HUMAN RIGHTS IN THE lucky country

Andrea Durbach

Raised and educated in the 'rights vacuum' of South Africa, Andrea Durbach has a unique perspective on Australia's attitude to human rights.

Andrea Durbach is the Assistant Director of the Public Interest Advocacy Centre in Sydney.

This article is based on a paper given at the Human Rights Centre (UNSW) and Public Interest Advocacy Centre conference: Advancing Human Rights – Legal Strategies.

An article in the October 1992 *Alternative Law Journal* entitled 'Legitimacy of Violent Resistance?'[1] reminded me of my ambivalent and colliding theories of human rights which have been moulded by two very separate but compatible worlds.

Against a history of horrific violence, endemic to a political system which will drag increasing violence along with its inevitable demise, Islam argues that the South African regime's 'persistent denial of equal rights and self-determination to the majority of its citizens' serves to legitimate a violent exercise of those rights. He continues at p.207:

> Equal rights and self-determination of peoples are recognised as basic human rights and a major purpose of the UN [Charter] . . the relationship between a government and its peoples striving for equal rights and self-determination . . . has outgrown the domestic jurisdiction of South Africa [and is now regarded as a] legitimate international concern.

Para. 5 of Principle V of the 1970 UN Declaration on Principles of International Law 'imposes an absolute injunction on the forcible denial of equal rights and self-determination' by a government against its citizens. Islam suggests: 'If this prohibited force is used against the beneficiary of the right, the latter acquires a right to resist the former with the necessary counter-force'. The right to resist is a permissible last resort, available only where the enforcement of the right to equality through peaceful means has become impossible.

The enforcement of rights through peaceful means, through legislation which reflects the interests and concerns of the majority, is a notion to which the majority of South Africans can only have aspired.

The South African background

As a South African, I grew up in a country which had an uneasy and very separate occupation of the African continent. The premise of 'apartness' on which the apartheid system is based was designed to accord to the people of South Africa different rights and privileges based on the colour of their skin. Inspired by a fierce and concerted persecution, and by their own experience of suffering, the black people of South Africa have fought a struggle for the most precious of human rights, a struggle for the right to live.

For approximately 75% of the South African population, apartheid has effectively meant the brutal denial of rights commonly associated with a civilised society or, as some might say, 'a lucky country'. This denial underlined an array of legislation which effectively excluded every black person from South African citizenship, with the ultimate aim of making black people habitual visitors to or in their country of birth.

To ensure compliance with this myriad of legislation, regulations, government decrees and prohibitions, the state evolved an extraordinary apparatus of control and defence, a vile brutality which has resulted in a culture where the outlaw is a legitimate opponent of apartheid, and where assertion of rights has been criminalised.

With the legalisation of apartheid, South Africa was prevented from exercising voting rights as a UN member state. As a result, it has failed to

pay its budget and, given the incompatibility of many international conventions and declarations with the tenets of apartheid, South Africa has not been a loyal member state, nor a keen signatory. Consequently, I studied law and the notion of rights with little reference to the Universal Declaration, international covenants, UN resolutions and agencies. My knowledge of human rights evolved amidst a permanent exhibition of a grotesque deprivation of rights.

Without recourse to or reliance on the United Nations Charter, Declarations or Covenants, Nelson Mandela announced, in an ANC address to the Pan-African Freedom Conference held in Addis Ababa in January 1962, that the African National Congress had little choice but to embark on an armed struggle against white domination:[2]

> During the last ten years, the African people in South Africa have fought many freedom battles, involving civil disobedience, strikes, protest marches, boycotts, and demonstrations of all kinds. In all these campaigns we've repeatedly stressed the importance of discipline, peaceful and non-violent struggle. We did so, firstly because we felt that there were still opportunities for peaceful struggle and we sincerely worked for peaceful changes. Secondly, we did not want to expose our people to situations where they might become easy targets for the trigger-happy police of South Africa. But the situation has now radically altered ... South Africa is now a land ruled by the gun. The Government is increasing the size of its army, of the navy, of its air force, and the police ... All opportunities for peaceful agitation and struggle have been closed ... when a minority Government maintains its authority over the majority by force and violence, peace in our country must be considered already broken.

The arguments presented by Islam and Mandela offer two approaches to the pursuit of a similar quest. The right to self-determination is legitimated in United Nations instruments. The right to struggle for life is grounded in the experience of incomprehensible human suffering. Simply stated, the Afrikaner poet, Breyten Breytenbach writes:

> A minority regime which can only be maintained through violence, has forfeited its right to exist, because it is unjust in conception and application [3]

The Australian contrast

For me, as an outsider, from a world where rights have been diminished and discarded by legislation, Australia's history and record in promoting and protecting rights has been comforting. The list of international human rights instruments to which Australia is a party is impressive. These include the International Covenant on Civil and Political Rights and its Protocols, the International Covenant on Economic, Social and Cultural Rights, and the many Conventions – on torture, discrimination, women, children, slavery and refugees.

The domestic legislation which reflects Australia's obligations as a Convention signatory hints at a national adherence to values and concerns absent from a world, such as South Africa's, which prides itself on having a well-stocked library of legislation which erodes and confiscates individual freedom.

In the introduction to the *Ideas and Ideologies* series on Human Rights, Eugene Kamenka writes:[4]

> The conception of human rights is of central importance in the development of the modern world. Like all such ideas, it is very much theory-laden, implying a general view of man and society, of individuality, politics and the ends of government. Like all such ideas, it is profoundly historical, expressing the aspirations and seeking to remedy the ills of particular places and times. It is thus an idea with a history, an idea that changes in both content and social function.

The idea of human rights as 'profoundly historical', changing in both content and social function, is critical to taking rights seriously. Comparably, Australia exudes a coveted egalitarianism and a belief in the importance and recognition of human rights. Historically it has had on offer an abundance, a richness, of human rights. But, as Donald Horne warns in *The Lucky Country,* 'there is little point in self-congratulatory comparison'.[5] Archbishop Desmond Tutu, on his recent visit to Australia, offered an appreciative critic's perspective: 'I would say, as a former schoolteacher, this pupil (Australia) is doing well but there is room for improvement'.[6]

In a *Review of Australia's Efforts to Promote and Protect Human Rights* by the Joint Committee on Foreign Affairs, Defence and Trade published in December 1992, the Committee 'found it impossible to separate parts of our domestic practice from our international reputation and, therefore, our international credibility' (p.xxvi). The *Review* reports (p.59-60) Human Rights Commissioner Brian Burdekin giving evidence to the Committee:

> In my view, there is no doubt that the greatest hindrance to our nation being taken seriously, or to our efforts to promote human rights in other countries, or to protest violations, still has to be the position of Aboriginal and Torres Strait Islander people in this country. There is an abundance of evidence that, in this respect, Australia does not respect and ensure human rights on a basis of equality as we are bound in international law to do.

Additional questions of compliance and domestic concern considered by the Committee as reflecting a gap in national practice, and a weakness in Australia's human rights record, related to juvenile detention, the abuses of women's rights and the treatment of refugees.

In the international arena, Australia has demonstrated a proud and often enviable tradition in upholding its responsibility to assist those who have been unable to protect themselves from the cruelties perpetrated by nation states against their own people. In 1991, former Prime Minister, Gough Whitlam AC, QC, in a critique of Australia's human rights profile stated:[7]

> It may well be true that no nation has said more about human rights than Australia; it is certainly true that dozens of nations have done more about human rights and have done so more promptly and wholeheartedly.

Australian apathy

Australia's ratification of an impressive array of international human rights instruments (thus far 19 of the 24 conventions have been ratified), and its innovations for redressing oppression and human rights abuses in foreign jurisdictions, are indeed laudable. But to pride itself on membership of an international human rights society, and on the notion that 'things are worse elsewhere', simply fosters an 'innocent happiness' in-house, an ideology of mediocrity and apathy.

Donald Horne's 'lucky country' lives on the ideas of other people, and 'most of its leaders (in all fields) so lack curiosity about the events that surround them, that they are often taken by surprise'.[8] Horne recalls (p.21) Bertrand Russell's visit to Australia in 1950 when Russell predicted that Australia pointed the way to a happier destiny for man throughout the centuries to come; 'I leave your shores,' said Russell, 'with more hope for mankind than I had when I came among you'.

Privilege attaches to the luxurious world which brims with an expansive culture of rights. While most Australians may be, as Horne says, 'uniquely unaware' of their obligations which arise from this fabric of rights, their challenge is to ensure that Russell's 'hope for mankind' is kept buoyant and sharply in focus.

To rest on the laurels of ratification of human rights instruments is a soft and irresponsible option. In a land of peace, where

rights have been shaped in a climate of calm, it is easier to keep a balance and tempting to avoid sharp issues. Our challenge is to be vigorous in our vigilance of rights, to use the tools ensuring their prominence exhaustively and effectively. We must guard against and undermine the sense of ease contrived by the sweet life, and be mindful of and curious about the events which surround us, and their historical and cultural complexities.

References

1. Islam, M. Rafiqul, 'After the Boipatong Massacre – Legitimacy of Violent Resistance?', (1992) 17(5) *Alt.LJ* 207.
2. Mandela, Nelson, *The Struggle is my Life*, International Defence and Aid Fund for Southern Africa, London, 1978, p.122.
3. Quoted in Sparks, Alastair, *The Mind of South Africa*, Mandarin, London, 1991, p.211, fn.18.
4. Kamenka, Eugene, *Ideas and Ideologies – Human Rights*, Edward Arnold, London, 1978, p.vii.
5. Horne, Donald, *The Lucky Country*, Penguin Books, Victoria, 1964, p.9.
6. Quoted in the *Sydney Morning Herald*, 14.10.93.
7. Quoted in a speech by Brian Burdekin in *Human Rights Complaints under International Treaties* presented to International Human Rights Mechanisms Seminar, 31 August 1993, Sydney, organised by the Human Rights Council of Australia.
8. Horne, above, p.220.

THE MECHANICS OF

The **Population Registration Act**, the cornerstone of South Africa's pigmentocracy, racially classified each individual South African. The right to franchise was allocated on the basis of this classification.

The **Reservation of Separate Amenities Act** legalised the provision of separate buildings, services and convenience for different racial groups.

The **Immorality Act** and **Mixed Marriages Act** made inter-racial sexual relationships and marriage illegal.

The **Group Areas Act** assigned residential areas to each population group to the exclusion of other groups, uprooting hundreds of thousands of black people to make way for white zones within black areas.

The **Black (Urban Areas) Consolidation Act** made it illegal for most black people to remain in white areas for more than 72 hours. Under this Act each black person was required to carry and show on demand a so-called 'passbook' which gave information about the person's work, employer and rights to stay in a particular white area.

The **Prevention of Illegal Squatting Act** criminalised residents in an unauthorised area and empowered authorities to forcibly remove whole communities to designated lands, often barren and peripheral to essential facilities necessary for life.

'Bantu Education' was designed to equip black children for the menial role which the apartheid system assigned to them; black schools were starved of resources and curricula excluded subjects which were necessary to prepare children for higher education and admission to skilled and professional occupations.

States of Emergency drastically curtailed freedom of speech and expression, freedom of association, freedom of assembly and the right to personal freedom.

The **Internal Security Act** had extensive banning provisions which allowed the Minister of Law and Order, without notice to the concerned individual, by publication in a government gazette, to prohibit printing or distribution of any publication if satisfied that the publication endangered state security or the maintenance of law and order.

The **Prisons Act** deemed it a crime to publish any false information concerning the experience of any prisoner or ex-prisoner or relating to the administration of any prison. This Act effectively barred the dissemination of information regarding allegations of torture, the imposition of solitary confinement, and the psychological and physiological deterioration of prisoners.

The **Internal Security Act**, and previously the **Unlawful Organisations Act** allowed the Minister of Law and Order to ban any organisation which, in his opinion, engaged in activities which endangered the security of the state or maintenance of law and order or propagated the principles or promoted the spread of communism.

The **Internal Security Act** also allowed for the banning of gatherings, except *bona fide* sports occasions and funeral processions. It also allowed for the banning of individuals. A banning order amounted in the words of South African legal academic, Tony Matthews, to 'a civil death and to a large extent the personal and social death for the victim of the order' (quoted in G. Bindman, *South Africa: Human Rights and the Rule of Law*, 1988, p.57, fn 24).

The **General Law Amendment Act** authorised detention without trial for lengthy periods – initially 90 days, followed by a detention provision for up to 180 under the **Criminal Procedure Act.**

The **Terrorism Act** allowed for indefinite detention and the **Internal Security Act** permitted preventive detention. Detention orders were made in respect of individuals who engaged in conduct or activities which undermined the maintenance of law and order. The definitions of offending conduct under these Acts were extraordinarily wide, and every criminal act of whatever magnitude could be brought within the statutory scope of the definition of 'terrorism'.

The **Police Act** discouraged reporting of information of vital concern to the public, particularly relating to allegations of ill treatment of detainees under the **Internal Security Act.**