

Opening Luncheon Speech

Australasian and Commonwealth Law Reform Agencies Conference on Globalisation and Law Reform - Cooperation Through Technology – March 2000

Interview with Professor Ralph Simmonds from Murdoch University

Q. Justice Kirby, thank you very much for talking with us tonight. Your paper is very much about consciousness of fundamental human rights world-wide, and you point to a growing consciousness. How do you measure such a thing? How do you measure growing consciousness?

A. I think one can measure it by the amount of activity that's going on in the international media, by the amount of activity that's going on in the United Nations and in the organs of the international community, regional organisations, and just by the interest of citizens in human rights.

When I was at law school, not all that long ago, it wasn't really on the agenda. Yet now it's on everybody's lips. That's where it should be. And it grows out of the changes that we've seen in the twentieth century. It's a mighty movement and it's a movement for good and for the betterment of humanity.

Q. Do you see anything in this that law reform agencies have contributed to, or that law reform agencies can benefit from?

A. It's a very interesting thing. When the Law Reform Commission (the ALRC) was set up there was a provision in the statute which instructed us to ensure, so far as possible, that our recommendations and proposals for law reform were consistent with the International Covenant on Civil and Political Rights. Now, this was in an Act of the Federal Parliament, 1973. It was pretty unusual because, at that time, Australia hadn't even signed the International Covenant. We were not parties to it. Still less were we parties to the First Optional Protocol. So it was, as it were, beckoning us to the future. And I have to say it was Lionel Murphy's idea. Lionel set up the Commission. He pioneered the statute. He pressed it through Federal Parliament. And he insisted that this should be in the statute. We took it seriously because every proposal we made had to be measured against the standard of the Covenant. It began that process in my own mind of bringing me back not to vague generalities but to the growing body of international law which has grown up around the Covenant and around the Universal Declaration, around the European and American covenants or treaties. This is a world-wide movement.

To some extent we in Australia and in the Asia-Pacific region have been cut off from some of the reality of the international human rights movement, but I think the Law Reform Commissions, by going back to the fundamental principles, have led the way.

Q. Is that something you feel that you benefitted from personally, working in the Law Reform Commission?

A. Yes, I did. However, I have to tell you that when I went back into the court, when I went into the Court of Appeal at the end of my decade in the Law Reform Commission, I really resumed a life of a fairly orthodox lawyer. Some people may doubt that. But that's how I saw it myself. I really thought that, well, now, that was okay for the Law Reform Commission. But in a court you don't really trouble yourself with international law. International law is up there in the clouds. It's between sovereign states and princes. It's not something that affects the day to day living law. But my eyes were opened to the change in that respect when I went to a meeting of senior Commonwealth judges in Bangalore in 1988. There I learned and took part in the development of the Bangalore Principles. They teach that when, as a judge, you reach a crossroads, when the statute is ambiguous or there's a gap in the common law, you can appeal to international human rights principles. So that was, as it were, a second awakening.

Q. How did you learn more about the international norms that you came to be sensitive to?

A. In the early stages in the Law Reform Commission I learned that there was an International Covenant. Let us be candid; even though I did international law under Professor Julius Stone at the Sydney Law School (and he was a great teacher with a profound influence on the life of all of his pupils, including me) we really concentrated there on the United Nations charter and not so much on the human rights law. We were looking at the political organs of the United Nations in respect of which I was later a special representative in Cambodia to play a little part. We didn't really look at the body of international law dealing with human rights.

So it became important in the Law Reform Commission. Then I parted from it and resumed my rather ignorant life as an ordinary Australian lawyer, really denying the role of international law; not seeing that as having much relevance to day to day practice. After Bangalore I did see the relevance of it. In ordinary court cases I would refer to it and would call it in aid. I would have the books behind my desk in my chambers. You could almost hear the creaking of the eyebrows of my colleagues when I started to refer to these principles in the decisions of the courts. But if you hang around long enough in the law, as I have — 25 years now — you see things which once were heresy become orthodoxy. Even if not entirely orthodoxy at least they begin to trickle in to the life of the law. That's what's happened in relation to international human rights law in Australia.

Q. *Are there examples or an example that particularly sticks in your mind of the unexpected use of international law in an aspect of your work?*

A. There are many examples. In fact I've written some of the cases in the New South Wales Court of Appeal in an essay in the *University of New South Wales Law Journal*. One case does stick in my mind. We were sitting in the court and on one side was Samuels JA, now the Governor of New South Wales, and on the other side of me was Clarke JA. It was a case where a judge had stopped an interpreter who was interpreting in the mute language, and he said, 'Well, you don't have to interpret that.' She kept on interpreting. And he said, 'You don't have to interpret. Madam, I've said you don't have to interpret that.' She interpreted and the judge refused to go on with the case. She said, 'So long as this case is proceeding it is my ethical and professional duty to interpret.' So the parties rushed up to the Court of Appeal. There was no Act — the *Right of Interpreters Act*. We didn't have a *Bill of Rights*. We didn't have some great principles of jurisprudence about due process or the right of people to interpreters. So we had in a sense to go down to fundamental principles. So I looked at the Covenant and there it was: the right in a proceeding of law to have access to an interpreter. I referred to it and my colleagues came along with that. And so you could see the appeal through the *Human Rights Commission Act* which annexes the International Covenant to it. You could see an appeal to broad principles of human rights. They're not strangers to lawyers of the common law tradition. That was once explained by Lord Scarman, who was the first chairman of the English Law Commission. He said, 'Lawyers of the common law don't find the fundamental principles of human rights in the United Nations conventions surprising, because those conventions were largely written after the War by Anglo-American lawyers. They talk of fundamental principles which are familiar to the common law.' So once you actually get the books there and the jurisprudence and the doctrine which has grown around it, you actually find it quite comfortable and quite familiar to somebody brought up in the common law.

Q. *We began with you mentioning that this was a provision in the Act setting up the Australian Law Reform Commission that it consider the covenant. Reflecting on the work of the commission while you were there and since, is that one of the best ways you believe of fostering human rights consciousness in the work of agencies like that?*

A. I hate to say this to a law professor, but I think you've got to start earlier than that. By the time you get into a law reform body you're generally a venerable old hand in the law. I was all of 35 or 36 when I started, so you've really got to get young minds when they're at law schools. You've got to teach them that we are living at that very curious moment of human history where international law and international law of human rights is suddenly becoming of relevance to lawyers.

It's not part of our domestic law unless our legislature or another law maker brings it in. But a judge is a law maker and a judge can bring in the principles in an appropriate case in an appropriate way. It is actually surprising how many problems you get where a statute is ambiguous or the Constitution is ambiguous, or a principle of the common law is obscure. Then you can go back to fundamentals. And

it's at least as relevant, in my humble opinion, to go to this growing body of international law for principle as it is to some case in England in the 15th, 16th or later centuries.

Q. Your paper suggests at some points that you seem to believe that the language of fundamental human rights is sort of becoming a juristic lingua franca at the moment; that people now understand across a wide range of diverse legal cultures the notion of fundamental human rights. They may not all agree with it in the same terms.

A. Of course, in most countries it is part of the daily living law because it's reflected in the bills of rights of the constitution of most countries. Australia really is now the last outpost. Even the United Kingdom with its new human rights legislation will, in the year 2000, take the plunge. In a sense it already had taken the plunge by being a party to the European Convention on Human Rights which made the United Kingdom, its laws and practices answerable in Strasbourg. And the United Kingdom is a big customer in Strasbourg. Many, many cases went to the European Court of Human Rights. So that the British have become accustomed to it. The Canadians with their Charter have become accustomed to it. The New Zealanders with their bill of rights legislation have become accustomed to it. All the new Commonwealth and South Africa are accustomed to it. The Americans have had it for 230 years with their bill of rights. We alone are, in a sense, cut off. Yet not entirely, because we're parties to the International Covenant. We are parties to the First Optional Protocol to the International Covenant which renders Australia answerable to the Human Rights Committee of the United Nations. As Brennan CJ, then Brennan J in the Mabo case pointed out, Australia's common law will inevitably be influenced by being answerable to these international bodies and to these international principles. It will trickle in. It won't be quite as rapid as it is in countries with their own bills of rights reflecting these fundamental principles. But it will come and it is coming. It is therefore something I think is important to teach in law schools. It's important for advocates to raise before courts. It's important for law reform commissions to pursue. And it's important for citizens to know about as well.

Q. One of the interesting aspects of human rights' scholarship, particularly now in the United States and Canada, is concern about the skew between the rhetoric of human rights and its achievement on the ground, and I'm thinking particularly of a most stimulating book by David Cole, writing about the American Bill of Rights, that is sets up a wonderful scheme that is in fact regressive; it's not accessible to all people, particularly the poor. I'm wondering whether you agree that that is a risk with human rights norms?

A. There's an awful lot of variance between rhetoric and reality in the law. In fact, I was discussing with one of my colleagues recently. Another book, whose name escapes me at the moment, presents the thesis that we have attributed 'intent' to Parliament but increasingly the politicians in Parliament have not actually been playing a great part in the fashioning of the law.

If you take, for example, some of the cases that have come recently before the High Court — the Bond litigation, for instance — you'd look at the intricacies; the intricacies of corporations law in Australian and the interface of federal and state laws and the extremely complicated way in which it's been done. I'll warrant that very few, if any, politicians really understood what was being enacted. In that sense you've, as it were, transferred the 'intent' outside the chamber and very much to the bureaucrats and to the officials. So that reality and appearances is often different in the law.

Coming back to your question in relation to human rights, when I served as special representative of the Secretary-General in Cambodia I learned a lesson which is very important for Australian lawyers to learn. This was taught to me by Cambodian peasants, soldiers and ordinary citizens. They made the point to me, 'Human rights to us is not only what happens in the ballot box. It's not only what happens in the police station or in the court room. They're important,' they said, 'but to us human rights is a clean glass of water. Human rights is education for my daughter, as well as my son. Human rights is access to a hospital if we have an accident at home.' That these are human rights. Of course, if you go back to Mrs Roosevelt's Universal Declaration and if you go to the International Covenant on Economic, Social and Cultural Rights then the Cambodian peasant knows more, in a sense, than the average Australian lawyer. Most Australian lawyers would say, 'Well, that's not really human rights. That's not justiciable. That's not actionable in a court of law. It's not apt for legal remedies. That's political.' But to ordinary people this is often the essence of the fundamental principles that should govern their lives as human beings. Some people call that an Asian exception; I don't think it's an exception. It's a perception of the entirety of human rights.

Q. Is that something you see human rights consciousness being extremely good for, is stimulation and broadening of the legal imagination, which is something you spoke about indirectly tonight at the graduation ceremony?

A. The problem with law is that it - - Glass JA said this to me once. He was a great judge and I sat with him in my early days in the Court of Appeal. He said - it's an old saying - 'the law sharpens the mind by narrowing its focus'. And there's no doubt that to be a good lawyer you have to really concentrate on detail. It's no good - - you could have a case before the High Court which deals with issues of the greatest human rights importance, but unless you've got a good lawyer with skills of lawyering then you have a menace before you. Such people may have heart but not mind in gear. It's very important in law to be a good lawyer and a good technical lawyer. So you've got to have that. But you've also got to have the imagination to ask the deep questions and to be concerned about the fundamental issues.

When I went to the service and spoke at a function for the late Ron Castan QC, who was counsel in Mabo, I met his wife. It turned out that Mrs Castan had gone up with Ron Castan to Papua New Guinea in a case concerning the rights of the native people of Papua New Guinea in a claim for native title against the Crown. And Mrs Castan kept saying when they'd come home after a day, 'Why don't we have this in Australia?' And Ron Castan, good land lawyer that he was, said, 'Privy Council decision, 150 years, land law, don't touch it, it's not possible.' Mrs Castan kept saying, 'Yes, Ron, but why does the Crown owe these duties to Papua New Guineans but not to Australians?' And in the end Ron Castan and his team began - the idea began to burrow away.

I think it's very important for us to challenge orthodoxy in the law, and especially where fundamentals are concerned - fundamental human rights - and not simply to give up and say, 'Well, nothing can be changed.' Because things can be changed. Mabo is a great illustration of that, and there are many others. Dietrich is another one where things which were settled were settled badly and were reconsidered and came out right in the end.

Q. That's often said to be the great strength of comparative law as a way of educating young lawyers as it forced them to stand outside their tradition by confronting them with a workable set of alternatives. Is that the way you conceive then of fundamental human rights?

A. There are so many things that I learned in my time in law reform. In a sense, they mean that I look at the law in a slightly different way to somebody who hasn't had an education that I had as a young lawyer by chance. Possibly it was before my time. I was given an opportunity for which I was a bit reluctant at the beginning but which gave me a number of lessons. The lesson of the human rights norms. The lesson of comparative law, looking at how other countries and other systems outside the common law solved the problem that we were working on and. Above all, the lesson of conceptualising, of looking at an issue in the law apart from just solving the immediate problem which, of course, is the great gift of the common law. The common law abstains from the grand theory. The common law solves a problem. That's why it's such a powerful legal system and is at work in the Empire on which the sun has set. It's a problem solver. But you do need, if you're to take a job in law reform or the High Court, to look conceptually at how things fit together.

Q. What does that tell you, do you think, about the sorts of people who should serve on law reform commissions? Does that affect the sort of people you want to choose for that job?

A. Not necessarily, because when I came I was a fairly orthodox person brought up in the adversary system of the common law of England as transplanted in Australia. I disdained international law. That was the thing of governments. I disdained or was not particularly knowledgeable about - I don't think I actually disdained it - human rights. I'd taken part in the Council for Civil Liberties and I sort of had vague ideas. But I didn't have a body of doctrine. Now I've got those books behind me. I mean, we're not talking here just of the words of the International Covenant on Civil and Political Rights. There's a whole body of case law and of decisions of the European Court of Human Rights, the Inter-American Court, the UN Human Rights Committee, the International Court of Justice and other bodies which have developed the meaning of these principles. If you get a little problem within Australia you can go back to fundamentals and look at how these other nations - the Canadian Supreme Court with the charter, the Americans with their *Bill of Rights* - have solved these fundamental problems. And

increasingly Australian courts are doing this. We're throwing off the shackles of parochialism. I think that's a good thing.

Q. How do you guarantee or how do you at least improve your chances of getting good comparative law arguments put to you, or good materials being served up to you?

A. Well, if you're in the Law Reform Commission you go out searching for it and you get assistance from scholars and you go away and you look at it, you research it overseas or you write and you get the information, you study the law reform reports. Now, through the internet, that's not such a big deal as it was in my time.

In courts a lot depends on the interaction between the judge and the advocate. I'm not just talking here of the High Court of Australia. I'm talking about the intermediate appellate courts, the Supreme Courts of the States and Territories and the Federal Court, the Family Court and also the other courts. I mean, we're talking of something — a movement — which is coming slowly through our whole legal system. But nothing will happen if an advocate doesn't conceive of the issue and propound it to a court. Or nothing will happen unless a judge starts to ask a question. And when a judge does start to ask the question you'll hear those creaking eyebrows of your colleagues. But my advice is, whether it's to law reformers or to judges, hang in there. Ask the questions. Inquire. Be inquisitive. Find out how others are doing it. The common law is a great system but it's not perfect. It can sometimes take wrong turnings, as we did on native title and as we did originally on the right to legal assistance in a serious trial where you are indigent and can't afford counsel. So we do take wrong turnings. The only way we'll get the law back on keel in matters relating to fundamental human rights is to go back to the principles which are informing so many other jurisdictions of the world.

Q. I guess what I was asking or edging towards is whether a transformation of a larger sort might be required to effectuate improvements in this area, and I'm thinking of movements away from purely adversarial methods of appellate argument that involve the use of amicus curiae on a larger scale and things of that sort.

A. I have suggested in a number of cases in the High Court that that would be something that would be helpful to the court. In Canada and in the United States it's commonplace. Even in England; I mean, if you look at the Pinochet case and you see the amici that came before the court and you see regularly the way in which interveners are accepted. Again, we are the lone resister to this. We're sticking to our view that it's not appropriate, that a case is between parties and it adds to the cost and the time and so on. But once it became appreciated that a court such as the High Court (or such as a Court of Appeal) is in certain cases — about a third of cases I would estimate — developing new doctrine and pressing the law forward, then once you appreciate that role of judges, then you do need extra assistance. There are many things that I believe we will live to see.

Maybe the great example of law reform will ultimately even intrude into the courts in terms of methodology. I've myself never understood why we don't get advocates, for example, to write a first draft of the judgment which they say a court should adopt. Or why we don't have a court official, as they do in the European systems, in some of them, to draft the first draft: like a discussion paper so that the issue before the court then in a case, at least in the highest courts, could be targeted on improving the draft. Now, that happens I think, or did happen, in the European Court of Human Rights as between the commission and the court in the old days. Things have changed a little now. But law reform technique of having something as a proposal and then concentrating on it and seeing its weakness and testing it has a lot going for it. Maybe I'll live to see the technique of law reform translated into the courts of Australia. One day it will come anyway.

Q. I wonder — this is a slightly mischievous question following up on that — why do you think we are, as it were, the odd person out in the common law world?

A. We were to some extent cut away by our great distance, though that excuse has gone with the internet, with the end of Privy Council appeals. We're no longer linked in to the English system at a time when the English system is itself becoming much more creative. There's always an element in Australia of self-satisfaction, and also perhaps a little bit of cussedness. But I just express my opinions. Others have a different view. Of course, it would be imperative in accepting interveners and amicus curiae in a court that you keep your eye on what the main thing that the court is there for. It's not

a senate committee. It's not resolving legislation and it doesn't want to run up the costs unreasonably to the parties. You've got to keep your focus on solving the dispute of the parties. In a sense, that may even be implicit in what the Constitution permits federal courts to do. So you can't get too far away from that. But within that parameter I think there is a role for having amici and having interveners in appropriate ways. Courts have plenty of weapons to keep on top of any abuse of time or running up of costs. This is what happens in Canada. It's what happens in the United States, what happens in most other civilised countries. In due course it will come to pass in Australia.

Q. I'm wondering if you take comfort from Richard Posner's thesis and his reflections on becoming a judge. One of the things he said that struck him as a judge that had not struck him as an academic is how important it was to have a large number of young lawyers being pumped out from the US law schools who exhibited considerable diversity in age and ethnic background and such. It seems to me Australia, with its recent rapid expansion in law schools, is going through that process currently. That must change the law, and I'm wondering if it's going to change it in directions?

A. You may be right. I don't know of any recent studies. But I know of a study soon after I was appointed to the Law Reform Commission 25 years ago, and I know of a study about 10 years later by Professor Goldring, now Goldring DCJ. They rather showed that the people who were coming into law schools were fairly stable in coming from upper middle-class Anglo-Celtic backgrounds. That the law looked a very English profession and rather frightened away people of other Australian ethnic communities.

Looking at the graduation class that I've just attended I can see changes are definitely coming; changes for the better. The law is the servant of everybody. It ought to reflect the entire population. But I think we should get Goldring DCJ to take a bit of time off from the District Court and do his survey again. It would be actually interesting to know whether that pattern of upper middle-class private school education and wealthy backgrounds is still a feature of the law. I hope that such people are still there. They surely are. But I hope that there's a mixture of people from different backgrounds.

I am the only Justice of the High Court at the moment whose entire education was in public schools. That's not uncommon throughout the history of the High Court. The representation of the schools that educate 70 per cent of the community in Australia has always been low. That perhaps reflects the nature of the composition of the legal profession.

Q. Assuming that I were right, assuming that there has been a transformation since Goldring DCJ did his original work — perhaps I go back to my original question: do you think it will bring change on and, if so, what sort of change do you think it will bring?

A. Another lesson I learnt in law reform was not to base opinions on too many distant hypotheses but to get back to empirical data. When we had our first reference on a criminal investigation we took a cue from Professor Mangan and Vankovsky in Scotland and we got out into paddy wagons and we went around with the police and we saw what actually happened on the ground, so I learned so much in law reform and one of them was, base your judgments on good science, and that's really a very important principle throughout life to do that. But I believe if we did go out into the real world of the young persons coming in to the law we would find a confirmation of an impression I get, and that is that young people in the law today are idealistic. They are people dedicated to the sense of justice that is the great motivation of the good lawyer. I mean, we're technicians, we're servants of those who can afford to pay for us if we're practitioners, but we are servants of justice under law, and equal justice under law for all people, without discrimination. So that this is the noble aspect of the calling of law. At its heart it is the idea of fundamental human rights. We've had it in our blood and bones from the common law. But now we have a new stimulus. The new stimulus is the principle of international human rights found in the Covenant, found in the Universal Declaration and found in the case books of not only the courts like the US Supreme Court and the Canadian Supreme Court, not only the European Court of Human Rights but also increasingly in our own courts and in the High Court of Australia. That is the way of the future. It's therefore the way of the future of law reform as well.

Q. Well, as both a legal educator who looks at the students as they come in to law school and a law reform commissioner who's worked with them since, it's a very fine note on which to end our interview. Thank you. Justice Kirby.