report to the United Nations Human Rights Commission. The Commission has now been replaced by the Human Rights Council. Before that Council the Special Rapporteurs and Special Representatives of the United Nations continue to render accountable, before the world community, rulers who in earlier decades were accountable to no-one except to their own power. This constitutes to be an important development of the Organisation that Evatt helped to establish.

The United Nations also performs important work in fields in which I have been associated with. These include:

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<sup>48</sup> See *Thomas v Mowbray* (2007) 233 CLR 307 at 484-487 [530]-[533] per Callinan J and contrast 442 [386] of my own reasons. Cf commentary G Martin "Anti-Terrorism' Laws upheld in High Court challenge" (2008) 32 *Criminal Law Journal* 114 at 116.

- the struggle against HIV/AIDS through the World Health Organisation and later the joint agency initiative of UNAIDS;
- the efforts to promote democratic government and economic opportunities, through the work of the United Nations Development Programme;
- the endeavour to bring to life the principles of economic equity and employment justice for which Evatt worked, through the work of the International Labour Organisation; and
- the development of the governmental principles appropriate to the new age of biotechnology, through the work of the International Bioethics Committee of UNESCO.

In the International Bioethics Committee in UNESCO I chaired the drafting group that in 2004-05 produced a new Universal Declaration of the United Nations: the *Universal Declaration on Bioethics and Human Rights*. That *Declaration* was adopted by the General Conference of UNESCO in November, 2005. Like the UDHR it is a non-binding statement of general principles. Drafting the document taught once again the difficulties and compromises inherent in drafting such international instruments. The work that Evatt and the UDHR began in the 1940s was before us as an inspiration and an example. That work continues to this day. Australians are engaged in that work. It is often unsung. Generally, it is unknown, including in Australia itself. However, such work is in the proud tradition that Evatt and his colleagues pioneered at the outset of the life of the United Nations, exhibiting

confidence in the utility and long-term value of the organisation and its mission to protect fundamental human rights.

Over the years, the UDHR has been referred to on many occasions in decisions of the High Court of Australia. The first such reference appeared in *The King v Wallis*<sup>49</sup> decided in August 1949. In his reasons in that case Latham CJ referred to the UDHR and specifically to the provisions of art 20(1), guaranteeing the right to freedom of peaceable assembly and association. Whilst acknowledging that the UDHR was “not part of the law of Australia”, it was cited to demonstrate the basic issues of principle involved in a claim that persons should be required to join a particular organisation before they could lawfully be employed in an industry.<sup>50</sup>

Over the years since 1949, individual judges of the High Court have made many references to the UDHR. Several were made by Justice Lionel Murphy.<sup>51</sup> He was by no means alone. The UDHR was referred to by most members of the Court in *Koowarta v Bjelke-Petersen*.<sup>52</sup> In *Mabo v Queensland* in 1988, it was referred to by several

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<sup>49</sup> (1949) 48 CLR 529

<sup>50</sup> (1949) 48 CLR 529 at 546.

<sup>51</sup> *Dowal v Murray* (1978) 143 CLR 410 at 429; *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583 at 607; *Re Cormick* (1984) 155 CLR 170 at 180.

<sup>52</sup> (1982) 153 CLR 168 at 178, 205 per Gibbs CJ, 219 per Stephen J, 234 per Mason J and 239 per Murphy J; *Gerhardy v Brown* (1985) 159 CLR 70 at 102 per Mason J, 124, 126, 134 per Brennan J.

members of the Court.<sup>53</sup> In more recent years, many Justices of have made reference to the UDHR.<sup>54</sup> Over virtually the entirety of my own service on the High Court, my reasons have contained references to the principles stated in the UDHR.<sup>55</sup>

In the municipal courts of almost every nation in the exposition of domestic law regard is now had to the fundamental principles of human rights. This development is also happening in Australia, including in the High Court. In 2007, a prisoner challenged her exclusion from the right to vote in the then pending federal election. She called in aid decisions

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<sup>53</sup> (1989) 166 CLR 186 at 217 per Brennan, Toohey and Gaudron JJ, 230 per Deane J.

<sup>54</sup> For example, *A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 231 per Brennan CJ, 244, 247 per Dawson J, 273 per Gummow J and 296 of my own reasons; *U v U* (2002) 211 CLR 238 at 261 [87] per Gummow and Callinan JJ; *Plaintiff s157/2002 v The Commonwealth* (2003) 211 CLR 476 at 518 [116] per Callinan J; *Re Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 211 CLR 441 at 454 [20] per Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ; *Re Minister for Immigration and Multicultural and Indigenous Affairs and Anor; ex parte applicants S134/2002* (2003) 195 ALR 1 at 6 [20] per Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ.

<sup>55</sup> For example, *Wilson v Minister for Aboriginal, Torres Strait Islander Affairs* (1996) 189 CLR 1 at 40, fn 119; *Ousley v The Queen* (1997) 192 CLR 69 at 142 fn 317; *Chakravarti v Advertiser Newspapers Limited* (1988) 193 CLR 519 at 575 fn 181; *The Commonwealth v Western Australia* (1999) 196 CLR 392 at 461 fn 233; *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290 at 328 [121]; *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 fn 191; *Coleman v Power* (2004) 219 CLR 562 at 616-7, fn 220; *Harriton v Stephens* (2006) 226 CLR 52 at 89 fn 242; *Koroitamana v The Commonwealth* (2006) 227 CLR 31 at 51 [66]; and *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 127 [208].

of other countries, such as Canada, upholding and explaining the central importance of the right of citizens to vote, including prisoners<sup>56</sup>. She also invoked a decision of the European Court of Human Rights which had found that legislation in Britain, that excluded prisoners from the right to exercise the franchise, was incompatible with the United Kingdom's obligations under the European Convention on Human Rights<sup>57</sup>.

In the end, the High Court granted relief to prisoners. The majority held that, under the Australian Constitution, prisoners serving terms of imprisonment of less than three years could not be excluded from the right to vote in federal elections. Such an exclusion would be disproportionate and inconsistent with the Australian constitutional design, which operates on three-year cycles for federal elections. The Court's decision effectively upheld a basic civil right by reference to the text, history and democratic purpose of the Constitution<sup>58</sup>. Nevertheless, the reasoning of the Court in *Roach* bears witness to the notion of fundamental rights inhering in individuals by reason of their very humaneness. This was the notion that lay at the heart's core of the

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<sup>56</sup> *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519.

<sup>57</sup> *Hirst v United Kingdom* (2005) 42 EHRR 41.

<sup>58</sup> *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 177-179 [13]-[18] per Gleeson CJ; 203-204 [100] per Gummow, Kirby and Crennan JJ; 230-231 [163] per Hayne J; 234-235 [181] per Heydon J.

UDHR. It is a notion protective of liberty, equality and diversity in a free society. It was a notion that Evatt defended in his public life.

Australians can be proud of the role that their political leaders and officials took in the establishment of the United Nations Organisation and the adoption 60 years ago, of the UDHR. Whatever his human mistakes and foibles, especially in his later years, Australians can be specially proud of HV Evatt for his role as a legal scholar, as a High Court Justice, as a founder of the United Nations, as a committed supporter of the UDHR, as an internationalist and as a defender of liberty.

**THE UNIVERSITY OF SYDNEY**

**ST ANDREW'S COLLEGE**

**HV EVATT LECTURE 2008**

**14 AUGUST 2008**

**HERBERT VERE EVATT, THE UNITED NATIONS AND THE  
UNIVERSAL DECLARATION OF HUMAN RIGHTS AFTER 60 YEARS**

**The Hon Justice Michael Kirby AC CMG**