SOUTH AUSTRALIAN MULTICULTURAL AND ETHNIC AFFAIRS COMMISSION

FORUM ON HUMAN RIGHTS - A VISION FOR THE NEXT FIFTY YEARS

ADELAIDE, SOUTH AUSTRALIA, 10 AUGUST 1998

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The Hon Justice Michael Kirby AC CMG

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PERSPECTIVE

Each participant in this forum will bring their own perspective to the task of futurology. For me, looking into the future and predicting the shape of human rights concerns in the next fifty years, naturally enough, takes me to my own experiences. Many of those experiences have arisen outside the courtroom. However, as I shall demonstrate, aspects of human rights are constant companions for any judge and lawyer in Australia[1]. What is new is the growing

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* Justice of the High Court of Australia. President of the International Commission of Jurists (1995-98.

1 See D Kinley (ed), *Human Rights in Australian Law,* Federation 1998 forthcoming for a detailed review of the impact of

Footnote continues

utilisation of international law and international jurisprudence to give content to the expressions of human rights principles which we previously derived, exclusively, from the utterances of common law judges, mostly in England.

My perspective is a peculiar one. But it has special relevance for the topic of this forum. I have seen the future. It is my privilege to describe it.

After an orthodox legal education and initial training in the legal profession, I was appointed in 1975 as the first chairman of the Australian Law Reform Commission. By the terms of its Act[2], that Commission is obliged to make its recommendations for reform of the law so far as possible compatibly with the *International Covenant on Civil and Political Rights*. That was a somewhat odd statutory requirement, given that, at the time it was enacted by the Parliament, Australia had not made the *Covenant* part of domestic law. Indeed, it has still not done so. But at that time, Australia had not even signed the First Optional Protocol under which people can bring complaints to the United Nations Human Rights Committee about the failure of the Australian governmental and legal system to comply with fundamental human rights. Odd though it may have been, it was a

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international human rights law on many aspects of Australian law.

2. *Law Reform Commission Act* 1973 (Cth), s 6.

statutory obligation taken seriously by the Law Reform Commission. The Commission had to test its proposals against the principles of the *International Covenant.* Given that the first task assigned to the Commission was the preparation of a report on criminal investigation, it was a statutory instruction pregnant with possibilities. I soon learned the importance of the *Covenant.* Even then, twenty years ago, this was a growing field of law with the decisions of the European Court of Human Rights in particular giving guidance on analogous matters of basic principle.

My work in the Law Reform Commission eventually took me to Paris to the Organisation for Economic Cooperation and Development (OECD). This was because the Fraser government's first reference to the Commission required investigation of the adequacy of Australian law for the protection of privacy. Because of the impact of information technology, linked to telecommunications, the issue of privacy protection had by the 1970s become a transcontinental concern. Hence the involvement of the OECD. I was elected to chair the OECD committee. It produced Guidelines for the Protection of Privacy. These were eventually adopted by the Council of the OECD. They were ultimately accepted by Australia. They form the basis of the privacy principles which found their way into the federal *Privacy Act.* They are, in effect, part of the law of Australia as well as of other countries whose law is as different from our legal system as that in the Netherlands and Japan.

What did this experience teach? Several things:

- That human rights were of growing importance to the international community.

- That new problems were being presented by advances in science and technology.

- That those problems were extremely complex and required much thought and a great deal of work to secure consensus on a principled response that would be effective and not one quickly overtaken by further changes in technology.

- That the international community could work together and, despite difficulties of language, culture and legal tradition, could agree upon basic principles that could guide local lawmakers to the effective protection of human rights in the future.

- That problems are proliferating and that local lawmakers need help from international agencies if those problems are not to be consigned to the too hard basket.

All of these lessons remain true. They point the way to developments for human rights protection in the future. My experience since those early days in the Australian Law Reform Commission and at the OECD in Paris has confirmed the lessons. They indicate to the way in which we will have to respond, as an

international community, to the challenges of human rights in the next fifty years. The key words are: globalism and regionalism; technology; and cooperation.

EXPERIENCE

My work in the OECD led on, as these things do, to various other international responsibilities which have reinforced the lessons I learned in the 1970s:

- In 1988 I was appointed to the Global Commission on AIDS of the World Health Organisation (WHO). This was the international body initially established by WHO to examine the social, legal and ethical implications of the HIV/AIDS pandemic. Work on that body taught me a paradoxical lesson. It was that the countries which were most effective in the struggle against the spread of HIV/AIDS were those which were best protecting the human rights of people who were living with HIV/AIDS or most at risk of infection. This was a paradox because it was contrary to the punitive, judgmental response of most people, including many medical people. Yet it was generally accepted by WHO. It has become part of the strategy adopted in this country. We owe a great debt, as a country, to Dr Neal Blewett, as federal Health Minister and to Professor Peter Baume, his opposition number, who came quickly to the realisation of the paradox. Once again, humanity faced an unexpected and novel problem. A global organisation

began to give practical assistance in the lessons of human rights for the way in which the problem could most effectively be tackled.

In 1991 I was appointed to the International Labor Organisation (ILO) Fact-Finding and Conciliation Commission on Freedom of Association. That body sent me to South Africa shortly before the change in the constitution of that country. It investigated the state of labour relations in South Africa. It produced a report which was ultimately adopted by the South African government and parliament. The report was grounded in the international principles of human rights and in particular the conventions of the ILO. Again, this was a clear illustration of the way in which an international body could help a country, then long a stranger to international human rights norms, to conform to those principles.

In 1994 I was asked by both the government and opposition parties in Malawi to act as co-chairman of the constitutional conference which shepherded that country from a one-party state to a democratic, multi-party system. The task arose out of earlier work with the United Nations Development Programme (UNDP) working on the run-up to constitutional changes in Malawi. Once again, and with a different agency of the United Nations, I saw the way in which significant and practical change defensive of human rights could be facilitated in a very practical way.

Since 1995 I have become involved in activities relevant to the Human Genome Project. In that year I was appointed to the Ethics Committee of the Human Genome Organisation, a private scientific body. Then, in 1996, UNESCO appointed me to the International Bioethics Committee. That body, during my service, developed and recommended the *Universal Declaration on Human Rights and the Human Genome.* It is the first attempt by the United Nations to state the fundamental rules which should govern a development of science and technology of profound significance to human rights. Can there be a more significant question for human rights than who will be "humans" and how our species will adapt and develop in the coming millennium?

In 1996 the United Nations Centre for Human Rights (UNCHR) in Geneva asked me to chair a conference which it co-organised with UNAIDS, the body which brings together the United Nations initiatives on HIV/AIDS. This conference propounded principles for good governance in the context of HIV/AIDS. They were commended to the member countries of the United Nations by the Director of UNAIDS and the High Commissioner for Human Rights. A strong emphasis was

contained in them upon protection of fundamental human rights in a context where those rights may often be at risk[3].

In 1997 the Centre for Human Rights included me in the preparation of a manual on judicial use of international human rights norms. This was an area which had interested me because of my earlier involvement on a series of judicial conferences organised by the Commonwealth Secretariat in London. That series brought together judges from all parts of the Commonwealth of Nations, and also from the United States of America and Ireland. These judges of the common law worked on the formulation of certain principles. These have influenced the developments of the impact of universal human rights on common law judicial decision-making. The propositions of the so-called *Bangalore Principles*[4] were simple. If a statute was ambiguous, a modern judge could construe the statute in conformity with fundamental human rights principles if those principles had become part of international law and especially if the country concerned had ratified them. If the common law was silent, the judge could

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3. For a good example of how the lack of human rights protections can aggravate the spread of HIV/AIDS see C Beyrer, "War in the Blood - AIDS in South East Asia" [Spring 1998], Burma, 5.

4. (1988) 62 ALJ 531; (1989) 63 ALJ 497.

develop new principles of the common law by reference to any relevant norms of international human rights law. This was a way of bringing international human rights jurisprudence into active contact with the common law itself. In his decision in *Mabo v Queensland [No 2]*[5] Justice Brennan made it plain that the *International Covenant on Civil and Political Rights* was bound to affect the development of the Australian law once Australia subscribed to the First Optional Protocol. By taking that step Australia, in a sense, joined an international system for the exposition and application of international human rights principles. The result would inevitably be the impact of the one upon the other.

SPECIAL EXPERIENCE

All of the foregoing opportunities have given me a vision of the future. But one specially relevant and the most eye-opening experience which I had in this sphere, was in my capacity as Special Representative of the Secretary-General for Human Rights in Cambodia.

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5. (1992) 175 CLR 1 at 42.

The establishment of that office was agreed in the *Paris Peace Accords* which set up the United Nations Transitional Authority for Cambodia (UNTAC). When that authority withdrew after the first general elections, a Special Representative of the Secretary-General was designated to become a guardian of human rights in that country where human rights had so long been neglected. I was appointed to that office in 1993. I thus joined a very small band of highly talented persons, mostly lawyers, who worked for the United Nations as Special Rapporteurs and Special Representatives. There are about twenty-four of them. Some work on thematic subjects such as the Special Rapporteur on the Independence of Judges and Lawyers (Dato' Param Cumaraswamy of Malaysia). Or the Special Rapporteur on the Rights of Women, or the Special Rapporteur on Summary Executions. Others work for and in particular countries - such as Cambodia, Sudan, Cuba, Afghanistan and other parts of the world where particular human rights violations and risks need attention.

It was a wonderful experience to operate with the non-governmental originations, brave individuals and worthy governmental and official representatives in Cambodia. But it was a special experience to present my reports to the General Assembly (in November) and the Commission on Human Rights (in March). I took my turn with the other Special Rapporteurs and Special Representatives. They are a kind of network of agents of the United Nations. They have no armies. They are supported by no blue helmets. Their sanction is their report to the international community

through the United Nations. They oblige tyrants and dictators, as well as governments struggling to come to terms with human rights obligations, to answer before the bar of the international community in a way that never happened in times gone by. Tyrants and autocrats who answer to nobody at home are obliged to come before the international community and give their answer. This is not a perfect system for the protection of human rights. But it is a beginning. We are living to see it develop even further.

The recent acceptance of the establishment of the International Criminal Court by the conference of plenipotentiaries in Rome[6] is another step in the direction of the creation of new instruments of a kind of global government. The International Criminal Court will extrapolate from the experience of the International Criminal Tribunal for the Former Yugoslavia and the Tribunal on Rwanda. Its statute is complex and in some ways imperfect. But it is a beginning for rendering to account those who commit serious crimes against humanity and against those fundamental human rights, included in the statute of the Court, for which the United Nations stands.

Having seen the development of these new global institutions, and having played a little part in some of them, I have seen the

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6 (A/Conf.183/C.1/L.76/Add1-15) 17 July 1988.

future. With the growing advance of problems of a global character and, in particular, of a technological and scientific dimension, it was inevitable and timely that these developments in global (and regional) institutions would occur. They are not to be the subject of fear, least of all in a country such as Australia where we have our own strong institutions for the defence of our human rights. But we Australians, as good international citizens, must play our part in building the network of influence and protection for human rights so desperately needed in other societies which still fall seriously short of human rights observance.

CONSTITUTIONAL INTERPRETATION

There is one extension of the *Bangalore Principles* which I would wish to mention. I hope and expect that in due course it will become accepted as a principle in Australian jurisprudence. It arises out of some remarks I have made in a series of cases in the High Court. Those cases deserve greater attention than they generally receive. It is in the nature of most media coverage of High Court decisions that the nuances are lost. Yet it is in the nuances and the detail that the work of the Court must be explored and understood.

The principle to which I refer is one which extends the *Bangalore Principles* into the construction of the Australian Constitution itself. It is a principle which I mentioned in the case of *Newcrest Mining v The Commonwealth*[7] and developed in the *Hindmarsh Island Bridge* case[8]. In the latter, a case which concerned the meaning of the races power in the Australian Constitution, I observed that, to resolve ambiguity in the meaning of a constitutional phrase, it was legitimate and appropriate for a judge today to have regard to international human rights norms. No other Justice of the Court embraced this approach. At the moment it is a view which I alone have expressed. However, I have served in various judicial offices in this country for twenty-four years. That service affords me a perspective of the years, indeed of the decades. There are now few judges in the country who have served longer than I. And I still have a decade more to go! One thing you learn from long judicial service is that legal ideas, once considered heresy or at least heterodox, come in time (if they are right) to be accepted as orthodoxy and perfectly natural.

Let me therefore cite the reasons which I gave in the *Hindmarsh Island Bridge* case for adopting the new principle of

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7 (1997) 71 ALJR .....

8 (1998) 72 ALJR 722.

construction of the Australian Constitution to which I have referred. It will be for future judges, and indeed citizens, to consider whether my exposition is convincing. I said[9]:

> Where there is ambiguity, there is a strong presumption that the Constitution, adopted and accepted by the people of Australia for their government, is not intended to violate fundamental human rights and human dignity. Such violations are ordinarily forbidden by the common law and every other statute of this land is read, in the case of ambiguity, to avoid so far as possible such a result. In the contemporary context it is appropriate to measure the prohibition by having regard to international law as it expresses universal and basic rights. Where there is ambiguity in the common law or a statute, it is legitimate to have regard to international law. Likewise, the Australian Constitution, which is a special statute, does not operate in a vacuum. It speaks to the people of Australia. But it also speaks to the international community as the basic law of the Australian nation which is a member of that community. If there is one subject upon which the international law of fundamental rights resonates with a single voice it is the prohibition of detrimental distinctions on the basis of race ...".

VISIONS OF THE FUTURE

There are many topics which will come into the field of human rights concerns in the future. Some of them are old-fashioned human rights topics which will be seen in a new light and require closer attention. Amongst these I would include important aspects of the human rights of women and children to be free of disadvantage; of

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9 *Ibid* at 765, 766.

homosexual, bisexual and trans-sexual persons; of people living with HIV/AIDS; and of the aged. But there are also new topics which will come to be seen as topics for human rights protection. I refer, for example, to the human rights of drug dependent persons.

The lesson of the past is that sometimes we need new spectacles to see wrongs in terms of fundamental human rights. This can be demonstrated by previous attitudes to the human rights (including the political rights) of women; to the denigration, punishment and deprivation of rights of gays and lesbians, and to the belittlement of people for no rational reason but for their race or ethnic origin or the colour of their skin. Irrational distinctions on irrelevant grounds will have no ultimate place in the world of the new millennium. The law and international human rights jurisprudence in the next fifty years will be playing a part to bring about improvement. So will education and the media for, as the UNESCO Charter says, war (and I would add all human rights offences) begin in the minds of human beings. It is minds that we must win over to the cause of respecting the lives and dignity of all human beings and protecting their environment on this vulnerable blue planet.

Forgive the biographical elements of this contribution. But for me they help to make more concrete the points I have been endeavouring to make. The lessons which I draw from my life's experience are these. Human rights in the next fifty years will continue the development which we have seen in the fifty years since the *Universal Declaration of Human Rights* was adopted. We will

witness further developments of new norms for the kinds of new problems (or old problems which we can now see in a new light). We will face development of further international institutions - such as the International Criminal Court and the network of human rights guardians of whom I was privileged for a time to be one. We will also see the growth of regional as well as global instruments of human rights protection. In Africa it has now been decided to establish an African Court of Human Rights. This means that there is, or soon will be, such a court for the Americas, for Europe and for Africa. Only in Asia and the Pacific is there no system for regional human rights protection. This will be a major focus of concern in the next fifty years. Australia will have to play a part. It will have to be willing to submit itself (as it has through the United Nations Human Rights Committee) to a regional human rights body, judging its compliance with fundamental human rights. Generally we do better than most countries. But sometimes we err. Being human, we are not immune from the correction by others who may sometimes see our failings more clearly than we do.

Amongst the most difficult problems which will be presented to humanity in the next fifty years are those thrown up by technology. The problems of nuclear proliferation which imperil our species. The problems presented by information technology for privacy, and for dealing with other human beings in full respect of their dignity and humanity. The problems of the most complex character presented to our species by the unravelling of the genome.

Yet the lesson of my experience is that we can call upon international and other bodies to help in the domestic solution to these problems. It can be done and it is being done. We must redouble our efforts to ensure that the mechanisms are more effective. And that attention is paid to their outcomes in the democratic institutions of a country such as Australia. Distracted by politics and often by the entertainment of the race for power, our leaders sometimes pay insufficient attention to the problems of effective human rights protection and to the complex new issues that are being presented for action by them.

So the key words for the future remain global and regional developments; technology; and cooperation. Acute difficulties remain on the human agenda. But the world has made mighty progress in the past fifty years. And there will be more to come in the next fifty years in a millennium which I would call the millennium of hope.