

UNIVERSITY OF VICTORIA

BRITISH COLUMBIA, CANADA, JANUARY 1987

LEON LADNER LECTURE

HUMAN RIGHTS AND TECHNOLOGY: A NEW DILEMMA



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The Hon. Justice Michael Kirby, CMG
President of the Court of Appeal, Supreme Court
New South Wales. Australia

["As this clock] rings out the passing of each hour,
I hope it will remind the young students that not
only does time go fast, but that the hours...
are very precious and the use of those hours will
seriously affect the success, the happiness, and
the future of their lives."
Leon Ladner

LEON LADNER - A NOTABLE LIFE

Time, as Leon Ladner put it, is precious and fleeting.
Yet few people could have crammed into a lifetime so many
public, private and personal achievements as did Leon Ladner.

in whose honour this lecture series is named. Born in November 1884, he died in April 1978 in his 94th year. Many of his achievements will still be vivid in the memory of the people of this part of Canada. Reading of them in Australia, on the brink of our own Bicentennary, brought home to me the debt we owe to the pioneers and founders of our two countries.

Ladner's family derived from Penzance in Cornwall, England. His father and uncle travelled in a covered wagon over the California trail. How romantic and idyllic it all looks on the silver screen. But how arduous were the tribulations of those early settlers.

The Ladners settled in the place now named after them. Young Leon Ladner attended public schools. He took his primary degrees at the University of Toronto. He was President of the Vancouver student society in 1909. He had a lifetime's interest in University education, culminating with many years of service on the Senate and Board of Governors of the University of British Columbia. He was a marvellous benefactor of education: realising, doubtless, the debt he owed for his life's achievements, to the discipline of education.

Unable to secure enlistment for the Great War, he was spared a fearsome death in the mud of the Somme. He stood aside for a veteran's candidate in the election of 1917. But in 1921 he was elected to the Canadian House of Commons in the Liberal-Conservative interest. He served on the back bench until 1930. He took a leading part in many forward looking ventures of legislation. His life had prepared him for a compassionate concern for the disadvantaged, particularly the aged and neglected.

In the turmoil of the economic events of 1930 he was defeated. Thereafter he devoted himself to the practice of law. He built the notable law firm, of high repute, that bears his name. But he also continued an active interest in public affairs. I have mentioned his role in the university and his benefactions. He was also busy in numerous commercial ventures. He sat in 1957 as a member of the Royal Commission on Energy. He took a leading role in the resolution of the international law issues raised by the Columbia River Development. He received in his lifetime many honours, including the LL.D degree (honoris causa) of the University of British Columbia. His wife, Jeanne, died before him. He was survived by three daughters and a son. Such is the bare outline of a notable life.

THE CHARTER AND TECHNOLOGY

It is a life which spans the turmoil of a remarkable century. It began soon after Queen Victoria was named Empress of India. The British Empire, which linked Australia and Canada to the Imperial Crown, was at its apogee. Optimism and confidence in the capacity of British people to do virtually anything was unbounded. The English law was one of the chief benefits of the Imperial covenant that linked the peoples of the Empire. Administered by independent judges, scrutinised, ultimately, by the Privy Council in London, protected, in the end, by the British fleet, these were days of public assurance and self confidence. True it is things were not so rosy if you happened not to be white or if you were poor. If you were a woman, you had no vote - something Leon Ladner was later to campaign to reform.

The changes that were to come about in Leon Ladner's lifetime were many. So far as the law is concerned they included a great number of developments, notably the growth of the public sector and the consequent rise of administrative law; the development of new ways of doing business by mass production and the need to adapt legal remedies and procedures as a consequence. And the changing social attitude to morality and justice which have wrought a revolution that would have been regarded as unthinkable in the puritanical, decorous and somewhat oppressive days of Leon Ladner's childhood.

Yet two developments stand out, affecting society and the law, which would most puzzle a lawyer of 1884 coming back to Canada or Australia today, a century later. We have only to mention them to reflect upon the unfathomable and unpredictable changes in our societies and their laws in a hundred years from now. The court procedures have not changed all that much. The laws of evidence would be quite familiar. Large areas of land, probate and property laws would be similar. But it is the areas of difference which I wish to address. I intend to do so in their relationship to each other. I refer to the developments of human rights law and the remarkable advances of science and technology which present the law with so many puzzling dilemmas.

At the time of Leon Ladner's birth, and indeed until quite recently, it was a truism of British lawyers that a written statement of fundamental rights was unnecessary and possibly, harmful. You will remember Madison's famous answer to those who sought to include a statement of rights in the constitution of the United States:

"Who will be so bold as to declare the rights of the people?"

Yet declare them they did. The Bicentenary of the first ten amendments to the United States constitution approaches in 1990. In Canada, your courts are busily engaged in interpreting the new Charter of Rights and Freedoms. In Australia, following high controversy and opposition from a remarkable collection of minority interests, the Government, this year, announced its abandonment of proposals for a legislative Bill of Rights.¹ A Commission established to review the Australian Constitution in time for the Bicentenary in 1988, is examining various possibilities for a general or limited collection of constitutional guarantees.² In the light of the recent political developments in Australia, the prospects of change in this area appear gloomy.

It is for that reason that lawyers in Australia watch with special fascination the reported cases under the Canadian Charter. A recent review suggests that the Canadian Supreme Court, in its interpretation of the Charter is "the most activist and libertarian of all Canadian courts".³ British Columbian statutes are reported to have been most affected by the Charter where 37% of the challenges have been successful.⁴ Calls are frequently made to the judges that this is a time for "bold spirits" and "not timorous souls".⁵ A glance at the Canadian law reports crossing my desk indicates the variety of issues coming before the courts under the Charter.

How astonished a judge of 1884 would have been to have to consider the assertion, by a petitioner found not guilty by reason of insanity, that such a conviction was inconsistent

with the equal treatment of all citizens before the law. Yet this was lately the subject of a ruling by the British Columbia Court of Appeal in a challenge to s 542(2) of the Criminal Code, by reference to s 15 of the Charter.⁶ Yet if such a case would cause astonishment, other cases would have caused a sense of outrage and scandal. For example, the suggestion that s 63.01(5) of the Liquor Control Act of New Brunswick, regulating live nude entertainment on hotel premises, contravened civic rights to freedom of expression. This was the question also determined in May 1986 by a decision of the New Brunswick Court of Appeal on the complaint of the Rio Hotel. It had led that Court (with the notable dissent of Angers JA) to uphold the validity of the Act on the basis that the guarantee of "freedom of expression" in the Charter:

"does not include the public exposure of female public areas for the primary purpose of selling larger quantities of liquor".⁷

The majority judgment suggested that the framers of the Charter did not have any such rights in mind. Even to suggest that any such a right existed would have been an outrage at the time of Leon Ladner's birth. Such is the distance we have come. Some would say that, in the words of the song (apt in this context) that we have "gone about as far as we can go". Yet there were, no doubt, those in the 1890's who could not conceive of greater human progress and liberty than they then enjoyed. So who is to say where these developments will lead in a century from now.

IN THE STEPS OF SCHRÖDINGER

For all these changes in social and legal phenomena, future historians will write about our time for quite another

purpose. If mankind survives, this century will be celebrated, principally, for the remarkable scientific and technological developments which have occurred in it. These developments profoundly affect the individual, the social environment, the relationships of nation states and the planet. They reach out into space. The dreams of scientists of yesterday become the fascinating achievements of today and the prospects of tomorrow. The dynamic forces of science and technology released during the lifetime of Leon Ladner necessarily affect the definition and application of human rights. It is about this effect that I propose to devote the balance of this lecture.

An attempt will be made to illustrate (for no more is possible) the way in which some of the main scientific and technological developments of our time affect the traditional perceptions of human rights, expressed, as they often are, in language derived from the 17th and 18th century doctrines of the Rights of Man. Such prescriptions were based, quite frequently, on religious beliefs or writings on natural law. They still affect modern statements of rights - such as the Charter and the recently failed Australian Bill of Rights. It is timely to look afresh at the definition of human rights and at the endeavour to catalogue them. It is not necessary to debate whether, as is claimed, the main scientific and technological developments themselves have a common origin in the remarkable insights into quantum physics derived principally from the work of Erwin Schrödinger in Germany in the mid 1920s.⁸

Lawyers, by education and training are typically uninterested in physics and mathematics. The definition and

enforcement of human rights remains overwhelmingly the province of lawyers - most of them ignorant of the detail of modern technological developments and uninterested in the scientific theories that support them. Uncomfortably for the lawyer, the nature of humanity, the organisation of society and the very persistence of civilisation are now profoundly and increasingly affected by the doings of the scientist and the mathematician. To persist with "two worlds" in which lawyers cling to the familiar civil, political and economic rights substantially defined before the scientific developments of recent decades is to run the risk of failing to address attention to urgent problems as to human rights, simply because these are so complex, controversial or unfamiliar. Alternatively, the risk is run that old statements of human rights, framed in earlier times, will prove irrelevant, incompetent or unacceptable when measured against the new and urgent problems which science and technology present.

This review is timely for a number of reasons. In Canada, the courts and the legal profession are coming to terms with the language of the Charter. You are learning to live with a binding statement of fundamental rights. In Australia, the debate about human rights has taken on a new focus despite the temporary setback to the proposed Bill of Rights.

Some of the objections voiced to the terms of the proposed Australian Bill of Rights arose from scientific and technological developments, unknown or of little significance when the language, from which the Bill was derived, was first written. Developments in the field of biology present the clearest illustrations of the difficulty of applying human

rights provisions, designed to protect life, to circumstances where human life can now be developed in vitro and made the subject of investigation, experimentation, contract, use and destruction. The noted Australian historian, Professor Geoffrey Blainey, criticised the composition of the Australian Constitutional Commission and its committees precisely because "no scientist or technologist of distinction has been asked to share in the reshaping of a Constitution which will be quickly outdated if it does not envisage how new inventions could alter daily life and national deliberations in the next half century".⁹ By way of contrast, in the post Franco democratic constitution of Spain, care was taken to include in the definition of the human rights, to be respected and enforced in the new democracy, at least some entrenched rights (notably on data protection and data security) which, although apt for the last quarter of the 20th century, find no place in the human rights debates which accompanied the French and American revolutions two centuries earlier.

It would be my hope, that in time, in Australia, our belated embrace of the notion of a Charter of Rights will not rest content with adding to our Constitution, itself largely devised in the 1880s, the catalogue of rights which was agitating the philosophers in the 1780s. In a country of markedly declining church attendances¹⁰ and in which agnosticism is rapidly increasing¹¹, a high focus upon freedom of religion, although not to be disparaged, may be of less immediate relevance to human rights concerns today than provisions about freedoms from undue invasion of data privacy. In countries in which the media of mass communications, printed

and electronic, are in the hands of a diminishing number of interests, guaranteed rights of access to information and to use of the media of mass communications may be of more significance than generalised statements about free speech and the free press. These remarks are not to disparage the importance of a Bill of Rights initiative or the enduring relevance of the orthodox list of civil and political rights. They are to make the point that the world has moved on. A new series of problems have presented themselves. Most of them are traceable to science and technology. Unless new rights are fashioned, ungainly attempts will be made to fit them into language framed for quite different purposes.

Until quite recently, the general attitude of informed people in countries such as Canada and Australia was that the benefits accruing to mankind from scientific discoveries, and their applications through technology, are essential attributes of human progress, and overwhelmingly beneficial. Reflections upon the terrible destruction of the two World Wars, and other more limited conflicts since 1945, together with concern about the capacity of modern weapons of nuclear, chemical and bacteriological warfare, to cause suffering and even annihilation of mankind, have more recently produced, a more pessimistic mood. Increasingly it is recognised that not all science is good for humanity. Even scientific developments generally thought beneficial (such as the reduction of infant mortality and the "green revolution" in agricultural production) may product an explosive increase in population which puts unacceptable pressure upon food supplies, living space and economic resources.¹² The result, in at least some of

the countries affected, is human suffering. In other countries, the result is the imposition of a regime of strict birth control which would challenge notions of individual rights such as would be regarded as fundamental in Canada and Australia. The factories which bring industry may be responsible for pollution of the environment. The computer which brings the new technology may abolish much routine labour and undermine the capacity of an economy to fulfil a human rights "guarantee" of the right to work.¹³

To record these growing reservations about science and technology is not to cast doubt upon the positive contributions which they may make to human rights, defined as rights of fundamental or paramount importance essential to a decent and fulfilling human life.¹⁴ Biotechnology relieves pain and suffering. For example it may help otherwise childless couples to the fulfilment of family life, itself the subject of many human rights guarantees.¹⁵ Computers and the other developments of informatics promote the flow of information. Satellites enhance the right of free speech so that it may now extend far beyond the limited capacity envisaged in 1789. They permit leaders and individuals to speak instantaneously to hundreds of millions of people. These developments also have significance for the modernisation of backward economies. Even nuclear fission may, under appropriate conditions, present advantages to mankind faced otherwise with the inevitable ultimate depletion of energy based on fossil fuels. It is not my present purpose to enter the debate about the right to development and the duty of developed countries to contribute to the real expansion of human rights in the developing world by the transfer of hard

technology.¹⁶ Talk of human rights without effective guarantees of life, liberty, food, shelter and security may appear empty in countries where those rights cannot be guaranteed and where human rights are allegedly debased by the deprivation of access to technology which would be regarded as essential in our countries.

It is not necessary to be a Luddite or to be opposed to scientific and technological developments, simply because one is alert to the risks which they pose for the fundamental rights of humanity. What is essential is that people who in 1986 profess an interest in human rights, should lift their sights from the catalogue of concerns of the 17th century philosophers - important although they mostly still are - and interest themselves in the new challenges which science and technology present today. Happily, in the international development of human rights, this is beginning to happen, although slowly. Yet so far there is little evidence of more than a selective interest in the subject in Canada and Australia.

INTERNATIONAL DEVELOPMENTS

The development of the Canadian Charter and the moves in Australia to the same direction should be seen in their proper international context.

The intellectual and institutional developments on human rights in the second half of the 20th century have been described as a "remarkable revitalisation and extension of the great 17th and 18th century doctrine of human rights".¹⁷ There is no doubt that, in part, the motive force behind this phenomenon has been the rising power and influence, in the

international community, of the United States of America. The revolutionary origins of that country, the Declaration of Independence and the Bill of Rights adopted in 1790 profoundly affected, and continue to affect, the nature of American society. They influenced President Wilson's 14 points for a peace settlement in 1919. They explain President F.D. Roosevelt's wartime call to the international community to uphold the Four Freedoms - freedom of speech and expression, freedom of worship, freedom from want and freedom from fear. These goals, adapted as Allied war aims, in turn influenced the foundation of the United Nations Organisation. From the start, one of the objectives of that organisation has been "to promote respect for human rights and fundamental freedoms".¹⁸ Although there is much justifiable cynicism and disillusionment with the world body, now in its fifth decade, there can be little doubt that it has played a significant part in the development of an international jurisprudence of human rights. There is a "paradox" pointed up by Egon Schwelb. One of the purposes of the United Nations, an organisation of governments, is the promotion and encouragement of respect for human rights. Therefore, the governments of the States Members of the United Nations by the Universal Declaration of Human Rights and other human rights instruments have engaged "in the task of protecting their own citizens against themselves".¹⁹ What is now necessary is a recognition of an additional paradox. Governments and other entities need protection themselves, lest they and the citizens and residents in their care, lose rights, hitherto regarded as fundamental to humanity (including even

life itself) by reason of the potentialities of modern technology.²⁰

Australia and Canada, in the work respectively of Dr. H.V. Evatt and Professor John Humphrey, took a leading part in the initiation of the early efforts of the United Nations Organisation to define and prescribe human rights.²¹ The result was, in turn, the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (1966).²² There have been many other relevant regional and special conventions.

One of the consequences of the international development of the notion of "human rights" through the United Nations, with its rapidly expanding membership coming from all parts of the world has been a noticeable shift in the debate. That shift has reflected the composition of the United Nations Organisation itself. Whereas immediately after its establishment, reflecting the then overwhelming influence of the countries of Western Europe and North America, the concerns of the international human rights debate were still profoundly influenced by such human rights statements as the French Declaration of the Rights of Man and of the Citizen of 1789 and the American Bill of Rights of 1790, by a decade later, the emphasis had changed significantly. The International Covenant on Economic, Social and Cultural Rights in its preamble places emphasis upon the fact that "the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights as well as his civil and political

rights".²³ Now, it is the developed world in which there is a rising concern about the implications for fundamental rights in respect of the new technology. This is because it is the countries of the advanced economies which enjoy that technology whose people are therefore exposed to their risks and dangers (as well as to their benefits). Generally speaking, it is difficult to enlist great interest in the dangers of information technology to personal privacy in countries which do not even enjoy a rudimentary telephone system. Likewise, the problems of in vitro fertilisation may seem exotic and remote as dangers to human rights in countries where the practical problems are precisely the opposite: too much fertility and over population. A danger of the modern universalist approach to human rights is the inevitable and proper emphasis which the international debates now place upon subjects of the most acute concern to the poor countries. These remain the social and economic rights and the affront to dignity and humanity perceived in apartheid and like systems of institutionalised racial or cultural discrimination. In such countries, concerns about data protection and organ transplants appear remote, middle class anxieties. Typically, they can find relatively little attention in international discussions of human rights.

However, the process of interdisciplinary and international attention to the impact of new technology in the United Nations has begun. For example, some aspects of the dangers presented by nuclear fission were examined by the United Nations Scientific Committee on the Effects of Atomic Radiation. The recent Chernobyl disaster in the Soviet Union has spurred the International Atomic Energy Agency to promote

an international treaty to deal with early warning of nuclear mishaps and to provide for transnational liability claims. The problem of population explosion was sent to the United Nations Economic and Social Council and its Population Committee. The International Conference on Human Rights which met in Tehran, Iran, in 1968 declared, in the Proclamation of Tehran:

"18 While scientific discoveries and technological advances have opened up prospects for economic social and cultural progress, such developments may nevertheless endanger the rights and freedoms of individuals and will require continuing attention."²⁴

This resolution was later adopted by the United Nations General Assembly.²⁵ The Assembly invited the United Nations Secretary-General to undertake, with the assistance of the Advisory Committee on the Application of Science and Technology to Development and in cooperation with the executive heads of the competent specialised agencies, a study of the problems arising in connection with human rights from developments in science and technology. The General Assembly instruction specified in particular the difficulties that were perceived as arising from the following stand points:

- (a) respect for the privacy of individuals and the integrity and sovereignty of nations in the light of advances in recording and other techniques;
- (b) protection of the human personality and its physical and intellectual integrity in the light of advances in biology, medicine and biochemistry;

- (c) use of electronics which might affect the rights of persons and the limits which should be placed on such uses in a democratic society, and
- (d) more generally the balance which should be established between scientific and technological progress and the intellectual, spiritual, cultural and moral advancement of humanity.²⁶

A preliminary report prepared as a result of this resolution called attention to the additional problems of the deterioration of the human environment, the population explosion, the increasingly destructive power of nuclear weapons and the hazards arising from atomic radiation. As a result of these initiatives a number of agencies of the United Nations Organisation were brought into the new debate, including the Economic and Social Council, the World Health Organisation (relevant to the health aspects of human rights and scientific and technological developments) and the Commission on Human Rights. These bodies, the United Nations Educational, Scientific and Cultural Organisation (UNESCO) and non-universal groupings such as the Nordic Council, the Council of Europe and the Organisation for Economic Co-operation and Development (OECD) have, since the 1970s, addressed themselves to various aspects of the new technology as it affects human rights.²⁷

What has been lacking at the international level, as in domestic jurisdiction, has been a perception of the overall relevance of scientific developments for the concept of human rights. In part, this is because of the continuing infatuation with the priorities to which importance has more traditionally

been attached. In part, it is because the human rights debates have, until now, been largely the province of lawyers for whom scientific and technological developments are often an uncongenial mystery. In part, it has been because of the specialised institution, national and international, in which aspects of the new technology and their impact on humanity and society are considered. In part, it is because of the high controversy of some of the questions raised and the moral dilemmas that are posed, many of which seem intractable. For these and other reasons there has been little endeavour to reflect the major scientific and technological developments of the last 50 years, and their impact on human rights, in a conceptual way. Instead old human rights instruments, developed for earlier times, are scrutinised for their possible utility in solving the controversies presented by the new technology. Piecemeal legislation is enacted. No Luther of jurisprudence has emerged to pull together the implications of nuclear physics, informatics and biotechnology for 21st Century man and woman.

NUCLEAR PHYSICS

Concerns about the impact on human rights of nuclear fission derive from the unprecedented destructive force of weapons of mass destruction which have been developed as the technological product of this remarkable scientific development. Without human life, talk of civil and political rights and even of social and economic rights is pointless. Therefore, concern about the manipulation of nuclear fission in the form of weapons quite naturally attracts the attention of those, anxious about the future of human rights. The obvious

dangers to human life include the deliberate detonation of nuclear arsenals by governments or terrorists, accident or sabotage at nuclear power stations and the long term pollution of the environment by radioactive materials which escape from weapons, power stations or their waste products.²⁸ But as Sieghart has pointed out, there are other dangers less obvious. They include the risk that the very safeguards which may be introduced for the purpose of controlling the dangerous proliferation of nuclear material, may lead to "an insidious, gradual and deleterious change in the nature of free societies".²⁹

The sixth report of the British Royal Commission on Environmental Pollution (chaired by Sir Brian Flowers, F.R.S.) was clearly concerned about the risks, both direct and indirect, which would attend a significant proliferation of plutonium fuelled power stations.

"What is most to be feared is an insidious growth in surveillance in response to a growing threat as the amount of plutonium in existence, and familiarity with its properties, increases; and the possibility that a single serious incident in the future might bring a realisation of the need to increase security measures and surveillance to a degree that would be regarded as wholly unacceptable, but which could not then be avoided because of the extent of our dependence on plutonium for energy supplies."³⁰

To some, the supply of cheap electricity from internationally reliable fuel suppliers is a matter of paramount social need. Others have expressed their fears by the aphorism that they

would "rather read the Bill of Rights by candle light than not to have it to read at all".³¹ The need for protection of the rights of the many from the risks of the deranged terrorist or determined blackmailer having access to nuclear material has already produced international reactions with consequences for human rights. In October, 1979, the International Atomic Energy Agency announced that after two years of negotiations, some 58 nations had agreed on the text of the first International Convention on the Physical Protection of Nuclear Material. Article 5 establishes a comprehensive international network for "cooperation and assistance to the maximum feasible extent" in "coordinating recovery and response operations in the event of any unauthorised removal, use or alteration of nuclear material and in the event of credible threat thereof". The implications of this Convention, and a future and more stringent condition that may be imposed as nuclear installations proliferate in the world, for an open society and for civil liberties, is already the subject of much anxious writing.³² The writers are not necessarily supporters of nuclear disarmament or opponents of uranium mining. Many are simply concerned lawyers who consider that the delicate balance of civil liberties will be profoundly affected, or even mortally undermined, by the defence measures which will be necessary for society to protect its survival against the enormous risks involved in nuclear material proliferation. The concern is with the "creep effect". In illustration, reference is made to the fact that between 1976 and 1979, a period in which there were no additions to the United Kingdom civil nuclear power program, the numerical strength of the British Atomic Energy Authority's special

constabulary increased by 50% from 400 to 600. It is pointed out that this is the only police force in the United Kingdom (save for certain units at airports lately so authorised) to carry automatic weapons and the Chief Constable of which is not answerable to any elected assembly.³³

A recent decision of the Canadian Supreme Court illustrates the way in which, in default of human rights measures specific to scientific and technological issues, attempts will be made to call in aid other, more general, statements of fundamental rights in an attempt to promote a desired policy relevant to the new technology. In Operation Dismantle Inc & Ors v The Queen & Ors³⁴, the appellants sought to challenge the decision of the Canadian Federal Cabinet to permit the testing by the United States of America in Canadian territory of cruise missiles. The appellants invoked s 7 of the Charter which states:

"Everyone has the right to life, liberty, security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

The appellants sought a declaration that the decision of the Canadian Cabinet to permit testing was unconstitutional as being in breach of this provision. They also sought an injunction to prohibit the testing. A judge of the Federal Court had refused the Government's motion to strike out the statement of claim as disclosing no reasonable cause of action. The Federal Court of Appeal unanimously allowed the appeal, struck out the statement of claim and dismissed the action. The Supreme Court of Canada unanimously upheld this decision. However, the reasoning of Dickson, J (as he then was) (with

whom Estey, McIntyre, Chouinard and Lamer JJ concurred) differed slightly from the reasoning of Bertha Wilson J. All Judges rejected the Government's contention that Cabinet discussions were not reviewable by the courts under the Charter. Wilson J specifically affirmed that the decision was not insulated from review because it was a "political question". The Supreme Court of Canada had a constitutional obligation under s 24 of the Charter to decide whether any particular act of the Executive Government violated or threatened to violate any right of the citizen. Dickson J held that s 7 of the Charter could only give rise to a duty on the part of the Executive to refrain from permitting the testing if it could be said that a deprivation of life or security of the person could be proved to result from the impugned Government act. He pointed out that the alleged violation of the Charter turned on an allegation of an increase in the risk of nuclear war resulting from the Cabinet's decision to permit the testing. This allegation depended upon assumptions and hypotheses about how independent and sovereign nations operating in an international arena of uncertainty and change would react to the Canadian Government's decision to permit the testing of the cruise missiles. But since the foreign policy decisions of independent nations were not capable of prediction on the basis of evidence to any degree of certainty approaching probability, the nature of the reaction to the Federal Cabinet's decision to permit the testing of the United States missiles could only be a matter of "speculation". Accordingly, the appellants could never prove the causal link between the decision to permit the testing and the increase in the threat

of nuclear conflict. For this reason no breach of s 7 of the Charter was provable and the statement of claim should be struck out.

Wilson J was prepared to go further than the majority. She was prepared to contemplate circumstances in which a government initiative in respect of nuclear weapons might contravene the Charter:

"A declaration of war ... almost certainly increases the risk to most citizens of death or injury. Acceptance of the appellant's submissions, it seems to me, would mean that any such declaration would also have to be regarded as a violation of s 7. I cannot think that that could be a proper interpretation of the Charter.

This is not to say that every governmental action that is purportedly taken in furtherance of national defence would be beyond the reach of s 7. If, for example, testing the cruise missiles posed a direct threat to some specific segment of the populace - as, for example, if it were being tested with live warheads - I think that might well raise different considerations. A court might find that that constituted a violation of s 7 and it might then be up to the government to try to establish that testing the cruise with live warheads was justified under s 1 of the Charter. Section 1, in my opinion, is the uniquely Canadian mechanism through which the courts are to determine the justiciability of particular issues that come before it. It embodies, through its reference to a free and democratic society, the essential features of our constitution including the separation of powers,

responsible government and the Rule of Law. It obviates the need for a "political questions" doctrine and permits the court to deal with what might be termed "prudential" considerations in a principled way without renouncing its constitutional and mandated responsibility for judicial review."³⁵

Australia is far from the Canadian position. In Canada, the Charter is part of the Constitution. In Australia the proposed Bill of Rights has now lapsed. Even as presented it was not a part of the constitution and was not to be judicially enforceable. Many lawyers in Australia doubtless breathe a sigh of relief that Australian judges face no immediate prospect of deciding cases like the Operation Dismantle case in Canada. Many would believe that such issues are better resolved in the elected rather than the unelected organs of government. On the other hand, the notion of a modern human rights instrument with nothing specific to say about the greatest potential danger to human rights, in nuclear destruction, will be condemned by some observers as concentrating on lesser priorities, whilst ignoring the central threat to human existence, without which human rights can have no meaning. On the other hand, this omission may be nothing more than an acknowledgment of the limitations of the law and of currently available international and domestic institutions for solving dilemmas which, however important for human rights, have other, wider geopolitical dimensions.

INFORMATICS

Recent developments of information technology (computers, communications technology, satellites and the electronic media) have numerous implications for human rights. The guarantee in

Article 18 of the Universal Declaration that everyone has a right to freedom of thought, conscience and religion and the guarantee in Article 19 that everyone has the right to freedom of opinion [including] freedom to hold opinions without interference, may, in some circumstances, be diminished by data banks and surveillance devices. The promise in Article 12 that no one shall be subject to arbitrary interference with privacy may be diminished by computer technology, surveillance devices and the new media.³⁶ The promise in Article 23 (1) that everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection from unemployment is obviously affected by the proliferation of information technology with its capacity to replace much routine work.

Concern that the new information technology could endanger human rights was perceived with increasing anxiety from the middle of the 1960s. As a result, in part, of initiatives of the Swedish section of the International Commission of Jurists, a debate commenced in Scandinavia about the need for the protection of individual rights in respect of automated data, that is to say, data processed automatically by computer. Subsequently, this concern led to initiatives in the Nordic Council to define basic information practices. Later, these initiatives were taken up in the Council of Europe. In 1980 the Council of Europe approved a Convention for the Protection of Individuals with regard to Automated Processing of Personal Data. It was adherence to this Convention by the United Kingdom which produced the passage of the Data Protection Act 1984 (UK).

Numerous domestic laws on data protection, stimulated by the developments in the Nordic Council and the Council of Europe (and later the European Parliament) produced international concern that the proliferating data protection (or privacy) laws could impede the development of the new technology, diminish effective protection to the individual because of the resort to "data havens" and frustrate the harmonious development of fair information practices, necessary if the rights of individuals were to be effectively safeguarded in the new technological advances and assured of their benefits. The result has been the endeavour, upon a wider international stage, to give greater focus to the generality of the language guaranteeing "privacy" which appears in the Universal Declaration and the International Covenant on Civil and Political Rights³⁷ and to stimulate concern beyond the countries of Europe, the United States and Canada, which were the first to enact privacy/data protection laws. Hence, the initiatives in the OECD and UNESCO. Of greatest relevance to Australia are the Guidelines adopted by the Council of the OECD in September 1980 on the Protection of Privacy and Transborder Flows of Personal Data.³⁸ Australia and Canada have announced their adherence to these Guidelines.

The Guidelines were proposed as "a consensus on basic principles which can be built into existing national legislation, or serve as a basis for legislation in those countries which do not yet have it".³⁹ They contain seven principles. The "collection limitation principle" proposes that there should be limits to the collection of personal data and that any such data should be obtained by lawful and fair means

and, where appropriate, with the knowledge or consent of the data subject. The "data quality principle" proposes that personal data should be relevant for the purposes for which they are to be used and, to the extent necessary for those purposes, should be accurate, complete and kept up to date. The "purpose specification principle" proposes that the purpose for which personal data are collected should be specified not later than at the time of data collection. The "use limitation principle" would limit the disclosure of personal data to those specified purposes unless with the consent of the data subject or authority of law. The "security safeguards principle" would guarantee that personal data is protected by reasonable security safeguards against loss, unauthorised access, destruction, use, modification or disclosure. The "openness principle" proposes a general policy of openness about practices and the availability of data. The "accountability principle" would nominate a data controller to be accountable for complying with these rules. But the most important principle, called "individual participation", would confer upon the individual the right to obtain from the data controller or otherwise confirmation of the existence of data related to him and to have access to such data in a reasonable time, at no excessive cost, in a reasonable manner and in a form readily intelligible. If denied access, he should be given the reasons and be able to challenge the denial.

In Canada these principles are reflected in the Federal Privacy Act 1982.⁴⁰ In Australia, they have recently been accepted by the Federal Government. However, the legislation to give them statutory force was linked to a highly controversial

proposal to establish a national identity card ("the Australia Card").⁴¹ This legislation was defeated by the Australian Senate in December 1986. The Government has indicated its intention to re-introduce the measures in March 1987.

Many other issues relevant to individual rights in the developing information technology require attention. One of them concerns telephonic interception. In Australia, without a Charter, it has been necessary to consider the limits of interception by reference to orthodox rules of statutory construction, rules of evidence and the protection of the fairness in the conduct of criminal trials. They have proved of limited use.⁴² In Canada, s 8 of the Charter has been invoked to suggest that interceptions of private communications constitute an unreasonable search or seizure. The argument was recently rejected by the British Columbia Court of Appeal.⁴³ But perhaps the most interesting development here has occurred in the United Kingdom under the stimulus of a judgment of the European Court of Human Rights.

The case in the European Court followed a decision in the English courts dismissing a claim for a declaration that the tapping of the applicant's telephone calls had been unlawful.⁴⁴ My predecessor in this series, Sir Robert Megarry, V.C., dismissing the claim, stated that he found it impossible to see how the relevant English law could be said to satisfy the requirements of the European Convention of 1950 on Human Rights and Fundamental Freedoms. An application was made to the European Human Rights Commission alleging violation of the rights conferred by Article 8 of the European Convention. This guarantees respect for private and family life, the home and

correspondence. Article 8 par (2) limits interference by a public authority with the exercise of these rights, "except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime for the protection of health or morals or for the protection of the rights and freedoms of others". Before the European Court, it was not disputed that the telephone had been intercepted by police investigating various offences of dishonesty. The authorities refused to disclose whether, in addition to this, the telephone had been "metered" to register outward telephone calls. The subject of the interception had been charged with a number of offences of dishonesty involving the handling of stolen goods but had been acquitted. The judgment of the European Court of Human Rights criticised the absence of legislation in the United Kingdom regulating the issue of warrants or controlling the way in which metered information was used. Although there were rules of practice under which such warrants were given, they did not have the authority of law. Specifically, they did not control the Home Secretary's discretion to issue warrants. Much attention was paid in the European Court's judgment to the exception in Article 8 par (2) of "in accordance with the law". In a previous judgment the Court had laid emphasis on the need to protect the individual from the arbitrary exercise of power in secret by the Executive Government.⁴⁵ In this case, it was held that administrative conventions were no substitute for a legal rule, publicly available. It therefore found that the United Kingdom had violated the rights of the subject. In a

democratic society, the Court held, the authority of the Executive to tap telephones should be strictly regulated so as to preserve the best interests of that society from arbitrary interference in secret by the Executive Government. A satisfactory system of judicial control could safeguard individual rights and ensure that such interferences as took place were only such as were "necessary in a democratic society". As a result of this judgment, the United Kingdom Parliament enacted the Interception of Communications Act 1985. The list of legislative and administrative changes introduced in Britain as a consequence of findings of the European Court of Human Rights is long and significant. It includes amendments to prison rules, changes in corporal punishment in schools, the enactment of the Contempt of Court Act 1981, changes in legislation regulating homosexual conduct, mental health practices and others.⁴⁶

The proponents of the Charter idea contend that, in a modern democratic society, an occasional stimulus to neglectful governments and legislators is not out of place. In default of specific and detailed statements of rights, apt for the developments of new information technology, courts will be invited to derive such rights from traditional statements cast in broad language. The right to "privacy", in particular, will be called upon to do much work.⁴⁷

BIOTECHNOLOGY

Already in the 1960s, commentators on human rights were beginning to call to attention the importance for human rights of new developments in biology. at UNESCO in 1968 a call was made for interdisciplinary work to define the respective rights

and duties of those involved in organ transplantation.⁴⁸ The world community, after the shocking revelations of human experimentation on prisoners during World War II, particularly at Auschwitz concentration camp, responded with a number of statements relevant to the rights of patients and the duties of those providing health care. The judgment of the International Military Tribunal upon twenty three German physicians who were tried for crimes against humanity committed during the war became the source of the "Nuremburg Code".⁴⁹ This represented an attempt to set down the basic principles to which any medical experimentation on human beings must conform if it is to satisfy the relevant moral, ethical and legal considerations. The Nuremburg Code was refined and developed in the Declaration of Helsinki in 1964. This was adopted at the 35th World Medical Assembly in Venice in 1983.⁵⁰

However, it is now increasingly realised that there is a risk of denigration from the necessarily general statements of human rights by biological manipulation made possible by scientific developments. Thus, guarantees of "human dignity" in Articles 1, 5, 6, and 29(1) of the Universal Declaration of Human Rights may be affected by foetal experimentation, experiments on human subjects, in vitro fertilisation, embryo transplantation, genetic manipulation, the sale of organs for transplantation and so on. The promise of the right to life, as in Article 3 of the Universal Declaration, raises inevitably the question of when human life begins to which that guarantee applies. A new focus to this controversy is provided by claims to abortion on demand, in vitro fertilisation and embryo transplantation. The assertion of a right to "life" also raises

the issue of the quality of life. Is it life of any kind which is absolutely guaranteed? May not those who enjoy the "right" opt, in certain circumstances, for its termination?

Developments in the knowledge of human fertility add fresh attention to the language of other guarantees of human rights, expressed before the modern technology was available. Can Article 16(1) of the Universal Declaration, with its guarantee that men and women of full age have a right to marry and "to found a family" provide support for a claim to in vitro fertilisation, embryo transplantatio, artificial insemination, surrogate parenting and womb leasing, transplantation and the like? Is the guarantee of special care and assistance for motherhood and childhood in Article 25(2) relevant to the new procedures available to overcome infertility? Is the guarantee of adequate health and medical care in Article 25(1) the basis for a claim of access without limitation to these expensive new techniques?

The Victorian State Parliament in Australia, apparently alarmed by advertisements offering surrogacy arrangements⁵¹, has enacted legislation to make it an offence to advertise surrogate arrangements and to render any such contracts void and unenforceable. Such legislation has also been presented in the United Kingdom. But in the United Kingdom, such laws could be challenged in the European Court of Human Rights as violating the guarantee of family privacy (Article 8) and the guarantee of the right to found a family (Article 12). Similar challenges could doubtless be raised in Canada under the Charter.

The provision of Article 18 of the proposed Australian Bill of Rights that "every human being has the inherent right to life and no person shall be arbitrarily deprived of life" occasioned an expression of concern by the Australasian Episcopal Conference of Bishops of the Roman Catholic Church. Referring to the provisions of clause 9(3) of the Bill, as originally drawn, in which it was stated that the rights and freedoms applied only for the benefit of "natural persons", the Bishops expressed anxiety lest the guarantee in Article 18 should be construed to exclude the unborn.⁵² As a consequence of this expressed concern the Bill was later amended. In its present form, clause 9(3) states "the rights and freedoms set out in the Bill of Rights do not apply for the benefit of bodies politic or corporate". The Attorney-General stated that this was all that had been intended by the original clause and the reference to "natural persons".⁵³ but the Government rejected an Opposition amendment designed to assert that human life exists from the moment of fertilisation. The President of the Australasian Episcopal Conference then indicated that the Government's amendment to the legislation fell short of allaying all of the concerns of the Bishops. They were doubtless mindful of the fact that, in the United States, the constitutional right to privacy has been interpreted as conferring, in certain circumstances, a right in the mother to an abortion on demand.⁵⁴ It was in part as a response to continuing Church opposition that the Australian Bill of Rights lapsed. During his recent visit to Australia, the Pope urged attention to discrimination by the law. However, the only categories which he referred to were discrimination against the

unborn child and against the family. Such are the difficulties which confront modern framers of human rights statements. Each minority group has its own special perception of priorities.

The existence of human rights statements obliges legislatures, courts and the community to address themselves to fundamental questions. In the present context, these include the definition of human life, the rights of the community to protect itself from dangers such as typhoid and the AIDS virus by measures which diminish the rights of others⁵⁵, eugenics⁵⁶ and the triage decisions that are daily made in hospitals to provide expensive health care to some, but not to others who will then die.⁵⁷ They state the standards against which must be measured the rights of parents in respect of their children⁵⁸, the rights of the mentally ill and of the community to endeavour to change their human behaviour⁵⁹, the rights of the mentally retarded⁶⁰, the rights of those addicted to psychotropic drugs⁶¹ and many others.

In the international community increasing, and sometimes effective, attention has been given under the aegis of the World Health Organisation, to certain commercial practices which have a seriously deleterious effect on the life and health of millions of human beings. The largely successful effort of the World Health Organisation to promote the International Code governing the marketing of breast milk substitutes has reduced the largely unnecessary and undesirable sale of these products in the developing world, where they all too frequently led to infant mortality and malnutrition.⁶² But the allegations persist of the sale of hazardous materials and products in developing countries even after these have been

withdrawn from sale or superseded in the developing world. The persisting sale of Dalkon shield contraceptive devices, long after their withdrawal from the United States market, as a means of exhausting supplies in poor and developed countries is specifically alleged.⁶³ The promotion of cigarettes and other tobacco products in developing countries, as a response to declining sales in traditional markets, will be seen by some (in the light of medical evidence of their danger to health) as a significant assault upon public health and thus the human rights of millions to live a decent life.

CONCLUSIONS

It is not coincidental that many of the leaders of the battle for respect for individual rights in countries where they are most grievously denied are scientists. Yuri Orlov, sentenced to seven years hard labour and five years of "internal exile" for publicising alleged Soviet violations of the Helsinki Accords is a particle physicist. Anatoly Shcharansky, until recently serving a sentence of 13 years hard labour for human rights actions is a mathematician and computer scientist. Andrei Sakharov, probably the leader of the Soviet human rights movement was until December 1986 in internal exile in Gorki with his wife. He is a nuclear physicist and a full member of the Soviet Academy of Sciences. There are many other scientists who could be named.⁶⁴ Lawyers are less prominent. So it is also in Eastern Europe⁶⁵ and in the dictatorships of Latin America.⁶⁶ The coincidence of nuclear fission, the microchip and biotechnology at the one moment of human history - and the potential of these developments profoundly to affect, improve or destroy human life - has mobilised many members of

the scientific community to a more active concern about the impact of their labours on human rights.

It is clear that the three principal scientific developments referred to in this lecture have very significant implications for human rights. The human rights debate of the future must involve as many scientists and technologists as it does lawyers. The catalogue of human rights developed by 17th century philosophers and lawyers, and given fresh impetus by the United Nations Organisation after World War II, needs fresh consideration. Otherwise statements of human rights will be silent upon the many urgent and modern problems thrown up by science and technology today. Or ungainly attempts will be made to stretch concepts developed for earlier times and to apply them to situations which could not have been conceived when the current formulae of human rights were put on paper.

If lawyers are to continue to play the leading part in the human rights debate of the future, they must become more aware of scientific and technological advances. Otherwise they will increasingly lack understanding of the questions to be asked. let alone the answers to be given. And lawyers must develop a greater sense of urgency about the issues of this debate. New problems arise virtually every day. Our institutional means for solving them are inadequate. The problems are urgent. Time is short. We should heed the warning of Leon Ladner. Our use of passing time seriously affects the future happiness of mankind.

FOOTNOTES

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