

“At Century’s Dawn – Future and Past of Human Rights and Rule of Law”

Commentary on paper of Professor Douglas Cassel in Panel 4 “The Globalisation of Human Rights Consciousness, Law and Reality” by Avrom Sherr, Woolf Professor of Legal Education, Institute of Advanced Legal Studies, University of London to be delivered Tuesday 25th July, 2000 at the London Marriott, Grosvenor Square

I am honoured and proud to be here today at one of the first fruits of the joint intellectual endeavours of Institutes of the School of Advanced Study of the University of London. My thanks to Professor Gary McDowell for inviting me and for his part in pulling all of this conference together and our thanks also to Northwestern University School of Law for joining in what proves to be an exceptionally interesting conference.

My own background includes the teaching of what we used to call “civil liberties” over a period of sixteen years and writing in the area of what we have called “Freedom of Protest, Public Order and the Law”. A rest from teaching in that area has provided a little more perspective, but a little less knowledge of literature, events and law during the last eleven years since I published my book on that subject. During that time I have worked largely on trying to understand the work practices, competencies, management, ethics, organisation and sociology of the legal profession and the details of legal service delivery as well as the content, organisation, structure and delivery of legal education.

Coming from this background, I have three, largely unconnected, comments to make. Given time I suspect I could identify a common theme, and you may be able to do that rather better than I. Each comment in no way detracts from Professor Cassel’s important paper. But each provides a small caveat or footnote to some of the elements of his paper. They relate to some problems of cultural imperialism involved in globalisation; some questions of a movement away from equality rights discourse to special rights realities; and some reservations regarding non governmental organisations as a major instrument of spreading Human Rights and implementing and monitoring them.

Globalisation

First to the issue of globalisation. A recent book by Braithwaite & Drahos entitled “Global Business Regulation” and published by Cambridge University Press this year addresses some of the dangers as does Professor Cassel in his paper. Braithwaite & Drahos show through interviews with 500 international leaders in business and government how global institutions such as the World Trade Organisation, World Health Organisation, the OECD, IMF, The World Bank and various NGOs and significant individuals are linked together through key mechanisms, actors and principles. It is their argument that effective and decent global regulation depends on the determination of individuals to engage with powerful agendas and decision making bodies that would otherwise be dominated by concentrated economic interests. So, nothing new there.

Similarly Professor Terry Halliday, currently working at the American Bar Foundation in a paper given last Monday at a meeting of the International Sociological Association, Sub-Group on the Legal Profession spoke of the work of the World Bank and the IMF also in forcing new systems on debt countries which would enable debt to be more easily recovered in circumstances of failure or bankruptcy. These systems involve a set of regulations for bankruptcy organised and policed as in the USA or the UK, a judicial system similarly organised, professional legal bodies similarly organised – each of these to be set up in each of the countries to whom money will be given and the burden of debt allowed.

In my understanding of these arrangements, and not the words of Terry Halliday, special advantages would be given in each of these developing countries which would have the effect of immensely privileging international law firms from the USA and the UK as well as international commercial interests based within those countries, to reap the benefits of commerce there based on an alien, transplanted legal culture. All of this is intended to prevent situations like the collapse of the “Tiger Economies” or the failure of national financial organisations; when such failures are really much more likely to be about economics than law, and this form of cultural imperialism is destined to produce massively uncharted and uneducated perturbations in local culture and economy without curing the mischief which is supposed to be addressed.

The globalisation of other features of legal systems, the beneficial features such as Human Rights (which I earnestly do believe to be beneficial features although I might even distrust my own country's judges as a group to make sensible decisions on) has potentially the same effect on different cultures. In the same way as kinship and other local social norms may define economic networks, so may different cultures define systems for deciding, broadcasting and monitoring Human Rights in other countries. Privileging a particular view of these on the basis that WE think it is good for YOU (rather like the UK exporting the European Convention as a Constitution to the emergent nations of the old Commonwealth whilst not incorporating it ourselves) may also be dangerous as well as paternalistic and ultimately doomed to failure. This has been shown recently in Fiji, not two years after a new Constitution was supposed to cure exactly the mischief which has occurred. Thus, globalisation of Human Rights may also be a wolf in sheep's clothing and its benefits need to be tempered by its dangers.

Equality of Rights or "Special Rights"

And now turning to issues of equality – rights discourse used to be couched in terms of equality, that is that all should be given the same standard, the same recognition under law, the same possibilities and the same opportunities. I note a recent difference, once again a difference which I consider to be correct, but one which changes the scene. In my work in understanding what is happening on an international basis to legal aid and legal services I note, especially in Canada, Australia and New Zealand the beginnings of a setting up of special legal services for "first nations peoples" in those countries, or Aborigines. I note similarly in Norway special legal services for Laplanders. I note special services in parts of the United States for Native Americans. Whilst I see these movements as entirely correct, I also note a move away from the objectives and discourse of equality.

I see no difference between these first nations rights and the rights of those who are socially excluded in the UK. Rather than being first nations or Aborigines, often these are immigrants and those recently arrived. But once we move away from equality to specialised systems of services and rights, the competition will be greater and decisions will be made on a different basis of fairness and justice than that of equality. Fads and fashions of fairness will arise, as I believe they already do. Whereas the fad of creating a further set of rights to be

administered equally broadens rights for all, a fad or fashion to recognise and serve the specific rights of specific groups moves away from a level playing field of equality.

Additionally, as I have seen in working on two projects across Europe relating to legal services for discrimination in AIDS/HIV, special rights given to special groups for altogether beneficial reasons often lead those groups to be stigmatised and as a result those who should obtain these rights, and through special services, do not wish to be so labelled. The result is the opposite of the intention. There is something which is concerning about this. It is a set of uncharted waters and needs more thought and more theory.

Non-Governmental Organisations

Professor Cassel notes the enormous positive contribution towards the determination and instrumentation of Human Rights which is carried out the world over by non-governmental organisations. Such organisations are usually thought of as beneficial, positive and liberal in their approach. However, good or not, they are actually a motley set, some professional, some volunteer, some well endowed and some poor, some morally and socially representative and some not. Rather like “cause lawyering” it rather depends on the cause, the client and the lawyer, the fact of being a non-governmental organisation does not by itself provide any blessing, certainty or competence.

Unlike democratically elected governments who at least in theory are subject to some levels of control at least at the electoral ballot, a non-governmental organisation can be absolutely and totally wrong, such as a campaign relating to a certain oil rig, without any real redress or control. Rather like governments, NGOs rely also on some ability to manipulate the press and the media in order to secure a change in public perception. Where they are good, good people will agree with them. Where they are bad, it is still possible for people in a misguided way to agree. Unlike elected democratic government they have no opposition. NGOs will therefore be more important in countries where there is only one party government and where the voice of an opposition is not heard.

NGOs are volunteers, can be vigilantes and are an unstructured set of individuals. In the same way that I might be concerned about our judges’ newly endowed with the power to understand and decide on issues of Human Rights, I will equally be concerned about the actions of other individuals, not even selected (let alone elected) to provide a more moral

judgment, holier than mine or thine. I am indebted to Professor Cassel for a reference to a paper given by Professor Richard Builder in July of last year at the European University Institute, which apparently makes similar points.

Therefore three caveats which do not in anyway remove from the importance of Professor Cassel's paper but each note a small concern about the overall effects of the globalisation of Human Rights as a means of cultural imperialism, as a disturbance to equality frameworks and in relation to a prime medium of generation – the NGO.