

Human Rights – Essential for Good Governance

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1 Planting Ideas Young

There is no doubt that nurturing good governance is essential to ensuring respect for human rights. Without the rule of law, independent courts and the other institutions of modern society – necessary components of good governance – the promise of human rights may remain just that: a promise unfulfilled. Enforcement of fundamental freedoms when it matters may be impossible. The lesson of history is that transparent, responsible, accountable and participatory governance is a prerequisite to enduring respect for human dignity and the defence of human rights.

The idea of an essentially moral commitment to the dignity of each human being must be planted in the minds of the young. It must begin in the home. It may be sustained by religious, spiritual and moral instruction. It should be an essential component of early education. It is not good enough to leave the defence of human rights to people like me: judges, officials and lawyers. The spirit of human rights must pervade the community. It must find expression in energetic, questioning civil society organizations and informed citizens.

I can remember the first time I heard of the *Universal Declaration for Human Rights*. Soon after Mrs Roosevelt's committee delivered the document and it was adopted by the General Assembly of the United Nations in December 1948, every Australian schoolchild received a little pamphlet. There in fine print, which I could read in those days, were the fundamental rights of every human being.

The Australian Foreign Minister, Dr H V Evatt, had played a part in fostering the development of the *Universal Declaration*. He became a President of the General Assembly of the United Nations and, indeed, played an important role in the establishment of the United Nations. Key elements of his work were the defence of the rights of smaller nations and the commitment of the United Nations to the protection of human rights.

The *Universal Declaration* became well known throughout Australia, especially among schoolchildren. I have little doubt that my early encounter with the values and principles in the *Universal Declaration* profoundly affected my attitude to this grand idea. I have held the commitment in my mind since I was a child aged nine. The commitment is still there. In the aftermath of the Second World War, humanity committed the future to international peace and security; economic equity; justice and human rights. That commitment remains to this day. But it is yet fulfilled? That is our challenge.

2 Institutions, Justice and Wisdom

Within every nation state, there is a need for strong institutions to uphold justice and to protect human rights and fundamental freedoms. However, having institutions is not enough. Governance is not enough. As the United Nations High Commissioner for Human Rights Louise Arbour has reminded us, it must be “good” governance. This means that its institutions must attend not just to the views and interests of the majority or the powerful. A nation’s institutions must also protect what the High Commissioner has described as the “most excluded” groups in the community. A Chief Justice of Australia once explained that it is relatively easy for societies to protect the interests of the people in the majority. The real test for the commitment to human rights comes when the demand for protection is made by minorities, especially vulnerable and unpopular minorities (See *Adelaide Company of Jehovah’s Witnesses Inc v The Commonwealth* (1943) 67 CLR 116 at 124).

Soon after I received my copy of the *Universal Declaration* in 1949, a government was elected in Australia with a mandate from the majority of the people to ban the Australian Communist Party and to impose civil restrictions on its members. The communists were intensely feared and often hated. At about this time a battalion of Australian soldiers were sent to Korea to fight under the United Nations flag. In my country, and many others, there was a deep fear of communism. In some ways the position was similar to the fear of terrorism today.

It was also at about this time that my grandmother remarried. She married a communist. As a boy, I knew that the government and Parliament were moving to pass a law against him. Indeed, that law was enacted. But it was challenged in the Court upon which I now serve. That Court held that the law was unconstitutional. It struck it down. A cloud lifted from our family. The Court found by six Justices to one, that the Australian Parliament lacked the power under the Constitution to enact such a law (See *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1). In effect, it concluded that laws could be enacted that responded to wrongful acts done by communists. But they could not be enacted to try to control the beliefs of individuals or their right to seek to persuade others to those beliefs.

This was a splendid example of good governance. The essential democratic and free character of the Australian democracy was upheld at a time when it was tested. At about the same time, the Supreme Court of the United States, by six Justices to two, held that a similar law passed by the United States Congress was valid (*Dennis v United States* 341 US 494 (1951)). This was despite the express provisions for freedom of speech and freedom of assembly in the United States Constitution. We had no such provisions in the Australian Constitution. Our judges had less exposure to political issues. They wore horsehair wigs and most of them were commercial lawyers. Yet they reached a conclusion that defended the tolerant and participatory character of the Australian system of government. It is an interesting question as to why such different results were arrived at in two similar countries at the same time. History, I believe, judges that the Australian court got it right. Good governance extends its protection to dissident voices.

3 The Need for Institutions of Law Reform

One of my first public posts was to help establish the Australian Law Reform Commission. I served in that position for a decade after 1975. In that institution, which still flourishes, I learned that the rule of law, important though it is for good governance, is not alone enough.

Law is not necessarily a guarantee of justice or of the protection of human rights and fundamental freedoms. Law can actually sometimes be an instrument of oppression. Autocracies are full of law. And democracies can sometimes have laws that are unjust. In my youth, in Australia, we had many such laws; we still have unjust laws – every society has. Good governance must provide ready means to change laws which are unjust and oppressive.

In those days there were strong laws against Asians entering Australia, indeed any people of colour, entering Australia. Those were the days of White Australia. There were laws restricting the civil rights of Aboriginal Australians. There were laws that were unjust to women. Laws criminalised homosexual Australians. These laws were well drafted; efficiently enforced; maintained without the slightest corruption; and some at the time saw them as examples of good governance. But now we realise that law must constantly be scrutinised. We must regularly review laws for they become out of date – reflecting earlier attitudes and different knowledge. Society changes and the law must change. Judges can effect some changes; but most changes must come through parliamentary and governmental action.

In Australia we have reformed many of the laws that were so unjust in earlier decades. Parliamentary committees, national inquiries, law reform commissions and now human rights bodies are needed to stimulate change. We must institutionalise law reform. Many of the causes of corruption, that necessarily undermine good governance, arise from the inflexibility and rigidity of underdeveloped legal systems. When the law does not change, modernise and adapt, it leaves spaces for corruption. That is why institutional law reform is so important to good governance and to combating systemic corruption. Punishing a few corrupt officials is an inefficient and inadequate answer. Systemic change is necessary to tackle the underlying causes of corruption and to sustain good governance in times of transition by effective law reform.

4 Educating Judges in Human Rights

One of the greatest decisions of the Court on which I serve was *Mabo v Queensland [No 2]* ((1992) 175 CLR 1). That was a case in 1992 which overruled 150 years of land law in Australia. It found that, contrary to the previous understanding of the law, Australia's indigenous peoples retained their right to land, the so-called native title right. That right had not been abolished with the arrival of European settlers in Australia, as had previously been held by the Australian courts.

The key that unlocked the door for such a radical change in the law was provided by human rights. The High Court of Australia decided that the previous law which deprived the Aboriginal people of land rights was contrary to their fundamental human rights: specifically their right to be free of legal discrimination based solely on their race or ethnic origins. The importation of notions of fundamental human rights into the Australian common law was a mighty step for the judges to take. It was contrary to much earlier legal thinking.

Obviously, it is often difficult for judges to accommodate radical new ideas. Universal human rights is such a new idea. Many judges are locked into the legal notions learned during their training in law school, decades earlier. Some are unresponsive to new challenges. They need the stimulus of wider reading, of continuing education, of attending conferences where these thoughts are discussed. They need submissions of informed lawyers who push the boundaries of new ideas. It cannot be left solely to the judges.

In Australia, there is now a vigorous discussion of the extent to which fundamental human rights affects the interpretation of the Constitution (*Al Kateb v Godwin* (2004) 78 ALJR 1099; the interpretation of ambiguous legislation made by Parliament (see *Behrooz v Secretary, Department of Immigration, Multicultural and Indigenous Affairs* (2004) 78 ALJR 1056; *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 78 ALJR 737); and the elaboration of the common law where it is unclear (*Cattanach v Melchior* (2003) 77 ALJR 1312 at 1321 [35]). This is a healthy intellectual discourse. Time is on the side of the influence of the international law of human rights in national courts. In recent months, the Supreme Court of the United States in *Lawrence v Texas* (536 US 558 at 576 (2004)) held that it was permissible and helpful to have regard to such developments in the understanding of human rights internationally and in regional bodies to help confirm local conclusions. Those explorations threw light on the meaning of the American Constitution.

This, therefore, is the world we are now entering. It is a world of universal ideas to help stimulate good governance in our nation states. It is a global process that is natural. It comes with globalization and the advances of technology. These are not solely economic phenomena. Where national human rights bodies have been established they should, as happens in Australia, intervene in test cases to provide the highest courts especially with up to date knowledge about the jurisprudence of universal human rights. Such ideas will not always be immediately adopted and applied. However, to introduce them into municipal governance, we need the stimulus of new agents of change. We need to share the experience of courts in other lands and the wisdom of judges everywhere as they grapple with common problems.

5 Respecting Differences

In every post in life we learn. In the 1990's, in addition to my Australian judicial posts, I served as President of the Court of Appeal of Solomon Islands. Here too I learned the value of working with judges from other lands. The Solomon Islands Court of Appeal

had traditionally been comprised of expatriate judges – some from England, New Zealand, Australia and Papua New Guinea. I sat with these judges and it was an experience both to serve and to learn from each other.

When I arrived in my post, it had not been conventional for local judges to serve on the Court of Appeal. I thought that this should change and that gradually expatriate judges should give way to local judges of high talent. I therefore arranged for Solomon Island judges of the Trial Division to participate with me in the Court of Appeal. What I had not considered was that, occasionally, this created difficulties. Local clan membership sometimes made it awkward for a judge to participate in a particular case. My well-intentioned innovation had to be understood and implemented against the background of local customs and traditions. Every society has its own peculiar ways. In today's world, we must embrace the principles of good governance and protect human rights as universal notions. But we must also accept that their introduction will sometimes need to accommodate and adjust to the culture of each place.

6 Governance and Rights

Efficient governance can certainly survive without respect for human rights. Autocracies can deliver effective rule; build highways; and make the trains run on time. But to have *rights*, that are worthy of that name, it is essential to have notions of citizenship for each individual. It is necessary to develop a dual system that respects the voice of the majority but also listens to the “most excluded”. If governance means merely economic efficiency and the free flow of capital and finance, it will bring many advantages to the people. But it will lack the spirit and moral quality that is promised by the universal instruments of human rights. Technocratic excellence is important; but it is insufficient. Human rights constitute the sap that gives life to the tree of good governance. The two ideas derive from the same historical source and constitute essential features of effective modern government. We must build these features – each of them – in every land and for all people.