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HUMAN RIGHTS - THE EXPANDING AGENDA

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Justice Michael Kirby

THE PAST

We are on the eve of Human Rights Day and I am here to speak of human rights.

To some Australians talk of human rights is either boring or irrelevant. Reaching for another prawn from the barbie on a hot Christmas afternoon - the air filled with the drone of cicadas - they are inclined to look on human rights as other people's problems. Talk of international conventions conjures up the spectre of interfering globe trotting foreign bureaucrats trying to tell us Australians what to do. They may be prepared to concede the help which the human rights lobby gave to winning for Australia the leap-for-joy Olympics. But for many Australians - including many lawyers - the notion of harmonising our law to the international formulations of human rights is extremely offputting.

The void left by the collapse of the Soviet Union and the Eastern Bloc has been filled - horribly enough - by a revival of narrow nationalism. We have even seen a few symptoms of this in Australia: a provincial South Pacific jingoism which I deplore. After Hiroshima, we should all have gained the insight of our common global destiny. It is that insight which lies behind the movement for human rights, which has

been such a feature of our planet since the world emerged from the ashes of the Second World War and the bonds of colonialism.

In the past year, my work as Chairman of the Executive of the International Commission of Jurists (ICJ), based in Geneva, has taken me to many trouble spots for human rights. It has been my privilege to see the way in which the emerging global government has been stimulating and supporting the defence of human rights, democratic freedoms and the rule of law. Of course, we have a long way to go. But as we approach a new millennium, I believe that we can be generally optimistic. The foundations of a better world are there. And they are growing every day.

- * I began this year in Moldova - one of the former Republics of the Soviet Union, now independent. There, earnest lawyers and politicians were seeking to derive from Western experts the fundamental lessons for building what we take for granted - an independent judiciary and a society governed by law, not Party arrogance and nepotism;
- * From there I went to Lesotho, an independent State within the borders of South Africa. My purpose was to help explain, in towns and villages, the rudiments of a multi-party democracy which would shortly replace twenty years of military rule. The transfer of power was duly accomplished, peacefully and successfully. I hope it becomes a model for Africa;
- * In February, fresh from *Spycatcher*, I lectured the British on a more open system of government. Remarkably enough, they still do not have a *Freedom of Information Act*. They, who have given the world much by way of law and justice, sought to learn from Canada and Australia the lessons of more open government where democracy is more than an occasional trip to the ballot box;
- * In March, I took part with Canadians, Quebeckers, Inuit and many others in an examination of one of the most vexed issues of the time: the right of self-determination of peoples. A right guaranteed by the *Charter* of the United

Nations whose content and application are extremely controversial but crucial to the future of the post-Cold War world;

- * A major conference also in Canada, to which I contributed, examined the ways countries all over the world are seeking to teach fundamental human rights in schools and colleges and by the media. Better by far to instil the basic respect for individuals, so that it becomes instinctual conduct and does not need resort to expensive courts and tribunals for its enforcement;
- * In May I was rapporteur for a conference in Spain, including Nobel laureates, on the human rights issues of the Human Genome Project. Truly, by genetic engineering, we may be able to manipulate the future of our very species. Future generations may stand on the shoulders of the intelligence of the scientists of our time. If humans change will human rights change too?;
- * Mid-year saw the Vienna Conference on Human Rights - with the clash of wills between those who would emphasise universal human values and those who urged that the perspectives of fundamental rights are bound up with culture: rendering Western notions unsuitable for export to Asia. Universalism eventually won the rhetoric. But the impediments in the machinery for investigating and redressing abuses of human rights succumbed to the resistance of autocratic nations wielding great influence on the world's stage;
- * At the Commonwealth Law Conference in Cyprus, in June, delegates from every nation of the common law examined ways in which basic rights could become more available to ordinary citizens. My own paper explained the ways in which the risks of miscarriages of justice in the courts could be reduced. Fresh from the disasters of the Irish trials, the British delegates listened attentively;
- * An examination in France of the human rights issues of the development of an AIDS vaccine followed. Sadly, such a vaccine will probably be trialled on the poor soldiers of Africa but, when available, reserved for the most part to the wealthy societies of the developed world;

- * There followed an intense involvement in a training session in Phnom Penh by which the future judges of Cambodia were being prepared for service in a new democracy;
- * In July, I went to Malawi where the Life President, Dr Hastings Banda, was forced by useful international pressure to submit to democracy. I chaired sessions at which Government and Opposition faced each other for the first time - many of the Opposition newly released from prison. Here is another country in Africa which is seeking out, with international help, the road to democracy and respect for diverse opinions;
- * In August, I participated in an extraordinary conference in South Africa when, for the first time, the white judges of that country met their counterparts from the judiciary of Commonwealth Africa. Our task was to consider the ways, in a new South Africa, for translating brave words about human rights into the practical law for a most dangerous situation;
- * In October, I was asked to launch the equal opportunity policy of the New Zealand Law Society in Auckland. This is designed to give greater chances in the law in that country to women, members of ethnic communities and other minorities in a profession which does a lot of talking about human rights but does not always practise what it preaches;
- * And last week in London, from the high pulpit of St Martin in the Fields, I brought a message for World AIDS Awareness Week. In the struggle against the spread of HIV, one of our best weapons, paradoxically, is respect for human rights. Only by assuring this respect will we capture the minds of those at risk and persuade them to alter their behaviour for their own sake - and thus for the sake of all.

I recount this chronicle not to inflict on you a travelogue of my peregrinations. These activities, squeezed into stolen days, have been pursued along with one of the heaviest judicial workloads in this country. My purpose is to illustrate the varied and

vibrant nature of the human rights scene in our world in 1993. We have now gone beyond the basic instruments which establish the core principles of human rights. We are now exploring the ways in which these principles can be translated into action in every country, including our own:

- * How an independent judiciary can actually be established with lessons from lands like Australia;
- * How democracy can replace autocracy and military dictatorship;
- * How the promise of self-determination can be translated into dignity and self-respect for people cut off from self-government by oppressive borders;
- * How indigenous people, denied sufficient control of their own destiny can find self-respect; and
- * How challenging new human rights problems can be addressed, such as AIDS and the Human Genome Project.

To do all these things humanity needs global networks of committed non-governmental organisations. Such as the International Commission of Jurists, Amnesty, the Watch organisations, International Alert, Interights and other bodies of brave and determined idealists. Unashamed idealists for whom to be called a liberal is a badge of honour and for whom internationalism is the banner of the future.

THE PRESENT

The most interesting local development, from the point of view of an Australian lawyer concerned with human rights in 1993 has been the growing influence, in the decisions of the courts, of international human rights law.

For along time, it was considered that international law spoke to nations and governments and states. It was no part of local law unless specifically incorporated. That was a rule appropriate to the world before Hiroshima, jumbo jets and instantaneous telecommunications. But now, in Australia, England and other

countries of the common law, it is increasingly recognised that the international law on human rights has a very real part to play in the local legal system. The *Mabo* decision of the High Court is extremely important for the human rights of Aboriginal Australians. In their quiet moments of reflection, I think most fair dinkum Aussies will accept that the time had come to explode, at last, the myth that Australia was an empty continent when the white settlers arrived in 1778. This was a myth made by courts and bureaucrats, not by Parliament. What the courts made, they could unmake. Elected Parliaments (which neglected this issue for 150 years in Australia) can now lay down a new compact with the Aboriginals and Torres Strait Islanders. But that compact will be based upon facts and reality, not upon myths, self-deception and plain injustice. Uncomfortable as the *Mabo* decision debate has been and is, it has clearly been a suitable way of responding to the International Year of the World's Indigenous People.

In the long eye of the common law, *Mabo* may be seen as important for an still more fundamental and wide-reaching proposition. It was stated in the leading judgment of Justice Brennan:

"The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear in the common law [of Australia] the powerful influence of the Covenant and the international standards it imports."

International law, unless incorporated by Parliament, cannot override our Australian law. But where, as so often happens, our laws are silent or ambiguous, the judges and lawyers of Australia can now look to international principles to help fill the gaps and to help resolve the ambiguities. This is already happening in many cases in our courts. It is the way in which fundamental human rights principles are becoming woven into the reinforcement of the everyday common law of Australia. When I first propounded this notion nearly a decade ago, it was regarded as legal heresy. Now, it

is becoming accepted as legal orthodoxy. It requires that lawyers and citizens of the future in Australia should become aware of the fundamental principles of internationally stated human rights. Let us bring those principles down from the tablets of international conventions into the law of our Australian society and into our daily lives.

If some think that there is altogether too much talk about human rights and not enough about human duties, they are partly correct and partly wrong. The obverse of human rights is the imposition of duties on others to respect those rights. Generally, those others are powerful interests in government, in the bureaucracy, in multinational and large corporations and, dare I say it, in the global media. It is in respect of such powerful and opinionated organisations that the fundamental rights of the individual are expressed in international instruments and protected by people like me, working independently in courts and tribunals to enforce justice and fairness. Certainly, there is a need for individual responsibility, as for example in containing the spread of the AIDS epidemic. Certainly too, there is a need for collective responsibility. If we live in society, we must subsume some of our individualism to the greater good of society as a whole. We must accept the rules of the road by which we live together. But those rules themselves must conform to fundamental principles which it is all too easy to overlook. That is why the checklist of fundamental human rights is important, not least in a country such as Australia which has no constitutional bill of rights which the courts can enforce as such.

When we attempt to provide an overnight solution to a problem, beat up into urgency by the mass media, it is as well to have fundamental principles available by which to test the bright ideas put forward. Take for example the instant solution of a ban on all so-called "violent" videos in response to the *Bolger* case in England; as a case in point. The media, which trumpets endlessly its *own* freedoms, embraces greedily and often the magic solutions put forward which reduce the freedoms of others.

The boundaries of human rights principles are not set in stone, like the laws of the Medes and the Persians. They are constantly being pushed forward as we gather new insights. So, in recent years, we have come to see the great injustices suffered by women, by members of ethnic minorities, by gays and lesbians and other groups to which we were earlier blind. Laws on these subjects may be changed. But changing attitudes must sometimes await the instruction of a new generation at the parent's knee and at the local kindergarten, where ideas are formed which tend to last a lifetime.

At a recent meeting of the International Commission of Jurists in Geneva a number of new topics were adopted as the forward programme of the Commission to stimulate the world community's consideration of important new topics for human rights. The new agenda included:

- * Human rights and sexual orientation. The freedoms won by homosexuals and bisexuals in Australia (although not Tasmania) are by no means universal. In Iran and many other lands, homosexuals are still punished and even executed for their nature. This must stop. We must bring global pressure to see that it stops and not just put such wickedness down to legitimate cultural or religious differences;
- * The impact of modern technology on human rights also requires the closest attention. By chance, I go from this address to a meeting at the Federal Attorney-General's Department. I will there be examining the local implementation of the Guidelines of a Committee of the OECD which I chaired on data security. This follows the work of an earlier OECD Committee on Privacy Protection which gave rise to our Federal *Privacy Act*. The advent of computers, of biotechnology and the Human Genome Project present acute issues for human rights which sometimes seem beyond the capacity of Parliaments of lay people to understand and address. Yet address them we must. To do nothing is to make a decision;

- * The global environment also presents issues of environmental human rights which can only be tackled by international cooperation in defence of the planet. The people know this. It is one of the reasons for the great political success of the Greens in many lands, including our own;
- * The human rights of drug dependent people and drug users must also be considered on the future agenda. At present, such people are often sacrificed on the alter of the courts, for assignment, in many cases, to prison, in order to frighten off the majority from the use of drugs. Clearly this strategy has failed. Yesterday, a multi-partisan *Charter* calling for drug law reform in Australia, the abandonment of prohibition and the adoption of harm minimisation, was launched in Sydney. It has my full support. This is also a global problem which cannot be met by local laws alone. It presents the familiar quandary of the limits of the legitimate rôle of the State in intruding into the personal private behaviour of adults; and
- * The impact of human rights on Christian, Moslem, Jewish and other religious fundamentalism is another issue which the ICJ has placed on its agenda. Last week, I had dinner in London with Salman Rushdie, safely guarded by two large detectives. The intolerance with which his writing has been met, and the *fatwa* which puts upon him an international sentence of death, shows how very real is the challenge to human rights thrown out by religious intolerance. As fundamentalism is growing in many lands, fuelled often by extreme nationalism, it clearly hands us, the proponents of universal human rights, the gauntlet of a challenge to win the minds of the people in the coming century. The competitors for the minds of the people in the next century are human rights, diverse democracy, nationalism, intolerance and fundamentalist extremism.

Intolerance is clearly at work. To some extent we see it at home. We also see it in the demands of some of our Asian neighbours. It is important that to them, out of self-respect, Australia should speak with a straight forward and single message. It is no good telling China and Indonesia that human rights abuses are not really our concern and then laying down a different rule for Papua-New Guinea and others more susceptible to our instruction. In the current *contretemps* between Australia and Malaysia we see, I believe, reflections of a rather autocratic leader faced with the free speech of an Australian politician grown strong in the environment of free speech that nurtures our form of society. What Australian - name one - would turn a hair if called "recalcitrant" by another Australian in robust comment? There is now a most earnest examination going on throughout Canberra of Malay dictionaries to seek to explain the problem by reference to difficulties of language translation. But it is not that at all and we all know it. It is the response of someone out of sympathy with the culture of freedom that cherishes honest expression and honours diverse opinions even when they differ from our own. Much more serious than this present difference with Malaysia was the manner in which that country, under its current leadership, moved in 1988 to dismiss from office the highest judge of the nation, the Lord President, Tun Salleh for saying much, much less than I am saying here before you today. To their great credit, a thousand and one lawyers of the Malaysian Bar Association on 9 July 1988 unanimously passed resolutions of condemnation against *that* recalcitrance. I supported them. But most Australians at the time could not have cared less. And the media ignored the event. Without independent judges human rights rest on fragile ground.

We must seek to build in Asia and the Pacific new institutions to reinforce respect for human diversity and fundamental rights such as exist elsewhere in the world. In Europe and the Americas there are now international and regional commissions and courts which receive and adjudicate upon citizen complaints of breaches of basic rights brought against their countries at the bar of international law and opinion. Even in Africa there is a permanent Commission of Human and Peoples

Rights. But not in Asia and the Pacific. It is time that the Australian Government took the initiative to promote such an Asia-Pacific Commission and Court of Human Rights. This has been proposed for many years by Lawasia. It could start with those countries which, like Australia, already submit to the Human Rights Committee of the United Nations, to which Justice Elizabeth Evatt was recently appointed. Those countries of the region are Australia, Mongolia, Nepal, New Zealand, the Republic of Korea and the Philippines. It may take a little longer to rope in other countries of the region. But we should start the process.

To those who say that the Confucian societies, or the Islamic communities, of our region will never join I would answer in the words of Governor Chris Patten of Hong Kong:

"There is nothing specifically or exclusively European or North American about respecting human dignity. If you're a journalist locked up for months for telling the truth, if you're a trade unionist incarcerated for championing workers' rights, if you're beaten of the head (or worse) by a policeman, the brutal result is the same, for you and for the community, whether it happens to be Europe or Asia, America or Africa. Human rights are indivisible and interdependent. ... The main reason for wanting to sweep human rights under the carpet is to retain political power or crush opposition."

In recent days I have received an appointment from the Secretary General of the United Nations (Dr Boutros Boutros-Ghali). It represents an important challenge, to translate some of these fine words into practical action in a very real situation. I am to be his Special Representative on Human Rights for Cambodia. I express my appreciation to the Australian Government, and specifically to Senator Gareth Evans, for their support in my nomination for this post. It is the first time an Australian has been so appointed. I have no doubt that, in part, it is a tribute to Senator Evans himself, who played such a remarkable rôle in bringing about the Paris Peace

Agreements which led to the free elections, the new constitution and the brave new chance for Cambodia which has suffered so greatly.

To reflect my sense of urgency about this appointment, I have already had discussions in Geneva with the United Nations Centre for Human Rights. I have also arranged a visit to Cambodia in January 1994. My mandate requires me to have contact not only with the Government but with the people of Cambodia. I am required to address not only respect for human rights there but also their practical protection. My duty is to report to the United Nations at its highest levels.

This is the first time that the United Nations has adopted such an active rôle in the internal human rights arrangements of any country. It is a great challenge and opportunity for the fledgling organs of the international community. If we get it right it will have great implications.

To assist me in the performance of these duties, which are completely independent of the Australian Government, I will make contact with national and international human rights organisations and ordinary Cambodians at home and in the scattered refugee communities, including in Australia. When I am in Cambodia I will not just talk with politicians and judges. I plan to visit prisons, to speak with journalists and to listen attentively to those claiming the diminution of their human rights. We must all be constructive in helping the building of the new Cambodia. But it is vital that it be built on truth and international principle with the full assistance of the United Nations and member countries like ours.

I was in Phnom Penh in July. My task was to help teach the new judges. Virtually every judge and lawyer of the old days was murdered or driven into exile by the successive revolutionary régimes. Collected in the number one courtroom in the Supreme Court in Phnom Penh were a group of school teachers and others, undertaking a crash course to become the judges and magistrates of the new Cambodian democracy. It was a humbling experience. Their earnest dedication to their country and its welfare was an inspiration, and most moving for me.

At a quiet point in the lectures, I stole away from the Court House. I rode on a motor cycle through the backstreets of Phnom Penh to a three-storey building, once a high school built by the French. There, on the walls were the *graffiti* of long forgotten students, rude suggestions about their fellow pupils and jests about their Caucasian teachers. But now on the walls are also the grim reminders of what Cambodia has lately been through. Like the Nazis, their oppressors photographed everything. The haunting eyes of the victims of the genocide in Cambodia - before and after torture - remain with me to this moment. The instruments of torture are left largely in their place as they were when the Vietnamese troops stormed into Phnom Penh to put an end to the Pol Pot régime, for which time and civilisation had stopped. The problems for human rights in a country like Cambodia are enormous. They test our resolve to build a better world on the basis of the respect of each precious individual who breathes and lives and hopes and dreams and suffers and has a practical and a spiritual life. For those who have died and suffered, and for those who are living in hope of human rights, I must succeed in this new task.

In terms of human rights, we have many problems in Australia. But also many blessings. That is why today I have looked beyond our country. Our blessings impose upon us a duty to share our resources and our experiences with our neighbours and our friends. We should do so humbly and not arrogantly. We should do so attentive to their instruction about our faults. We should do so evenly and not inconsistently. We should do so generously and where necessary bravely.

These are the messages that should go out in this week in which we celebrate Human Rights Day throughout the world. Human rights are universal. They inhere in human beings everywhere simply because they are human - our brothers and sisters. Human rights require spirited champions. They depend vitally upon an informed and supportive media. Their boundaries continue to expand. Their challenge reaches out from Canberra to Cambodia and far beyond. This is not an issue only for governments. It is a moral challenge to each one of us - each human being with unique moral insight. I hope that we will be equal to the challenge.