

Human Rights Gay Rights

Michael Kirby

Back to school days

The first school that I ever attended was a local kindergarten conducted by Mrs Church. I have no idea of her first name. Back in 1943, schoolchildren never became familiar with their teachers. Certainly not in kindergarten.

One day, we were all lined up on Parramatta Road, outside St Andrew's Anglican Church at Strathfield, a suburb of Sydney. We were given flags and told that we would be expected to wave them. A very important visitor was shortly to pass by. The visitor was a woman: Mrs Eleanor Roosevelt. She was the wife of the President of the United States of America. Although I knew little about her or about her husband Franklin Delano Roosevelt for that matter, I knew that she was important. So I waved the Australian flag and cheered as the motorcade went passed.

Eleanor Roosevelt was in Sydney as a stopping point on a tour of Pacific bases in the theatre of war in which American and Australian troops were then engaged. It was a war that concerned the very survival of the Australian nation. It was not to be ended for more than a year, in August 1945, with the defeat of Japan following the detonation of two atomic bombs. However, those events lay in the future. Meantime, Eleanor Roosevelt was in Australia to thank and encourage her country's allies and to visit injured

soldiers on behalf of the President. And also to take part in the opening of the nearby Veterans' Hospital in Concord West. This was the Repatriation General Hospital at Concord. It still stands on a point near the end of the Concord Road into which Eleanor Roosevelt and her motorcade swept as they passed by the cheering schoolchildren. In my imagination, I like to think that our eyes made contact. She was one of the great heroes of human rights of the 20th century.

In her own country, Eleanor Roosevelt was a fearless champion of human rights. In the 1940s and for long after, racial prejudice denied basic human rights and equality to millions of people, both in the United States and in Australia. In the United States, the prejudice was directed mainly at the African-American cohort of the population. At the time, they were called the Negroes and Negresses. In Australia, the same prejudice was addressed to our own Aboriginal population. Although they were the earliest inhabitants of the Australian continent, they were denied respect for their land rights and much else. Prejudice was also to be found against people who were not 'white'. These were the days of the 'White Australia Policy'. It was next to impossible for 'non-white' people to come to Australia. Still less to be admitted as citizens.

In the United States, as we know now, Eleanor Roosevelt constantly badgered her husband, the President, to do more to eradicate discrimination, prejudice and inequality — especially as it affected the Black minority. She was opposed to the requirement that even obliged Black servicemen to serve in segregated army corps. At least we never did that in Australia. After the war, Eleanor Roosevelt took a leading part in the establishment of the United Nations Organisation. This was to be the most important enduring gift that her husband, the President, left as a legacy. Originally, it had been intended to include in the Charter of the United Nations a Bill of Rights for all humanity. This was designed to contribute to the building of a more equal and just world for all the people in it.

Time ran out on the drafting of this bill of international rights. However, a committee was established to prepare a statement of the basic rights of all human beings. Unanimously, Eleanor Roosevelt was elected to be the chair of that committee. For three years, she and her colleagues worked to draft the international statement of rights. Eventually, their draft was presented to the General Assembly of the United Nations on 10 December 1948. This was four years after I had seen Eleanor Roosevelt pass by.

In the chair of the General Assembly of the United Nations on the day of the adoption of the *Universal Declaration of Human Rights* (UDHR), was an Australian.¹ He was another champion of universal human rights: Dr Herbert Vere Evatt. At that time, he was the President of the General Assembly of the United Nations. Later, from a distance, I also came to know him because he was a well-known Minister and later judge in Australia. And he was an alumnus of my public high school: Fort Street High in Sydney.

The UDHR was adopted with no country voting against its terms. A small number of states abstained; but none opposed. Eleanor Roosevelt declared that the UDHR was officially endorsed by the world community. It was, she said, to become the Magna Carta of people everywhere. The first article of the UDHR was uncompromising in its generality of application:

All human beings are born free and equal in dignity and rights.

This language embraced every individual in our world. It did not apply only to citizens. It did not apply only to 'white' people. It did not apply only to good people. Prisoners, murderers and even traitors were to be entitled to the freedoms that were declared. There were no exceptions to the principles of equality. Years later, the present Secretary-General of the United Nations (Ban Kin-moon) declared:²

No one gets to decide who is entitled to human rights and who is not.

In later years I was to have the privilege, as a judge in Australia, to uphold and apply the principles stated in the UDHR where they were, or became, part of Australia's law; and also in the many treaties that were ratified in the decades after 1948 in order to give force and detail to the principles of universal rights set out in that instrument. Later still, in work for the United Nations and other bodies, I had the honour to serve successive Secretaries-General³ and various agencies of the United Nations⁴ and other international bodies⁵ in expressing and upholding the human rights of people in many lands.

Yet, throughout these years, I knew that my own fundamental human rights, and dignity, were not fully respected. I knew this because just a decade after that brief encounter with Eleanor Roosevelt in 1944, I began to realise that I was homosexual. I was attracted sexually to people of my own gender. I knew all the horrible words used to express hatred and hostility towards gays. I was a 'poofter'. I was 'queer as a witch's ear'. I was a 'faggot'. I was 'abominable'. I was 'unnatural'. Some equally horrible words were hurled at people of different races. They were the 'wogs', 'reffos', 'chinks', 'slope-heads', 'dirty blacks', 'abos'. But in the back of my mind I remembered the words that Eleanor and her colleagues had written down: 'All human beings are born free and equal in dignity and rights'.

When I was 11 years of age, my teacher handed out a copy of the UDHR to every child in our class. He explained that we needed to study it and learn it. Only if we lived it out could we avoid catastrophes like World War II; the genocidal murder of millions of innocent people; the catastrophic atomic bombs that spelt danger for the survival of human beings and our blue planet. I took courage and comfort from this promise of human rights. I knew that the promise applied to me. It applied even to gays.

Cruelty and hostility

The cruelty and hostility directed at a young gay boy growing up in Australia in the 1950s and the 1960s were not confined to words and curses. There was plenty of action. For the whole of Australia's history since the British settlements were established in 1788, the law had applied and enforced laws bequeathed to Australia from Britain, the colonial power. These laws dated back to medieval times in England. In fact, they were based upon an understanding of statements in the Old Testament of the Bible.⁶

The applicable words, written thousands of years ago, long before modern scientific knowledge about the causes, features and inalterability of each person's sexual orientation and gender identity, imposed cruel and barbarous punishments whenever men were found to be gay or caught or suspected of sexual conduct with other men, including even where that conduct occurred in private and between consenting adults. Consent and discreet circumstances were no excuse.

Right up to the middle of the 19th century, the death penalty was often imposed on those convinced of these 'unnatural crimes'; 'abominable crimes'; 'crimes against the order of nature'. Tabloid newspapers screamed the lurid stories of gays who were trapped by handsome young policemen, acting as agents provocateurs. Careers were ruined. People were driven to suicide. An open declaration of one's sexuality or sexual identity was fatal for the person's work life, reputation and dignity. The family were disgraced. Life was just about over. All because a person felt attracted to another person of the same sex.

The gross excess and disproportionality of this response to what would ordinarily be viewed as a harmless variation in human nature was not appreciated. It is sad to admit that some of the strongest advocates of this barbarous approach to variations in sexuality were religious leaders. They demanded that the criminal laws should not be changed; that they should be enforced; and that

this hated minority should suffer so that others, watching, would avoid any temptation to go down the same 'dangerous' path.

In my teenage years, words of caution and even questioning began to be uttered. In Indiana, in the United States, another great American, Alfred Kinsey, conducted research into human sexuality. He was not satisfied with the denunciations. He wanted to discover the incidence and variations of the manifestations of human sexual variation.⁷ His research led on to a large flowering of psychological and sociological research that confirmed what he had found. People do not choose their sexual orientation or gender identity, he discovered. In many cases it is probably genetic. Certainly, it cannot be changed. People who are left alone by society can succeed in forming happy relationships. They are no more at risk of unwanted sexual activity from their orientation to others than is the case with heterosexual people. The realisation that this was so led to inquiries⁸ and eventually to law reform.

The laws in England were first changed in 1967.⁹ The English changes were copied in many other countries. In Australia, the first State of the Commonwealth to enact changes was South Australia in 1975. The last state to change its laws was Tasmania in 1997. Similar changes happened in many other Western countries where the old criminal laws had applied. However, in the majority of countries in the Commonwealth of Nations (the old British Empire) there was great resistance to the changes. Churches and divisive politicians rejected the lessons of science. They still do. In 43 of the 54 countries of the old British Empire (now the Commonwealth of Nations) the criminal laws against gays remain steadfastly in place.

Meantime, in my own life, I had been blessed at the ripe old age of 29 by meeting my partner, Johan van Vloten.¹⁰ In 2016, we celebrated 47 years together. In Australia, we could still not have our relationship recognised by the law of our country: either in the form of 'marriage' or even of 'civil union' or 'civil partnership'. However, we got by without the legal recognition and eventually

many of the discriminatory laws that had previously existed to remove the protection of the state from partners in our position were changed.

Nonetheless, in early 2016, the death of the spouse of an English tourist in Adelaide in South Australia showed the oddities that existed because of the refusal of the Australian legal system to recognise same-sex relationships. The man, legally married under English law, could not identify his dead spouse because their relationship was not recognised in Australia. He was treated as a 'stranger'. He could not claim the ashes to take them back to England. There was an outcry against this lingering cruelty in the law. There were promises that the Death Certificate would be amended to acknowledge the marriage in England and to give dignity to the couple. Ironically, in accordance with the wishes of the deceased spouse, his organs were made available to recipients in Australia in a gesture based on love for fellow human beings for strangers, signified in his lifetime.¹¹ But Australian law did not respect him and the man who had married him.

While many of the wrongs and indignities towards gays in Australian law have been modified, reversed and reformed in the past 20 years or so, the lack of change in the protection of gay people around the world has gradually attracted the attention of the United Nations and other bodies committed to the protection of universal human rights. This did not happen overnight. At first, the very idea that a person's sexuality and gender identity would be protected by human rights principles was regarded as absurd. But, starting in the 1960s, the tide began to turn.

Human rights to the rescue

The commencement of the conversation between lesbian, gay, bisexual, transgender, intersex and other queer people (LGBTI) and the notion of universal human rights began not in the corridors of the United Nations in New York or Geneva but in the European institutions for the protection of human rights.

In 1981, a citizen of the United Kingdom in Northern Ireland, Geoffrey Dudgeon, invoked the jurisdiction of the European Court of Human Rights. He did so because the law in that part of the United Kingdom still contained criminal legislation providing for the punishment of consensual adult sexual acts by same-sex persons. The European Court of Human Rights had been established to give effect to the European Convention on Human Rights. This was an instrument that was profoundly influenced by the UDHR. In fact, it was initiated in 1950, just two years after UDHR had been adopted by the United Nations. Many of its provisions were substantially the same, or even identical to the provisions in the UDHR. However, unlike the UDHR, the European Convention provided machinery to ensure that the countries that subscribed to the European Convention would comply with its requirements. It was this facility that Mr Dudgeon invoked. He did so in the face of earlier rulings, within the European human rights mechanisms, that had rejected the idea that human rights machinery could come to the rescue.

Notwithstanding the negative earlier decisions, Mr Dudgeon succeeded. The European Court of Human Rights in Strasbourg ruled that Northern Ireland's criminal legislation on same-sex acts violated the right to privacy contained in Article 8 of the Convention. The decision in the Dudgeon case¹² was a key to unlock the door of human rights principles. Mr Dudgeon's initiative was quickly followed by a similar claim brought by Senator David Norris of the Republic of Ireland against his country. Unsurprisingly, the European Court came to the same conclusion. It rejected the notion that Irish lawmakers, responding to what was said to be a 'more conservative' society, had elected to justly criminalise same-sex activity. It held that this was an invasion of privacy guaranteed by the European Convention.¹³ A similar ruling was reached soon afterwards in respect of Cyprus.¹⁴

Other non-European countries had in their constitutions provisions protecting individual privacy. Thus, in the United States

Supreme Court, reversing an earlier decision,¹⁵ a ruling was made in 2003 in *Lawrence v Texas*¹⁶ that adopted similar reasoning leading to the same conclusion. Anti-gay criminal laws were an impermissible invasion of adult private sexual conduct. A like conclusion was reached in 2005 in Fiji.¹⁷ In India, in 2009, by reference to basic rights provisions of the Indian Constitution, the same outcome was arrived at by the High Court of Delhi.¹⁸ However, it was to be reversed in 2013 by the Supreme Court of India.¹⁹

Most countries of the world today have human rights provisions in their constitutions. Australia does not because of the comparative age of our constitution (1900). However, cases in national courts displayed ups and downs. Some proved emphatically supportive of the equality, dignity and human rights of gay citizens, as in South Africa.²⁰

In other cases (such as Zimbabwe, Singapore and Malaysia) courts did not uphold the appeal to basic rights.²¹ They asserted that, if any changes were to come about, they would have to come through Parliament by legislative votes of the representatives of the people. Sadly, in a number of countries, the hostility towards gays stood as an impediment to such change and the attainment of dignity and equality for all.

It was in these circumstances that the focus of reformatory action shifted from the European Court of Human Rights and national courts to the United Nations itself. The first major breakthrough to provide protection for gay people in an important decision of the United Nations was the ruling by the UN Human Rights Committee that the state criminal laws of Tasmania, which alone maintained criminal punishments for adult private consensual gay acts, were in breach of the *International Covenant on Civil and Political Rights*. Specifically, a majority of the Committee held that those laws were in breach of the privacy rights expressed in that Covenant.²² One member also felt that they were in breach of the obligation to avoid discrimination on the grounds of sex and the principle of equality reflected in the Covenant. This was an

extremely bold decision of the Human Rights Committee at the time (1992). However, it quickly gave rise to a large number of follow-up applications, both before the UN Human Rights Committee²³ and involving UN human rights mandate holders; and invoking the support of the UN Human Rights Council, established later.

The leaders of the United Nations began to point out the criminalisation and imposition of discriminatory laws against LGBTI people were incompatible with the language and purpose of the UDHR and of the international treaties for the protection of human rights to which the UDHR gave rise.

The first UN High Commissioner for Human Rights who raised the issue of gay rights as human rights was Mary Robinson, past President of the Irish Republic. Her successors did likewise, including Louise Arbour, Navi Pillay and Prince Zeid Ra'ad Al-Hussein, the current High Commissioner. The Administrator of the United Nations Development Programme (Helen Clark, past Prime Minister of New Zealand) was also forthright in supporting gay rights as human rights. And no voice was clearer or stronger in this cause than that of Ban Ki-moon, the present Secretary-General of the United Nations.

Navi Pillay, in her last report for the Human Rights Council in 2014 declared:²⁴

In the past five years there has been growing awareness of the severity and extent of human rights violations based on sexual orientation. In July 2013, [the Office for the High Commissioner for Human Rights] launched 'Free & Equal', a global campaign designed to raise awareness of this form of discrimination and violence against lesbian, gay, bisexual and transgender persons. In the six months since it was launched millions of people have accessed and shared campaign videos, fact sheets and other materials.

Earlier, Secretary-General Ban Ki-moon, in July 2013, had launched an unprecedented a year-long initiative within the United Nations dedicated to ending violence and discrimination against lesbian, gay, bisexual and transgender people. Materials on the campaign became available from a dedicated website, on Facebook and Twitter, and in the activities of all the agencies of the United Nations. The Secretary-General said:²⁵

To those who are lesbian, gay, bisexual or transgender, let me say: you are not alone. Your struggle for an end to violence and discrimination is a shared struggle. Any attack on you is an attack on the universal values the United Nations and I have sworn to defend and uphold. Today, I stand with you, and I call upon all countries and people to stand with you too.

The struggle for the recognition of gay rights as part of universal human rights is still ongoing. Many countries deny the link. Some countries remain terribly hostile. Reports in the international media tell of the violence and hatred exhibited towards LGBTI people in several lands: in Africa, the Caribbean, Arab countries and in some parts of Asia. Occasionally, because of international news media bringing the reports of reform and change in other societies, the laws against gays remain in place but are not enforced as they were in earlier times. However, this is not an acceptable compromise. While the law exhibits hostility towards gays, young gay people and their families and friends are forced to hide their identity as I did for many years: at school, at university, in youth, and even as a mature adult. Don't ask, don't tell is itself an oppression of gay people. Increasingly, they look to the United Nations to secure reform and change. Happily, many agencies of the United Nations and reports that they commission and work that they perform bring the message to the world loud and clear.²⁶

What is it about the simple language of the UDHR that forces hostile to human dignity and equality in Australia and elsewhere do

not understand? 'All human beings are born free and equal in dignity and rights' is a promise clear enough. Nearly equal or almost equal, or irrelevantly unequal does not reach the United Nations' standards. Fortunately, young people in many countries increasingly see that this is so. A recent survey was conducted in Hong Kong about the desirability of enacting a law for the Asian region that would forbid and redress discrimination against LGBTI people. A decade ago, there was a strong sentiment against *such* a law. Now there is a slight majority in *favour*. But the most hopeful sign is that the younger citizens in Hong Kong supported anti-discrimination laws to the extent of 90% of that cohort. It is just not an issue of law. Unredressed hatred against people for something they do not choose and cannot change is increasingly seen as irrational. It cannot properly be supported by law. The law must be equal and just to all people. And if this is true in the Hong Kong Special Administrative Region of China, it is true everywhere.²⁷

Eleanor Roosevelt's legacy

So far as I know, Eleanor Roosevelt did not speak out specifically in favour of gay rights. Virtually nobody did back in the 1940s and 50s when she was pursuing her dream through the United Nations. After her death, many biographers wrote of her remarkable and extraordinary life. Some of them dug deep and found certain romantic entanglements of her husband with other women. Some have even suggested that Eleanor (who had many close friends who were lesbian couples) had romantic relationships with women. Anyone who is interested can glance at the Wikipedia page that tells the extraordinary and heroic life of this great woman. Whether she was a member of the LGBTI minority or not is unknown to me. It really does not matter. She was brave and strong in upholding the principles of the UDHR. She left a mighty legacy. It continues to make its mark on the world. It continues to spread the message that all human beings are born free and equal in dignity and rights. And

that includes, though she did not say it (and may not have considered it), LGBTI people worldwide.

My own life has been a witness to the changes that have occurred in many places (but not all) concerning gay people. The world is still dangerous, hostile and unfair to many who are gay. But things are getting better. The biggest issue that is presented is not whether Australia will recognise same-sex marriage. As my life has shown, one can get by satisfactorily without a certificate of marriage; if there is love, fidelity, support, laughter and tears to share, people can survive without a marriage certificate. It should not be denied to those adults who want it. One day it will be available.

The biggest issue in our world is hostility that exists among some religious people who have forgotten the main lesson of their religion: to love God and to love one another. The recent reports of the murder of young gay people by Daesch (ISIS) is an indication that the struggle for equality and human dignity is by no means over. This is why gay rights are human rights. Silence about them is a formula for death and oppression. Australia must be engaged with this issue as a global struggle. We can take inspiration from the lady who drove by my school in 1943.

When Eleanor Roosevelt died in November 1962, the United States President, John F. Kennedy, was joined by Presidents Truman and Eisenhower and with a future President, L.B. Johnson, at her funeral service. Her friend and admirer, Adlai Stevenson — a would-be President — said of her:

What other single human being has touched and transformed the existence of so many? She would rather light a candle than curse the darkness, and her glow has warmed the world.²⁸

All of us should be inspired by her story. She had faith that we of the human species would survive, protect our future, love one another and write great principles into global law. We must all light the candle. We must all shine the light.

Author note

There is further information on the international moves for the protection of the human rights of LGBTI people worldwide through the United Nations and elsewhere in MD Kirby, *Sexual orientation & gender identity — a new province of law for India* (Tagore Law Lectures), Universal, New Delhi, 2015, Lecture VI, ‘International responses’.

Endnotes

- 1 *Universal Declaration of Human Rights*, GA Res 217A (iii), UN GA, Third Session, 183rd Plenary meeting: UN doc A/810 (10 December 1948).
- 2 UN Secretary-General, remarks to special event on leadership in the fight against homophobia, 11 December 2012, available at <http://www.un.org/sg/statements/index.asp?mid=6504> in Tagore Lectures, 191.
- 3 Including as UN Special Representative for Human Rights in Cambodia, 1993-6 and as member of the Secretary-General’s High Level Panel on Access to Healthcare 2015-6.
- 4 The ILO, WHO, UNESCO, UNODC, UNAIDS, UNHRC and others.
- 5 Including in the Commonwealth of Nations, the World Bank, the Global Fund against AIDS, Tuberculosis and Malaria and the OECD. This issue was addressed by the report of the Eminent Persons Group of the Commonwealth, *Commonwealth of the people – time for urgent reform* (London, October 2011) 98-102.
- 6 Genesis 13,11–12, 19. See Tagore Lectures, 79–80. Leviticus 18.26–27; 20.23.
- 7 A Kinsey et al., *Sexual behaviour in the human male* (Philadelphia, Saunders, 1948); Ibid *Sexual behaviour in the human female* (Philadelphia, Saunders, 1953). See Tagore Lectures, 60–61.
- 8 United Kingdom, report of the Committee on Homosexuality and Prostitution (Sir John Wolfenden, Chairman) Cmnd. 247, 1957.
- 9 *Sexual Offences Act 1967* (UK).
- 10 Told in MD Kirby, *A private life*, Allen and Uwin, 2011, 65.
- 11 M Oprey, ‘How Britain’s same-sex marriage laws awoke South Australia to its own injustices’, *The Guardian* (Australia edition), available online.
- 12 (1982) 4 EHRR 149.
- 13 (1988) 13 EHRR 186.
- 14 *Modinos v Cyprus* (1994) 16 EHRR 485.
- 15 *Bowers v Hardwick* 478 US 186 (1986).
- 16 *Lawrence v Texas* 539 US 558 (2003).
- 17 *McCoskar v State* (2005) FJHC 500.
- 18 *Naz Foundation v Union of India* [2009] 4 LRC 828; (2009) DLT 277.

- 19 *Suresh Kumar Koushal v Naz Foundation* (2015) SCALE 55; (2014) 1 SCC 1.
- 20 *National Coalition for Lesbian and Gay Equality v Minister of Justice* 1998 (6) BCLR 726 (W). See also E Cameron, 'Sexual Orientation and the Constitution: A Test Case for Human Rights' (1993) 110 SALJ 450 at 464.
- 21 *Banana v State* [2000] 4 LRC 621.
- 22 *Toonen v Australia* (1994) 1 Int Hum Rts Reports 97 (No.3).
- 23 *Young v Australia* Communication number 941/2000; UN doc CCPR/C/78/D/941/2000 (2003).
- 24 High Commissioner for Human Rights, Navi Pillay, Opening Statement to the United Nations Human Rights Council, Twenty Fifth Session, Geneva, 6 March 2014, 2-3. Available online.
- 25 UN Secretary-General, video message to the Human Rights Council Meeting on Violence and Discrimination Based on Sexual Orientation and Gender Identity, 7 March 2012, available at <http://www.ohchr.org/EN/issues/discrimination/pages/lgtspeechandstatements.aspx>
- 26 See, for example, United Nations Development Programme, Global Commission on HIV and the Law, *Risks, Rights & Health*, New York, 2012, 3.3 [MSM], pp. 43ff; 3.4 [TGP], 51–54.
- 27 Hong Kong, *Study on legislation against discrimination on the grounds of sexual orientation, gender identity and intersex status*, available at <http://www.cuhk.edu.hk/research/sogistudy/indexeng.html>.
- 28 DW Dunlap, 'Fifty years after her death, Eleanor Roosevelt's admirers will celebrate her life', *New York Times*, 28 November 2012, available online.