

MELBOURNE PRESS CLUB

Geoffrey Robertson

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NEIL MITCHELL

...our argument about whether a culpable driver got five years or four seemed a little irrelevant. It was put into context. Well Geoffrey Robertson is a man who understands better than any that context and he's known for two things in this country. His role as a human rights advocate and his role as a television presenter with the Hypothetical series, which even my kids tell me beats Survivor any day. Actually there is a third thing for which he is well known in this country - that's his wife - Australian author Kathy Lette. That's somebody I have been privileged to interview several times Kathy and the dinner table conversation would intrigue me and probably intimidate me in that household with Kathy Lette and Geoffrey Robertson around the breakfast table, it'd be a pretty challenging place. In fact, you could probably film that and you'd outrate Survivor. Geoffrey Robertson's recently been appointed the president of the Special Court for Sierra Leone to prosecute war crimes and crimes against humanity in that country. That'll be his topic at the law conference this afternoon. I think given the state of the world, it's difficult to imagine the more appropriate time for us to hear from such a man - ladies and gentleman, please welcome Mr Geoffrey Robertson QC.

GEOFFREY ROBERTSON QC

Well that was a much kinder introduction than I received in Edinburgh last week when the Chairman with a pronounced Scottish accent introduced me as a distinguished liar. My own accent has undergone a few changes - *Private Eye* describes me as an Australian who has had a vowel transplant.

But the process probably began when I made my first appearance at the Old Bailey, as a young lawyer still with the Australia accent and the nasal vowels pronounce branch and France, and I had to appear in my first case to do the appeal for a gentleman who had been charged with wearing an indecent T-shirt, in front of a judge of ferocious severity and morality. I had to get up and tell him what the case was all about, and I said 'Well, my Lord, its about a t-shirt with the emblem 'F\$@k art, lets dance" There was a terrible silence, and then a voice from the bench 'F\$@k art, let's what, Mr Robertson?' 'Dance, dance, my Lord, dance' There was another silence. 'Oh you're an Australian. What you mean to say is 'F\$@k art, let's dance!' And so my vowels shortened and I became a fully fledged member of the English Bar, but these days as you watch and you have to CNN and Fox and Sky and so and its interesting to see how many of the reporters and presenters do have Australian accents. It's the accent of choice - it lacks the arrogance of the American, the condescension of the British, the rather grating sound of the South Africans, the duplicity of the French, the constipated vowel sound of the New Zealander. Australian is becoming the lingua-franka of international broadcast journalism. Which means, of course, more employment.

But equally a greater share in the dangers and I think we should remember today the Australian photographer, Paul Moran, who was the first of up to fifteen casualties that the press has suffered in doing its duty to cover the Iraq war. And I think that remembering as we do with pride as well as sorry, the journalists who have lost their lives in, not only in Iraq, but in Afghanistan and Kosovo, and other dangerous missions in these days of war and terrorism. It's, in fact, it is impossible it is often said and critically, that journalists have only themselves to blame when they put themselves in dangerous places and there are criticisms, I think, genuinely to be made of some media organisations who have taken to offering freelances extra money to cover situations where they wouldn't put their own employees at risk.

But even put that aside, it's impossible as you know, however careful and professional you are, however deeply embedded as the current phrase goes in the friendly forces, to avoid friendly fire, unfriendly landmines, or simply deception and betrayal. Daniel Pearl who was a friend of Stuart Carl and myself and in the Wall Street journal complex, was the most cautious of journalists. But when you read the evidence, you read the almost diabolical cunning which lured him to his fate, and you realise that in this profession in the time of cunning terrorism, work in the field is not safe, and never can be. The duty of extracting information, and extracting it from terrorist groups as well as from secretive and tyrannical governments.

I was asked to speak today about how journalists can help human rights and I thought to put a vice versa on that - how human rights can help journalists. In both cases, I think it begins with the simple recognition - that journalism is the exercise by occupation of a freedom guaranteed by all to all, a freedom of expression that finds its place in human rights treaties. The right to obtain and impart information whether true, or whether its reasonably believed to be true after all careful checks, is simply the correlative right of your readers and listeners to receive that information. Of course, that right is cribbed and confined by laws of libel, by contempt and by new devices that governments are inventing to make journalism more difficult.

But I think the most important development over the last 20 years, the way the human rights movement have gone on the offensive. I remember when I was at university and joined Amnesty International, it was all about writing letters to tyrants to ask them to be less tyrannical. I can remember writing 'Dear President Pinochet, can we please have an end...' Idi Amin I wrote to on directions. You had to address him as 'Your Excellency, Idi Amin VCDSO and Bach, could you please organise a coronial enquiry into the bodies of the three chief justices who were found floating in the river of Uganda..'

But that day has passed, and today the human rights movement has gone on the offensive and demands of governments that they should put such tyrants, overthrow them and put them on trial. I think much of that development has come from the media. The development, the beginnings of CNN in 1981 really signalled the time when at least people in the democracies of the world could feel the sorrow and the pity and the anger than comes from seeing torture and mass murder and rape and that is how the new development, the war crimes courts, one of which I preside, dealing in what are called crimes against humanity. Crimes which are so black that it diminishes us all as human beings to think that other human beings can conceive and commit them. So, the international media has been, I think, the recruiting sergeant for the human rights movement. Of course, it has been difficult, particularly in the Commonwealth where at a Commonwealth conference, and we think that the common law is a pretty precious thing but particularly in countries where Commonwealth governments want to suppress criticism, that has not been the case. Libel, in particular, has been used.

I remember in Singapore, going out and defending great journalists like the late Derek Davies, who were prepared to risk, and their proprietors were prepared to risk, massive libel damages in order to give some coverage to an opposition that was being oppressed and was not, of course, ever mentioned in the, at least never mentioned accurately in the straits times - the muzzled lapdogs of the regime. That standing up for the right to report accurately is expensive, particularly expensive for proprietors in that some of those cases I would have to cross examine - Lee Quon Yu, for day in day out and at the end of the case the judge would a few hundred thousand dollars in damages because of the way my cross examination had upset the feelings of the Prime Minister whereupon the Malaysian Bar Association issued a statement saying this is the first evidence we've had that Lee Quon Yu has any feelings.

But the last Commonwealth conference we were at in Kuala Lumpur, we spent part of the time visiting Murray Hibbert the far east economic review correspondent who had been jailed for

contempt of court, which is another common law offence, ill-defined and in the hands of insecure or oppressive governments can be used to jail journalists.

There are new ones coming on stream almost every day. Last year, I went out to Zimbabwe to defend Andrew Meldrum, for twenty years the Guardian correspondent, who had been arrested and charged under the new offence carrying two years imprisonment of abuse of journalistic privilege. Not that journalists have any privileges in Zimbabwe, but, and not that his article had even been published. The Guardian is not published or distributed in Zimbabwe but, and here's a sign of the times, in the central police office in Harare there is an underground room devoted to police officers who spend their time dialling Internet numbers looking for criticisms of Mr Mugabe, and they found Andrew's article in the Guardian on-line, and he was prosecuted or abusing his journalistic privilege.

I think the first lesson, and the first thing that journalists can do to help human rights is simply to keep on doing their duty no matter how adverse the situation. And not to collapse and apologise and grovel and do all the things that these governments expect because that simply encourages them.

There is a second matter that I should mention that has been brought home to me after my appointment last year by Kofi Annan to the court in Sierra Leone which is dealing with the war crimes in that country. The war that broke out a few years ago was a particularly barbaric one. You may remember, I think, some of the grotesqueries of the war are unique. There was the mutilation campaign after the UN elections. One of the forces opposed to those elections went round saying 'which hand did you use to vote?' and then it would be lopped off by a machete, and many, there are tens of thousand of people throughout Sierra Leone who simply have no hands or one hand missing.

There were the kidnap of children, a particularly horrific crime, to use either as sex slaves or as assassins. They were taught at age 12 to use AK47's. And there was nothing, as they found out, that tends to demoralise the village so much as having their head man executed by a 12 year old. There was, the most grotesque of all, and I've had to watch this in film and I am sorry to mention it at lunchtime, but it will show you the depths to which you can descend. Several of the leaders played up the old juju tradition that eating one's enemy's heart will give one the enemy's strength and a number of prisoners of war were used for that purpose.

And the poignancy of this happening in Sierra Leone, of course, is that this was where the world's first humanitarian mission started when the British Navy in the early nineteenth century freed the slaves down the coast of West Africa and brought them to Freetown. That's how Freetown, the capital, began as the place where liberated slaves were educated. And in time, it developed British style democracy where Graham Green wrote 'Heart of the Matter' when he was stationed there, Cecil Rhodes came in to make money from the diamonds, the cursed treasure of the country, and yet it descended into a level of barbarism with hundreds of thousands being killed.

Now that war ended about a year ago and there is still a very uneasy peace and coming in as a head of a court that is to provide some measure of retributive justice, one looks very much to the press, and of course, Operation No Living Thing, which was swept through Freetown targeted journalists in particular, lawyers and journalists always the targets in these cases, and I find that the press first of all, finds it difficult to understand, and the court has spent a lot of time and money on education campaigns training journalists to understand basically what has happened. It's difficult with so many either fled or dead, and of course, in some countries, you have journalists who are brought up in a ministry of information and simply don't understand the role of the free press.

We also find corruption, I remember finding a lot in Indonesia in the 70's, the press would, journalists would want money to write the story that would please you, and if you didn't give them the money they'd write displeasing stories.

I think that in these post-war reconstruction situations and Iraq is another ... I think that the media can assist human rights by providing training courses to teach basic professional skills and basic professional ethics to journalists in a society that is emerging from chaos. That certainly has been my experience in Sierra Leone.

I want to now turn to the other side of the coin ... what human right principles can do for journalists. I come or I grew up in Sydney in the sixties and it was quite an extraordinary experience to read the newspapers in the morning and then to go to work and hear from friends what was really happening. Sydney was run by a man called Robert Askin a premier who was utterly corrupt to his fingertips... gaming and serious crime. Journalists all knew this. Not a word was published. The police that beat up the anti-Vietnam demonstrators were equally corrupt. The Fraud squad was behind frauds, the Vice squad was running most of the vice and the serious crime squad was pulling off the serious crimes. Journalists knew this. Not a word was published in the newspapers. Even the Church ... the man who confirmed me in the Church of England, Archbishop Gough, was providing headlines to the young Rupert Murdoch's Mirror, "Younger generation wallowing in a mire of sexual immorality" was doing a lot of wallowing himself to such an extent that he was caught with a Sydney socialite on a luxury cruise in Spain and the Anglican Church defrocked him and sent him off to Britain to the very smallest parish in Britain. Not a word of this appeared in the Sydney press. Of course it was all over the Catholic Church's edition ... you went to confession and the priest would say "have you heard the latest about the Archbishop" ... but this was a result of the laws of libel because the press had the duty of proving the burden of proof of truth ... not only of truth, but you had to prove truth and public benefit.

There was a case I was involved in as a young articled clerk where the press had proved that there was a vote rigging scandal in an electorate outside Sydney and the truth had been proven but the advocate on the other side was Clive Evert who managed to get the jury to bring back a verdict on the basis that there was no public benefit in exposing corruption in the Labour party in this electorate because it was only a small electorate. And on that basis, of course in time, the High Court changed matters. It took to till the Mason court the reforming Mason court in the early 1990s and it took a case where of all people, Andrew Theophanous tried to vindicate his good reputation. I think the High Court probably thought enough was enough and they invented ... I think is not an unfair word ... a constitutional implication for free speech about politics and government. They said it must follow from having a constitution that government and politics will be ... can be spoken about freely. And so you have a privilege to write about politicians and to write about government officials if you really believe what you're writing and if you've taken all reasonable steps to check it. Even if subsequently it turns out to be untrue.

Well that's all very well for writing about the rorts of politicians who invent their travel expenses. But in the case of rorts by big business which can cost the community hundreds of millions of dollars there is still absolutely no privilege. You've got to get it right and you bear the burden, unlike any other form of civil law, you have the burden of proving truth and you have no public interest or reasonableness defence. And this seems to me to provide a very strange situation. You imagine you're going to be locked in to read the HIH report this afternoon. Now most journalists did know that HIH was in trouble and they weren't able to warn the public. The Victoria's State Bank as you know collapsed. Why didn't you warn the public? You must have known what was going on? And of course that's because there is no privilege, there is no reasonableness defence, no public interest defence to warn the public before these

things happen. The buck is passed to the lawyers and the ACCC on the Royal Commission on ASIC ... closing the door after the con men bolt. And whether its crooked small business or crooked big business there is an anomaly in Australian law that you can speak more freely about politicians than you can about other public interests. So the press does not play the watch dog role that it has been assigned under decisions following human rights conventions.

This is not the case in Britain, in New Zealand or in South Africa and Australia is lagging behind these countries because as a result of our Human Rights Act in Britain with its free speech guarantee. The decision the Australian position that only politics and government are protected from ... or have the privilege to report was rejected. In the case called 'Reynolds' the press was given a much wide ranging, more wide ranging privilege to speak frankly about public interest matters, business and the like and in the South African Constitutional Court last year it was ruled that the only way that it could be justified under human rights conventions to have a burden of proof on the media in libel actions was if they could justify under a reasonable publication defence. And that was developed from human rights treaties.

So Australia is in that sense out of step not having a Bill of Rights to appeal to take advantage of this jurisprudence that is welling up in other countries that do.

In other respects the freedom of expression guarantee has been of great importance to the press and its international courts have been prepared to take a streetwise view of it to actually recognise when a chilling effect is likely to occur. Two examples recently, one was the case in the European Courts of Human Rights of the young British journalist, Bill Goodwin, who was ordered to disclose his source for exposing a misbehaviour in a company. The Court of Appeal in Britain said seemingly reasonably, just put your source's name in a brown paper envelope and deliver it to our clerk and only if you lose in the final appeal will we open the envelope. Bill Goodwin didn't do that and he went instead to Strasbourg where the Court of Human Rights is the final arbiter. They delivered a ground breaking judgment in which they used the freedom of expression clause to say this "protection of journalistic sources is one of the basic conditions for press freedom as is reflected in the laws and professional codes in a number of states and affirmed in several international instruments on journalistic freedoms. Without such protection sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources the press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom such a measure cannot be compatible with the freedom of speech guarantee unless there is an overriding public interest. And that was a case that reversed a whole series of common law decisions that forced journalists to disclose sources.

Another and the last case ... the last example I'll give you concerns war correspondents. Last year a war correspondent for the Washington Post was summonsed by the International Court for War Crimes in Yugoslavia, sitting in the Hague. It summonsed him to give evidence ... not quite routine evidence in fact, on the basis that every journalist had a bound and duty to assist the prosecution and subsequent war crimes. This may be acceptable to some journalists at the end of some wars, but clearly for journalists who are going back into conflict zones a rule that they were routinely compellable to give evidence against the people they interviewed would mean, as Phil Knightley, one of our witnesses and Roy Gruppmann from Newsday, another eye witness has pointed out, would inevitably mean that they would lose the ability to get into places, they would lose interviews, they would lose if they would be perceived as being on the side that had ... that was most likely to set up the war crime courts at the end of the war. And on that, using the freedom of expression clause in human rights treaties the Appeals Court at the

International Court of Justice in the Hague upheld the journalist's right not to be compelled to testify unless in effect his evidence would make all the difference between guilt and innocence.

So you can see the way in which human rights principles are now being used to protect journalists by those cases. So I think at the end of the day the question of whether how journalists can help human rights is really an issue of simply supporting the principle of freedom of speech because that is the principle that protects the profession which operates with human rights as its *raison d'être*. I heard John Howard the other day saying "oh we don't need a Bill of Rights in Australia because we've got a democratic government and we've got independent judges and we've got a free press". But democracy is not enough. Independent courts are not enough. A relatively free press we may have, although we don't have a press like the dictator and the Tom Stoppard play says. Well we do have a relatively free press here. It's a press run by my relatives. But we're not in that situation.

But without the freedom of expression guarantee entrenched in a constitution or in a Bill of Rights the media will not be able to perform the watchdog function that is carved out for it and that it is part of its work for human rights. I would simply end by pointing out the anomaly in our libel laws and by saying that at the end of the day the press in Australia will be freer for having a constitutionally embedded freedom of expression guarantee.

Thank you.

APPLAUSE

NEIL MITCHELL

Thank you. Ladies and gentlemen we have about five minutes for some quick questions if you would please.

We have microphones moving about. No we got people carrying microphones around the room.

Yes.

Peter Harrington from the City of Melbourne - Llb Precinct

Can I say that today the group is fantastic and even more superbly your hypotheticals on television and we're delighted to be here today to meet you.

I'm a member of Reprieve Australia which is an off-shoot from Reprieve UK and we're working for the abolition of the death penalty worldwide. Now OK, my son currently who is a barrister is currently presenting a play here in Melbourne and thanks to the likes of 3AW and 774 and today for instance the Herald Sun and tomorrow the Australian have given a great exposure and the London Guardian and the BBC also took it to London to Paris, to Brussels, Denmark, Sweden and its off to New York also. Look I want to say to you is do you believe that our work for the abolition of the death penalty here in the Colonies may have some impact on the abolition of the death penalty globally.

Robertson

What time is the play on?

Harrington

8:00pm at the Courthouse La Mama tonight until Saturday.

Robertson

I'll try and catch it because I do think it's a very important issue and I read in The Age yesterday that certain judges from, I think, the Bahamas, no Barbados were upset when I made the point that the new Court that they're setting up to assist amongst other things in the carrying out of the death penalty without perhaps the safeguards that the Privy Council has insisted upon was a matter that was worth discussing at a Commonwealth law conference because I think it's the case that if the death penalty returns to England, Australia to a number of countries in Africa, the South African Supreme Court has declared it unlawful, then most if not all judges would resign rather than don the black cap and sentence a man to be hanged until he is dead. That grisly ritual that we used to know so well and was ended with Robert Ryan and his escape from Pentonville back in the sixties.

The sad fact is that judges in the Carribean are not only doing this regularly because ...

(a) because there is the atavistic belief that "an eye for an eye" but also because I'm afraid there is some American influence they feel that America's use of the death penalty justifies that course. Although in America we've seen Governor Ryan in Illinios and other places with DNA technology just showing how many wrongful convictions and wrongful executions there have been. So I think it is a matter that is ... I'm quite prepared to put on the agenda because I think that at a Commonwealth conference it is up to judges to talk through the actual way in which the law is developing and the gradual majority position certainly in the Commonwealth against the death penalty I hope is going to impress those judges who are still donning the black cap and sentencing people to death.

I think mainly in ... now in about three Carribean countries.

Kevin Lawbry - The Age

You wrote in September last year that Saddam Hussein was guilty of waging an aggressive war by invading Kuwait in 1991 and that constitutes an international crime. Hypothetically, where does that put George Bush? Three weeks ago he invaded Iraq.

Robertson

There's a long answer and a short answer to this one.

I did write that Saddam Hussein was clearly guilty of genocide in the 1980s. He not only used poison gas on the Kurds at Elebgibit and the most conservative figures suggest that he killed at least a quarter of a million of his own people. And the case ... of course that was overlooked, everyone wanted oil, everyone wanted his business. Britain, France and Germany sold him munitions that he then used in his invasion of Kuwait.

Where does that leave George Bush? It leaves George Bush 14 years ... 13 years later with a world that (a) has not defined aggressive war. There is no crime of aggression. A world unlike Cromwell and his great Commonwealth parliament in 1649 has not defined tyranny or indeed provided a law that supports tyrannicide, we have a theory of pre-emptive strike or pre-emptive self defence which is unacceptable on the authorities of international law. We have an argument based on UN Conventions which is long and convoluted and speaking as a judge I'd like to hear it argued out in court rather than read law professors advancing it in letters to newspapers. There is an evolving rule which is very much a human rights rule of the right to invade in order to stop the commission of crimes against humanity. It may also extend to punishing crimes against humanity but it is subject to the law of proportionality. In other words you don't take action that is going to perhaps kill more innocent than those you are seeking to punish. So there are some of the issues that we haven't yet evolved. International criminal law is at a very early stage. And I

think its important to recognise that. I hope the debates over the legitimacy of the Iraqi war will lead to a greater clarity in international law than there is at the moment. What I can say and I expressed this on Monday is that in any post-war reconstruction of Iraq. In any bringing to justice of the 55 Iraqis that are wanted on playing cards or crimes against humanity in the past ... what is important and what is required by the Genocide Convention to which America is the signatory as well as Australia, Iraq and Britain, is that there be an international ## tribunal which is set up to judge them and not a special military commission sitting in secret and comprised only of US Army officers where the defendant is denied ... not only access to much of the evidence but is denied his own council and has to accept an American military officer whether he likes it or not as his council. I think that it would be regrettable if the war ended with that kind of court judging Saddam Hussein if he is ever found or the leaders of his regime. That would not be acceptable either in the Arab world or in ours. The task I suggest for Australia and Britain and their duty under Article 6 of the Genocide Convention is to seek to persuade the US Defence Department to set up a proper court with independent judges acknowledging defendant's rights in order to deal with the crimes against humanity. Which undoubtedly on the evidence have been committed in the past in Iraq and the important thing about crimes against humanity is that it can't be amnestied, can't be forgiven or forgotten or made the subject of time bars. It is there and we have a duty to prosecute it. And equally we have a duty under international law to prosecute it fairly.

NEIL MITCHELL

Ladies and gentlemen I'm afraid we're out of time. Geoffrey has to get back to the law conference and on your behalf I'd like to thank him very much for his contribution today. As I said one of the highlights of our year.

Geoffrey, we have a tradition at the Melbourne Press Club, we only make presentations which are only useful. We don't give you ties and cufflinks. Our Federal Treasurer for example had half an hour kicking the footy outside with a couple of his heroes. Our Prime Minister we gave him a montage of photographs of himself ... at the Olympics ... at every gold medal ceremony he could get to, which was every gold medal ceremony which hangs in his office I believe and with a number of media performers who have spoken here, we've given them photographs of themselves.

We have researched you thoroughly and found not surprising like most barristers have one weakness, which is good wine so we present you with what we think is a very good bottle of wine from Dromana Estate Winery on the Mornington Peninsula here in Victoria, but its not just one bottle. More important a larger number of bottles will be delivered to your home in London. And thank you very much.

GEOFFREY ROBERTSON

For one dreadful moment I thought you were going to present me with a box of tapes of your past interviews with ##

NEIL MITCHELL

Ladies and gentlemen ... Geoffrey Robertson. Please enjoy the rest of the day, sweets will be served and we have some time to chat and discuss what has been raised.

Thank you.