The Impact of International Human Rights Norms: 'A Law Undergoing Evolution'

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In this paper, the Hon Justice Kirby outlines the history of, and reasons for, the growing impact of international human rights jurisprudence upon the work of judges in Australia, New Zealand, England and elsewhere. Formerly, international and domestic law were virtually entirely separate. But now there is increasing legal authority to support the use of international human rights jurisprudence in domestic judicial decision-making. It can be done in the application of constitutional or statutory provisions reflecting universal principles stated in international treaties. But, according to the 'Bangalore Principles', it can also be done where there is a gap in the common law or where a local statute is ambiguous. The judge may then fill the gap or resolve the ambiguity by reference to international human rights jurisprudence which will ensure that domestic law conforms, so far as possible, to such principles.

In its decision in Tavita v Minister of Immigration, *the New Zealand Court of Appeal declared this to be 'a law ... undergoing evolution'. The author outlines some of the impediments and problems for the evolution. But he also collects the reasons why it is a natural and inevitable phase of the common law in the current age. He suggests that judges should be aware of the developments. In appropriate cases, they should inform their decisions with relevant international human rights jurisprudence. That will at least ensure that they develop domestic human rights law in a principled way, consistently with international law, and not in an idiosyncratic fashion 'discovering' new fundamental rights which may otherwise be criticised as mere judicial invention.*

An earlier version of this paper was delivered at the New Zealand Judges' Conference at Rotorua on 11 March 1995.

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A GLOBAL PERSPECTIVE

It was snowing in Geneva. Late snow for March. On the shore of the Lake stands the Mussolinian building constructed for the League of Nations amidst the hopes of the 1920s. From the great corridors, warmly protected from the chill winds of the outside world, those with business in the Palais des Nations can occasionally catch a glimpse of Mont Blanc as it emerges from the clouds. An uplifting scene. And in the forecourt, the blue flag of the United Nations reminds all who see it of the hopes and disappointments, successes and failures, of the international body now in its fiftieth year.

I was in Geneva to present to the UN Commission on Human Rights my report as Special Representative of the Secretary-General for Human Rights in Cambodia. I ascended the platform to report to the representatives of virtually every nation on earth (as well as international agencies, non-governmental bodies and others) on the contributions of the United Nations to rebuilding human rights in a grievously shattered country. As I looked down at the faces of the assembled representatives of the world collected in a single room, it was impossible not to feel humbled. There, in a sense, in the one place, were the attentive eyes and ears of humanity. Upon human rights, always controversial, they would frequently disagree. But upon the common interests of the whole planet in the achievement of human rights, there could now be no real dispute. That large room, with its collected assembly, is a metaphor — as are also the satellites circling our globe — for the essential 'oneness' of the world and its peoples and their common interests, above state boundaries, both in individual human rights and in the rights of peoples.

The UN Charter, signed fifty years ago, like the Covenant of the League of Nations, recognises the primacy of the sovereign member states as the principal persons to whom international law is addressed and by whose consent it is made. Yet out of the ashes of war, genocide and destruction (and the threat of the nuclear peril by which the war was finally ended) came the Charter's recognition that sovereign states were not enough. The Charter was thus founded upon the recognition that, without effective respect for and protection of individual human rights and the rights of peoples to self-determination, the peace and security of the nation states would be unsure.[1] For lasting peace and security, the international legal order committed itself to building the relationship between states henceforth upon the basis of protection of the human rights of individuals and the collective rights of peoples.

Whereas the right of peoples to self-determination remains highly

1. Eg *UN Charter* Art 1.

controversial[2] and often unfulfilled,[3] great strides have been made in the past 50 years in the declaration of individual human rights and in the creation of international and domestic instruments for their protection and advancement. The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and many other international treaties prescribe fundamental rights. They are generally expressed in terms which are familiar to lawyers of the common law tradition. This is because, certainly in the early days of the United Nations, those lawyers had the largest part in the drafting of the Charter, the Universal Declaration, the covenants and treaties giving expression to such rights.

The judges and lawyers of the common law, who are the beneficiaries of a millennium of developments in the refinement, expression and protection of human rights by the English-speaking people, are often inclined to take such things for granted. Frequently they feel that they have nothing to learn from international law and its institutions. This is far from true. But for countries such as Cambodia, the building of the international law of human rights and the translation of its principles into daily reality are matters of the most acute practical importance. Sitting in the one room, the delegates of Australia and New Zealand are just a few metres from the representatives of Cambodia. We can celebrate our blessings and our diversity. But we should also recognise the essential unity of our shared humanity.

THE BANGALORE PRINCIPLES

What has this to do with the daily work of judges and lawyers in the courts of our tradition?

The traditional view of most common law countries has been that international law is not part of domestic law. Blackstone in his *Commentaries* suggested that:

> The law of nations (whenever any question arises which is properly the object of its jurisdiction) is here [in England] adopted in its full extent by the common law, and is held to be part of the law of the land.[4]

Save for the United States, where Blackstone had a profound influence, this view came to be regarded, virtually universally, as being 'without

2. R Falk 'The Content of Self-determination' in R McCorquodale & N Orosz (eds) *Tibet: The Position in International Law* (London: Serindia, 1994) 81-82; H Hannum 'Rethinking Self-Determination' (1993) 34 Virginia Journ Int'l Law 1; IM Koskenniemi 'National Self-Determination Today: Problems of Legal Theory and Practice' (1994) 43 Int'l Comp Law Quart 241.
3. Eg Int'l Commission of Jurists *Human Rights in Kashmir* (Geneva, 1995).
4. Quoted in *Chow Hung Ching v The King* (1948) 77 CLR 449, 477.

foundation'.[5] In Australia, Mason J explained the traditional position in 1982 in these terms:

> It is a well settled principle of the common law that a treaty not terminating a state of war has no legal effect upon the rights and duties of Australian citizens and is not incorporated into Australian law on its ratification by Australia....[T]he approval of the Commonwealth Parliament of the Charter of the United Nations in the Charter of the United Nations Act 1945 (Cth) did not incorporate the provisions by the Charter into Australian law. To achieve this result the provisions have to be enacted as part of our domestic law, whether by a Commonwealth or State statute. Section 51(xxix) [the external affairs power] arms the Commonwealth Parliament ... to legislate so as to incorporate into our law the provisions of [international conventions].[6]

More recently, however, a new recognition has come about of the use that may be made by judges of international human rights principles and their exposition by the courts, tribunals and other bodies established to give them content and effect. This has come about as a reflection of the growing body of international human rights law, of the instruments both regional and international which give effect to it, and in recognition of the importance of its content. An expression of what I take to be the modern approach was given in February 1988 in Bangalore, India, in the so-called Bangalore Principles. These were agreed by a group of lawyers from a number of Commonwealth countries. The meeting was chaired by Justice PN Bhagwati, the former Chief Justice of India. I was the sole participant from the Antipodes. Amongst the other participants were Mr Anthony Lester QC (now Lord Lester of Herne Hill), Justice Rajsoomer Lallah (now Chief Justice of Mauritius) and Justice Enoch Dumbutshena (then Chief Justice of Zimbabwe). Joining the Commonwealth participants was a judge of the Federal Circuit Court in the United States, Ruth Bader Ginsburg (now a Justice of the Supreme Court of that country). Relevantly, the Bangalore Principles stated, in effect:

- International law (whether human rights norms or otherwise) is not, as such, part of domestic law in most common law countries;
- Such law does not become part of domestic law until Parliament so enacts or the judges (as another source of law-making) declare the norms thereby established to be part of domestic law;
- The judges will not do so automatically, simply because the norm is part of international law or is mentioned in a treaty — even one ratified by their own country;
- But, if an issue of uncertainty arises (as by a lacuna in the common law, obscurity in its meaning or ambiguity in a relevant statute), a judge may

5. Ibid.

6. *Koowarta v Bjelke-Petersen* (1983) 153 CLR 168, 224-225: see comment by PJ Downey 'Law and the International Year of the Family' [1994] NZ Law Journ 433-434.

seek guidance in the general principles of international law, as accepted by the community of nations; and

- From this source material, the judge may ascertain and declare what the relevant rule of domestic law is. It is the action of the judge, incorporating the rule into domestic law, which makes it part of domestic law.[7]

In terms, the Bangalore Principles declared:

> There is 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.[8] 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.[9]

Some lawyers (and not a few judges), brought up in the tradition of the strict divide between international and municipal law, were inclined at first to regard the Bangalore Principles as heretical.[10] They referred to such cases as *R v Home Secretary, ex parte Bhajan Singh*[11] and regarded with scepticism the amount of assistance which could be derived from an international treaty, other international law or the pronouncements of international or regional courts, tribunals and committees.

HIGH JUDICIAL PRONOUNCEMENTS

But in the seven years since Bangalore, something of a sea change has come over the approach of courts in Australia, New Zealand, England and other countries of the common law.

The clearest indication of the change in Australia can be found in the remarks of Brennan J (with the concurrence of Mason CJ and McHugh J) in *Mabo v Queensland (No 2)*.[12] In the course of explaining why a discriminatory doctrine, such as that of terra nullius (which refused to recognise the rights and interests in land of the indigenous inhabitants of a settled colony such as Australia) could no longer be accepted as part of the law of Australia, Brennan J said:

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7. MD Kirby 'The Australian Use of Iinternational Human Rights Norms: from Bangalore to Balliol — a View from the Antipodes' (1993) 16 UNSW L Journ, 363.
8. Bangalore Principles, Principle 4: see (1988) 14 Cth Law Bull 1196. Cf (1988) 62 Aust L Journ 531.
9. Ibid, Principle 7.
10. Eg *Jago v District Court of NSW* (1988) 12 NSWLR 558; Samuels JA, 580. Cf *Young v Registrar, Court of Appeal* infra n 38; Powell JA, 291-293.
11. [1976] 1 QB 198, 207.
12. (1992) 175 CLR 1.

> The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of the 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. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organisation of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.[13]

To similar effect were the remarks of the English Court of Appeal in *Derbyshire County Council v Times Newspapers Ltd*,[14] later affirmed by the House of Lords,[15] which gave expression to a similar principle. In a sense, this paved the way for the reasoning of Brennan J in *Mabo (No 2)* and was referred to by him. The question in *Derbyshire* was whether a local government authority was entitled, by the law of England, to sue for libel to protect its corporate reputation (as distinct from that of its members). The trial judge had held that it was.[16] But this decision was reversed by the Court of Appeal. In the course of his reasoning, Balcombe LJ[17] referred to article 10 of the European Convention on Human Rights, to which the United Kingdom is a party. That article relates to freedom of expression. His Lordship observed:

> Article 10 has not been incorporated into English domestic law. Nevertheless it may be resorted to in order to help resolve some uncertainty or ambiguity in municipal law: see Lord Ackner in *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696, 761. Thus (i) Article 10 may be used for the purpose of the resolution of an ambiguity in English primary or subordinate legislation.... (ii) Article 10 may be used when considering the principles upon which the Court should act in exercising a discretion; eg, whether or not to grant an interlocutory injunction.... (iii) Article 10 may be used when the common law (by which I include the doctrines of equity) is uncertain. In *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 the courts at all levels had regard to the provisions of Article 10 in considering the extent of the duty of

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13. Ibid, 42 Cf *R v Dietrich* (1992) 177 CLR 292, 330, 337, 361, 365. See G Triggs 'Customary International Law and Australian Law' in A J Bradbrooke & A J Duggan (eds) *The Emergence of Australian Law* (Sydney: Butterworths, 1989) 376, 381; B F Fitzgerald 'International Human Rights and the High Court of Australia' (1994) 1 James Cook Uni L Rev 78
14. [1992] 1 QB 770.
15. [1993] AC 534.
16. [1992] QB 775; Morland J.
17. Id, 812.

> confidence. They did not limit the application of Article 10 to the discretion of the court to grant or withhold an injunction to restrain a breach of confidence. Even if the common law is certain the courts will still, when appropriate, consider whether the United Kingdom is in breach of Article 10.... This approach of English law to Article 10 is wholly consistent with the jurisprudence of the European Court of Human Rights. That court has, on more than one occasion, held that a doctrine of the English courts has violated a litigant's rights under Article 10 and this on occasion has led to Parliament having to change the substantive law.... In my judgment, therefore, where the law is uncertain, it must be right for the Court to approach the issue before it with a predilection to ensure that our law should not involve a breach of Article 10. That was the approach of Lord Oliver of Aylmerton in *In re K D (a Minor)* [1988] AC 806 where, in relation to an argument based on Articles 6 and 8 of the same Convention and a previous decision of the European Court of Human Rights ... he cited with approval the argument of counsel in the following passage at p 823: 'Although this is not binding upon your Lordships, the United Kingdom is, of course, a party to the convention for the protection of human rights and fundamental freedoms and it is urged that it is at least desirable that the domestic law of the United Kingdom should accord with the decisions of the European Court of Human Rights under the Convention.

To the same effect were the remarks of Butler-Sloss LJ in *Derbyshire*:

> Adopting, as I respectfully do, that approach to the Convention, the principles governing the duty of the English court to take account of Article 10 appear to be as follows: where the law is clear and unambiguous, either stated as the common law or enacted by Parliament, recourse to Article 10 is unnecessary and inappropriate. Consequently, the law of libel in respect of individuals does not require the court to consider the Convention. But where there is an ambiguity, or the law is otherwise unclear or so far undeclared by an appellate court, the English court is not only entitled but, in my judgment, obliged to consider the implications of Article 10.[18]

Since these words were written, a like question was presented to the New South Wales Court of Appeal in *Ballina Shire Council v Ringland*.[19] A majority (Gleeson CJ and myself; Mahoney JA dissenting) followed *Derbyshire* and the earlier judgment of the Appellate Division of the Supreme Court of South Africa in *De Spoorbond v South African Railways*.[20] In coming to our respective conclusions, both Mahoney JA[21] and I[22] referred to the provisions of Article 19.2 of the International Covenant on Civil and Political Rights, which Australia has ratified. Following as it did *Mabo (No 2)*, nobody questioned the relevance of a consideration by the court of applicable international human rights principles in assisting it to come to its conclusions about the content of local common law.

In New Zealand, the same trend has emerged. There, the position is

18. Id, 830.
19. (1994) 33 NSWLR 680.
20. [1946] AD 999.
21. *Ballina Shire Council* supra n 19, 721.
22. Id, 699.

somewhat different from that in Australia and England, by reason of the enactment of the Bill of Rights Act 1990 (NZ).[23]

In *Ministry of Transport v Noort; Police v Curran*,[24] the Court of Appeal was required to consider whether the provisions of the Transport Act 1962 (NZ), sections 56B, 56C and 56D, relating to breath and blood testing, were inconsistent with the right to legal advice under the Bill of Rights Act 1990 (NZ). The court, by majority (Cooke P, Richardson, Hardie-Boys and McKay JJ; Gault J dissenting) dismissed the appeal, holding that there was no relevant inconsistency. The reasoning of the judges differed. Cooke P referred to the 'cardinal importance', in giving meaning to the Bill of Rights Act 1990 (NZ), to 'bear in mind the antecedents':

> The International Covenant on Civil and Political Rights speaks of inalienable rights derived from the inherent dignity of the human person. Internationally there is now general recognition that some human rights are fundamental and anterior to any municipal law, although municipal law may fall short of giving effect to them: see *Mabo v Queensland* (1988) 166 CLR 186, 217-218. The right to legal advice on arrest or detention under an enactment may not be quite in that class, but in any event it has become a widely-recognised right.... Subject to contrary requirements in any legislation, the New Zealand Courts must now, in my opinion, give it practical effect irrespective of the state of our law before the Bill of Rights Act.[25]

The extent of a possible obligation on the part of New Zealand ministers to have regard to international human rights norms was considered by the Court of Appeal in *Tavita v Minister of Immigration (NZ)*.[26] This involves the consideration of the relevance of international norms to administrative decision-making, as distinct from the interpretation and application of the Bill of Rights Act. Mr Tavita had overstayed his permit to be in New Zealand. The main question concerning the court, dealing with Mr Tavita's application to set aside a removal order, was whether the minister, and the immigration service had failed, although obliged, to have regard to the international obligations relating to a child born to the applicant and his family in New Zealand and entitled to stay there. The Crown argued that the minister and the department were entitled to ignore the provisions whether of the International Covenant on Civil and Political Rights, its first Optional Protocol signed also by New Zealand or the Convention on the Rights of the Child, all ratified by New Zealand. Delivering the interim judgment of the

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23. Cf M Mulgan 'Implementing International Human Rights Norms in the Domestic Context: The Role of a National Institution' (1993) 5 Canterbury L Rev 235; J Craig 'The "Bill of Rights" Debates in Australia and New Zealand — a Comparative Analysis' (1994) 8 Legal Studies 67. Cf *R v Goodwin* [1993] 2 NZLR 153, 168.
24. [1992] 3 NZLR 260.
25. Id, 270.
26. [1994] 2 NZLR 257.

New Zealand Court of Appeal, Cooke P stopped short of deciding that international obligations *must* be considered in the performance of the administrative decision-making process.[27] Nevertheless, the Court reviewed the relevant jurisprudence under the European Convention established by decisions of the European Court of Human Rights.[28] His Honour went on to describe the minister's submission as:

> An unattractive argument, apparently implying that New Zealand's adherence to the international instruments has been at least partly window-dressing. Although for the reasons to be mentioned shortly, a final decision on the argument is neither necessary nor desirable, there may at least be hesitation about accepting it. The law as to the bearing on domestic law of international human rights and instruments declaring them is undergoing evolution. For the appellant [counsel] drew our attention to the Balliol Statement of 1992, the full text of which appears in (1993) 67 *Australian Law Journal* 67, with its reference to the duty of the judiciary to interpret and apply national constitutions, ordinary legislation and the common law in the light of the universality of human rights. It has since been reaffirmed in the Bloemfontein Statement of 1993.
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> If and when the matter does fall for decision, an aspect to be borne in mind may be one urged by counsel for the appellant: that since New Zealand's accession to the Optional Protocol, the United Nations Human Rights Committee is in a sense part of the country's judicial structure, in that individuals subject to New Zealand jurisdiction have direct rights of recourse to it. A failure to give practical effect to international instruments to which New Zealand is a party may attract criticism. Legitimate criticism could extend to the New Zealand courts, if they were to accept the argument that, because a domestic statute giving discretionary powers in general terms does not mention international human rights norms or obligations, the executive is necessarily free to ignore them.[29]

The Balliol Statement and the Bloemfontein Statement were made at meetings of judges from throughout the Commonwealth of Nations which were attended by Cooke P and myself. Like the earlier similar statements, issued after meetings in Harare, Zimbabwe and Abuja, Nigeria, they accept and endorse the Bangalore Principles.[30]

CASES APPLYING THE BANGALORE PRINCIPLES

The foregoing collection of judicial pronouncements confirms Cooke P's statement that the impact of international human rights law upon domestic law is 'undergoing evolution'.

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27. Ibid. See B O'Callaghan 'Note: *Tavita v Minister for Immigration*' (1994) 7 Auckland Uni L Rev 762, 764.
28. Eg *Berrehab v Netherlands* (1989) 11 EHRR 322; *Beldjoudi v France* (1992) 14 EHRR 801; *Lamgiundaz v UK* [1993] TLR 483.
29. Supra n 26, 266.
30. Cth Secretariat *Developing Human Rights Jurisprudence* (London, 1991) where these instruments are collected.

In an earlier essay,[31] I collected a number of decisions of the High Court of Australia and of the New South Wales Court of Appeal in which reference has been made to international human rights principles in the development of the understanding of local law. In my own court, the cases have included:

- A case involving a suggested ambiguity of the Bankruptcy Act 1966 (Cth) staying civil proceedings and whether it should be interpreted to exclude public law proceedings for the vindication of a public right.[32]
- A case concerning imputed bias by reason of a judge's earlier retainer, whilst a barrister, for a party to litigation in suggested breach of the requirement in Article 14.1 of the ICCPR that a person must have a 'fair and public hearing by a competent *independent* and *impartial* tribunal established by law'.[33]
- A case concerning whether the common law provides an enforceable right to speedy trial[34] having regard to the terms of Article 14.3 of the ICCPR.
- A case concerning a right of a mute person to have an interpreter assist in the understanding of evidence and argument given in open court in proceedings concerning her, having regard to the terms of Articles 14.1, 14.3(a) and (f) of the ICCPR.[35]
- A case involving the right of a litigant in person to have, as costs, expenses necessary for attending court by reason of the promise of 'equality' before the courts and tribunals under Article 14.1 of the ICCPR,[36] notwithstanding earlier court decisions to the contrary in England.
- A case involving the imposition of a fine of $60 000 upon a bankrupt, invalid pensioner prisoner as punishment for contempt of court, having regard to the prohibition on 'excessive fines' in the still applicable Bill of Rights 1688.[37]
- A case by a convicted contemnor involving an asserted denial of his right to have his conviction and sentence reviewed by a higher tribunal according to law as Article 14.5 of the ICCPR requires, when all that was provided was an entitlement to seek special leave to appeal against conviction to the High Court of Australia.[38]

There are many other Australian cases which could be mentioned, including cases in the Federal Court of Australia,[39] the Family Court of

31. Kirby, supra n 7.
32. *Daemar v Industrial Commission of NSW* (1988) 79 ALR 591.
33. *S&M Motor Repairs Pty Ltd v Caltex Oil (Aust) Pty Ltd* (1988) 12 NSWLR 358.
34. *Jago* supra n 10.
35. *Gradidge v Grace Bros Pty Ltd* (1988) 93 FLR 414.
36. *Cachia v Hanes* (1991) 23 NSWLR 304.
37. *R v Smith* (1991) 25 NSWLR 1, 15.
38. *Young v Registrar, Court of Appeal [No. 3]* (1993) 32 NSWLR 262.
39. Eg *Minister for Foreign Affairs v Magno* (1993) 112 ALR 529, 534; *Premalal v Minister*

Australia[40] and the Court of Criminal Appeal of New South Wales.[41] In many of the foregoing decisions, a feature of the reasoning is the reference by the judges, not only to the text of a relevant international instrument, but also to the development of the jurisprudence by courts, tribunals and committees — particularly by the European Court of Human Rights.

In New Zealand, the vehicle of the Bill of Rights Act 1990 (NZ), although not constitutionally entrenched, gives an established framework for the reference to analogous jurisprudence developed around similarly expressed provisions in international law. In Australia and England there is no similar domestic statute. This has not stopped the courts, in the manner suggested in the Bangalore Principles, from utilising international law where a relevant gap appears in the common law or a statute falls to be construed which is ambiguous or uncertain of meaning. Increasingly, judges of our tradition, faced with such a problem, are turning not simply to the analogous reasoning which they can derive from the judgments written, often in a different world for different social conditions, far away. Now, increasingly, they are looking, where relevant and applicable, to international human rights jurisprudence. In my view, this is both a natural and desirable development of our marvellously flexible and adaptable legal system. It is one which is in general harmony with the development of the international law of human rights. It is one apt for a time of global technology (eg, telecommunications, international transportation, satellites, etc), global problems (eg, the HIV/AIDS epidemic, atmospheric warming, over-population, etc) and global institutions.

CAUTIONARY TALES

Critics of the developments which I have outlined would list a number of considerations which certainly need to be taken into account as the judges venture upon this new source of law-making. The expressed concerns include the following:

- Treaties are typically negotiated by the executive government, as the modern manifestation of the Crown. They may or may not reflect the will of the people, expressed in Parliament.
- The processes of ratification are often defective. In Australia, for example, the Federal government deposited the instrument of accession to the first Optional Protocol to the ICCPR before tabling the instrument in

for Immigration (1993) 41 FCR 117; *Teoh v Minister for Immigration* (1994) 121 ALR 436; Black CJ, 443.

40. Eg *Re Marion* (1990) 14 Fam LR 427, 449; *Re Jane* (1988) 12 Fam LR 662.

41. Eg *R v Greer* (1992) 62 A Crim R 442; *R v Astill* (1992) 63 A Crim R 148; *R v Sandford* (1994) 33 NSWLR 172, 177, 185. Cf *DPP (Cth) v Saxon* (1992) 28 NSWLR 263; *Cannellis v Slattery* (1993) 33 NSWLR 104 (reversed HC).

Parliament. This was described by one observer as 'extraordinary ... without any public debate or even public awareness of its existence, let alone its scope and significance'.[42] There is now, in Australia, a lively discussion of the need to improve the procedures for the ratification of international treaties and to provide for pre-ratification scrutiny by the Federal Parliament.[43]

- In federal countries, such as Australia, special concern has been expressed that the ratification of international treaties may be used as a means to undermine the distribution of powers between the federal and state legislatures in a way never contemplated by the drafters of the Constitution.[44] One reason advanced for awaiting legislation to introduce an aspect of international law into domestic law in a federation, and to refrain from introducing such principles by judicial decision, is that this course will permit the constitutional validity of the statutory introduction to be tested in the courts.
- Then it is suggested that judicial introduction of human rights norms may divert the community from the more open, principled and democratic adoption of such norms in constitutional or statutory amendments which have the legitimacy of popular endorsement. It is upon this ground that some criticism has been voiced of the recent discovery by the High Court of Australia of fundamental rights to be implied from the nature and purposes of the Australian Constitution although not expressed there.[45] Those who hold to this view urge that it would be preferable to engage in a national debate and openly to embrace an enacted Bill of Rights than to accept such a development from a well-meaning judiciary, introducing it 'by stealth'.
- Some commentators have also expressed scepticism about the international courts, tribunals and committees which pronounce upon human rights. They are typically made up of persons from legal regimes sometimes quite different from our own. In *R v Jefferies,*[46] Richardson J observed that, whilst the jurisprudence of Canada in the area of human

42. A Twoomey *The Procedure and Practice of Granting and Implementing International Treaties* Parliamentary Research Service Background Paper No 27 (1995) 9. Cf Aust Parl Joint Committee on Foreign Affairs, Defence and Trade *A Review of Australia's Efforts to Promote and Protect Human Rights* (Canberra: AGPS, 1994) 47; Aust Dept of Foreign Affairs and Trade *Human Rights Manual* (Canberra: AGPS, 1993) 25.
43. For the earlier Australian practice: see *Hansard* (HR) 10 May 1961, 1693-1695 (RG Menzies).
44. See Kirby 'Human Rights: the International Dimension' — Cth Parl (Canberra, 17 February 1995).
45. Eg D Rose 'Judicial Reasonings and Responsibilities in Constitutional Cases' (1994) 20 Mon L Rev 195; A Fraser 'False Hopes: Implied Rights and Popular Sovereignty in the Australian Constitution' (1994) 16 Syd L Rev 213; L Zines 'A Judicially Created Bill of Rights?' (1994) 16 Syd L Rev 166.
46. [1994] 1 NZLR 290, 299.

rights and that of the European Court of Human Rights has offered undoubted assistance in the interpretation and application of the Bill of Rights Act 1990 (NZ), New Zealand should nonetheless be wary. It should not forget its own legal and social history which has disdained federation and, so far, has declined to accept an entrenched statement of rights with overriding constitutional force.

- To similar effect, critics have pointed to the generality of the expression of the provisions contained in international human rights instruments. Of necessity, these are expressed in language which lacks precision. This means that those who use them may be tempted to read into their broad language what they hope, expect or want to see. Whilst the judge of the common law tradition has an indisputable creative role, such creativity must be in the minor key. It must proceed in a judicial way. It must not undermine the primacy of democratic law-making by the organs of government, directly or indirectly accountable to the people.[47]
- Finally, some critics caution against undue, premature undermining of the sovereignty of a country by judicial fiat and the authority of every country's democratically accountable law-makers to develop human rights in their own way. The world, in the matter of rights protection, is by no means monochrome. We are now at pains to protect the bio-diversity of fauna and flora. The principle of self-determination of peoples is a reflection of the fundamental right of every people to be governed in a way acceptable to a majority of the population. It would be ironic if the advance of international human rights principles were to undermine the variety of human legal systems and democratic accountability which is itself an important right which courts should loyally respect.[48]

SUPPORT FOR THE BANGALORE PRINCIPLES

Against the foregoing considerations, the supporters of the Bangalore Principles point to a number of factors which must be kept in mind in the evolving jurisprudence to which Cooke P referred in *Tavita*:[49]

- The Principles do not undermine the sovereignty of national law-making institutions. They acknowledge that if those institutions have made (by constitutional, statutory or common law decision) a rule which is unambiguous and binding, no international human rights principle can undermine or overrule the applicable domestic law. To introduce such a principle requires the opportunity of a gap in the common law or an

47 Eg *R v Dietrich* supra n 13; Brennan J, 323.

48. See *Building Construction Employees & Builders' Labourers Federation (NSW) v Minister for Industrial Relations* (1986) 7 NSWLR 372.

49 Supra n 26.

ambiguity in a local statute. Then, by direct legislation or indirect introduction by the judicial branch of government, the principle can be imported into the law of the sovereign country. Far from being a negation of sovereignty, this is an application of it.

- The process which the Bangalore Principles endorse is, in a sense, as Brennan J described it in *Mabo (No 2)*, an inevitable one. As countries, such as Australia and New Zealand, by subscription to the First Optional Protocol, submit themselves to the external scrutiny and criticism of their laws by the UN Human Rights Committee, the result must be addressed. If a domestic law is measured and found wanting, a country must bring its law into conformity or be revealed as a mere participant in human rights 'window-dressing'.
- Modern notions of democracy are more sophisticated than formerly. They involve not only the reflection in law-making by the will of the majority, intermittently expressed upon a broad range of issues. Now it is increasingly appreciated that the legitimacy of democratic governance depends upon the respect by the majority for the fundamental rights of minorities.[50] Therefore, insofar as courts give effect at least to fundamental rights, they are assisting in the discharge of their governmental functions to advance the complex notion of democracy as it is now understood.
- So far as federal states are concerned, their constitutions do not stand still. The view has been expressed that a federal parliament and government is a trustee for the international standards of the world community in which it is the responsibility of the federal polity to be the nation's voice.[51] The power of a federal supreme court to strike down excessive laws and to measure all laws against the standards of the Constitution as understood from time to time, ensures that such laws meet the requirements of constitutionality. But federal constitutions must themselves adapt to the world in which the federal state now finds itself. This, indisputably, is a world of increasing interrelationships in matters of economics and of human rights. Judges, no more than legislatures and governments, can ignore this reality.
- Giving effect to international law, where a country has formally ratified a relevant treaty, does no more than give substance to the act which the executive government has taken. The knowledge that the judicial use of international law in this way is now becoming more frequent may have the beneficial consequence of discouraging ratification where there is no

50. H Charlesworth 'Protecting Human Rights' (1994) 68 Law Inst Journ (Vic) 462-463. C Caleo 'Implications of Australia's Accession to the First Optional Protocol to the International Covenant on Civil and Political Rights' (1993) 4 PLR 175.

51. H Charlesworth 'The Australian Reluctance about Rights' in P Alston (ed) *Towards an Australian Bill of Rights* (Sydney: HREOC, 1994) 53.

serious intention to accept, for the nation, the principles contained in the treaty.

- The international development of local law is already happening outside the judiciary. For example, international human rights principles are being introduced into domestic law by express legislation.[52] Sometimes that legislation follows determinations of a relevant international body, as was the case of the recent Australian statute: the Human Rights (Sexual Conduct) Act 1994 (Cth). That Act followed the decision of the UN Human Rights Committee in determining the complaint by Mr Nicholas Toonen against Australia in respect of the Tasmanian laws on homosexual offences, repealed everywhere else in Australia.[53] Given that other branches of government are giving effect to international human rights law, it is scarcely surprising that the courts, as a branch of government, are also taking such law into account in appropriate cases and in permissible circumstances.
- The developments just described are hardly surprising or threatening, at least to judges and lawyers of our tradition. The international human rights instruments have been, for the most part, drawn up by Anglo-American lawyers. In countries such as Australia and New Zealand, their concepts are often already enshrined in constitutional, statutory or common law principles. It is the jurisprudence which is now collecting around these broad concepts that is often helpful in facing the kinds of problems which societies must address today. That is why it is appropriate and useful for the common law now to modify its earlier principle of strict separation of international and domestic law. It is timely that a rapprochement between these systems of law should be developed. As we enter a new millennium where there will be increasing international law of very kind, it is part of the genius of our legal system that our courts have found a way to take cognisance of international human rights jurisprudence in appropriate circumstances and by appropriate and familiar techniques of reasoning.

CONCLUSIONS

The Bangalore Principles seemed to some to be radical when first enunciated by the collected judges meeting in the sunshine under the bougainvillea at the Government Resthouse in Bangalore in 1988. But even

52. Eg Privacy Act 1988 (Cth).
53. *Toonen v Australia* UN Doc CCPR/C/50/D/488/1992 (4 April 1994). For discussion, see A Funder 'The Toonen Case' (1994) 5 PLR 156; G Selvanera 'Gays in Private: The Problems with the Privacy Analysis in Furthering Human Rights' (1994) 16 Adel L Rev 331-340; W Morgan 'Protecting Rights or Just Passing the Buck?' (1994) 1 Aust Journ Human Rights 409.

in the passage of so short a time, they have come to be accepted throughout the Commonwealth of Nations as an orthodox statement of applicable principles for dealing with gaps in the common law and ambiguities of legislation to which universal human rights jurisprudence might lend an aid. Cautiously, the courts in Australia, New Zealand and England have begun to edge towards a new technique appropriate to the coming millennium. The full evolution of the technique has not yet been achieved. All of the difficulties have not yet been perceived, still less overcome. The restraints apt to a judiciary of our tradition, respectful of the legitimacy of the elected branches of government, have not yet been fully chartered. But the idea is now amongst us. It is a powerful idea. It is, I suggest, one appropriate to the times we live in. It is the privilege of judges of our tradition to assist in the evolution of this idea. That is why we should be alert to these developments, to their universality and their applicability in virtually all countries of the common law tradition. Once again, the common law, the great legacy of the judges of the past, is proving itself capable of adaptation to new times — times of increasing national and international concern about human rights. Fortunate are we to be the beneficiaries of this great legacy. But we must earn the privilege of being worthy inheritors of this tradition by the response we give to harmonising domestic and international law in a principled manner.

EPILOGUE: THE HIGH COURT'S DECISION IN TEOH

Shortly after this paper was delivered, the High Court of Australia published its judgments in *Minister for Immigration & Ethnic Affairs v Teoh*.[54] The decision requires comment in an epilogue to this article as the High Court in *Teoh* considered the effect, in municipal law, of relevant provisions of a treaty, ratified by the executive, but still unincorporated by domestic legislation implementing it. The decision is not without ambiguities and ramifications, as is reflected in the joint statement of the Federal Attorney-General, Mr Michael Lavarch, and Senator Gareth Evans in response to the decision.[55]

The respondent to the challenge of the Minister for Immigration to a decision of the Full Federal Court had been denied resident status and refused reconsideration of such decision. An order was then made under the Migration Act 1958 (Cth) to deport him. He had been charged with, and convicted of, offences relating to the importation and possession of heroin

54. (1995) 128 ALR 353.

55. Minister for Foreign Affairs and Attorney-General *Joint Statement on International Treaties and High Court Decisions* (Canberra, 10 May 1995).

and sentenced to six years' imprisonment. His wife had also pleaded guilty to offences relating to possession of heroin. Between them the couple had seven children. The children would be profoundly affected by the decision to deport their father. Clearly, Mrs Teoh as an Australian citizen was not subject to deportation.

Article 3.1 of the United Nations Convention on the Rights of the Child provides that in all actions concerning children undertaken by administrative bodies, 'the best interests of the child shall be a primary consideration'. The Full Federal Court had upheld the respondent's appeal from the decision of French J at first instance, which had rejected Mr Teoh's challenge to the decision to refuse to reconsider the decision not to grant resident status. Included in the reasons of Carr and Lee JJ in the Full Federal Court was that the relevant Article of the ratified treaty, while not incorporated into domestic law, gave rise to a 'legitimate expectation' that the Minister's delegate would, when considering the application for resident's status, exercise such powers in accordance with the principles contained in that Article. It was held that the delegate had not adequately considered the effect which this decision would have on the interests of the children. In deciding as she did, she had not afforded the respondent the opportunity to be heard on that point.

In hearing the minister's challenge to this decision, the High Court, including McHugh JA in his dissenting judgment, considered the effect on domestic law of international treaty provisions which had not been expressly incorporated. All of the judges reiterated the legitimacy of the use of such treaty provisions in construing ambiguous statutes, or as a guide to the development of an existing principle of the common law. Mason CJ and Deane J in their joint judgment said:

> The fact that [a] Convention has not been incorporated into Australian law does not mean that its ratification holds no significance for Australian law. Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party, at least in those cases in which the legislation is enacted after, or in contemplation of, entry into, or ratification of, the relevant international instrument. That is because Parliament, prima facie, intends to give effect to Australia's obligations under international law. It is accepted that a statute is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law.[56]

However, this endorsement was expressed cautiously by Mason CJ and Deane J:

> The courts should act ... with due circumspection when the Parliament has not seen fit to incorporate the provisions of a convention into our domestic law. Judicial

56. *Teoh* supra n 54; Mason CJ and Deane J, 362. Cf Gaudron J, 375; McHugh J, 384.

> development of the common law must not be seen as a back-door means of importing an unincorporated convention into Australian law... Much will depend upon the nature of the relevant provision, the extent to which it has been accepted by the international community, the purpose which it is intended to serve and its relationship to the existing principles of our domestic law.[57]

In *Teoh,* the Court was not concerned with a legislative ambiguity, or development of the common law. The question turned upon the relevance of the treaty provisions to the exercise by an official of a statutory discretion. Did Australia's ratification of the Convention give rise to a legitimate expectation that the decision-making power of the minister's delegate would be exercised in accordance with the principles set out in the treaty?

The majority of the court found that, while the ratification by the executive of the Convention did not, as such, incorporate its provisions into domestic law, it nonetheless affected the lawful exercise of administrative discretion. The positive statement by the executive, manifested by the act of ratification, of its intention to act in accordance with its provisions, gave rise to an expectation that officers of the executive would not act in a contrary manner. If they contemplated doing so, they should provide an opportunity to the person affected to argue against such a course. This was necessary to satisfy the requirements of procedural fairness. Dismissing the minister's appeal, the majority held that the minister's delegate had not satisfactorily taken the interests of the respondent's children into account as a primary consideration in accordance with the Convention. Instead, the delegate had accorded primacy to the policy requirements expressed in the departmental instructions manual relating to the grant of resident status. Further, the delegate had not informed the respondent of the intention to act in this way in order to permit him to argue against that course.

The initial caution expressed by the court about the use which might be made of unincorporated treaty provisions must be considered against the potential breadth of the majority's ultimate decision in *Teoh.* It was not necessary for the respondent to have been aware of the provisions of the treaty. Nor was it necessary for him to have actually held the expectation personally. An objective test asking whether or not the expectation was reasonable given the nature of the undertaking either by the government or of the particular agency sufficed. As Toohey J considered, this was particularly appropriate given the general nature of the government's undertaking to the world at large, and to the Australian public in particular, to act consistently with the principles enshrined in the treaties which it ratifies on behalf of Australia. This approach contrasted with the opinion of McHugh J who concluded:

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57. Id, Mason CJ and Deane J, 362.

> It seems anomalous ... to insist that a decision-maker must inform a person that a rule will not be applied merely because, objectively, reasonable persons have an expectation that such a rule would be applied. It seems even more anomalous that a person should have to be notified that a rule will not be applied if he or she is not even aware of the rule's existence.[58]

The majority of the High Court was careful to reiterate that its approach would not result in the indiscriminate adoption of principles which Parliament had not seen fit to incorporate directly, emphasising that acknowledgment of the existence of a legitimate expectation could not itself give rise to an enforceable right that the decision-maker be compelled to act in accordance with the treaty. But it did give rise to a right to be heard on that point, if the decision-maker did not intend to so act. It was noted by one member of the court[59] that the expectation would not arise were there sufficient evidence of a contrary intention on the part of the legislature or of the executive.

The decision in *Teoh* requires consideration not only for its recognition of the way in which international law may be relied upon in the domestic forum, tempered by the caution evident in the Bangalore Principles themselves. It is also important as an acknowledgment that the act of the executive in ratifying treaties may alone give rise to a legitimate expectation on the part of an individual who may later be affected by the decision-making processes of an agency or officer of the government. The substantive effect of the decision remains ungauged. The Federal government has recognised sufficient possible implications in the reasons of the High Court to respond in the joint statement of Mr Lavarch and Senator Evans, to which I referred above. The ministers affirmed that entry into any treaty should not be grounds for a legitimate expectation that decision-makers will act in accordance with its provisions, while the treaty itself remains unincorporated. They promised legislation to restore that position. Such legislation, if introduced, will need to be watched with great care lest it set back the natural development which has been occurring in Australian courts, as in others, to bridge the gap between domestic law and developing principles of international law — particularly in the field of human rights. *Teoh* has regenerated the debate concerning the use of international norms in domestic procedures. It has also led to renewed demands for parliamentary and public scrutiny of the process of treaty ratification. *Teoh* confirms that the age of the impact of international law on Australian municipal law has arrived. And is that not an inevitable development suitable for the approaching millennium?

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58. Id, McHugh J, 382-383.
59 Id, Toohey J, 374