

"Seeing Health Rights in the Global Context"

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MACFARLANE BURNET CENTRE FOR MEDICAL RESEARCH

SEMINAR ON HEALTH AND HUMAN RIGHTS

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SEEING HEALTH RIGHTS IN THE GLOBAL CONTEXT

The Hon Justice Michael Kirby AC CMG*

A PERSONAL CONTEXT

My life has involved me in a number of activities which have been relevant to the issues of health and human rights.

My work in the Australian Law Reform Commission frequently took me into study of various questions of Australian law as it affects health and health rights. Thus the project on human tissue transplantation examined that area of bioethics and the law. The project on privacy involved a scrutiny of personal integrity and medical records. The exercise on reform of the law of evidence involved questions relevant to medical evidence and medical privilege.

In addition, my service in a number of international bodies has allowed me to see the impact of developing human rights law upon the law generally and health rights in particular. My work on the Global Commission on AIDS between 1988 and 1991 exposed me to one of the main issues for health and

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human rights in the world today. More recently my work as Special Representative of the Secretary-General for Human Rights in Cambodia has confronted me with the intensely practical questions of reconciling the large promise of a "right to health" with the day to day reality of health care conditions in Cambodia.

My work as a judge in Australia, a country of the common law, has taught me the growing impact of international human rights law upon our legal system. This was seen most vividly in the reasoning of the High Court of Australia in the *Mabo* case concerning the land rights of Aboriginal Australians. But in many cases, large and small, the same globalisation of the law and impact of international human rights law, may be seen.

UNIVERSAL HUMAN RIGHTS PRINCIPLES

Relevant to the right to health, the most economical way in which I can outline the appropriate principles of international law is to quote from the paper of Professor Virginia Leary.¹ This is a new journal of the Center for Health and Human Rights in the Harvard School of Public Health.

At p 32, Professor Leary collects the basic principles of the universal human rights law relevant to human rights and health. With a few minor modifications for the Australian context, this is what she says:

"The 1948 Universal Declaration of Human Rights is not a treaty. However, most of its provisions are now considered as constituting customary international law. Article 25 of the Declaration reads:

'Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and the right to security in the event of ... sickness, disability...'

¹ "The Right to Health in International Human Rights Law" published in *Health and Human Rights* 25 (1994).

The language of the WHO Constitution has also inspired the provisions of several treaties:

- *WHO Constitution (Preamble)*
The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social conditions.

- *International Covenant on Economic, Social and Cultural Rights*
Article 12(1): The States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

- *Convention on the Rights of the Child*
Article 24(1): States Parties recognise the right of the child to the enjoyment of the highest attainable standard of health.

- *African Charter on Human and Peoples' Rights*

Article 16: Every individual shall have the right to enjoy the best attainable state of physical and mental health.

There is no regional human rights treaty for Australia or the Asia/Pacific region.

The important WHO and UNICEF Declaration of Alma-Ata adopted at the International Conference on Primary Health Care in 1978, also used similar language:

'The conference strongly reaffirms that health, which is a state of complete physical, mental and social well-being, and not merely the absence of disease or infirmity, is a fundamental human right and that the attainment of the highest possible level of health is a most important world-wide social goal whose realisation requires the action of many other social and economic sectors in addition to the health sector.'

It should be noted that the use of the language "highest attainable standard" in these documents presupposes a reasonable, not an absolute, standard. Also, the language

of the WHO Constitution emphasises an essential element implicit in the shorter phrase "right to health" by referring to non-discrimination on the grounds of race, religion, political belief, economic, or social conditions. Emphasis on non-discrimination in relation to health is reiterated in the following discrimination conventions.

- *Convention on the Elimination of All Forms of Racial Discrimination*

Article 11(1)(f) provides that States Parties shall take all appropriate measures to eliminate discrimination against women in the enjoyment of 'the right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.'

Article 12 of the same convention provides that all appropriate measures should be taken by States Parties to eliminate discrimination against women 'in the field of health care in order to ensure on a basis of equality of men and women, access to health care services, including those related to family planning.'

The first step in the consideration of the impact of universal human rights law is to know its sources and its content. That is why Professor Leary has performed an important task in collecting the principle tenets and placing them before us all.

AIDS STRATEGIES REINFORCE HUMAN RIGHTS RESPECT

In my service on the WHO Global Commission on AIDS, I had the privilege to meet two specially fine United States scientists, Jonathan Mann and June Osborn. Jonathan Mann was then the Director of the Global Programme on AIDS of the World Health Organisation. He taught me the AIDS paradox:

HIV/AIDS brings with it important challenges to human rights. With the virus comes the second epidemic of discrimination. The AIDS paradox teaches that, ironically enough, the best way to stem the tide of the epidemic is by protecting the human rights of those infected or most at

risk. Only then is there a chance to get into their minds. Only then will there be a chance that their behaviour will be modified to protect themselves against infection. We have partly learnt this in Australia. But it is a lesson still to be learnt in most countries of the world.

Dr June Osborn taught me the second principle of HIV/AIDS law and policy:

All laws and policies to deal with HIV/AIDS must be based not upon mythology, prejudice, hunch, guesswork, attitude or even hope. They must be based upon good science and sound data.

It is imperative as we address the many challenges of HIV/AIDS that we should remember these two principles. Only if we do so will we ensure that the global challenge of HIV/AIDS is addressed in a way which is respectful to the human right to health care and to the other important and basic human rights which are enjoyed by human beings everywhere, as an attribute of their humaneness.

CAMBODIA'S ATTEMPT TO REBUILD HEALTH FACILITIES

In my capacity as Special Representative of the Secretary-General for Human Rights in Cambodia I have visited Cambodia on four occasions in 1994. My task is to report to the Commission on Human Rights in February/March of each year and to the General Assembly in November.

During my visits to Cambodia I have seen the way in which brave people are rebuilding the shattered, and almost destroyed, health facilities of that country. I have visited the King Sihanouk Hospital (formerly the Soviet Hospital) in Phnom Penh, the Battambang Hospital and many other smaller health facilities. In these I have seen the devastation caused by war and the many victims seriously injured by land (anti-personnel and tank) mines.

In my second report, presented to the General Assembly in New York on 22 November 1994, I made a number of urgent recommendations on the human rights of Cambodians to basic health care and what should be done to fulfil that right. I also referred to the grave problem of land mines which is so detrimental to the Cambodian people's enjoyment of a right to health care. Let me quote from my report:

**** On the right to health:**

** The need to upgrade the infrastructure and delivery of health services remains urgent and substantially the same as stated in the first report.*

** Particularly urgent priority should be given to campaigns to prevent the transmission of human immunodeficiency virus (HIV) / acquired immunodeficiency syndrome (AIDS). New initiatives should be taken, in consultation with UNDP and the World Health Organisation (WHO) to promote awareness about AIDS in the media, in secondary schools, in other educational institutions and in other appropriate public ways. There must be a heightened sense of the urgency of promoting HIV/AIDS awareness and education in Cambodia. The Centre for Human Rights should, in cooperation with UNDP, WHO and other relevant international and national bodies promote seminars, workshops and other initiatives designed to mobilise non-governmental human rights organisations in campaigns of HIV/AIDS awareness. Particular attention should be addressed to assisting the Secretariat for Women's Affairs and non-governmental women's organisations and to promoting the relevance of women's empowerment. The organisation of prostitutes into associations for self-protection should be promoted. Investigations should be made concerning the availability from international donors of free condoms for distribution to sex workers and other target groups with appropriate advice about HIV/AIDS and its modes of transmission. Mobile vans to provide such education and assistance should be established without delay in main cities.*

* *The Special Representative welcomes the investigation by the National Assembly of the current availability of pharmaceutical drugs having dangers to life and health if used without strict medical supervision. The better control of such drugs and scrutiny of the effectiveness of imported drugs should have the attention of the Government of Cambodia in a way consistent with the continued provision by pharmacies of cheap drugs and advice to members of the public unable to secure, or to afford, medical attention.*

There is a need to monitor the channelling of pharmaceutical drugs and medicines donated to hospitals in Cambodia. It is alleged that such donated pharmaceuticals are often found on sale in pharmacies or in the local market. Arrangements should be made to prevent the sale of donated medicines and to avoid their misuse."

**** On landmines:**

"During his third mission, the Special Representative received detailed briefings on, and took an active part in discussion about, the activities of the Cambodian Mine Action Centre and non-governmental organisations involved in demining in Cambodia. He welcomes the strong support given by the Government of Cambodia as well as international support for the important work of removing anti-personnel and anti-tank mines, which proliferate in Cambodia.

The Special Representative endorses the recommendations of the group of agencies and non-governmental organisations concerned in the activities of mine clearance, released on 29 July 1994 during his field mission (see annex IV to the present report). He notes that some progress is being made in the review of the applicable 1980 international Convention and Protocol. In particular, he urges:

(a) Strict implementation by the Government of Cambodia of legal regulations on the possession and use of land-mines in Cambodia;

(b) Consideration of a unilateral cessation of the deposit of further anti-personnel mines by the RCAF to

stop the cycle of land-mines despoliation of the territory of Cambodia;

(c) A request to the Secretary-General to consider summoning, at an appropriate time, an international conference to give a fresh impetus to progress on this devastating means of waging war with such terrible and indiscriminating consequences for civilians;

(d) Developing mine awareness and education by the Government of Cambodia directed to the people, especially in rural areas and areas of conflict;

(e) The promotion of new technologies of mine clearance;

(f) International prohibition of the use of plastic mines, which contain almost no metal parts and are thus extremely difficult to detect.

The Special Representative again calls attention to the recommendations contained in his first report concerning international control of the manufacture, export and trade in anti-personnel and anti-tank land-mines. He repeats the applicable recommendations there stated. They are given a heightened sense of urgency by what he saw during his third mission to Cambodia and the toll upon human life and the environment of Cambodia and the stability of the civil society of that country"

POST HIROSHIMA

All of us, as citizens of the world post-Hiroshima, have an obligation to know and understand the basic framework of universal human rights principles. Respect for fundamental human rights is one of the foundation-stones upon which the new world order was established in 1945 when the United Nations was set up. The 50th Anniversary of the United Nations calls us to reconsider the achievements and failures of the Organisation with respect to fundamental rights. All of us have an obligation to translate the great principles of the *Charter* and international law into our domestic law and the activities of our daily lives.