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THE CHALLENGE OF HUMAN RIGHTS

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A CENTURY CLOSING

Consider this century. What will it be remembered for in the eye of history?

I suggest for three things especially - and they are interconnected. The first is the most terrible history of war. Never has there been a century of such suffering and mass destruction. Never has humanity witnessed so many examples of genocide: the Jews of Europe, the Khmer who fell victim to Pol Pot; the Tutsis and the Hutus in Rwanda. It is still going on. Connected with war - and often growing out of the technological needs of the war machine - are the most remarkable advances of science. This has been the century of science. We have witnessed the rise and rise of informatics; the discovery of nuclear fission and of wondrous advances in biotechnology culminating in the Human Genome Project. Thirdly, there is the beacon of hope. The advance of global

human rights. The recognition that, in the dignity of each individual human being, lies a kernel of fundamental rights which are inalienable and which belong to that human being simply because he or she is human.

BASIC CONSTITUTIONAL RIGHTS

It is appropriate on the occasion of the fiftieth anniversary of the adoption by the United Nations of the *Universal Declaration on Human Rights* to reflect upon the human rights movement. Its roots lie deep in the philosophical writings of scholars and thinkers in every intellectual tradition. The modern exposition of basic rights is often traced to the English *Magna Carta* (1215) and English *Bill of Rights* (1688); to the French *Declaration of the Rights of Man and of the Citizen* (1789) and to the amendments adopted to the newly established Constitution of the United States of America (1790).

When the Australian Constitution was adopted in 1901 it contained relatively few express declarations of fundamental rights. The founders believed that the best protection of our basic rights lay in the democratic parliament, responsive to the will of the people. It is true that our constitutional arrangements have generally protected fundamental rights of at least the majority of our citizens to an extent not always achieved in those societies which have incorporated fine sounding charters of rights in their constitutional documents. Yet because of the world-wide advance of the human rights idea since 1948, much pressure is now exerted on Australia to reconsider the

question whether it too, like virtually every nation on earth, should adopt a charter of fundamental rights and freedoms - rights above politics and popular pressure of the moment. Other countries of our legal tradition, such as Canada and New Zealand have now done so. Even the United Kingdom, long resistant to the incorporation of fundamental rights in domestic law, is now considering a Bill introduced by the Blair Government effectively to incorporate in British law the rights enshrined in the European Convention on Human Rights. We now stand almost alone.

My purpose is not to go over these well known facts although it is appropriate to consider them in the context of the celebrations of the *Universal Declaration* and as we, in Australia, reflect upon constitutional reform and the centenary of our own federation. Instead, I wish to make the point that in several little understood ways Australia has been participating in the global development of human rights and in the attempts to convert the fine words of international treaties and principles into practical operation. Let me mention three ways in which this is happening. They may not always be understood. But they are certainly worth considering.

CONSTITUTIONAL IMPLICATIONS

One development, which began before my appointment to the High Court of Australia, involves drawing upon the inferences that are necessarily derived from the brief text of the Australian Constitution. The text says nothing expressly about the right of free

expression. There is no First Amendment guarantee of a free press in the Australian Constitution. Yet the High Court of Australia has concluded that it is implicit in the establishment of a democratic system of government as stated in the Australian Constitution - with elected Parliaments - that a high measure of free expression must be enjoyed by all in Australia. To express their opinions and exchange information concerning political, social and economic matters. Otherwise the constitutional commitment to democracy would be a charade. Elections would be a farce.

There have been critics of this constitutional development by the Court. Some have even said that the Court has usurped the right of the people to change their Constitution. It has done nothing of the sort. As it has from the very beginning of federation, the High Court has simply construed the Constitution. Necessarily judges look at the same words with the eyes of their generation. They reflect the perceptions of the times they live in. Only in this way has our Constitution (one of the oldest in the world) been adapted from horse and buggy times to the space age. Australians may one day agree to express reform which incorporates a Charter of Fundamental Rights and Freedoms in their Constitution. In the meantime, it seems likely that arguments will be advanced to draw out of the sparse language of the text inferences concerning the necessary implications about fundamental rights which all Australians should enjoy in a society such as that established by the Constitution.

The *Universal Declaration* of 1948 initiated an enormous growth of international treaty law which now represents the foundation of the global human rights movement. Treaties forbid unjust racial discrimination, discrimination against women or against children, discrimination against workers or human and cultural genocide. This growth of international law is itself a product of the recognition of the fact that humanity lives together in one fragile planet, all of us affected by events though they happen on the opposite side of the world. The lesson of the age of nuclear weapons, HIV/AIDS, global warming and flashpoints of war and conflict is that, in matters of human rights, we cannot ignore developments in other places. The old-fashioned idea that each country could go it entirely alone is now giving way to an understanding that the nation state must adapt to, and comply with, fundamental human rights principles.

JUDICIAL DECISIONS

In the High Court in a series of decisions, I have suggested that Australian courts can draw upon international human rights law in various ways:

- * By using these principles to develop the common law where past precedents, written by judges in earlier times, present no clear solutions to the problem in hand.

- * By interpreting Acts of Parliament, where they are ambiguous, in a way that conforms to international human rights law.
- * Even by interpreting the Australian Constitution itself in a way that ensures, so far as possible, that it conforms to universal human rights principles.

Not everyone agrees with these developments. But on the edge of a new millennium I have little doubt that, in time, this will be the approach which all lawyers will take to the development and understanding of the law.

GLOBAL PRESSURE

A third advance is also worth noting. It has been my privilege to take part in a number of activities of the United Nations, and other international and regional bodies, which have helped societies (including Australia) to bring their law into compliance with international human rights. I was only partly successful. Thus in Cambodia, as UN Special Representative on Human Rights, I endeavoured to persuade government leaders to build a new society conforming to universal rights. In the World Health Organisation Global Commission on AIDS there was a similar endeavour to persuade states to develop their strategies, responding to the AIDS pandemic in a way consistent with the basic rights and dignities of those affected. The influence of fundamental principles is now being brought to bear on virtually every country of the world. Thus

Romania will not be accepted into the Council of Europe until it repeals its harsh and discriminatory laws against gay and lesbian citizens. Of course, some societies and some groups in society resist the pressure to comply with fundamental human rights. Their leaders cite religious or cultural exceptions. But if the rights concerned are truly "fundamental" and "universal", they inhere in the dignity of each precious human being. They cannot be excluded on the pretended grounds of geographical, cultural or religious exceptions.

This is an exciting time for the advance of human rights in our world. Some people fear these developments. They cling to the old ways of nationalism and to the familiar paths of unjustifiable discrimination, alienation and belittlement. They may succeed for a time. But the international human rights movement is now unstoppable. It is caught up in the spread of education and the global developments of information technology. In the coming millennium, the tyrants and the autocrats will ultimately give way to effective social and legal remedies for every important departure from human rights.

WINNING HEARTS & MINDS

This is where the work of teachers and schools is so important. There is still a lot of ignorance and prejudice in every society, including that of Australia. The struggle for human rights will be won not in international conferences or even in courts of law - though

these will be important. It will be won in the hearts and minds of the new generation which generally looks with optimism and idealism to the promise of the new millennium about to dawn. It will be a millennium, we hope, freed from the scourge of war by the rationality of democratic and accountable government, global cooperation and international economic equity. It will be a time of ongoing and dazzling scientific and technological advances. Above all it will be an age for the universal attainment of fundamental human rights. We are on a path to enlightenment. Teachers have the privilege and responsibility of pointing the way ahead. Like all of us, they can draw inspiration and find directions in the principles which state the fundamental human rights of brothers and sisters in every land. There is no dream. It is the way of the future.