CONFERENCE: South Pacific Human Rights Seminar
AT: Rarotonga, Cook Islands
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CIVIL RIGHTS AND DISCRIMINATION

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I have been asked to address

? The International Covenant on Civil and Political Rights

And

? The Convention on the Elimination of Racial Discrimination

I am first by custom bound to acknowledge this land, which is important to me as a Maori, and to convey my respects to the people of this place and to their leaders. In doing so, I will briefly mention, by way of introduction,

A Pacific Perspective on Human Rights

> Whakarongo te taringa ki te hau raki e pupuhi nei, I takea mai I Hawaiki nui...

Listen to the north wind blowing from the great Hawaiki?

Like many others of similar kind, this saying reminds the New Zealand Maori of their descent from the ancient voyagers who peopled the pacific some 3,500 years ago, spreading across as many miles of ocean until in the last millennium, Aotearoa (New Zealand) was settled too.

My own tribe, Ngati Raukawa, speaks more specifically of our origins

> E kore au e ngaro; he kakano I ruia mai I Rangiatea.
>
> I will never be lost; I am the seed sown from Rangiatea.

The Maori penchant for history and genealogy has fashioned a strong sense of identity and destiny as a people. We recount the voyages as though they were yesteryear, recalling to mind that the winds that took the Maori to Aotearoa made that country part of the Polynesian homeland. Polynesia, or Òmany islandsÓ belies the Maori customary view that conceptualises the islands as one home, Hawaiki, and the people as belonging to one family, the family of Hawaiki ‹ or Hawaii, Savaii or Havaiki, as it is variously called.

Thus have Maori developed a sense of place and belonging, encapsulated in our description of ourselves as the tangata whenua, the people of the land. I am not surprised to find that Maori have no monopoly on that opinion. Only the dialects changes. Whenua is vanua in Vanuatu, while tangata is kanaka, for the Kanaks of New Caledonia. This feel for an historical belonging to the land of oneÕs birth, is emplasised in the metaphorical manner of our speaking. For Maori, whenua, or land, means also after-birth, or that which one is born out of.

So it is I pay my respects to this place and to these people, to those who stand at the beginning of my life.

So too I am reminded that the families of Hawaiki, as Maori would call them, or of the South Pacific as they are more generally known, share a similar heritage and many common concepts. Most especially we bring to the family of peoples that comprise human-kind, the experience of the group ethic that so few in the West comprehend, let alone enjoy.

Whether it be in land, commerce, or family law, we are inheritors of a

distinctive world view in which the rights of the individual are conditioned by respect for our kin, a respect imposing obligations of a social kind, so that our performance determines our individual status.

This is something much more than the individual right to collectivise as one wishes. Those who think that way, usually have not lived the life-style endemic to Pacific peoples.

And those who see an individual-right / group-right conflict, generally miss the point. The Pacific way establishes, rather, how one embellishes the other. Even in this nuclear age, we have the potential to reinforce the value of family and kin connections in world norm-setting.

I await with great interest, then, the suggestions to this seminar for a draft Pacific charter of human rights.

International Covenant on Civil & Political Rights

Dr Quisumbing brings to this seminar the inspiring record of the United NationsÕs achievements in the human rights field over the last 45 years. There is now an impressive code of human rights standards, valid for all states, and to which all states are expected to adhere. That code, comprised of more than fifty international instruments, covers the range of human endeavour < civil, political, economic, social and cultural. Yet four instruments stand out, collectively comprising an International Bill of Human Rights < the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and the associated Optional Protocol. From these four instruments a whole body of international human rights law has evolved. In the words of U Thant, the first Secretary-General of the United Nations, they have provided a ÒMagna Charta for Man KindÓ. I thought it rather gracious of him to so elevate the Magna Charta.

Dr Quisumbing has already described the Universal Declaration of Human Rights and the International Covenant of Economic, Social and Cultural Rights. I will now consider the twin International Covenant on Civil and Political Rights.

Both Covenants were adopted by the same General Assembly resolution of 16 December 1966. It was an historical feat, that after some 17 years debate, the resolution was unanimous; and politically significant too, for that unanimity gives the Covenants much greater force.

Many of the provisions have since been incorporated into customary international law, and thus binding even on states that have not formally ratified them.

The unanimous resolution is also a tribute to the care and sensitivity of the drafters in taking into account the major concerns of the developing world. Thus the right to self-determination, not mentioned in the Universal Declaration, is explicitly provided for in both Covenants, along with the associated right of all peoples freely to dispose of their natural wealth and resources, and not to be deprived of their own means of subsistence.

In the preamble of both Covenants, and subsequent United Nations resolutions, the Òinterdependence and indivisibilityÓ of the two sets of rights in the respective Covenants is explicitly recognised. However, as Dr Quisumbing has made clear, they are also distinct.

Economic, social and cultural rights contain the necessary ingredients for the survival and well-being of the individual and oneÕs group, that which is necessary for body and soul. At the heart of the International Covenant on Civil and Political Rights however, is the notion that the individual will not be unduly imposed upon by the State. It is a view of human rights that owes much to western history, a story associated with famous milestones like Magna Charta, the United Kingdom Bill of Rights and Habeas Corpus Acts, the

having been placed there by the creator just as other peoples have their places too. They are inheritors of the land of their birth by right of their birth, and indeed they are born of it, born out of the earth mother. The Maori term Ôtangata whenuaÕ fully captures this sense. ÔThe people of the landÕ, the literal translation, omits mention of a double meaning, for Ôwhenua Õ, or Ôland Õ means equally Ôafterbirth Õ, thus symbolising as umbilical, the traditional attachment between land and people.

Accordingly whether we walk in the moccasins of the Indian or follow in the footsteps of the Maori we will come to view the world another way around. From the native perspective it is not for the indigenous people to have to prove their right, title and interest in the resources of their own homeland. The onus is rather on the settler to establish the settler right by reference to some arrangement or agreement. That which remains to the native, is all that has not been freely given over.

To the extent that the common law provides a right for indigenous people then, it also takes it away, by presuming that the right exists by licence of that law, a licence by which it might equally be constrained. Customary fishing rights may illustrate this. In New Zealand the extent of the right has yet to be determined and there are doubts that fish caught in the exercise of a customary right can be sold (thus compare Ministry Agriculture and Fisheries v Love 1988 DCR 370 with Ministry Agriculture and Fisheries v Campbell 1989 DCR).

Many issues are involved touching upon the development rights of native people, the basis for the non-Maori right to the resource, and the nature and relevance of any native opinion on the application of their own laws. It is doubted however that justice will be seen to be done, or indeed, can be done if the issues fall to be determined solely within the dogma of the non-native Ôparty Õ, or if regard is had to the accumulated wisdom of one side alone. The very factual base demands that both should be considered and fairly balanced.

Similarly the rule that treaties are not binding unless Parliament so decides, is itself the product of a common law to which again, Maori for their part did not subscribe. Since no-one told Maori of the requirement when the Treaty of Waitangi was signed, the common law appears to them more like some sleight of hand than the just application of a long experience in providing for fair play.

This point of view was apparent in 1984 when the then Minister of Justice, acting, I believe, with the best of good intentions, proposed a draft Bill of Rights in which the Treaty of Waitangi would be declared part of the supreme law of the land. Despite the long record of Maori pleas for legal recognition of the Treaty, a gathering of some 1000 Maori at Ngaruawahia marae expressed strong reservations with the Bill of Rights proposal. The Treaty was a pact between two equals, and thus with a life-force of its own. In putting the Treaty up, Parliament would be putting it down, by presuming a control upon it.

The integrity of a monocultural approach is questioned when comparing judicial opinions on native people. In 1832, Chief Justice Marshall regarded the United States Indian tribes as nations. The constitution had made Òall treatiesÓ a part of the supreme law. That might have meant treaties of an international nature between sovereign states but there was no doubt in the mind of the Chief Justice that the treaties with the Indians were included too. He wrote

> The Indian nations have always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial .... The very term Ònation Ó, so generally applied to them, means Òa people distinct from othersÓ. The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the

previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words Ôtreaty' and Ônation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense (Worcester v Georgia, 31 US (6 Peters) 515 at 559-60).

The Maori had the initial benefit of neutral words, being kindly described in R v Symonds (1847) 2 NZPCC 387 as Ôaboriginal natives' and ÔMaori New Zealanders'; but by 1877 Maori too had descended to being mere Ôsavages' and Ôprimitive barbarians', Ôwithout any kind of civil government or any settled system of law' (Wi Parata v Bishop of Wellington [1877] 3 NZLJ (NS) 72).

Pity then the aborigine of Australia. Their culture was so profoundly misunderstood that the Australian continent was declared legally vacant, or Ôterra nullius', as though the people were less than human.

These and other examples illustrate how a western jurisprudence is seen simply as legal imperialism when indigenous peoples are judged by the standards and perceptions of another culture, the more so when, as in these cases, assumptions are made by the court without the benefit of native opinion. Needless to say the results have impacted enormously on the recognition of indigenous peoples' rights, and will continue to do so for so long as undue attention is given to legal opinions formulated in a by-gone era.

The source of indigenous peoples' rights must be seen to lie, in my view, in the indigenous people themselves, in the reality of their existence, replete with their own standards, norms and laws, all, like those of any society, quite capable of development. They should have no lesser right than the settlers to draw upon the norms of their own culture, and adapt them to changed circumstances as the English have done through their own law. Accordingly in my view, the definition of Maori rights ought not to depend on the extent to which custom may be admitted according to English legal tenets. Regard must be had to the native practice as it was, is now and is capable of becoming. The aspirations of the native people must also be seen as relevant. To the best of my knowledge no lesser criteria were ever applied to restrict the development of the English, unless they chose to apply restrictions on themselves based upon their own societal norms.

The reality remains that no such right exists in practice unless it can be identified and applied within the national legal system. Legal pluralism may assist to an extent but it does not help in areas of cultural conflict.

One might therefore regard as promising, some indications of the development of a New Zealand bicultural jurisprudence, one that has regard to the traditional values and contemporary aspirations of both the indigenous and settler peoples as founders of the modern state, without predetermined views as to the worth of one above the other, and to the extent practicable, without judging one by the other. The objectives of such a system is to accommodate the needs of both people within the framework of a unitary law, and to resolve the areas of conflict in a broad appeal to fairness, not in sole reliance upon the prior laws of either side.

The more modern jurisprudence contended for is based on need and fact, that two peoples exist in this country with their own dynamic world-views, both needing accommodation, both requiring modification to allow fairly for each other, but both valid except to the extent that they have been expressly limited by the national governing authority.

It is further suggested that while the Treaty of Waitangi is not part of the domestic law except to the extent that Parliament has provided, it should properly be called in aid to resolve areas of conflict, to assist the interpretation and application of legislation or to help determine what is

fair, upon the ground that it is evidence of that which the two parties themselves agreed upon in order to accommodate each other. It will be seen at once for example, that under this Treaty both peoples are constrained by the need for a national governance for the maintenance of peace and good order.

The beginnings of this bicultural jurisprudence are apparent in the decisions already mentioned of the New Zealand courts, in the amelioration of laws and legal principles to accommodate Maori circumstances and the interpretation of statutory provisions to take account of Maori values, without statutory requirement to do so, and for no other reason than that a Maori people exist, with certain standards, opinions and attitudes arising from their own cultural base. This form of judicial enterprise has been aided by the increasing number of statutes that now require a Maori perspective to be taken in certain cases, and to the reports of the Waitangi Tribunal in elucidating a Maori cultural view.

The ability of the courts to treat cross-culturally is merely a matter of experience as the record of judicial interpretations of s3(1)(g) of the Town and Country Planning Act 1977 well shows. This was a provision introduced to our planning laws on the urging (and draftsmanship) of the New Zealand Maori Council, and which required that planning should consider, inter alia, Òthe relationship of the Maori people and their culture and traditions with their ancestral landÓ. Every Maori I met with knew instinctively what was meant, for it expressed a cultural sentiment. This was not so apparent to the Planning Tribunal however which sought to give meaning to the section by defining Ôancestral landÕ (was it Maori land, general land owned by Maori or did it mean graves?). It was not until 1987 in Royal Forest and Bird Protection Society Inc v Habgood (1987) 12 NZTPA 76, as upheld in the Court of Appeal in Royal Forest and Bird Protection Society Inc v Mangonui County Council (1989) 13 NZTPA 197, that it was the relationship that was seen to be important, not the definition of the land. In other words, customary Maori attitudes to land had also to be brought into account.

In this manner, the Maori of this country stand to benefit in my view from an emerging ÔNew Zealand common lawÕ based on both the separate and shared traditions and experiences of the founding cultures. Through the interplay of the Waitangi Tribunal, the courts and specific legislative provisions, a bicultural experience in the dispensation of justice is growing. The jurisprudential base may need refinement but the judicial activity I would argue, is making a valuable contribution the commonwealth legal scene.

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