

TALKING ABOUT HUMAN RIGHTS

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I acknowledge the traditional custodians, the Widjabul Tribe of the Bundjalung Nation.

When Justice Kirby and I were at our respective opportunity classes in Sydney, we were exposed then to the *Universal Declaration of Human Rights*.¹ I suspect his teacher made it available to them, as did mine. Around the walls and above the windows was the whole *Declaration*. It was there because the United Nations wanted children to be told about it. They wanted children to learn about its principles.

But it was just recently in terms of human rights, that I was reminded what in some sense an amorphous subject it is and a difficult one to define. I was with an alumnus of Southern Cross in Cambodia last Saturday. He is the Deputy President of the Human Rights Commission for Cambodia, a country with a lot of problems in terms of human rights and corruption and so on. But he was worried about garment workers. And he said ‘Where is there a statement in human rights terms indicating the areas that ought to be looked after for garment workers?’

And I said ‘Well, it’s part of human rights of course, a safe workplace.’ But we deal with human rights in different ways. We have developed industrial laws and awards and workplace safety measures, which arise out of human rights but arise independently. But they do in fact occupy that concept.

And I thought, as I had been thinking of this presentation, that I should give some examples on a broad range of human rights activities and I should try and get you to think of the different ways in which human rights are manifest.

I do not want to, however, just deal with human rights and entitlements because I want to put it in this context. It is not just a matter of human rights. All people that live in a collective society have duties as well. I think a collective group

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1 *Universal Declaration of Human Rights*, GA Res 217A, 3rd sess, 183rd plen mtg, UN Doc A/810 at 71 (1948).

has a right to ask – and that means a government and that means Parliament – to ask its individual members to contribute to civil society. Paying tax is not something we like, it is however something a government is entitled to ask. National Service is something that is, since the beginning of time, been something that governments ask. I did mine, I didn't have to go overseas, but I did mine and I have never been fitter.

But in terms of the *Universal Declaration*, it was passed at a time when we had a Cold War. We had the ... it was not the Iron Curtain then, but it was at a time when the world was divided in major philosophies. It was adopted mainly because of the pressure of that remarkable woman Eleanor Roosevelt. But it was passed 48 votes to nil with eight abstentions. The eight abstentions were of course the then Soviet Block members, and I think South Africa and Saudi Arabia. But there was no opposition.²

The initial draft came shortly after the first conference in '45 and immediately after that most terrible of world wars, by a French man whose English is remarkably good, René Cassin. And in its various forms it finally came on the 10th December 1948 to be declared. And after all the debates about whether you have a legally enforceable declaration, a legally enforceable law, the two main vehicles that come from that were the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*.³ They have been extrapolated into, incorporated into, some laws, for instance the *Evidence Act 1995* of the Commonwealth of Australia, and NSW and most of the other States now, incorporates the ICCPR to assist with interpretation. I will talk about that briefly. But it has led to a series of treaties which spell out in much more terms what was originally embodied in that remarkable document: the Refugee Convention,⁴ the Genocide Convention,⁵ the Convention on Rights of the Child,⁶ the Covenant to Eliminate Discrimination against Women,⁷ a whole range of treaties, which are part of our consciousness.

2 See A McBeth, J Nolan, and S Rice, *The International Law of Human Rights* (Oxford University Press, 2011) 13–24.

3 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

4 *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954).

5 *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951).

6 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

7 *Convention on the Elimination of all Forms of Discrimination against Women*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981).

Now human rights are not new. This is, as some of you may remember the 800th anniversary of the Magna Carta, which of course was not aimed at ordinary citizens, it was only aimed at an elite. But nevertheless it set out a series of principles which have been developed and incorporated into the English law over the intervening centuries.⁸

But human rights of course are part of collective mankind, whether it is the law of Hammurabi, whether it is in the Dravidian laws, or the Vedas that led to that. All of them have the thread of human rights. But of course it is easy to talk about human rights, but it's not always easy to apply them. And what I think saddens me more than anything else, is the capacity of governments, public commentators and members of Parliament, to rationalise why they do not apply in some circumstances and to have other reasons to set them aside and not apply them.

And we are in the process of doing that yet again.

After 9/11, the attack on the Twin Towers, the world then went into a paroxysm of legislation to stop terrorism. And of course what happens at a time like this, that the law agencies, police and Central Intelligence Agency type agencies always have a list of powers that they say 'Here Minister, here Mr Secretary. This is what we should do to solve this.'

The fact that there is, very often, a total disconnect between what is being proposed and what in fact becomes the law does not matter because politicians have the desire to pretend or to want to embody the perceived needs of the audience. And the public who are normally not terribly rational at times about these things, understandably, say 'Yes he is good, he is doing something', 'She is good, she's doing something'. The law comes in without people looking at the consequences. And the organisation that Michael Kirby and I have been involved with for most of our lives, the International Commission of Jurists,⁹ we set up an eminent Jurists Panel and took evidence around the world to show that people should not be subject to draconian laws.¹⁰

An example: at a time when the civil war in Sri Lanka was occurring, I went to a fundraising event for the Tamil community here in Sydney to raise funds. I think we raised \$400. It was because there was no medicine getting through for ordinary ailments to the diabetics, the asthmatics and so on. That was an

8 See Prue Vines, *Law and Justice in Australia: Foundations of the Legal System* (Oxford University Press, 2nd ed, 2009) 47–51.

9 See <<http://www.icj.org/>>.

10 See 'Global Security & Rule of Law', The International Commission of Jurists (2015) <<http://www.icj.org/themes/global-security-rule-of-law/>>.

offence. I happily committed an offence because I wanted to raise money for these people but under the laws I did not ensure that my dollars didn't go to buy bullets. I didn't have my accountant go over it, and I was careless, I was reckless about not following that through – because that was the offence that was created.

And at the moment the government has in place, because of the publicity about terrorism and people coming back to Australia and so on, legislation that again will take away basic human rights.

It is said to be aimed at terrorists but in fact it is largely not. It takes away the right to have convictions based on admissible evidence. Inadmissible evidence under our law can be admitted – evidence taken unlawfully, evidence taken contrary to any declaration or established human rights. People are being told it is about terrorists but it does not specifically mention terrorists, most of it does not, but they are powers the Australian Security Intelligence Organisation would want to have.

And because it is at a time when the press has built up fear about terrorism – I am not saying we should not be concerned about it, of course we should – but is more likely to get through because it is easier for Parliament to say to an opposition that is opposing it, 'You're opposing it, you're in favour of terrorists'. And the simplistic nature of the debate causes that harm.

Therefore I just wanted to remind you of the First Declaration, the first article:

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.¹¹

Nowadays they probably would have said sisterhood as well.

That statement was nearly almost not put in other than in the Preamble because they thought that is so self-evident. But we human beings through governments and otherwise – and governments are the major invaders of human rights – have in fact lost sight and need to be reminded about it.

I thought I should not just say what I have done, but give an account of some of the things that I have been involved in. Mainly as an example of how diverse human rights are but also to give an accounting of what I learnt when we were at school learning about the *Universal Declaration*.

11 *Universal Declaration of Human Rights* art 1.

When I first sought endorsement from my political party I only spoke on one subject. While most candidates spoke about education and industrial law and all of the other things that politicians like to talk about, I only spoke on one subject which was the elimination of laws discriminating against women. The sort of thing in those days – I am talking early 1975 – a woman could not get a loan from a bank without a male guarantor. This was also reflected in how a woman was described, I mean it was ‘John Robert Arthur Dowd of such and such address, Barrister-at-Law and Helen Jill, his wife’. That was the way women were described. And in the overwhelming bulk of title deeds and in documents they were described as being occupied in ‘home duties’. That was the way in which we treated that major section of our community. Most of those things have of course gone and I did not get to do a second speech because I got endorsed before we got around to second speeches.

But within the Parliament, and some of you have heard this before, but in the Parliament I moved the first motion to remove the criminal laws on male homosexuality, and made enemies from that time that prevented me advancing in some ways, but enemies that I happily made because people think that you can control human life by passing laws. Laws are passed by the tyranny of the majority and eventually the law did change, but I had made it easier by being the first one in any Australian Parliament to remove this totally abhorrent law. And we, I, took a lot of criticism but happily so: ‘It is better to fail for the right reason than to succeed for the wrong one’ – that is a ‘Dowdism’.

But also I put a motion on about attempted suicide, and that was in fact debated. The then government set up a subcommittee of ministers to come and talk to me about it and they were worried about suicide pacts. I explained to them that was covered by the existing law and how it was covered in terms of manslaughter. So we had the debate, we actually took it to a vote and the law was changed. There was subsequent legislation. But one of the best contributions was discussion of the member of Scott’s party when it was clear that they may not make it, and ultimately they didn’t. One of them went out into the snow and said, ‘I will be a little while’.¹² He committed suicide to save his friends as they did not succeed. But it cannot be wrong to do that and the law was changed.

But also it used to be a civil crime to be illegitimate, that you were dealt with differently under inheritance law as to whether you were illegitimate or legitimate. So that is an issue that I raised.

12 Captain Lawrence Oates, member of Captain Robert Falcon Scott’s tragic Antarctic South Pole expedition in 1910–12; see ‘Scott of the Antarctic (1868–1912)’, BBC – History (2014) <http://www.bbc.co.uk/history/historic_figures/scott_of_antarctic.shtml>.

Each was a group – women, male homosexuals, people whose parents had not married – that were discriminated against, under the law. They were born free, born with the right to be themselves, and society decided that they should be criminals and governed by criminal law or by civil law.

And in government, I abolished retirement – I have not actually got around to retiring yet – but we used to have compulsory retirement in the public service and then in the private sector. This was discrimination against the aged. It is not always great to be old, but it is great to be able to fulfil yourself as a contributor to society. And I personally could see that we were going to need more people, we did not want too many people retiring and too many old ones to support. I think people should be continuing to use their skills.

I brought in laws against racial vilification because racism is always present in every society, but I brought in laws to prevent that.

And one of my last acts – and it did not get introduced in time because they held it up – was to abolish female genital mutilation. My department said ‘Oh yes but that’s covered by the existing law.’ I said ‘Yes of course it is, assault occasioning grievous bodily harm or other offences such as that.’ I said ‘I have got to send a message into the community, it’s happening now.’ It is still happening. And it was delayed before the election because they did not want to offend those people in the community that practice it. And we keep it quiet, generally, because we want people going to the hospital to get it fixed, rather than saying there is people going to the hospitals for the problems that come.

Just imagine, there are people in our community that wish to take away from females a fundamental right, and it is normally the paternal grandmother that does it in Africa, where I go for ActionAid.¹³ In Ethiopia we are changing societies there to eliminate female genital mutilation, it is a tremendous project that we have and it is working and we are getting the support of indeed some of the Muslim priests, the Muslim sheiks there, to change that law.

So that in my now work as President of ActionAid Australia¹⁴ I go to places such as Ethiopia to try and remove the restrictions against women, to remove the impediments on people suffering from AIDS. And one group that I saw there, they were being taught, ‘you can have tea with someone who is HIV positive’, and in fact this group of women, there were four women who were HIV positive and one man, this group was teaching each other how to deal with it, and how not to ostracise people.

¹³ See <<http://www.actionaid.org/>>.

¹⁴ See <<http://www.actionaid.org/australia/>>.

But my other International Commission of Jurists has involved me in East Timor, where people were invaded with the concurrence of the then Australian government, the connivance, and remained occupied for 24 years. And the International Commission of Jurists caused – something you may remember – a Coroner’s inquest here, the most expensive one in Australia’s history, whereby we exposed the lies that were told by the Australian government at the time and the Indonesian government that five journalists were killed in crossfire. They were not – they were murdered.¹⁵ And we brought that out. It took 31 years from when we started on the issue in 1975 till that occurred, and of course it was not just the five journalists, it was all the atrocities that occurred during that time.¹⁶

The people of Sri Lanka – where the terrible Liberation Tigers of Tamil Eelam organisation arose partly out of the fact that the Sri Lankans passed the Sinhala Only Act of 1956 which prevented people teaching in their own language. It was cultural suppression. The same thing in Tibet, where we now have cultural suppression where there are only 50 per cent of the people of Tibet who are Han Chinese or other Chinese and the same in Mongolia. Now cultural suppression is an appalling practice carried out by dominating governments and people need to be reminded of the way in which governments enforce the tyranny of the majority.

Although in one of the previous Michael Kirby lectures we have talked about a desirability of a Bill of Rights, I feel obliged as I give my accounting to let you know my views on the subject matter.

I do not agree with a Bill of Rights, whether at Commonwealth or state level, that gives judges the power to interpret the law for all society and clarify the law or make new law.

I have had to interpret the *International Covenant on Civil and Political Rights* because in a murder trial that I heard the question of the right to call illegal evidence, illegally obtained evidence, was to be considered in the light of that treaty. Interpreting treaties and extrapolating into common law rights is very difficult. Treaties are expressed in very general terms. So I do not think – because I believe in the democratic society that we have – it is for judges to create law where the law has otherwise been silent, to overturn laws by their interpretation of international treaties. But I do believe, however, that there is a judicial function to be performed, to be carried out.

15 ‘The Balibó Five’, Balibó House Trust, 2015 <<http://balibohouse.com/balibo-five/>>.

16 See ‘Attacks on Justice’, International Commission of Jurists (2000) <<http://www.icj.org/indonesia-attacks-on-justice-2000-indonesia/>>.

The Commonwealth Parliament decided not to have a human rights charter but they did bring in the *Human Rights (Parliamentary Scrutiny) Act* in 2011. That means that all proposed laws, not regulations, but laws are subject to an analysis by a committee that puts in a note to the Parliament to say where it is in breach of human rights terms.

Now that is a start. It is not always taken into account, it is usually not. Nevertheless that is a start. But I think that the present mechanisms of an Ombudsman or parliamentary Auditor-General or a Human Rights Commission is not a sufficient mechanism to allow us to properly protect human rights. I do therefore believe that we in New South Wales, and indeed the Commonwealth, should adopt a law like the Victorian law of 2006.

Victoria has the *Charter of Human Rights and Responsibilities Act 2006*. The court dealing with when a matter arises that involves human rights interpretation, notice must be given to the Attorney-General and the judge makes a declaration of incompatibility of the law, the case, the legal issue involved, the statute involved, with human rights norms. That declaration goes to the Attorney-General and it does not affect the parties, that is, the law, the declaration does not change the law as applies between the parties, but it goes to the Attorney-General and therefore the Parliament for the Parliament to decide whether they want to change something.

And the Parliament retains the power to make a decision as to whether they change the law or not. But they do it after a judge has given a considered reason as to the fact the law is in breach of human rights criteria and there can be a debate about the matter and it can become a political issue.

But the secondary part of having such a declaration is that it is out there pronounced by the Parliament that there is a Human Rights Charter, it can be in the public Parliament, it can be in the public domain so that any debate on the issue is going to be publicised. People are going to be reminded and, with our modern electronic technology, we can ensure that the issues are raised, not just hidden.

But it also reminds us by having a Charter of Human Rights that everyone can remind themselves as to what those rights are. We need to re-educate the public – we really need to re-educate children as to what human rights are.

You see at the moment, just taking the state, one fellow that I sentenced for murder, gave him 18 on the top and 13 on the bottom, was a model prisoner. He served his 13 years, the Parole Board said ‘This man can be released, when he gets a C2 classification’, which I will explain. The Serious Offenders Review

Board said this man can be released but provided he gets a C2 classification. So the then head of Corrective Services, because it was a politically visible trial, determined that he should not have a C2 classification. That was an arbitrary decision, totally intransparent, totally opaque. He could not get a classification. There was no review of that decision, there was no mechanism to appeal that decision, that law is still the same. Now in fact the fellow's 18 years is finished and he is probably out. All I could do was refer him to the prisoner's aid mechanism to see what could be done. But a non-reviewable absolute discretion is anathema to any society. If it happened behind the Iron Curtain we'd say how bad it was. It happens here.

We now have laws that have been brought in on mandatory sentencing – a denial of the right of a human being to have trial by a court and sentencing by a court because it is sentencing by Parliament. And again anyone can justify 'Oh we gotta do this', a whole series of reasons can always be put forward and the press are not always as critical as they ought to be about this. That is in breach of human rights, the right to have a fair trial. You cannot have a fair trial, because the trial includes the sentencing.

And in terms of federal laws, we were one of the early parties to the *Refugee Convention*. Surprisingly enough the *Refugee Convention* sets out that leaving a country and going to another country, which is an unlawful act, is not unlawful. So over several governments of all political persuasions we now have politicians calling them illegals. They are not illegal if they seek refugee status here. They may not get refugee status, but it doesn't make them illegal. They are entitled to be here and make that application and if they are not within the criteria for refugees then of course, I accept that some will have to go back. But if you do not even give them the right to have that determination and you call them illegals from the start – that is a breach. We detain innocent people in detention. Arbitrary detention occurs in clear breach of the *Universal Declaration of Human Rights*.

In my capacity as Deputy President of the Mental Health Review Tribunal,¹⁷ I have to see the cases when I do a dozen, ten or a dozen cases in a day, from other conflicts, European conflicts, the Balkan conflicts, and the Vietnam war and so on – because people come here and they have problems and many of them have had the problem triggered or exacerbated by the conflict.

Holding people in detention without any prospect or any indication that they will be dealt with as refugees is seriously damaging ... it is damaging to everybody that is involved. But Australia does it in breach of human rights law,

17 See <<http://www.mhrt.nsw.gov.au/the-tribunal/>>.

and what I have said to a lot of people in the refugee world is, ‘It’s interesting most Australians are very good in dealing with refugees personally, doesn’t matter where they are in the community, they’re very good, they get on well with them, they make them feel welcome and so on.’ But as a collective mentality, it is easy to build up the Australian public resistance to people coming here, so-called illegally, but of course they are not illegal. There is no difference in people coming by plane or by boat – that is simply a government policy.

So if we Australians want to step down from those heady days under Doc Evatt as President of the General Assembly of the United Nations – when a whole series of treaties, the 1949 treaties, the Geneva Conventions, all of those other treaties that I have mentioned . We were part of it. Australia was head of the small nations. We had a reputation that was enviable. In the *Genocide Convention*, we were the second one to sign the treaty – though of course we didn’t implement it for another sixty years. But we did in fact do that.

My society is a great society. My young days I was very conscious how democratic we are, and for all the faults of our democracy, I have seen an awful lot of others in my travels – for the International Commission of Jurists and otherwise – to see just how harsh other countries are.

We used to be able to hold our heads high.

We are not the only country that has refugees.

We are not the only country that has asylum seekers.

And however complicated it may be and for whatever reason, we have got some 30-odd thousand people waiting to be considered. They are now many of them being held in different forms of detention unable to work and get the benefits of a society.

I refer to these because I want you to think again whether your automatic reaction to someone saying ‘These are illegals’ ought not to be ‘These are people seeking to have a right to live, bring their families to another country, a right that we all have.’ The right to go to another country is in the *Universal Declaration of Human Rights*.

So in terms of what I propose, and as I say I am not the first person giving a Michael Kirby lecture to talk about the *Universal Declaration of Human Rights*, to talk about the need for a Charter of Human Rights. I want this society to consider the Victorian example, to consider it federally and in New

South Wales whereby the weight of a judge's decision means that there is a public pronouncement that this law is in breach of human rights. Secondly, I want every young child brought up with the fact that we have a declaration of human rights mechanism here. And thirdly I want the society generally to bring us back to a society in which we look out for the disadvantaged. There are still many disadvantaged people in our society and I have mentioned some of those that I have been involved in, whether overseas or here in Australia or otherwise.

I want to be proud of being an Australia. I am not withstanding these bad things.

But I want us all to build a better society, something that totalitarian regimes overseas cannot point to us and say 'Look you do that'. And therefore Australia can become a better leader in guiding others to a better understanding and a better implication of human rights.

I thank you for all, particularly those that have heard me talk on some of these before, but I consider it a great honour to be giving a lecture which carries the name of Michael Kirby. Some of you have heard that we go back to the prefects' room in 1955 at school whereby we talked about Brown and Fitzpatrick when the Federal Parliament put two journalists away; it was a momentous occasion, something I still remember. And I want to thank Michael in this lecture for all he has done through all his activities for human rights here in Australia and around the world.

