

HIV/AIDS AND HUMAN RIGHTS

OSAKA UNIVERSITY JAPAN

OSAKA UNIVERSITY, JAPAN

Department of Pathology

Research Institute for Microbial Disease

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The Hon Justice Michael Kirby AC CMG

Australia

HUMAN RIGHTS IN THE NEW WORLD ORDER

Article 1 of the Universal Declaration of Human Rights, crafted in the despair and hope of 1945 declares:

"All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards each other in a spirit of brotherhood."

Of this dedication of the world to human freedom, equality and dignity we would not alter so much as a word nearly 50 years later. We should reaffirm its message and ask what lesson this pivotal assertion of human rights has for each succeeding generation in a world still troubled by war, poverty, injustice and pestilence.

One of the great teachers of the century, Martin Luther King Jr, gave us a text of hope when he said:

"The 20th century is strewn with the victims of human cruelty, and it is also replete with

*examples of human triumph. The world-wide struggle against war, racism, poverty, colonialism and totalitarian repression all testify to the truth that while men may be oppressed by slavery, the urge for freedom will persist undiminished and while death may break men's bodies, it shall have no dominion over their souls."*¹

To Dr King's list of causes of human repression, others could be added including gender, disability and sexual orientation. Each generation requires teachers to lift the scales from the eyes of the people to see unjust discrimination wherever it exists. It is an unremarkable fact that, before such instruction, ordinary, decent people, who would never think of themselves as discriminatory or unjust, act out their prejudices doing great wrongs, without necessarily intending to.

Many good illustrations of this truth can be seen in the early decisions of the courts responding to the claims of women to equal opportunity in society.

The point to be made is that the lessons of human rights and equal opportunity are constantly being taught. But to teach them, we need courageous and forthright pedagogues who see more clearly than others wrongs being done. And who have the courage to protest and the will to change society for the better, often in the face of determined opposition. In a decade or so, the instruction of these teachers will seem trite, even self-evident. It will even seem surprising that such instruction actually had to be given, just as now it seems surprising that educated men of our civilization, and in the recent past, could hold such prejudiced and wrong-headed attitudes towards equal opportunity for women. But at the time of changing social

attitudes, the task of the teacher can be painful. Civilized people, in an increasingly interrelated world, must be alert to the new lessons of universal human rights. Those lessons have relevance to the global challenge of HIV and AIDS.²

LESSONS FROM SYPHILIS & THE BOURBONS

We live at a time of human rights anniversaries. 1988 was the 400th anniversary of the Bill of Rights in England which accompanied the Glorious Revolution. 1989 was the bicentenary of the Declaration of the Rights of Man and of the Citizen which emerged from the French Revolution.

1990 was the bicentenary of the Bill of Rights which constitutes the first ten amendments to the United States Constitution. The crafting of the fundamental rights which so colour the law and life of that country had been postponed at the time of the American Revolution. James Madison had said: "Who will be so bold as to declare the rights of the people?". But declare them they did. Their incorporation in the constitution of the United States continues to influence the attitudes of that country and, thereby, the shape of the modern world.

We now approach the 50th anniversary of the agreement by F D Roosevelt and Winston Churchill of the Allied war aims in the Second World War. These later came to full flower in the United Nations Charter (1948), the Universal Declaration of Human Rights (1948), the International Covenants on Civil and Political Rights and Economic Social and Cultural Rights (1976) and the regional treaties which declare and protect human and other rights in Europe (1953), the Americas (1978) and Africa (1986). In addition, there are more than twenty

treaties, regional and international, which cover particular rights in more detail.³ Among the basic human rights stated in these instruments, to be enjoyed without distinction of any kind, such as on the grounds of race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth or other status are a number of fundamental rights of importance during the crisis presented by HIV and AIDS as Sieghart points out. They include:

- * The right to life;
- * The right to health;
- * The right to liberty and security of the person;
- * Freedom from inhuman or degrading treatment or punishment;
- * The right to freedom of movement;
- * The right to privacy;
- * The right to marry and found a family;
- * The right to work;
- * The right to education; and
- * The right to social security, assistance and welfare.⁴

The body of international law on human rights is not simply a series of statements of pious platitudes drafted by politicians and then forgotten. It is part of international law. It is binding on the community of nations in differing degrees, depending upon the ratification of international instruments, whether the rules stated in them have become part of customary international law and part of the law of the country concerned.

Developing around the regional and international instruments of human rights is a jurisprudence stated by the courts and other institutions established to give effect to such instruments and by national courts. The most influential of these bodies has probably been the European Court of Human Rights. Its pronouncements bind the twenty-one member States of Europe which have ratified the European Convention on Human Rights.

Unfortunately, neither Asia nor the Pacific have a regional convention stating basic human rights. Nor is there a court, commission or other body to investigate, report on and redress human rights violations in this part of the world. An important challenge for citizens committed to human rights in Australia and Japan should be the preparation of a regional convention and a proposal for a regional institution which could attract countries of our region, including our own.

Recently it has been suggested that the basic culture of societies still influenced by the Confucian ethic is fundamentally different from the culture of other countries of the Western tradition, which are more sympathetic to the notion of human rights.⁵ However that may be, it is undeniably desirable that we should have, in every region of the world, an inter-governmental institution to safeguard human rights and to spread the word of departures from internationally agreed norms. There is no obvious reason why it should be appropriate to have a convention and an inter-governmental institution for Europe, the Americas and Africa but not for Asia and the Pacific. Recent events in this part of the world, quite apart from AIDS, demonstrate

the urgent need for such an institution. Human rights, by their definition, inhere in human beings. They are not confined to people in a particular culture. They are universal. They are part of the attribute of being human. Respect for them should be universal. Machinery should be provided to enquire into and redress alleged derogations.

Self-evidently, the great collection of human rights law which has been such a feature of world history in the past fifty years especially, transcends in importance even such a serious epidemic as HIV/AIDS. Human rights are accompanied by human duties. Obviously, human rights have limits. The limits were once expressed in terms of the rule that the right to swing your arm ceases when you hit me. Obviously, there is no human right to spread a life-threatening virus, such as HIV. On the contrary, there is a human obligation not to do so and a legitimate entitlement of the State, representing humans who are at risk of becoming infected, to take measures designed to limit that risk, if not to eliminate it.

All national and international statements of human rights allow for derogations from the human rights declared in them. Typically, such derogations are permitted if they conform to three requirements.⁶ They must be expressly provided by law so that the derogations do not depend upon arbitrary administrative power. This is a requirement of *form*. They must be derogations which are manifestly necessary in a democratic society to achieve a pressing social need. This is the limitation of *necessity*. And they must be strictly proportional to the need to tackle the defined object in hand when weighed in the balance against

the adverse effects they may have upon people whose rights will be affected by them and by society itself which has its own interest in the exercise of human rights. This is the requirement of *proportionality*.

If we remember the basic human rights and the criteria for derogations from them, we are provided with a very useful system for measuring proposals designed to deal with the HIV/AIDS epidemic. Contrary to the opinion of some public health officials, many politicians and most lay citizens, the protection of public health does not provide a *carte blanche* to override fundamental human rights. There is a danger that public health and other laws will be drawn in panic, and overlook basic human rights. Especially in the face of such a serious and dangerous virus as HIV, it is inevitable that there will be impatience with the talk of human rights and that this will invade popular, political and even medical thinking. It is important that lawyers, with long social memories, should remind those who have the responsibility for lawmaking of the mistakes that have been made in the past when, in panic, societies have departed from the foregoing basic rules.

A good illustration of the departures can be seen in the treatment of syphilis.⁷ There is quite a good historical analogy between HIV/AIDS and syphilis, although syphilis is not spread by a virus. Syphilis first appeared in Europe about four hundred years ago. It took four hundred years for the discovery of a blood test for it and the development of specific curative drugs. Both syphilis and HIV/AIDS are mostly transmitted by sexual intercourse. Both conditions can be acquired neonatally and through the sharing

of blood. Both conditions, untreated, produce a substantial period of severe suffering. Each has a high ultimate mortality. In both cases the person infected (especially, in the case of syphilis, in a female) may be unaware for many years of the infection. In both cases the person will be infectious to others during parts of that period. In both cases the condition is (or was in the case of syphilis) incurable. In both cases early treatment involved radical measures with severe side effects (such as the use of arsenic in the early treatment of syphilis). In both cases there are stages to the development of the infection although the intervals are longer in the case of syphilis than in the case of HIV/AIDS. Both conditions evoke public fear and condemnation. We should therefore strive to learn, in the case of HIV/AIDS, from the earlier strategies used to deal with syphilis before it could be cured.

In the United States, many mistakes were made in the early legal regulation of syphilis. During the First World War, after the American entry into the War, naval regulations were changed to require the removal of doorknobs on all United States vessels. This move was based upon the fear that syphilis would be spread by hand contact. We now know that such a fear was totally unfounded.⁸ The case demonstrates the danger of basing public health strategies on fear rather than sound scientific data.

Also in the United States during the First World War, the President authorised the rounding up of 30,000 prostitutes on the basis that they might be a risk to the war effort. Congress allocated huge sums for their detention. The case is one of the untold derogations from human rights

which occurred during the United States in wartime.⁹ Another involves the detention of Japanese Americans under an order issued by President F D Roosevelt. That order was challenged in the courts by Mr Korematsu, an American of Japanese origin. In time of war, the United States Supreme Court by a vote of 6 to 3 upheld the Constitutional validity of the President's action. One of the dissents was by Justice Roberts. He said that, if the law were upheld, there would be no telling where this kind of excess would go beyond what was needed to deal with a specific problem in hand. If, for example, the United States were hit by an epidemic, a President might see it within his power to round up all suspect groups and deprive them of their liberties as American citizens.¹⁰

In the United Kingdom between 1864 and 1869 three *Contagious Diseases Acts* were passed. They enabled suspected prostitutes in certain designated towns and ports to be detained, subject to a statutory medical examination and, whilst in detention, treated under compulsion. The scheme was, of course, very well intentioned. However, it evoked a great deal of opposition, including from the medical profession itself which had no desire to become "medical police". The Acts were repealed in 1886. However, procedures for compulsory report and contract tracing remained in place until, in 1916, the Royal Commission on Venereal Diseases recommended, instead, the establishment of special clinics offering free and confidential treatment. These clinics would operate on an entirely voluntary basis. They would guarantee complete anonymity and confidentiality. The Royal Commission set as its goal the uncompromising

policy of minimising the spread of venereal disease. It asserted that this goal was more likely to be achieved by voluntary and confidential cooperation of the patients themselves than by Draconian measures based upon compulsion.¹¹ The United Kingdom experience was paralleled in Australia and elsewhere. It has served as a better model: better for disease control. Better for the protection of human rights.

The approach of the British Royal Commission was vindicated. In the treatment of venereal diseases generally, it is still in operation in the United Kingdom, Australia and elsewhere. It is important that we should not forget the lessons from the earlier experience. Let us not be like the Bourbons - learning nothing from history: forever condemned to repeat its mistakes. AIDS tests our attitudes to human rights while calling for urgent measures of epidemic control. And human rights matter most when they are most severely tested.

FOOTNOTES

1. M L King Jr, cited in M Einfeld, *"One Lawyer's Musings on the Morality of Medicine"*, address to the Australian Jewish Medical Federation, July 1990, mimeo, 55.
2. P C Sieghart, *"AIDS and Human Rights: A UK Perspective"*, BMA Foundation for AIDS, 1989, London, 7. See also L J Moran, "HIV, AIDS and Human Rights" (1990) 12 *Liverpool Law Rev*, 3 and United Nations, Centre for Human Rights, *Report of an International*

Consultation on AIDS and Human Rights, Geneva, July 1989, UN, NY, 1991.

3. Sieghart above n 2.
4. *Ibid*, 6.
5. R Little and W Reed, *The Confucian Renaissance*, Federation, Sydney, 1989, 83.
6. Sieghart, above n 2, 25.
7. *Ibid*, 20f.
8. A M Brandt, "AIDS - From Social History to Social Policy", 14 *Law, Medicine and Health Care* 233 (1986). See also M D Kirby, "AIDS and Law" in S Graubard, *Living with AIDS*, MIT Press, Cambridge, Mass, 1990, 387ff.
9. K M Sullivan and M A Field, "AIDS and the Coercive Power of the State" in 23 *Harvard Civil Rights-Civil Liberties Law Rev* #1, 139, 155 (1988), 155.
10. *Korematsu v The United States* 323 US 214 (1944).
11. *Sydney Morning Herald*, 21 February 1991, 7.