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INTERNATIONALISM: THE BIGGEST CHANGE IN LAW

The University of Colombo, Sri Lanka
Convocation Address
Wednesday 21 July 2010

On the conferral of the honorary degree of Doctor of Laws

The Hon. Michael Kirby AC CMG

THE UNIVERSITY OF COLOMBO, SRI LANKA

CONVOCATION, WEDNESDAY 21 JULY 2010.

ON THE CONFERRAL OF THE HONORARY DEGREE OF DOCTOR OF LAWS

INTERNATIONALISM: THE BIGGEST CHANGE IN LAW

The Hon. Michael Kirby AC CMG Hon.LLD (Colombo)

WITH GRATEFUL THANKS

It is a great joy for me to return to Sri Lanka. Especially for the conferral of an honorary degree, recommended by the Senate and resolved by the Council of this great University. It is an additional honour to be asked to deliver this Convocation address.

I have served on the governing bodies of three universities in Australia, one as Chancellor. I attended hundreds of such ceremonies. The familiar forms are followed, there as here. For most of the graduates, this is the last of their lectures. Because the families and friends gather to celebrate, it is usual to invite a speaker to lift the thoughts of the congregation from mundane, every-day events of the here and now. But the speaker must not be too long-winded or boring in that task.

First, I must felicitate my fellow graduates. I must thank their parents, partners and supporters for bringing them to this day. My own first graduation ceremony, at the University of Sydney, occurred in 1959:

astonishingly 50 years ago. Photographs and films taken on such occasions freeze in time the images of those most dear to the graduates. In the Anglo-Saxon tradition, an impediment often stands in the way of verbalising the love that we feel for those who made all this possible. I hope that, in Sri Lanka, there is no such obstacle. Love is the universal force that transcends even learning, talent and power.

In the new won peace, that ends a bitter civil conflict of nearly 30 years on this island, the graduates must feel a special sense of exhilaration and optimism today. Yet with the honours and accomplishments come responsibilities and duties: to family, the community, to the country and the world. It is the relationship between the graduates and the world that I wish to reflect upon today. Fifty or even 30 years ago, this would not have been the speaker's theme. But the driving force of technology brings us all increasingly together. Little more than a day ago I was in London. Our world is linked by jumbo jets, the internet, YouTube and Twitter; the global ideas of human rights and duties; the global challenges of terrorism, the financial crisis and HIV/AIDS.

It is this global phenomenon that radically alters the discipline of law, as it was taught to me in the 1960s, and the law as it will exist for those graduating in the discipline today. I want to illustrate this phenomenon (and its difficulties) with three practical instances from my own recent life. It is important for the graduates in law, and indeed in other faculties, to go forth from such a ceremony, released from isolationist parochialism. We must all now be citizens of the world. This is the planet that the graduates inherit and that they must strive to understand and to improve.

UPHOLDING JUDICIAL INTEGRITY

When I studied law in the 1950s and 60s, the focus of virtually all our thoughts was on the jurisdiction in which we hoped to practise law. For me, this was the State of New South Wales, in Australia. We were admitted to practice by the Supreme Court of our State. We needed to know the federal Constitution and a few federal laws. But most of the laws that we were taught in those days were State statutes. The common law largely prevailed, united throughout the British Empire and Commonwealth.

In the intervening decades, federal law has expanded in Australia. Legal minds have become more national in legal outlook. But today, even that is not enough. Today, we are being released from our own local jurisdictions. Increasingly we think in global terms as international law expands, and as we perceive the global problems for our species: such as climate change, religious intolerance, nuclear proliferation, informatics and bioethics.

There is no greater exemplar in the world of this new way of thinking than Judge Christopher Weeramantry of Sri Lanka. Once a distinguished Justice of the Supreme Court of Ceylon, later a professor in Melbourne, Australia, he is here today (a famous son of Sri Lanka) as a one-time Judge and Vice-President of the International Court of Justice. In the law, one does not rise higher. His work for international law, and for the sharing of wisdom and security amongst different peoples, continues. In one project in which we have worked together, the Judicial Integrity Group, he leads an endeavour to express the principles of judicial integrity applicable throughout the world. The Group is made up of chief justices and senior judges from many

countries. Its convenor is Dr. Nihal Jayawickrama – one-time secretary of Justice of Sri Lanka. I am a member, and rapporteur, of that Group which works closely with several United Nations agencies. We were together last in January 2010 in Lusaka, Zambia. Our task there was to spread the ideas of the Judicial Integrity Group to colleagues in the judiciary throughout Africa. The fundamental right to a judge who is professional, independent and impartial is not a local thing. It is an attribute of universal human rights.

Having a formal court system is necessary in any country; but not sufficient. The courts must be uncorrupted, courageous and accessible to the people. They must uphold the principle of equal justice under law. They must protect minorities, and not just powerful majorities. They must defend the little person against instances of bureaucratic, military and executive abuse of power. One meeting of the Group took place in Colombo six years ago.

The principles adopted by the Group have already profoundly affected national judicial codes and even high judicial decisions (including of the Privy Council). That is how law develops today. Judges know, through the internet, that judicial colleagues and other law makers are watching their decisions far from the chambers in which they write them. None of us is now cut off from such global scrutiny.

The reputation for independence, impartiality and integrity is hard-won by the judiciary. If it is lost, it takes many years, even decades, to be regained. Judges are not tested by easy cases where their decisions will please powerful interests. They are tested when they uphold the rights of unpopular minorities. The High Court of Australia did this in

1951 when it struck down a federal statute that sought to ban the Australian Communist Party[1]. The Court also did so in 1992 when it upheld the right of Australia's Aboriginals to native title in their traditional lands[2]. It did so in 2007 when it upheld the right under the Constitution, for prisoners to vote in national elections despite a statute purporting to deprive them all of the vote[3]. It did so when it upheld the right of homosexual refugees from Bangladesh to assert protections under the Refugees Convention[4].

To make such decisions and to assert the rights of the majority and the rights of minorities, judges, courts, lawyers and the media must be assured of independence of mind and of person. Although such cases can sometimes be extremely irritating to elected governments, they are the very stuff of which democracy is made. In the twentieth century, we learned beyond doubt that democracy is not just the rule of majorities, asserted at intermittent intervals at the ballot box. It is a way of life. It is one that respects every person and protects the human rights of all. It upholds majority rights; but also the rights of minorities. This is the genius of a modern democracy. And of the community of democratic nations.

RESPONSE TO HIV/AIDS

A second field in which I have witnessed the protective role of the law is in relation to the global response to the HIV/AIDS epidemic. Over three decades, I have served on international bodies advising the United Nations on the ways in which the world community and national

1 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.
2 *Mabo v Queensland* [No.2] (1992) 175 CLR 1.
3 *Roach v Electoral Commissioner* (2007) 233 CLR 162.
4 *Appellant S395 of 2002 v Minister for Immigration and Indigenous Affairs* (2003) 216 CLR 473.

governments can treat the infected as well as halt the further spread of the virus[5].

Most people would think that the law has little, if anything, to do with an epidemic, such as AIDS. Apart from public health law, what has the law got to do with AIDS? This is where a strange paradox arises. The countries that have been most successful in containing this dangerous epidemic have adopted laws to protect minorities vulnerable to infection. These include sex workers, injecting drug users, men who have sex with men, prisoners and refugees. Persuading national governments to protect such groups is never easy. The punitive streak in human beings often comes to the fore. There is a call for more punishment and more stigma, not protection. Yet experience has shown that such strategies simply put the people most at risk, outside the essential messages that will lead to their self-protection, and thus to the protection of the community.

Last month, in New York, I attended a preliminary meeting for the new UNDP Global Commission on HIV and the Law. This body will be responding to two very large legal questions presented by AIDS. One is the global intellectual property regime that results in very high prices for the anti-retroviral drugs, essential for the many very poor people who are HIV positive. The other is the urgent need to amend, or repeal, prohibitary laws targeted at sex workers, drug users and homosexuals. These laws, many of which are the unlovely legacies of colonial rule, undermine the efforts of prevention strategies, aimed at reducing the current rates of HIV infection.

[5] In the World Health Organisation Global Commission on AIDS (1986-95); the UNAIDS Reference Panel on AIDS and Human Rights (2000-); and the United Nations Development Programme, Global Commission on HIV and the Law (2010-).

In Sri Lanka, your rates of HIV are lower than in most countries of Asia. But there are pockets of high risk people who need to be addressed[6]. The National Strategic Plan for your country has called for a drastic increase in prevention strategies. But these will need to enlist lawyers to understand and explain the difficulties of securing behaviour change through law. To help them see the obstacles which many current laws cause for that purpose. As the Sri Lanka Strategic Plan says[7]:

> "People who have a higher risk of HIV exposure are often the most difficult to reach, because homosexuality, soliciting and drug use and trafficking are illegal and [this] drives them underground. The ... national AIDS policy mirrors the Sri Lankan Constitution in taking as guiding principles universal human rights and dignity of all Sri Lankans, including their sexual and reproductive rights. There should be no discrimination ... on the basis of gender, HIV status, sexual behaviour or sexual orientation."

These are very strong words. Today's graduates must embrace and explain why it is so. As a starting point, they could enlarge their thinking by reading the enlightened judgment of the Delhi High Court, given by Chief Justice A.P. Shah in the 2009 case of *Naz Foundation v Union of India*[8]. That decision struck down s377 of the *Indian Penal Code* as incompatible with the Indian Constitution's provisions guaranteeing citizen equality and privacy. You in Sri Lanka still have the relic of the same section, long after the instigators have themselves repealed it. By legislative or judicial decision, it should be abolished as quickly as possible. It is an affront to basic legal principles. But it is also serious impediment to the struggle against AIDS.

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6 Sri Lanka, *National HIV/AIDS Strategic Plan*, 2007-2001.

7 *Ibid*, p5.

8 [2009] 4 LRC 838 (High Court, Delhi, 2 July 2009, per A.P. Shah CJ and S. Muralidhar J).

DEFENDING COMMONWEALTH CORE VALUES

The third global enterprise that I will mention took me to London this week as a member of a new Eminent Persons Group that will be examining the arrangements and future of the Commonwealth of Nations. The Commonwealth was effectively re-constituted in April 1949, with the participation of Prime Minister Nehru representing India and Mr. Senanyake, representing the newly independent dominion of Ceylon. The Commonwealth now comprises 54 nations, all but two of them (Mozambique and Rwanda) sharing the history of British rule and the legacy of the English language, parliamentary and legal traditions.

In the old days, the Privy Council maintained the unity of basic legal doctrines. With national independence, that coercive link fell away. Yet, throughout the Commonwealth, we were never so isolated as the United States judges and lawyers have been. We have never hesitated to draw upon the decisions of other Commonwealth countries. There would not, for example, be an Australian judge or lawyer who has not studied closely the famous Sri Lankan decisions in *Liyanage v The Queen*[9], both in the local courts[10] and of the Privy Council. It is regularly considered and applied in Australia. I have done so many times myself[11].

We can all therefore learn from each other, although it has to be said that, in recent years, there are comparatively few decisions of the Sri Lankan courts on constitutional and basic rights cases in the *Law Reports of the Commonwealth*. The decisions reported are more likely

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9 (1967) 1 AC 259 at 290-292 (PC).

10 (1962) 62 *New Law Reports* 313. See later (1965) 67 CNLR 193 at 259.

11 *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 125 [81], fn(192); *Re Macks, Ex Parte Saint* (2000) 204 CLR 158 at 266 [300] fn(371); *Silbert v DPP (Western Australia)* (2004) 217 CLR 181 at 188 [19], fn(17). (On separation of the judicial power).

to be on commercial questions, where issues of values are not so fraught[12].

A recent survey by the Royal Commonwealth Society (whose Director is himself an Australian of Sri Lankan origin, Dhananjayan Sriskandarajah)[13] suggests that the Commonwealth of Nations which links Australia and Sri Lanka is truly at a crossroads. How does it remain relevant to its diverse members in the next 60 years? How can we be sure that it will add value to the plethora of international organisations? If it relies solely on history and sentiment, it will wither away. Nostalgia is not enough to sustain it.

The challenge for the Commonwealth is one of building on the "core values" that its leaders repeatedly proclaim at their CHOGM meetings, the next of which is in Perth, Australia in 2011. No-one suggests restoring the coercive intrusions of Empire. But flowery rhetoric about commitments to democracy, human rights and freedom of expression are not enough today if the reality is that these values are sometimes ignored whilst the Commonwealth observes a tongue-tied silence or double standards.

This happened recently in Africa. Uganda saw the introduction of a bill to impose the death penalty on homosexuals. Malawi arrested, prosecuted and convicted two young men. They were imprisoned for 14 years for offences against the colonial anti-gay law. The Commonwealth was silent. In the end, it was the Secretary-General of the United

[12] See e.g. *Vanathawilluwa Vineyard Limited v Commercial Bank of Ceylon Ltd* [2008] 5 LRC 225. Contrast the earlier reporting on fundamental rights doctrine. See *Visuvalingam v Liyanage & Ors* [1985] LRC (Const) 909.

[13] Royal Commonwealth Society, *Common What? Emerging Findings of the Commonwealth Conversation* (November 2009, RCS, London).

Nations who secured their pardon. It was the High Commissioner for Human Rights, Navi Pillai, who insisted that local culture and religious beliefs could not override fundamental human rights. Apartheid in South Africa, you will remember, was defended by its designers on the basis of their warped understandings of biblical texts. Scripture and religion can be distorted, like the law, into serving oppressive ends.

The new group summoned to London will have the difficult, but very urgent task, of suggesting improvements to the Commonwealth that respect local national integrity whilst upholding universal human rights. In today's dangerous world, disrespecting human rights rarely remains a purely national problem. All too often it spills over into the neighbourhood and the world. Talk of local "sovereignty" needs to be adjusted today to the reality of a globe that is highly integrated in terms of trade, economy, communications, transport and human rights problems.

In Australia, we have discovered these truths, sometimes to our embarrassment. Visiting United Nations human rights officials have pointed to our occasional failings. Justice Bhagwati (one time Chief Justice of India) came for the United Nations High Commissioner for Human Rights. He criticised the Australian system of detention of refugees. So did the UN Rapporteur, Louis Joinet. And more recently, the UN Rapporteur on Indigenous People's Rights came to criticise (justly in my view) the racial basis of the Northern Territory Intervention by federal police and military forces which reduces the rights of Aboriginal Australians, identified by reference to their race.

Successive governments in Australia have pointed out that they are not bound by these criticisms. This is true of course. But the criticisms undoubtedly enlarge the civic and political discourse of our democracy. It is healthy. It is sometimes useful. In any case, it is part of the global character both of the United Nations and of the Commonwealth of Nations. Every land, including Australia, must accommodate to this contemporary reality. And it is part of the world in which this graduating class of Sri Lankan lawyers will live and practise their noble profession of law. The world now has global law. We must all now be aware of it. Increasingly, the world community demands it and insists upon it. To make the importance of this exercise the nine members of the EPG yesterday met Queen Elizabeth II as Head of the Commonwealth.

THE BLESSINGS OF PEACE

I come to my conclusion. I first visited Sri Lanka in 1974. I drove around this island, exploring for a month its many historical and natural beauties. I have always retained a special love for its people, its temples and beaches, its arts, food and music. The events of the intervening years have been doubly painful to me because I remembered so vividly the happy places of my youth. I could not then have imagined that I would return today, to this occasion and to this high honour.

Returning now I am reminded of the epigram which Winston Churchill wrote in 1939 as a commentary on the Great War of 1914-18. That was, you will remember, the war to end wars. Speaking of the values of a just and civilised people, he declared their aspirations to be:

> "In war, resolution; in defeat, defiance; in victory, magnanimity; in peace, goodwill."[14]

It is probably fair to say that these words were not fulfilled after the First World War, with the result that the second war became inevitable. History has an eerie tendency to repeat itself. My prayer for Sri Lanka is for peace, founded on magnanimity and goodwill for all its people.

With the suffering and burdens of war now in the past, I trust that Sri Lanka will move quickly to dismantle the security structures which emerged to respond to the war; that it will become more outward looking and re-engage more vigorously with the world; that it will embrace its old cosmopolitan energy and celebrate a vibrant and independent judiciary of great distinction. Every graduate on this day should dedicate themselves to these high objectives.

In a graduation ceremony like this in Australia, I had the privilege of conferring a degree on one of the greatest of our poets, the Aboriginal writer Kath Walker (Oodgeroo of the Noonuccal). Her poem, *Song of Hope*, has a message for us too on this occasion. It is a message that does not forget the pain of the past. But it looks to the future with confidence, in a spirit of love and reconciliation:

> "Look up my people,
> The dawn is breaking,
> The world is waking,
> To a new bright day,
> When none defame us,
> Nor colour shame us,
> Nor sneer dismay."

[14] W.S. Churchill, Epigram After the Great War 1914-18. In Sir Edward Marsh, *A Number of People* (1939) p152. It was later used as the "moral of the work" in each volume of Churchill's history *The Second World War.*

The closing words of the poem are specially apt to Sri Lanka today:

> “To our fathers’ fathers, the pain the sorrow,
> To our children’s children, the bright tomorrow”

To the University of Colombo, I express my heartfelt thanks. To the people of Sri Lanka, love and respect. To the new graduates, I proclaim the hope of a bright tomorrow. A global tomorrow. A tomorrow of international law and universal human rights.

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