THE BANGALORE PRINCIPLES AND THE INTERNATIONALISATION OF AUSTRALIAN LAW

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Treaties are not *directly* incorporated into Australian domestic law by the international act of ratification or accession by Australia. A treaty per se does not form part of domestic law unless and until it is incorporated by legislation and, in the absence of such legislation, it cannot create rights in or impose obligations on Australian citizens and residents. However, there have been important developments in recent years in the relationship between domestic law and international treaties. The High Court has shown a willingness to use treaties in the interpretation of statutes and in the development of the common law.[1] This is particularly so in the case of international human rights principles as they have been expounded, and developed, by international and regional bodies. More recently, the Court found that ratification of a treaty could give rise a legitimate expectation that the Commonwealth executive would adhere to the terms of the treaty, giving rise to rights of procedural fairness.[2] An expression that seems to encapsulate the modern approach to the use that may be made by judges of international human rights principles is found in the so-called Bangalore Principles.

On 28 February 1988, a judicial colloquium on the domestic application of international human rights norms was convened in Bangalore, India, by the former Chief Justice of India, PN Bhagwati. The colloquium, attended by nine judges and two jurists,[3] adopted a number of principles concerning the role of the judiciary in advancing human rights by reference to international human rights norms.[4] The Bangalore Principles acknowledged that in most of the countries of the common law world such international rules are not directly enforceable unless expressly incorporated into domestic law by legislation. After recounting the universal character of fundamental human rights and the guidance concerning their scope to be derived from international human rights instruments and jurisprudence,[5] the statement concludes that there has been:

> a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law - whether constitutional, statute or common law - is uncertain or incomplete.[6]

The thesis of the Bangalore Principles is not that international legal norms on human rights are incorporated, as such, as part of domestic law. Still less is it that domestic judges are entitled to override clear domestic law by reliance upon such international norms. In terms, the Bangalore Principles declared:

> It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes - whether or not they have been incorporated into domestic law - for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.

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> However where national law is clear, and inconsistent with the international obligations of the State concerned, in common law countries the national court is obliged to give effect to national law. In such cases the court should draw such inconsistencies to the attention of the appropriate authorities since the supremacy of national law in no way mitigates a breach of an international legal obligation which is undertaken by a country.
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> It is essential to redress a situation where, by reason of traditional legal training which has tended to ignore the international dimension, judges and practising lawyers are often unaware of the remarkable and comprehensive developments of statements of international human rights norms.[7]

The statement then calls for practical measures to promote knowledge of international human rights norms throughout the judiciary and the legal profession. It urged the provision of necessary texts, case law and decisions to law libraries, judges, lawyers and law enforcement officials.[8] It acknowledged the 'special contribution' which judges and lawyers have to make, in their daily work of administering justice, in fostering 'universal respect for fundamental human rights and freedoms'.[9] It recognised that the application of international norms would need to take fully into account local laws, traditions, circumstances and needs.[10]

The Bangalore Principles have been re-affirmed at subsequent similar judicial colloquia with minor amendments.[11] According to the Abuja Confirmation the process envisaged by the Bangalore idea involves nothing more than the use of the

> well established principles of judicial interpretation. Where the common law is developing or where a constitutional or statutory provision leaves scope for judicial interpretation, the courts traditionally have had regard to international human rights norms, as aids to interpretation and widely accepted sources of moral standards ... Obviously the judiciary cannot make an illegitimate intrusion into purely legislative or executive functions; but the use of international human rights norms as an aid to construction and as a source of accepted moral standards involves no such intrusion.[12]

For some time, the cause of the Bangalore Principles was prosecuted by only a few judges in Australia. Principally among them was Justice Kirby, then the President of the New South Wales Court of Appeal and the only Australian judge to attend this and successive colloquia.[13] As a result of the Bangalore meeting Justice Kirby gained an 'important insight' that he had 'tended to ignore the international dimension'.[14] In many criminal and civil cases, Justice Kirby has referred to international human rights norms. The cases have included:

- a case considering international obligations in a bankrupt's right of access to the courts;[15]
- a case recognising international obligations in relation to the independence and impartiality of the judiciary;[16]
- a case recognising the international right of an accused to a speedy trial;[17]
- a case recognising the right of a litigant to a court interpreter in civil proceedings;[18]
- a case recognising the recoverability of the cost of legal representation;[19]
- a case recognising the reasonableness of a fine for contempt of court;[20]
- a case recognising the right to legal representation in criminal trials;[21]
- a case recognising the right of an accused to question witnesses whose evidence might be exculpatory;[22] and
- a case recognising the right of an accused to use of property for the defence of criminal proceedings.[23]

Justice Kirby lamented the judicial caution in the process of internationalisation of Australian law. However, in 1992 the High Court gave its imprimatur to the use of unincorporated treaties in *Mabo v Queensland (No 2)*.[24] In the course of explaining why a discriminatory doctrine, such as that of terra nullius, could no longer be accepted as part of the common law of Australia, Brennan J (with the concurrence of Mason CJ and McHugh J) said:

> The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.[25]

The participation by Justice Kirby in the formulation of the Bangalore Principles is reflected in numerous extra-curial comments and judicial references by Justice Kirby to international human rights norms. Apart from Justice Kirby, no Australian judge has made explicit reference to the Bangalore Principles. Yet Justice Kirby described the Bangalore Principles as containing 'nothing revolutionary' in terms of well-established principles of statutory interpretation.[26]

Brennan J, in *Dietrich v R*,[27] explained that the judiciary do update and repair the defects of the common law but only so as to keep the common law current in the context of 'contemporary values of the community'. He explained that 'contemporary values' which justify judicial development of the common law are not transient or inspired by an interest group's campaign but are the 'relatively permanent values of the Australian community'.[28] Brennan J stated that 'a concrete example of contemporary values is given by Art 14(3)(d) of the International Covenant on Civil and Political Rights'.[29]

This approach is in many respects similar to the use made of treaties as a source of 'public policy', a practice that has given rise to longstanding judicial controversy in Canada.[30] 'Public policy' may refer to a set of background rights or principles that are indefeasible by interests external to those of the right-bearer, and that are the preserve of neither the common law nor statute because they are the common substrata of both.[31]

In a paper delivered before his retirement as Chief Justice of Australia, Sir Anthony Mason referred to the idea behind the Bangalore Principles. Sir Anthony stated that the High Court did not hold the view that *any* gap in the common law should be filled through the use of international conventions.[32] Principles of international law might be ranked according to their suitability for use as an interpretative aid. A particular rule's 'fit' with existing domestic law, and the culture in which that law operates, can provide a yardstick by which international law norms, which are too vague or too contested for use as an interpretative aid, can be excluded. Unthinking adoption of an incorporationist approach might only lead to the replacement of traditional Australian sources of law with traditional international sources of law, which the Court perhaps fears will delegitimise the common law in the eyes of the Australian public.

Although little use has been made of unincorporated treaties outside the field of human rights, within that field judicial interpretation is increasing likely to narrow the gulf between international norms and Australia's domestic law. This is to be seen both in the interpretative rules and, more dramatically, in administrative law. The law regulating the relationship between treaties and domestic law is far from settled. Of the administrative law cases where reference to international human rights norms is made, the analysis shows that in all but a handful of cases such references were simply references, not forming part of the ratio of the decision and formally making no difference to the outcome of the case. As Kirby J emphasised in *Newcrest Mining (WA) Ltd v Commonwealth*, 'the inter-relationship of national and international law, including in relation to fundamental rights, is 'undergoing evolution''.[33] The full evolution of the technique described in the Bangalore Principles has not yet been achieved.

Endnotes

1 See Glen Cranwell, 'Treaties and Australian Law - Administrative Discretions, Statutes and the Common Law' (2001) 1 *Queensland University of Technology Law and Justice Journal* 49, 52-60, 71-4.
2 Ibid 60-71. See *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.
3 Amongst the participants were: Mr Anthony Lester QC, now Lord Lester of Herne Hill; Justice Rajsoomer Lallah, now Chief Justice of Mauritius; Justice Enoch Dumbutshena, then Chief Justice of Zimbabwe; and Judge Ruth Bader Ginsburg, now a justice of the Supreme Court of the United States. Justice Kirby attended from Australia.
4 The Bangalore Principles are published in Michael Kirby, 'The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms' (1988) 62 *Australian Law Journal* 514, 531-2.
5 Ibid Principles 1-3.
6 Ibid Principle 4.
7 Ibid Principles 7-9.
8 Ibid Principle 9.
9 Ibid Principle 10.
10 Ibid Principle 6.
11 See J Starke, 'Judicial Colloquium of April 1989 at Harare, Zimbabwe, on the Domestic Application of International Human Rights Norms' (1989) 63 *Australian Law Journal* 497; 'Abuja Confirmation of the Domestic Application of International Human Rights Norms' (1992) 18 *Commonwealth Law Bulletin* 298; 'Balliol Statement of 1992' [1992] *Australian International Law News* 104; Lord Lester, 'The Georgetown Conclusions on the Effective Protection of Human Rights through Law' [1996] *Public Law* 562.
12 'Abuja Confirmation of the Domestic Application of International Human Rights Norms', above n 11, 301.
13 For a personal reflection of the influence of the Bangalore Principles on the exercise of the judicial function, see Michael Kirby, 'The Australian Use of International Human Rights Norms: From Bangalore to Balliol - A View From the Antipodes' (1993) 16 *University of New South Wales Law Journal* 363.
14 Ibid 364-5.
15 *Daemar v Industrial Commission of NSW* (1988) 12 NSWLR 45.
16 *S & M Motors Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358.
17 *Jago v District Court of NSW* (1988) 12 NSWLR 558.
18 *Gradidge v Grace Bros Pty Ltd* (1988) 93 FLR 414.
19 *Cachia v Hanes* (1991) 23 NSWLR 304.
20 *Smith v R* (1991) 25 NSWLR 1.
21 *R v Greer* (1992) 62 A Crim R 442.
22 *R v Astill* (1992) 63 A Crim R 148.
23 *DPP (Cth) v Saxon* (1992) 28 NSWLR 263.
24 (1992) 175 CLR 1.
25 Ibid 42.
26 Kirby, above n 13, 374.
27 (1992) 177 CLR 292.
28 Ibid 319.
29 Ibid 321.
30 *Re Drummond Wren* [1945] 4 DLR 674; *Re Noble and Wolf* [1948] 4 DLR 123, affirmed [1949] 4 DLR 375.
31 See Ronald Dworkin, *Taking Rights Seriously* (1977) 81-130. See also Brian Fitzgerald, 'International Human Rights and the High Court of Australia' (1993) 1 *Proceedings of the Australian and New Zealand Society of International Law* 85, 95-6.
32 Sir Anthony Mason, 'Towards 2001 - Minimalism, Monarchism or Metamorphism' (1995) 21 *Monash University Law Review* 1, 9.
33 (1997) 147 ALR 42 at 147.