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INTERNATIONAL COMMISSION OF JURISTS

THE REVIEW

HUMAN RIGHTS: AGENDA FOR THE FUTURE

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CHANGING WORLD: CHANGING AGENDA

Human rights in context: If you want to see the agenda for human rights in the decades ahead, look around. Look at the world: its problems and changes. Reflect upon the issues of today. Many of these issues will be with us for the indefinite future. Others point towards the problems which will engage human rights activists for the foreseeable future.

Prediction is a chancy thing. Who would have predicted five years ago the dissolution of the Union of Soviet Socialist Republics - with the opportunities and problems for human rights which that unpredicted event has caused, not only for the Soviet peoples but for those who formerly lived in the shadow of their power? Who would have predicted the release of Mr Nelson Mandela by the Government of South Africa and the dialogue which is proceeding in that country, as it abandons at least the legal vestiges of apartheid? Who would have predicted the near unanimity of the leaders of the world community at the Earth Summit in Rio de Janeiro? It seemed too much to hope that reason and a common concern about our blue planet would intrude in the selfishness of domestic and

international politics. Who, a decade ago, would have predicted the global challenge of AIDS which now threatens to take such a toll in human lives and human rights on the six continents?

Who, twenty years ago, would have foreseen the rapid rise of the prosperous States of Asia, the Confucian Renaissance with its own special implications for basic human rights? The power these societies will wield in the 21st century is beyond question. The Confucian ideals lay emphasis upon duties not rights; the community not individuals; and the rule of powerful men of virtue, not the rule of law. How will the ideals of the International Commission of Jurists (ICJ) adapt and change to a world dominated by nations of these traditions, whose enthusiasm for the human rights and rule of law notions of western Europe will often be muted at best?

The shift in world politics following the collapse of the USSR has enhanced the dominance of the United States of America as now the one undisputed superpower. Germany and Japan, its potential rivals, seem content with a more modest posture in world affairs. The history of the United States, its legalism and constitutionalism and the attitudes of its ordinary people are in tune with the objectives of the ICJ. These include a commitment to the rule of law; to the protection of basic human rights and to the defence of the independence of the judiciary and of lawyers in every land. The practice of the United States has sometimes faltered in the pursuit of these high ideals. But they are so close to the ideals of the United States itself that optimists would draw comfort from the undisputed victory of that country in the Cold War. "We won", the banners outside the White House proclaimed. But the real battles for the attainment of our ideals lie ahead. They involve turning the shibboleths and clichés into actuality.

Rule of just laws When President Bush visited Los Angeles

in the wake of the worst urban riots in the United States since the 1960s, he called for a restoration of the "rule of law". But the slogans being shouted in Los Angeles were "No justice, no peace". The law, and its institutions, had produced a result which shocked observers outside the United States and within. The San Francisco Examiner declared:

"Any way you look at it, the verdicts in the Rodney King beating case are wrong. Legally: police are now free to use excessive force to subdue suspects. Morally: poor blacks cannot get a fair trial. Ethically: the cops got away with it. Rodney King was beaten beyond any reason by four Los Angeles cops. That is the fact of the case. [The] verdict is an outrage."

Against this sense of outrage a call by the President for observance of the "rule of law" seemed to ring hollow. The rule of law is a high ideal. But it must not be a cloak for enforcing unjust laws. In the Rodney King case, a judge was persuaded to transfer the hearing of the trial to a venue from which the jurors would not truly be the peers of the accused. Not a single Afro-American juror participated in the trial. The legal system was, to that extent, manipulated.

A Presidential appeal to the "rule of law" is therefore unconvincing in such a case. The rule of law is only as good as the law which then rules. In the decades ahead it will be vital, both in the domestic and international context, to extend the notion of the rule of law. It should no longer be the rule of law, whatever that law may be. Supporters of basic rights should nail their flag to the mast of just laws. Reformed laws. So that the rule is a rule of just law. There were few more legalistic states than Germany under the Nazis. The authorities were often scrupulous in observing the most minor regulation whilst horrendous acts were done under the cover of law. So the lesson of recent, and not so recent, events is

that the rule of law is not, alone, enough. A dedication to just laws is required. This notion must be included in the ideals of the ICJ and in the future of the global human rights movement.

Extending global standards In the human rights movement sustained attention has been paid to the prescription of basic rights. Lately, that attention has spread to economic and social rights and to the rights of peoples. But securing agreement to fine international instruments is not enough. We must redouble our effort to secure the subscription by our countries to the international treaties on human rights. It is imperative to notice that such treaties emanate from a variety of international and regional bodies. For example, the International Labour Organisation, one of the oldest organs of the United Nations, has a developed jurisprudence within its specialised area which protects the basic rights of workers and defends their freedom of association, the right to collective bargaining and the privilege to withdraw their labour.¹ Other agencies of the United Nations have made like contributions to the development of human rights principles, within their areas of competence.

In Europe, the *Convention on Human Rights* provides outstandingly effective machinery. It is now essential to extend its influence to the countries of central and eastern Europe. In Africa, the Commission on Human and Peoples' Rights has a generally disappointing record on standing up to the dictators and militarists and vigorously pursuing individual human rights. There is no apparent reason why Africa should not, like Europe and the Americas, enjoy an independent court with the power to receive individual complaints of abuse. It is not as if Africa has been blessed with exemption from departures from basic rights.

In Asia and the Pacific, there is neither treaty nor

commission. There is no court. Yet in this part of the world, some of the worst abuses of human rights have occurred. In Cambodia, the most intensive genocide of the century took place. In Tibet, forces of the Peoples' Republic of China suppress the desire of an ancient people for self-determination. In Burma, the military ignore the verdict of the people at the ballot box. In China itself, the world witnessed a brave individual attempting to stop the tanks which rolled over the peoples' aspirations for democratic self-government as promised by the *International Bill of Rights*. In Hong Kong, the basic rights of the people to decide their own future have been ignored as the population of the colony was traded between two imperial powers.² In the Philippines, the promise of Mrs Aquino's reformist government appears to have failed.³ In Thailand, the recent riots saw attacks by the military on the proponents and defenders of democracy and human rights.⁴ In Fiji, a racist constitution was imposed and the colonel who led two coups against the constitution which he was sworn to defend, has now been appointed Prime Minister. The need, in Asia and the Pacific, for a convention on basic rights and machinery to enforce such a convention, must be made a high priority for those concerned about basic rights in that most populous part of the world.

Domestic implementation: Of equal importance, everywhere, is the object of bringing the principles of fundamental rights and the tablets in which they are enshrined in international instruments, down to application in ordinary cases in the courts in all parts of the world. The domestic application of international human rights norms strikes a problem in many legal systems, which adhere to the view that international treaties are not self-executing and only operate as part of municipal law if they are specifically enacted to be such by valid local legislation. But now, in England,⁵

Australia⁶ and other countries, courts of high authority are increasingly accepting the view that international statements of human rights may be used by judges and magistrates in resolving ambiguities of legislation and in filling gaps in the common law. In Anglophone common law countries this is a very important breakthrough. It promises greater attention to the international statements of human rights in the day to day work of the courts of law.

In Australia, the approach to which I refer was recently explained by reference to Australia's adherence in 1991 to the First Optional Protocol to the International Covenant on Civil and Political Rights. Justice Brennan, of the High Court of Australia, observed:

*"The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol ... brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule ..."*⁷

It was with the use of this principle that the High Court of Australia struck down a long-standing legal rule that the Aboriginal people of Australia enjoyed no title to land before the arrival of white settlers on the continent. A more dramatic impact of the standards of basic human rights would be hard to imagine in the Australian context.

Judicial independence: In the defence of the independence of the judiciary and of lawyers, the Centre established for that

purpose by the ICJ has played a most useful rôle in calling cases of abuse to notice. But it is not only in violence that the independence of practitioners of the law is threatened. In many countries, there is a need for vigilance against more subtle forms of interference. Examples include the effective removal of judicial officers from office by the expedient of reconstituting courts;⁸ by the chilling effect which accompanies government retaliation against judges whose views are unwelcome;⁹ by the misuse of the powers of promotion, patronage, titles and pension rights; and by the erosion of judicial salaries and conditions so that only lawyers of mediocre talent are attracted to positions requiring great courage and ability. In some countries judicial officers have fallen victim to temptation, corruption and partiality. Then, principles defensive of judicial independence of the just can be manipulated to protect the venal. Yet this fact can itself be used as an excuse to attack and remove the corrupt but also the honest and vigilant judge. This has happened in Peru during the latest coup.

So in the fields of the ICJ's special areas of interest - the rule of law, human rights, and the independence of judges and lawyers - there is much to do in the years ahead. The ICJ must look upon its troika of interests in a fresh light. I suggest below a number of new aspects which will merit its particular attention.

NEW PERCEPTIONS

Rights of Peoples: In virtually every region of the world, evidence of the assertion of the peoples' right to self-determination can be seen. Peoples' rights, and their definition, are still controversial. But the peoples' right to self-determination, at least, is enshrined in the United Nations Charter.¹⁰ In Punjab, Assam, Kashmir and elsewhere in India, the force of fission

is evident. It blew apart Pakistan, as that country was originally conceived. It has threatened the peace of Sri Lanka for two decades.

In Tibet, a people with a distinct language, culture and tradition valiantly maintain their assertion of the demand for self-determination. The same force is at work along the spine of the former Soviet Union: in Azerbaijan, in Armenia and in the Moldovian Republic. The shattering break-up of Yugoslavia demonstrates the abiding force of enduring linguistic, religious and cultural differences. Seventy years of Yugoslavia was not long enough to stamp out ancient enmities. In South Africa, racial and tribal differences continue to mark that society, notwithstanding the improvements which have lately occurred.¹¹ So this is clearly a force of the future to be reckoned with. Its significance for the nation state and for the development of international politics and basic rights in the century ahead will need to be considered. The application of the principle of self-determination to indigenous peoples (such as the Australian Aborigines, the Canadian Inuit and United States indigenes) will require consideration sensitive to their separate histories and legitimate demands.¹² If they are still a distinct "people" what does the UN Charter promise of self-determination mean to them?

Populist Politics: In the wake of the break-up of the Soviet Union, the hopes for a new golden age of human rights have been muted by a reversion to the enmities of the past. Intolerance and historical hatreds have re-surfaced: all too often whipped up by "democratic" politicians, playing upon popular sentiment. The danger of this misuse of democracy was called to attention by the present Secretary General of the United Nations on the eve of his appointment to that office. He warned of tyranny in the name of democracy. Much that has happened since January 1992 bears out his

warning. A redefinition of "democracy" is needed: one which respects the legitimate rights of minorities.¹³ Our contemporary concern with the misuse of democracy requires us to reflect anew upon the meaning of this idea. In many western countries, it means little more than a triennial visit to a polling station. Thereafter, there are all too often few checks which the people can hold over elected politicians. Legislatures in this century have lost much of their power to the Executive Government. The Executive has lost much of its power to the head of government: the Prime Minister or President. And the head of government has often lost power to the bureaucracy. None of us should forget President Eisenhower's warning in his farewell speech as President about the dangers of the industrial-military complex. The notion of what it is to live in a democracy requires redefinition. The promise of the *International Bill of Rights* must be given contemporary content in this regard.

Military Regimes: In many parts of the world, the military play a manipulative rôle in stifling the aspirations of the people. Sometimes the military secures the support of the population because of the memories of the greed and corruption of elected politicians. Nigeria and Indonesia may illustrate this fact. Elsewhere, as in Burma and Thailand, the military are turned against their people, particularly those who stand up for the protection of basic human rights. In some countries, dictators invoke the military to seize power. Fiji and Peru spring to mind as recent examples. The problem of restoring viable democracy, and the means of applying international pressure to that end, require attention. So does the inter-action of the military establishments in neighbouring military dictatorships. So too does the protection of basic human rights and freedoms under military dictatorships.

Religious Extremism: A phenomenon of recent times has been an increase in religious fanaticism. The history of earlier centuries was blighted by the fanatical wars and crusades of Christian extremists. Such intolerant adherence to Christianity still exists. Many of them are securing new converts in the troubled areas of the world where the demise of the philosophy of communism has left a spiritual void. But Christianity is not alone. In India, extremist Hinduism confronts extremist Islam. Intolerant messages of some fundamentalist Islamic groups reach from Afghanistan to Morocco. Reconciling fundamental human rights with religious faith and conviction will be a major task in the decades ahead. This will be so because the spread of religious fundamentalism seems assured in many of the former republics of the Soviet Union. There may be no basic conflict between the messages of the Bible, the Torah and the Koran and basic human rights. But, as practised, extremist religious fanaticism will be difficult to reconcile with fundamental human rights. The demand for the death of Sulman Rushdie illustrates the clash between unswerving faith in a perceived religious dogma (on the one hand) and the assertion of the basic right to freedom of expression (on the other). It should never be forgotten that the guarantee of religious freedom includes a guarantee of freedom from religion.¹⁴ This is now recognised in most western communities, which have generally passed through the phase of religious intolerance. But it is not always recognised in other parts of the world where poor, and often hungry people look for simple verities to ease their passage through this world to a better one yet to come.

Environmental freedoms: The World Summit in Rio de Janiero has focused attention on the exploitation of the environment and the danger which is presented to the human race by the depletion of

resources and the excessive growth of population. Industry in the wealthy countries emits carbon dioxide in billions of tonnes to the peril of the world's climate and ecology. The right to live on the planet, to breathe fresh air and to enjoy its environment may need the imposition on developed countries of rules designed to protect people in every country from the destruction of the common environment.

To these man-made challenges must now be added a new peril of nuclear proliferation. The break-up of the Soviet Union presents humanity with opportunities: but also with dangers. Amongst the most acute of these derives from the fact that the fine balance which was achieved amongst the nuclear powers in the Cold War may be lost as nuclear weapons from the Soviet arsenal are sold and as its nuclear facilities run down. These developments present risks to the whole world community. It will be in the interests of all creatures in the world that the world community should adopt the most effective controls against nuclear proliferation. It would be the ultimate tragedy of the demise of the Soviet autocracy if its result were a heightened risk of nuclear catastrophe and local nuclear conflicts. Yet such prospects cannot be ruled out. The most basal human right is to existence for without it the other rights mean nothing. Concerted efforts for the protection of the world environment, including against nuclear proliferation, must remain at the top of the agenda of those concerned with the protection of basic human rights.

Economic and social rights: The Secretary General of the United Nations said shortly before his election that the international community must beware that:

"A single state or handful of states should monopolise the decision-making processes affecting the organisation of all international affairs."

Noting that the International Monetary Fund and other aid agencies are making loans and grants dependent on increased democracy and freer economies as "a basic condition for participation in the new world order", Boutros Boutros Ghali warned that this:

"... should not serve as a pretext for the intervention by major powers in the internal affairs of the state under the guise of protecting democracy."

Economic rights go hand in hand with civil and political rights. They are part of the same international *Bill of Rights*. Knowledge and enjoyment of civil rights depends upon the other basic rights to life, education, health services and an opportunity to flourish, in happiness, as an individual human being.

In many developed countries, there are new challenges presented by rapid social changes. Thus, the breakdown of the nuclear family which has been such a feature of social conditions in the past forty years in most developed countries necessitates an urgent rethinking of the application of economic and social rights. Many of the groups in developed societies, which are asserting their basic rights, represent individuals who have long been stereotyped, catalogued and oppressed. I refer to women, to homosexual and bisexual people, people with disabilities and the elderly. These are the new "suspect classes".¹⁵

In developed countries the battles against racial intolerance and religious persecution have not been won. But, at least, in most such countries, laws and institutions have been provided to combat such forms of oppression. Often, the ethos of society condemns it. But there is still much oppression against people on the grounds of gender, disability and sexual orientation. The ICJ, looking to the future of human rights, will be in the forefront of international

efforts to combat such stereotyping and discrimination. There are new suspect classes which will require new international standards. It is important for human rights activists to extrapolate from the experience of particular groups (such as those discriminated against on the ground of race, colour or gender) to see these forms of discrimination as species of a wider *genus*. People should never suffer disadvantage by reason of attributes over which they have no control. Extending this basic principle to the campaign for human rights throughout the world will be an important mission for the ICJ in the decades ahead. Seeing particular categories of discrimination in the context of the wider problem of stereotyping should be our cause. The enemy is stereotyping. The objective is equal opportunity for all. Learning which techniques, amongst the many adopted, are most effective most quickly to turn the tide of discrimination will be an essential task for human rights campaigners. It should not be assumed that passing a law works a miracle. For most, attitudes of hatred and fear are learned from the cradle. Yet the law undoubtedly has a rôle in providing redress and in establishing acceptable standards.

Health issues: The advent of the Human Immunodeficiency Virus (HIV) which causes AIDS illustrates once again the unpredictability of human life and its human rights problems. AIDS presents new and different human rights issues to different societies. In developed communities it presents the danger of enlarged discrimination, fear and hatred of homosexual and bisexual men, intravenous drug users and prostitutes. In developing countries the rapid spread of HIV enlivens fear and prejudice against mainly heterosexual people who are ill. In all societies, the basis of discrimination and abuse of human rights is generally ignorance: of the nature of AIDS and of its modes of transmission. The World

Health Organisation (WHO) has taken important initiatives to promote strategies for the protection of the basic rights of people living with AIDS. This strategy is essential if the educational messages, necessary to the containment of this perilous epidemic, are to reach individuals in the communities most at risk. There is, at present, no cure and no vaccine against this dangerous new virus. It is therefore necessary to rely upon behaviour modification to contain its spread. This, in turn, depends upon the effectiveness of education. Getting into people's minds requires an attentive mind to listen to the message. That is why WHO has recognised from the start of the epidemic that the protection of basic rights and the prevention of the spread of the epidemic go hand in hand. Human rights agencies throughout the world must reinforce this important message. There is no human right to spread a life-threatening virus. But strategies of containment, as well as basic principle, require the respect for the rights of people who are infected and people at risk of infection.

Technology: The new technology of this age presents many challenges to basic human rights. Such challenges arise from computers which alter the perceptions of reality and provide the bases for invading individual privacy in a way that would have been impossible even in the recent past. Because the technology is global many principles for the protection of the basic right to privacy have been developed by international agencies.¹⁶ Such agencies are still working on other aspects of information technology relevant to human rights: such as the protection of the security of information systems, especially where they are vulnerable to destruction, deletion or distortion.

Biotechnology also presents many challenges to human rights.¹⁷ Nuclear technology presents the gravest peril, as

the world witnessed at Hiroshima. After that flash, brighter than a thousand suns, the world could never be the same again. Yet recent events show how endemic are the prejudices and attitudes of humanity. Science and technology leap ahead. They convey frail men and women into outer space. They plunge the depths of the oceans and explore the tiniest forms of life. They help shape the world we live in. Yet people inhabit that world, all too often carrying messages perilous to human rights. We must ensure that the future is shaped by messages optimistic for humanity.

AN AGENDA FOR ACTION

The foregoing represents only a small part of the agenda for bodies such as the ICJ. Amongst the first of the agencies for the protection of human rights, the ICJ has had a magnificent record. It has helped shape the international instruments which state the rights fundamental to the freedom of the individual. It has been vigilant in protection of the rule of law. It has established the international centre for the defence of the independence of judges and lawyers. Now, the ICJ has been joined by many other agencies which performed invaluable work in harmony with its efforts. The ICJ is itself taking new directions. It must reach out to a greater number of lawyers and their supporters in all parts of the world. The pursuit of justice ought to be the motivation of the lawyer in every land. The defence of just laws and of independent judges is a responsibility of lawyers but also of other citizens who hope to live in a community governed by laws not brute power. There are many other tasks which could be added to the agenda of the ICJ beyond those which I have collected above. Doubtless my agenda is influenced by my own experience. Yours will be different.

To those who fondly believe that the great battles of human rights have been won: that the basic instruments have been fashioned

and that the future looks rosy, I say look around. The world presents many challenges. In some ways these challenges are even more difficult and perplexing than those which faced the world on the brink of its new world order in 1945. In the decades ahead, I have no doubt that the ICJ has a vital rôle to play. A defender of the rule of just laws and constitutionalism. A proponent of the practical implementation of basic human rights everywhere. A champion for the independence of judges and lawyers in every land. And always a body charting the agenda for human rights in the decades ahead. The ICJ's work has not finished. Indeed, it has only just begun.

FOOTNOTES

* The Honourable Justice Michael Kirby AC CMG. Chairman of the Executive Committee of the International Commission of Jurists. Australian Human Rights Medal 1992. Personal views.

1. A body of jurisprudence has been developed, in respect of the Conventions of the International Labour Organisation, by the Freedom of Association Committee of the Governing Body and by the Committee of Experts on the Application of Conventions and Recommendations. See ILO, *Freedom of Association: Digest of Decisions and Principles* (3rd ed), Geneva, 1985; ILO, *Freedom of Association and Collective Bargaining*, General Survey of the Committee of Experts on the Application of Conventions and Recommendations, Geneva, 1983.
2. International Commission of Jurists, *Countdown to 1997: Report of a Mission to Hong Kong*, Geneva, 1992, 40ff.
3. International Commission of Jurists, *The Failed Promise, Human Rights in the Philippines Since the Revolution of 1986*,

- Geneva, 1991, 31ff.
4. International Commission of Jurists, *Report of the Mission to Thailand*, Geneva, 1992 (forthcoming).
 5. See *R v Secretary of State for the Home Department; ex parte Brind* [1991] 1 AC 696 (HL); *Derbyshire County Council v Times Newspapers Limited* [1992] 2 WLR 000 (CA), noted (1992) 66 *Australian Law Journal* 382.
 6. *Eddie Mabo & Ors v The State of Queensland*, unreported decision of the High Court of Australia, 3 June 1992.
 7. *Ibid*, Justice Brennan, p 30.
 8. *Attorney General for New South Wales v Quin* (1990) 170 *Commonwealth Law Reports* 1; (1990) 64 *Australian Law Journal Reports* 327 (HC).
 9. See Tun Saleh Abas & K Das, *Mayday for Justice*, Magnus, Kuala Lumpur, 1989.
 10. United Nations Charter, Article 1. See also Article 56.
 11. International Labour Organisation, *Report of the Fact-Finding and Conciliation Commission on Freedom of Association Concerning the Republic of South Africa*, Geneva, 1992.
 12. G B Kutkjian and A Pisca *Rights of Peoples*, SEDAM/UNESCO, Padova, 1991; G R Hall, *The Quest for Native Self-Government: The Challenge of Territorial Sovereignty*, (1992) 50 *Uni Toronto Law Review* 39.
 13. For a recent note on the work of the United Nations Subcommission on the Prevention and Discrimination and Protection of Minorities see (1991) 47 *ICJ Review*, 43.
 14. For Australian cases see *The Adelaide Company of Jehovah's Witnesses v The Commonwealth* (1943) 67 *Commonwealth Law Reports* 116; *Attorney-General for the State of Victoria (at the relation of Black) and Others v The Commonwealth of*

Australia and Others (1981) 146 Commonwealth Law Reports 559. See esp Justice Murphy (diss) 624; for United States cases see eg *Reynolds v The United States* 98 US 145 (1878); *Everson v Board of Education* 330 US 1 (1947).

15. See generally discussion T R Holroyd, "Homosexuals and the Military: Integration or Discrimination?" 8 *Journal Contemporary Health Law & Policy* 429, 445 (1992). For a discussion of approaches in the United States see *Massachusetts Board of Retirement v Murgia* 427 US 307, 312f (1976).
16. See eg Organisation for Economic Cooperation and Development (OECD) *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*, OECD, Paris, 1981.
17. Cf M D Kirby, "Law, Technology and the Future" (1988) 21 *Aust Journal Forensic Sciences* 112; see also R J Ravetz and D Dobson, *Science and the Law* (1991) 47 *ICJ Review* 69.