

**8th International Criminal Law Congress – Australian and New Zealand Criminal Law Association
A Matter of Human Rights**

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Human rights - Freedom from fear

The program for this Congress² suggests that many Australian lawyers involved in the criminal justice system, whether as lawmakers, judges, prosecutors or defenders have an interest in human rights. This is hardly surprising as the criminal trial process opens for examination the essential value of an individual's life [both as a victim and as an accused] and invariably, the identification and protection of individual 'rights' generally. Moreover, the quality of our criminal justice system, and equal access to justice within it, says much about how civilised our society actually is, perhaps much more than our knowledge of wine, art or the theatre. No objective assessment could deny the conclusion that it is 'fairer' to those who can afford to pay for their lawyers than those who cannot and that sometimes this issue alone can make the trial process miscarry.³ Also, the media play a [perhaps too] significant role in setting the 'standard' of guilt that is applied by the community's representatives at criminal trials.⁴ [Alan Dershowitz](#)⁵ similarly observed:

"...the most important cases for criminal lawyers to take are those involving the most despised, the most obviously guilty and most hated by the media because the system of justice is measured by how it treats those people. I believe very strongly that the job of the independent lawyer is to create a sense of doubt about the legal system. Scepticism is the key to justice. When society loses its scepticism, this promotes injustice. I think of myself as an outsider and part of my job is to engender scepticism."

Almost 70 years earlier, [Clarence Darrow](#), one of the more revered criminal lawyers of the twentieth century, whilst addressing a US jury in a murder trial in which the primary issue was said by Darrow to be whether a black man had an equal right to defend his home as a white man [after a spirited recital to a jury of the forced migration of African 'Negros' into the US], uttered:

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² The discussion at some of the Congress sessions include: "*Who cares about Asylum-Seekers?*"; "*The International Criminal Court; Koorie Justice?*" and "*... and Justice for All?*"

³ Not necessarily because paid lawyers are better but because they can usually allocate more time in preparation of their cases and will have greater access to experts and other legal and investigative support.

⁴ Juries are of course told that they must be satisfied "beyond reasonable doubt" but it is obvious that some jurors are likely to be swayed by prejudicial information that they receive inside and outside the court, before and during the trial. The recent publicity in NSW about gang rape crimes by certain ethnic minorities is an obvious example.

⁵ [Alan Dershowitz](#) is a professor of law at Harvard Law School, New York, United States. He also practices as a criminal lawyer in significant cases, often on a *pro bono* basis, and regularly comments on legal and social justice issues in the United States media.

“... because, after all, every human being’s life in this world is inevitably mixed with every other human being’s life and, no matter what laws we pass, no matter what precautions we take, unless the people we meet are kindly and decent human beings and liberty-loving then there is no liberty. Freedom comes from human beings, rather than from laws and institutions.”⁶

Nobel laureate [Aung San Suu Kyi](#), upon receiving the 1997 Sakharov Prize, in speaking of the plight of her people suppressed by a military regime for more than 30 years, spoke of the relationship between individual and human rights, freedoms and fears:

“Within a system which denies the existence of basic human rights, fear tends to be the order of the day. Fear of imprisonment, fear of torture, fear of death, fear of losing friends, family, property or means of livelihood, fear of poverty, fear of isolation, fear of failure. A most insidious form of fear is that which masquerades as common sense or even wisdom, condemning as foolish, reckless, insignificant or futile the small, daily acts of courage which help to preserve man’s self-respect and inherent human dignity. It is not easy for a people conditioned by fear, under the iron rule of the principle that might is right, to free themselves from the enervating miasma of fear.”⁷

When Franklin D Roosevelt addressed the US Congress shortly before the US committed itself to World War II, he spoke of four essential freedoms that were in his view worth fighting for:

“In the future days, which we seek to make secure, we look forward to a world founded upon four essential freedoms. The first is freedom of speech and expression – everywhere in the world. The second is freedom for every person to worship God in his own way – everywhere in the world. The third is freedom from want – which, translated into world terms, means economic undertakings which will secure to every nation a healthy peacetime life for its inhabitants – everywhere in the world. The fourth is freedom from fear – which translated into world terms, means a world wide reduction or armaments to such a point in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbour – anywhere in the world.”⁸

It is Roosevelt’s ‘fourth freedom’ that bears examination in this discussion – the freedom from fear.

Roosevelt spoke of it merely as an external obligation on the part of the strong and powerful in the global community to protect the weak. Suu Kyi speaks about it in terms of an internal struggle in the face of forceful tyranny, apathy and inactivity due to the fear of ‘powerlessness’ masquerading as ‘common sense’.

Most Australians, indigenous Australians aside, are fortunate not to remember the sense of fear that must attach to tyranny and oppression or to have endured any discomfort from involvement in war. We might remember East Timor, an experience which merely showed that taking military action in seeking to preserve the rights of our weaker and poorer neighbours says much about us even if our generosity was partly tainted with historic guilt and/or self-interest. Australians justifiably rejoiced in having assisted in the emancipation of a small nation which had endured much torment and lawlessness. That relative success should not cloud the memory of Vietnam, the tragedy of Afghanistan or the pending uncertain human tragedy of another

⁶ [Clarence Darrow](#), *Detroit, The trial of Henry Sweet, 19 May 1926*

⁷ Nobel Peace Prize laureate [Daw Aung San Suu Kyi](#), *House Arrest, Rangoon, Burma 1997*. This is part of a speech read out by her son upon receiving the prize on her behalf. Suu Kyi was then under house arrest in Burma for her political expressions. She was released in April 2002.

⁸ Franklin D Roosevelt, *Congress, Washington DC, USA, 6 January 1941*

global war.⁹ Nor does it explain our governments' selectiveness as to the issues that they consider worthy of 'fighting' for. Roosevelt ended his address to Congress as follows:

"This nation has placed its destiny in the hands and heads and hearts of its millions of free men and women; and its faith in freedom under the guidance of God. Freedom means the supremacy of human rights everywhere. Our support goes to those who struggle to gain those rights or keep them. Our strength is our unity of purpose. To that high concept there can be no end save victory."

In Australia we are at present being told that we face war. In fact, our politicians are presently deciding whether to actively support the US in its military campaign against Iraq. The challenge in this discussion might include an attempt to find within ourselves a certain truth about freedoms, ideals, and about individual human dignity and as well as rights and what we as individual lawyers, and collectively as a legal community, are prepared to stand for, and for that matter, 'fight' for.

Rights? Duties? Obligations?

From those lofty heights let us return to the local landscape. Lawyers have a critical role in shaping society's values. Our jury, sentencing and appellate work at times involves the shaping of thinking. Although newspapers report our work regularly they do so simplistically such that much is not known about the criminal justice system by most people.

We are asked, almost daily, to get excited [by early evening current affairs programmes and talk back radio chatter] about matters of trivia such as advertising slogans which are too risqué or demeaning, the moral questions raised by a footballer's sexual proclivities, which contestant will be the last to leave the Big Brother house etc, but it will usually take late night viewing of or listening to the ABC or SBS to see or hear about the deprivation of rights for women in Afghanistan or Iran or even to ponder the realities experienced by Aboriginal children in our urban and rural communities. Yet, we are driven to distraction by sport, sport and sport.¹⁰ This is reflected in the ridiculous indifference of most people in 'first world' countries such as Australia to the plight of others in the world whose human rights are being curtailed, unless of course such events have the potential to affect our own 'comfort.'

This is not a class divide but an experiential and intellectual one. Ignorance may be bliss but it also ferments apathy and moral weakness. Ignorance is also dangerous for our society and damaging for our children. The fact that Aboriginal children remain generally excluded from educational outcomes in our schools and Aboriginal men are 15 times more likely to experience gaol than non-Aboriginal men is a

⁹ In almost any war, women and children will undoubtedly suffer if not die or at least be maimed.

¹⁰ Sport in society is of course of value. The issue is really one of prioritisation of limited resources and whether the present pre-occupation in our society with sport is morally sustainable when our knowledge of and contribution to the plight of others in need is so low.

tragedy;¹¹ but it is a disgrace that more is not known about such things in polite society or that more is not being achieved in government and other initiatives. Much of the blame must rest on our collective failure, notable exceptions aside, as a legal community to properly inform the community at large of these issues. The resultant indifference could not be what Roosevelt had in mind before sending young men abroad to kill, not to defend their own land and property, but the ideal of protecting the human rights of others that they did not even know.

How then do criminal lawyers contribute towards human rights? The discussion at this Congress is an essential one. It raises the question of whether all lawyers should have, individually or collectively, a professional duty to be involved in these discussions and do so *pro bono*, that is, for the public good. And whether we must do more than 'talk the talk'. It is timely to be candid in our self-assessment of how well lawyers [not just criminal lawyers] actually discharge this obligation if it were one. What is clear is that we cannot expect our own present freedoms to be omnipresent. As recently observed by Nicholas Cowdrey QC¹²,

"Human rights can be easily eroded – and all states potentially have the power to oppress. But a democratic system that works well, in combination with a strong and independent judiciary and good laws, greatly limits such potential. Short of that, the responsibility inevitably rests with individuals and groups of individuals who are willing to stand up for human rights, even at the expense of personal comfort and security."¹³

It cannot be doubted that criminal lawyers [and administrative law lawyers] are more often challenged with scenarios of individual personal rights and freedoms being abridged than others in the community including other lawyers. The legal challenges undertaken in relation to the *Tampa* crisis, the Northern Territory mandatory sentencing legislation and deportation cases are recent examples of lawyers, mainly but not always criminal lawyers, acting for the public good.

What is less discussed is the fact that the quality of our system of criminal justice is much reliant upon the allocation of intellectual resources to its maintenance. Part of the responsibility in the due allocation of resources must of course rest with governments as they in differing ways determine the framework within which lawyers are accessible to represent the accused or the prosecution. In theory governments also select the lawyers who are to hear these cases and if necessary sentence the convicted offenders. Another, and equally important, part of this responsibility must rest with the lawyers who control or affect 'moral

¹¹ The national rate of imprisonment for Indigenous persons on 1 September 2001 was 1,765 per 100,000 adult Indigenous population. The corresponding rate for the total adult population of Australia was 145 per 100,000. This is an Indigenous prison rate of 15 times more than non-Indigenous: Australian Bureau of Statistics, Corrective Services, Australia, 20 December 2001 Cat. No. 4512.0

¹² NSW Director of Public Prosecutions

¹³ N Cowdrey QC & Adrian Lipscomb, *The Just Rule of Law, Southern Cross University Law Review V.4 December 2000*

standards' within the profession. This would include our law schools, our law societies and bar associations as well as the senior partners/directors of the larger employers of lawyers. Lawyers possess the valuable 'first world' tool of knowledge of how laws operate. An appreciation of rights must be gained before one feels a sense or obligation to be concerned about protecting these rights. Often this appreciation only occurs when one has to address a denial of those rights. Given that although the criminal law occupies a majority of Australian judge time, criminal law practitioners remain a small minority of the profession, much garnering of interest and involvement from the rest of the legal community is necessary for there to be any significant change.

Inherent value of *pro bono* work and sharing of the legal aid burden

There are many reasons why lawyers act on a *pro bono* basis. The range from the most noble to the bare opportunistic, but it cannot be doubted that most lawyers feel good about doing such work and many will proclaim to the world when they do. As much can be said by those that undertake legal aid criminal law defence work which remains the most under-rated community service undertaken by the legal profession albeit unfortunately by a very small part of it. This might suggest that lawyers feel that human rights activism and *pro bono* work is something that should be done and they feel good when they do it. The recent increase in *pro bono* schemes in large first tier firms in Australia is an indication that it is also thought to be good for a firm's profile or ethos to allocate some of its energy to undertake and publish *pro bono* efforts. This is not a cynical observation. All efforts should be encouraged. The fact is that for a whole range of reasons there has been an increase in the inherent appreciation for *pro bono* work and human rights awareness generally within the legal community. Whatever is causing this greater awareness or 'inflation' in value; it should be fostered and supported.

For criminal lawyers an obvious start is the greater embracement of the legal aid burden. If more senior criminal lawyers did more legal aid work then the overall quality of representation would increase. If more of the larger firms (i.e., those with the most intellectual and financial resources) embraced this responsibility then general access to justice in the criminal courts would dramatically increase. Such a change not only makes a contribution to individual cases, but younger practitioners will feel that ideals about rights are not just spoken of but that they are important and supported by the senior members of the legal community. Many criminal lawyers wrongly use the issue of legal aid work as a litmus test of their competence or experience – the phrase "*I don't have to do much legal aid any more*" is frequently said as an indication of ability - when in fact it merely identifies financial choice. Whilst it is probably true to say that some lawyers who undertake legal aid work could not otherwise attract sufficient privately funded criminal or other legal work, this does not justify lawyers who can attract such work not doing *some* legal aid funded work. It can

be viewed as an act of charity or part of a *pro bono* scheme. Principles espousing a commitment to such ideals should not merely be part of a banner on a firm's website credentials. Rather, they should be embraced by the principals within these firms; particularly the senior ones whose profit ratios from other work conducted by the firm are the highest.

Co-ordination, sponsorship and collegiate encouragement

Lawyers are, in the main, competitive. In an adversarial system our financial viability often turns on how 'good' others think we are even if that assessment bears no relation to how 'good' we actually are. The 'ownership' of causes and our professed commitment to ideals are sometimes used as marketing tools and also attract their own competitiveness. Singularity and ego sometimes stand in the way of collegiate strength. However, given how much needs to be done across many issues in Australia which concern human rights, [for example indigenous issues, refugee and asylum seeker issues, civil liberties issues as well as involvement in issues abroad: in East Timor, Afghanistan, Zimbabwe and Burma to name an obvious few], there is little to be achieved in being boringly competitive and much to be gained from coordination of efforts, collegiate sharing of information, resources and generous encouragement of all who are contributing or seeking to contribute.

Moreover, there is of course no one 'right way' to contribute to human rights. Indeed, if we were all to do the one thing then much would not be done that needs to be done. We all have differing skills and resources. Much discussion is needed to see how the involvement of all within the profession can be accommodated and encouraged. The leaders in our professional bodies should allocate resources towards more discussion on these matters in lieu of the historic focus on lifestyles, social gatherings and the perks of office. The law remains a noble profession and that fact should not be cynically disregarded. It is after all as observed by Cowdrey a question of how many of our 'first world' comforts we are prepared to forego in order to be involved in the improvement of the lives of others. Moreover we should free ourselves from the fear that when we do get involved, our contribution will have no obvious or immediate impact. That thought is only real when we conclude that we have not done enough.

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