A NEGLECTED TRANSNATIONAL LEGAL RELATIONSHIP: A PLAN OF ACTION FOR AUSTRALIA

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INTRODUCTION: A CULTURE OF NEGLECT

In June 1996, I was in Ahmadabad where I sat in the presence of a simple spinning wheel and the few earthly possessions of Mahatma Gandhi. It should never be forgotten that Gandhi was trained as a lawyer. In his legal training, he learned of the capacity of the law to cherish and protect liberty but also to oppress and subjugate free opinion. His deep insight into the role of the law as an instrument for freedom and justice had messages for people in every land including contemporary India and Australia.

The neglect by Australian and Indian lawyers of each other is as tragic as it is puzzling. It is tragic because it represents lost opportunity for two common law countries which are federations, which live by the rule of law, which are governed under democratic, parliamentary constitutions and which in theory, in different ways, protect fundamental human rights and basic freedoms.

Some use has been made in India of Australian constitutional decisions where the text of the Indian Constitution[1] bears analogies to the earlier Australian Constitution. Occasionally, decisions of the courts of these two countries call upon the reasoning of judges in the other.[2] Yet, what is surprising is that there is relatively little such use. This is surprising because the language of the law in each country (or at least of the superior courts and of the law reports) is the English language. The similarities of their federal constitutions and common law techniques are sufficient to present many potentially fruitful analogies. Their jurists meet each other in international conferences. They generally respect what they observe

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1 Khanna HR, The Making of India's Constitution (1981, Eastern Book Company, Lucknow). Several provisions of the Constitutions are the same. For example, compare Indian Constitution section 105 with Australian Constitution section 49.

2 A recent interesting example is the use of early Indian decisions in the Australian case on so-called Australian native title: Mabo v Queensland [No 2] (1992) 175 Commonwealth Law Reports 1, 36.

because of the substantial similarity of the professional traditions which they share. The terminology and even the statutory lineage of large areas of public and private law are similar, at times identical, that they invite useful comparison. For a time, they even shared in the Judicial Committee of the Privy Council a common apex in their respective judicial and legal systems. To this day, it is not uncommon (especially in matters of common law) to hear advice of that imperial judicial tribunal in Indian appeals read in Australian courts.

Yet, for all of this, the use made of Indian judicial decisions and legal innovations in Australian is comparatively small. The reverse is equally true. Why should this be so, when Australia and India are virtual neighbours across the Indian Ocean? When India is the most populous common law nation on earth, with many lessons to give? Why should it be so where both countries cherish the integrity and professional ability of the judges of our highest courts?

In part, the answer to the question lies in the way lawyers go about their daily work. Problems present themselves. Lawyers must quickly find solutions. In India, there is the treasury not only of the Supreme Court but, as in the United States, many distinguished state courts working in areas of the law of immediate national and general concern. Why should one bother to look into the legal system of another country when there are so many riches at home?

In Australia, the explanation is a little different. Until 1986, the Judicial Committee of the Privy Council was part of the Australian court hierarchy. It was only in that year, by the Australia Acts, that the last line of appeal to the Privy Council from the Supreme Courts of the Australian states was terminated.[3] Although appeals from federal courts and the High Court of Australia came to an end a decade earlier,[4] the residual and parallel right to appeal to a court outside Australia, sitting in London, continued that link long established in the minds of most Australian lawyers between the law of Australia and the current law expounded in England.

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3 1986 Australia Act section 11(1).

4 1968 Privy Council (Limitation of Appeals) Act; 1975 Privy Council (Appeals from the High Court) Act. See also Kirmani v Captain Cook Cruises Pty Ltd [No 2] Ex parte Attorney General (Queensland) (1985) 159 Commonwealth Law Reports 461.

Once that link was finally severed, there has been a significant change both in the content of Australian law, as found by the courts and in the techniques by which the courts find the law. In a sense, as was earlier discovered in India, the obligation to find the law entirely within that country encouraged a measure of creativity which would not tend to occur so long as the legal system was answerable to judges from abroad. Self reliance also created a greater sense of responsibility for the content of the law, to ensure that it was appropriate to the society and people whom the law had to serve.

Because it was not until 1986 when the Australian legal system was no longer answerable to the Privy Council in London, it was commonplace for judges and practising lawyers throughout Australia to have on their shelves not only books of Australian courts but also the case books from England. So long as Australian courts were accountable to the Privy Council, it was imperative that Australian lawyers and courts were aware of the developments of legal principle in and thinking of those English courts. To this day, in most judicial and Bar chambers in Australia are found copies of the Appeal Cases, Weekly Law Reports, All England Law Reports and English textbooks and digests. Although the line of appeal to the Privy Council had terminate forever, the English casebooks and case citations remain.

In part, this is because judges and lawyers are creatures of habit. Once the casebooks are on the shelf, the difficult thing to do is cancel the subscription. It is easier to maintain the congenial habits of a lifetime. Furthermore, the English reports remain a wonderful source of comparative law material. In a very real way, the link of the Australian legal system, which serves a comparatively small population of nearly 20 million to that of England, ensured that Australian law developed in the early period of nationhood, with the stimulus and direct contribution of one of the great legal systems of the world.[5] The Indian legal system is likewise indebted to that of England. But for constitutional and other reasons and because it long ago severed its link with the Privy Council, India has been more eclectic in its use of legal decisions from other places.

Now, Australia is proving the same. But it was not always so.

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[5] Hutley, "The legal traditions of Australia as contrasted with those of the United States" (1981) 55 Australian Law Journal 63, 69.

WORKING AT THE LINKS

Soon after the appointment as President of the New South Wales Court of Appeal (the busiest appellate court in Australia), I struck a blow for creative links between the Australian and Indian legal systems. The case was *Osmond v Public Service Board of New South Wales*.[6] The question was whether the common law in Australia had advanced to the point that a recipient of statutory power would be obliged, when asked, to state reasons for an exercise of that power affecting the interests of the person requesting the reason. The common law in Australia had certainly advanced to the point that judicial officers were required to give reasons.[7] But there was English authority to the effect that administrators were not so required.[8] Courts repeatedly said that giving reasons was good administrative policy.[9] But they would not support their pious statements with judicial orders.

In the course of my opinion I upheld the right to reasons. I invoked developments in the United States, Canada, New Zealand, Fiji and other common law jurisdictions. I then turned to India:[10]

> In India, the Supreme Court of India has elaborated, in a series of recent cases, a general requirement for administrative tribunals to give reasons for their decisions. Sometimes the requirements have been founded on the "elementary requirements" of a "quasi-judicial process" (see eg *Vedachala Mudaliar v State of Madras* 39 AIR 1952 Mad 2766 at 280; *Commissioner of Income Tax, Bombay v Walchand and Co (Put) Ltd* AIR 1967 SC 1435; *Govindrao v State of Madhya Pradesh* AIR 1965 SC 1222 at 1226); sometimes in the Indian Constitution special leave to appeal to the Supreme Court (see eg *Mahavir Prasad v State of Uttar Pradesh* AIR 1970 SC 1302; *Harinagar Sugar Mills Ltd v Shyam Sunder* AIR 1961 SC 1669; *Bhagat Rasa v Union of India* AIR 1967 SC 1606); sometimes in the review and supervisory jurisdiction of the State High Courts (see eg *Rangnath v Daulatrao* AIR 1975 SC 2146); sometimes in the rule of law (see eg *Mahabir*

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6 [1984] 3 New South Wales Law Reports 447 (Court of Appeal).

7 Pettit v Dunkley [1971] 1 New South Wales Law Reports 376 (Court of Appeal).

8 R v Gaming Board for Great Britain Ex parte Benaim [1970] 2 Queen's Bench 417 (Court of Appeal).

9 Breen v Amalgamated Engineering Union [1971] 2 Queen's Bench 190-191 (Court of Appeal).

10 See note 6 at 461.

Prasad v State of Uttar Pradesh (at 1304); and more recently in the principles of natural justice.

The use of principles of natural justice derived from the common law of England, as a basis for the notable support in two recent decisions of the Supreme Court of India in which the leading judgments were given by Bhagwati J, namely *Siemens Engineering and Manufacturing Co of India Ltd v Union of India.*[11]

In *Siemens*, Bhagwati J said that the rule requiring reasons to be given "was like the principle of *audi altreram partem*, a principle of natural justice (at 1789). The role of "natural justice"[12] in administrative law is an important principle intended to "invest law with fairness and to secure justice" was stressed by Bhagwati J in *Maneka Gandhi v Union of India* (at 625). Calling on the language of Lord Morris of Borth-y-gest in *Wiseman v Borneman* [1971] AC 297 at 302, Bhagwati J suggested that the "role of natural justice is 'fair play in action' and that it was why it has received the widest recognition throughout the democratic world". In that case the Supreme Court of India held that the Passport Authority was obliged to supply reasons for impounding the passport of Mrs Maneka Gandhi. The case is complicated by reference to the Indian Constitution and various statutory provisions. However, the basis for the obligation to provide reasons would appear to have been expressed to lie in the duties of or akin to those imposed in this country by the rules of natural justice.

In the Court of Appeal, Priesley J agreed with the result favoured by me. Glass J dissented. The High Court of Australia granted special leave to appeal. On the appeal, there was barely disguised impatience with my citation of so much foreign authority. Gibbs CJ expressed his opinion on the Indian cases thus:[13]

Kirby P referred to a line of Indian decisions in which it has been held to be "settled law that where an authority makes an order in exercise of a quasi-judicial function, it must record its reasons in support of the

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11 (1976) 63 All India Reports (Supreme Court) 1785.

12 Ibid at 1789.

13 Public Service Board (NSW) v Osmond (1986) 159 Commonwealth Law Reports 656, 668.

> order it makes": *Siemens Engineering and Manufacturing Co of India Ltd v Union of India.*[14] This, it was there said, "is a basic principle of natural justice". These decisions appear to state the common law of India, although without a detailed knowledge of the course of decisions in that country it would be hazardous to assume that they have not been influenced by the provisions of the Constitution of India or by Indian statutes...When the rules of the common law of Australia are unclear or uncertain assistance may be gained from a consideration of the decisions of other jurisdictions, but when the rules are clear and settled they ought not to be disturbed because the common law of other countries may have been developed differently in a different context. If the common law of India...requires reasons to be given for administrative decisions, it is different from that of Australia.

The High Court of Australia reversed the majority decision of the Court of Appeal. In Australia, the common law does not require officials to give reasons for their decisions.

My purpose is not to dwell on the detail of the particular case or the sting of reversal which, occasionally administered, may be good for the judicial soul. High authority of Indian courts and other courts of the common law world (indeed, if relevant, of civil law courts and international tribunals) would probably now be considered in the High Court of Australia in greater detail in a case involving questions of general legal principle.

Endeavouring to unlock the legal mind from the capture of English casebooks and to release Australian lawyers from a long-held connection with English legal doctrine has been a major contribution of the High Court of Australia in recent years. In *Cook v Cook,*[15] in the year of the final severance between the Australian judicial system and the Privy Council, it marked out the new regime. Commenting that the court under appeal in that case had declined to follow judicial comments of two the High Court's foremost judges (Latham CJ and Dixon J) whilst regarding itself as "constrained to accept the reasoning of the majority of the English Court of Appeal", the High Court said:

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14 Note 11 at 1789.

15 (1986) 162 Commonwealth Law Reports 376.

> Whatever may have been the jurisdiction of such statements in times where the Judicial Committee of the Privy Council was the ultimate court of appeal or one of the ultimate courts of appeal to this country, those statements should no longer be seen as binding upon Australian courts. The history of this country and of the common law makes it inevitable and desirable that the courts of this country will continue to obtain assistance and guidance from the learning and reasoning of United Kingdom courts, just as Australian courts benefit from the learning and reasoning of other great common law courts. Subject, perhaps, to the special position of decisions of the House of Lords given in the period in which appeals lay from this country to the Privy Council, the precedents of other legal systems are not binding and are useful only to the degree of the persuasiveness of their reasoning.[16]

In the consequences of this stance, the High Court of Australia has become distinctly eclectic. It is now not uncommon to have cited case decisions from many jurisdictions of the common law and far beyond. In a recent decision of the Court,[17] an appeal involving the Convention on International Child Abduction, the Court made copious reference to decisions in jurisdictions as far from Australia's ordinary legal traditions as Sweden, Germany, Israel, Argentina and Switzerland, as well as the more traditional sources of England, Scotland, Ireland, Canada, New Zealand and the United States.

The advent of technology has presented many global and transnational problems. These range from child abduction to international business disputes and common problems in the field of human rights. Technology can also rescue us from imprisonment in the English and Australian casebooks which still line the shelves of most lawyers' offices. Now, on-line legal services provide ready means to capture the most up to date and specially relevant material from jurisdictions which once would, for practical purposes, have been inaccessible. Lawyers cannot be expected, under the constraints within which they usually operate, to become masters of the law in a multitude of foreign jurisdictions other than their own.

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16 Ibid per Mason, Wilson, Deane and Dawson JJ.

17 De L v Director-General, NSW Department of Community Services (1996) 70 Australian Law Journal Reports 932.

However, the common problem which courts today face and the global similarity of many legal issues require, especially in the higher judiciary, an open-minded attitude to the assistance which may be received from one another. The assistance may be comparatively rare between countries such as Australia or India and Argentina. The legal traditions are so different. But as between Australia and India, there are so many links of concepts and legal theory that these two countries owe it to one another to become more familiar with relevant fields of jurisprudence so that they may take advantage of the experience which each has to offer.

LAW REFORM AND LEGAL CREATIVITY

Coinciding with the termination of appeals to a court outside the legal hierarchy has been a remarkable period of law reform and legal renewal in Australia. It is worth mentioning the present context because even a superficial knowledge of the developments of the law in India demonstrates that India is also going through a period of considerable creativity in the law, some of it originating in the Supreme Court of India.

In 1981, that Court held that the right of an indigent person to receive legal assistance was a fundamental human right which the courts would uphold.[18] In Australia, although the courts have not gone that far, it has been held[19] that a trial court may stay the trial of a person unable to afford legal representation where, if the trial were to be forced to proceed with the accused unrepresented, the result would be an unfair trial.[20] Clearly, each of these decisions has considerable significance for legal assistance. The tradition of adversary trial which India and Australia have inherited from England, posits for its effectiveness at least in complex and serious cases, that parties have access to accurate legal advice and skilled legal representation. The full extent of enforceable access to legal representation in Australia is still being worked out.[21]

Whether the principle applies to an appeal against conviction after trial has not yet been determined. How it could be enforced where the remedy of stay is not available is likewise left to conjecture. But it is plain that Indian

18 Khatri v State of Bihar [1981] 1 Supreme Court Cases 627.

19 See McInnis v The Queen (1979) 143 Commonwealth Law Reports 575 which reversed earlier authority.

20 Dietrich v The Queen (1992) 177 Commonwealth Law Reports 292.

21 Compare New South Wales v Canellis (1994) 181 Commonwealth Law Reports 309.

and Australian courts at the highest level are unwilling to condone or participate in a charade of justice in which there is an appearance of a fair trial but the reality is lacking.

The Supreme Court of India in *SP Gupta v Union of India*[22] took a strong stand to ensure judicial redress to any person claiming legal injury or to a determinate class of persons who by reason of poverty, helplessness, social or economically disadvantaged position or disability were unable to approach the court for relief. In such a case it was held that any member of the public may, acting *bona fide* and for oblique consideration, could maintain an action on their behalf. The amiss could seek judicial redress for the legal wrong or injury caused to such a person or determinate class of persons.[23] Although Australian law has not gone as far as this on the issue of standing, it has undoubtedly advanced in recent years.[24] Proposals for further reform have been made by the Australian Law Reform Commission and published in its journal, *Reform*.[25]

The development of the common law on standing is an area in which Australian courts, like those of many other lands of the common law, have lessons to learn from India. The sheer complexity of social and economic problems in India and the common disability of the other branches of government have caused people to seek redress in the judicial branch. In a series of creative decisions, the Supreme Court of India responded in a positive and effective way. Whilst judges must beware of claiming expertise and performing functions outside those proper to the judicial role,[26] that role is itself not frozen in time. Nor is it determined forever by the traditions of the English judiciary. Carefully and thoughtfully, the judicial role may be adapted to new needs as perceived by the Supreme Court of India. This is an area of Indian jurisprudence which could be studied with advantage in Australia.

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22 1981 (Supplement) Supreme Court Cases 87.

23 Sorabjee, "Public interest litigation for protection and promotion of human rights: the Indian experience" [1996] New Zealand Law Conference Proceedings 40, 41.

24 Onus v Alcoa of Australia Ltd (1981) 149 Commonwealth Law Reports 27, 38, 46, 57; Burmester, "Locus standi in constitutional litigation" in Lee HP and anor (eds), Australian Constitutional Perspectives (1992, Law Book Co, Sydney) 180 cited in Lindon v The Commonwealth [No 2] (1996) 70 Australian Law Journal Reports 541, per Kirby J at 547 (High Court).

25 See [1995] Reform 35.

26 Wilson v Minister for Aboriginal and Torres Straits Islander Affairs (1996) 70 Australian Law Journal Reports 743.

One relevant reform task which is of interest in Australia was lately assigned to the Australian Law Reform Commission. The Commission was asked to examine the adversarial system of litigation in Australia with respect to administrative law, family law and civil litigation proceedings in courts and tribunals exercising federal jurisdiction. The terms of reference to the Commission excluded analysis of criminal proceedings where the accusatorial trial was deeply entrenched. However, constitutional questions could arise in any attempts to change the basic system in Australia.

In reality, pure adversarial and inquisitorial systems are now hard to find. Most jurisdictions have a mixture of the two techniques. Some feature of the inquisitorial system had become grafted onto the court systems in Australia such that proactive judges are much more vigourously controlling and directing the efficient resolution of cases. In Italy, which is predominantly an inquisitorial system, aspects of the adversarial system have lately been introduced into the procedures of criminal trials. However, one study discovered that passive lawyers and bureaucratic prosecutors of the civil law tradition were culturally ill-suited to the new adversarial contest. They were not disposed to fight cases now motivated to seek their efficient solution. On the other hand, in Australia, in federal and state jurisdictions and in a myriad of tribunals, new procedures have been introduced in the nature of "case management" to enhance court control over litigation. The parties no longer set the pace and dictate the procedural steps of litigation. This languid approach of the past had tended to clog the courts and reduce efficiency.

Another innovation in Australia is the training of judges. This is an example of the borrowing which is occurring from the traditions of the civil law. In the French legal system for example, judges graduate from the National School for Judges into a career structure.[27] They are not chosen, as judges in Australia and India are, from the ranks of independent senior practising lawyers. In the complex world of the modern courtroom, it is now regarded as imperative to give the new judicial officer training in a wide range of subjects which may be required in judicial life and of which the new judge may have little experience. The training encompasses fields of new legislation such as redress for discrimination, new ideas such as gender sensitivity, new legal topics such as the impact of HIV/AIDS on the

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[27] Kinley D in [1976] Reform 40.

law,[28] and old problems which are only now being faced up to such as stress and its impact on judicial life.[29]

Australia, like India, has a most creative and professional law reform system. Most law reform in Australia is achieved through the political process, namely, through the initiatives of government and the public service. It was in this way that important statutory reforms were secured. These resulted in new national laws including those on corporations,[30] product liability,[31] the rights of Aboriginal Australians,[32] and the redress of gender bias in the law.[33] Other important reforms were secured through the work of the institutional law reform bodies, both federal and state.

The Australian Law Reform Commission is working on a wide range of topics which include the adversarial system mentioned above, children and young persons, complaints against the Federal Police, cross-border civil remedies, exchange traded derivatives, freedom of information, disability services and law of standing. State Law Reform Commissions in Australia are working on topics which include the reform of the law on sentencing, intellectual disability, defamation, succession, medical treatment for young people, and evidence. Basic problems such as pawnbroker legislation and the review of the Justices Act are also being dealt with.

While most legal reform comes, as it should in a democracy, from elected law-makers, the courts have also played a role in the modernisation of Australian law. Particularly since 1986, the High Court of Australia had been prepared, where appropriate, to take bold steps in the reform of the law by the use of judicial methods. Probably best known of these steps was the Court's decision in *Mabo v Queensland [No 2]*.[34] In that case, the Court held that the rights to land of Aboriginal Australians and Torres Straits Islanders survived the acquisition of sovereignty over Australia by the Crown. Previously, it was thought that the acquisition of sovereignty had destroyed so-called native title rights. But the Court exploded this theory.

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28 Kirby, "The role of the judiciary and HIV law" in Jayasuriya JC (ed), HIV Law, Ethics and Human Rights: Text and Materials (1995, UNDP, Delhi).

29 Kirby, "Judicial stress" (1995) 13 Australian Bar Review 101.

30 [1991] Reform 15; [1992] Reform 27; [1993] Reform 6.

31 [1991] Reform 105.

32 [1991] Reform 94.

33 [1993] Reform 3, 18.

34 (1992) 175 Commonwealth Law Reports 1.

As a result, the Australian Parliament enacted the 1993 Native Title Act which affords procedures whereby indigenous Australians may make claims to native title. There have been many other bold strokes by the High Court, but none as bold as this.

In the field of criminal law the decision of *McKinney v The Queen*[35] may be noted. It laid down the rules for the admissibility of uncorroborated and unconfirmed testimony by police and like officials. The rules were designed to reduce the risk of oppression and of conviction of accused persons on false evidence.

The Criminal Law Journal in Australia had urged comparative law analysis of Indian court decisions on criminal law.[36] The editors pointed out that the Indian Penal Code was adopted in other countries in the region such as Burma, Sri Lanka, Malaysia and Singapore. Some of its notions have lessons for criminal law in Australia particularly in those states which had adopted a code:[37]

> We therefore encourage Australian law reform bodies and, indeed, our judges, to refer to the Indian Penal code as a possible model for the reform of substantive criminal law... Such a move would also signal to our Asian neighbours that, in fundamental respects, our views about justice, right and wrong, crime and punishment are much the same. This in turn could foster shared ways of thinking about and dealing with crime.[38]

One area of the law where the Supreme Court of India had recently examined a broad band of jurisprudence from other common law countries concerned the law of defamation and privacy. In *R Rajagopal v State of*

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35 (1991) 171 Commonwealth Law Reports 468.

36 (1996) 20 Criminal Law Journal 125.

37 Sornarajah, "Duress and murder in Commonwealth law" (1981) 30 International and Comparative Law Quarterly 660; Cheang, "The insanity defence in Singapore" (1985) 14 Anglo-American Law Review 245; Peiris, "Involuntary manslaughter in Commonwealth law" (1985) 5 Legal Studies 21; Yeo, "Lessons on provocation from the Indian Penal Code" (1992) 41 International and Comparative Law Quarterly 612.

38 Editorial, "Reform in the criminal law: looking east" (1996) 20 Criminal Law Journal 125, 126.

Tamil Nadu[39] the Court held that a local government authority, like other organs or institutions exercising government power, could not maintain a suit for damages for defamation. A similar problem had been presented to me in the New South Wales Court of Appeal in *Ballina Shire Council v Ringland*.[40] Like Jeevan Reddy J, I had access to English decisions relevant to the point.[41] But he did not appear to have referred to the decision of the Appeal Division of South Africa in *Die Spoorland v South African Railways*[42] to the same effect. I was not referred to in the Indian decision although it would have been most useful. It is always extremely useful in matters of basic principle to have the reassurance of consistent approaches in basic questions of this kind.

The second important feature of *Rajagopal* arises from the use made of implications derived from the Indian Constitution.[43] The Supreme Court of India found that the right to privacy was implicit in the right to life and liberty guaranteed by Article 21 of the Indian Constitution. In Australia, the High Court recently derived implications of a constitutional freedom of communication on matters relevant to political, economic and similar concerns[44] although such rights are not spelt out expressly in the Australian Constitution. Like the Indian Supreme Court, the High Court of Australia was concerned to perform its function with a full awareness of the developments of constitutional principle in other common law countries. This was the approach which Jeevan Reddy J adopted in *Rajagopal*. I do not doubt that it will continue to be the approach adopted in Australia.

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39 (1994) 6 Supreme Court Cases 932.

40 (1994) 33 New South Wales Law Reports 640 (Court of Appeal).

41 For example, see Derbyshire County Council v Times Newspaper Ltd [1993] Appeal Cases 534, referred to in Ballina Shire Council v Ringland (1994) 33 New South Wales Law Reports 640, 646 (Court of Appeal).

42 (1946) Appeal Division 999 (South Africa Appeal Division).

43 (1994) 6 Supreme Court Cases 632, 639.

44 See Theophanous v The Herald and Weekly Times Ltd and anor (1994) 182 Commonwealth Law Reports 104 and cases there cited. For a commentary see Miller, "The end of freedom method in Theophanous" (1996) 1 Newcastle Law Review 39; Lee, "The Australian High Court and implied fundamental guarantees" [1993] Public Law 606; Fraser, "False hopes: implied rights and popular sovereignty" (1994) 16 Sydney Law Review 213; Rich, "Approaches to constitutional interpretation in Australia: an American perspective" (1993) 12 University of Tasmania Law Review 150; Jones, "Legal protection for fundamental rights and freedoms: European lessons for Australia?" (1994) 22 Federal Law Review 57.

However, this does not mean blindly following constitutional authority in other countries. The texts are different. But in matters of fundamentals, it is usually helpful to have one's own thinking illuminated by the writings found in the opinions of the highest courts of other nations, particularly those which share the same legal traditions. The way in which those courts grapple with difficult problems will surely help to illuminate the path for those that come later.

A PLAN OF ACTION

What can one do to improve the awareness in Australia and India of each other's laws? How does one break the spell of ignorance which had created such a gulf between two neighbouring countries with such similar legal systems? How does one build the links which would not only reinforce a natural association between Australia and India in this field but also facilitate business and economic contacts, dependant on law?

A number of steps are proposed which would be taken without a great deal of cost:

1. Visits: There should be more visits and lecture tours by leading Australian and Indian jurists to each other's countries. The Australia India Council has begun this process. There are established legal links between India and lawyers from the United Kingdom and United States. The creation of similar links between India and Australia should be explored.

2. Professional bodies: There should be more contact between the professional bodies of Australia and India. Already, individual practitioners are linked through the association known as LAWASIA. The thirtieth anniversary of LAWASIA was recently celebrated in Canberra and the keynote speaker was Krishna Iyer J of India. Such contacts in the form of visiting jurists could be put to a more routine and permanent basis. But this would require initiatives from the professional bodies of the legal profession themselves. A contribution could be made by governments by simplifying visa requirements. Visas to enter India are expensive and given for a limited duration only. The same is doubtless true of visas to enter Australia. It may be hoped that this will change.

3. Publications: The libraries of the Supreme Court of India and the High Court of Australia carry ample material from each other's jurisdictions. But it would be no bad thing if the Australian government were to fund subscriptions of the Australian Law Journal, for example, to be deposited in the High Courts around India for circulation to judges. Only when the judges become aware of the jurisprudence of another country will questions be asked of the profession that will send them searching for relevant analogies and precedents.

   Subscriptions to legal periodicals are expensive. Back issues are extremely expensive. But a few well-planned contemporary issues of the general Australian legal review surveying the scene could bear fruit. It might produce reciprocation. Both Australia and India still look to England for legal material. Yet, in all truth, the constitutional arrangements of Australia are closer to those of India than those of England.

4. Judicial training: Consideration might be given to funding the participation of a newly appointed Indian judge in the orientation and training courses given for Australian judges. Judicial officers from New Zealand and Papua New Guinea take part in these courses. It could be mutually beneficial to have participation by a new Indian judge. It would help stimulate the thinking of all. It would create friendships which would endure and expand.

5. Professional reciprocity: As India's economic advancement continues, its importance in the global and regional economies would become more obvious. Similarly, many Australian businesses are now looking for opportunities in the region. Capital markets are increasingly international in operation. With investment comes the need for legal services.

   Consideration should be given to reciprocity of legal qualifications at least for limited and specialised practice of law. The old notion that lawyers are prisoners of their admitting authorities must adjust to the need for specialist legal practitioners in connection with transborder transactions. Indian corporations operating in Australia will need Indian legal experts and *vice versa*. Admitting authorities should become more flexible in the provision of qualified practising

rights, to reflect the needs for legal services as their businesses venture beyond local borders.

6. Universities: It would be a good thing if a Chair of Indian Law were established at one of the Australian universities. The most natural place for a specialisation in the topic might be in Western Australia where there is a strong Indian community. The physical proximity of India is more keenly appreciated there. As business links increase, the need for Australian jurists to be aware of Indian law, particularly in the fields of commerce and public law, would become apparent. Already some Australian law schools are offering specialised courses in the law of East Asia.

7. Scholarships: Consideration might also be given to increasing the number of scholarships on a reciprocal basis by which young lawyers in India and Australia could take courses in each other's countries. This would help them refine their knowledge of the legal system of the other. Comparative law is always useful to a lawyer who throughout life must argue analogy. As the universities in Britain and United States close their doors to or impose prohibitive costs upon overseas students, those in the region should explore the potential to meet the desire of young graduates to pursue postgraduate education at a cost they can afford.

8. Law Schools: Judges and other senior practitioners should consider accepting appointment as Visiting Professors in universities in India and Australia. This could provide a useful opportunity for dialogue and learning about major legal trends. Even short term appointments of this kind are useful. The costs involved are minimal. Within Australia, AUSAid should explore such possibilities with Australian universities where undergraduates could be enriched and stimulated by news of the creative lawyering which occurs in India.

9. Young lawyers: The future belongs to the young. There are young lawyers' associations in Australia and India. Generally speaking, lawyers of the older generation lacked the imagination to perceive the similarities and advantages which would lie in creating links with jurists in India. They flew over India on their way to England. Their minds were locked into an attitude fixed in colonial times.

Although the law and its institutions had changed, their minds had not. Today, young lawyers in Australia and India are much more open minded. They are aware of regional imperatives and the economic opportunities which are presented. The more contact that can be established between young lawyers in Australia and India the better. A starting point lies in the professional associations and in invitations offered to key players who would take back the message of the many similarities that exist between the respective approaches to law.

CONCLUSION

The two countries sharing so many historical, linguistic, constitutional and legal links such as Australia and India should have more connections than they have. The Indian stereotype of Australia is probably as false as the Australian stereotype of India. The time has come, on the brink of a new millennium, to shatter the stereotypes and to forge a stronger relationship of neighbourliness and mutual awareness. It does not require much for us to achieve it. But will lawyers have the imagination to seize the chance of new horizons?