

## THE AUSTRALIAN USE OF INTERNATIONAL HUMAN RIGHTS NORMS: FROM BANGALORE TO BALLIOL - A VIEW FROM THE ANTIPODES\*

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### I. CONVERSION IN BANGALORE

There is a famous passage in the *Acts of the Apostles*. It describes the conversion of Saul, who later became St Paul: one of the Evangelists who spread the Christian message around the Mediterranean:

And as he journeyed, he came near Damascus: and suddenly there shined round about him a light from heaven. And he fell to the earth... And he [was] trembling and astonished.<sup>1</sup>

From an enemy, sceptic and persecutor, Paul became converted. Having the good news, he felt an obligation to share the flash of insight which he had received on the road to Damascus.

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1 *The Acts of the Apostles*, Ch 9, v 3, 4, 6.

In a humble way, as befits a working judge, I received an important insight which I have felt obliged, ever since, to practise and share. My conversion occurred in Bangalore, India in February 1988. It is true that I was no persecutor of international law or of the norms of human rights now enshrined in that law. How could I be a persecutor? My professional life had been (and is) devoted to the application of the principles of the common law of England as received into Australian law. Those principles carry with them to the four corners of the Commonwealth of Nations many of the international human rights norms which are now reflected in the international instruments. Such documents were themselves often drawn up by lawyers trained in the common law.

But although I was no persecutor, I was certainly a sceptic. Australia, like many countries of the old Commonwealth of Nations, had no modern Bill of Rights, entrenching beyond legislative power principles deemed fundamental to the preservation of human freedoms. Faithful to the general view of the common law, my legal system had rejected the notion that international law was automatically incorporated into domestic law. For me, as for most judges and lawyers of this century, brought up in the common law, international law was a vague *mélange* of political statements and motherhood principles - not to be compared with the precise, renewable and generally just rules of municipal law made by legislatures answerable to the people and judges accountable in the courts.

These were the attitudes which I brought to Bangalore. They were not idiosyncratic or especially unsympathetic opinions for the task which lay ahead of me. Instead, they were simple reflections of my legal education, the principles of law adopted by the courts of England and Australia, reinforced by the daily grind of solving legal problems, for the solution to which the principles of the international law of human rights seemed remote, irrelevant and some how foreign. According to this attitude, there is really no need for the busy judge and lawyer of a common law country to bother about international human rights norms. They may be useful as political slogans for societies still struggling towards the rule of law and a just, accountable legal system. They may even be useful for common law countries which have adopted a *Charter of Fundamental Rights and Freedoms* containing principles common to international human rights norms. But for countries which have to solve their problems by reference exclusively to common law principles as supplemented by local legislation, the *International Bill of Rights* and the doings of committees in Geneva and courts in Strasbourg seem far away. Either they are irrelevant because the rules of the common law are parallel, sufficient, complete, binding and authoritative, or they are inferior because they are not justiciable and enforceable, are mostly made by foreign politicians, are stated in language of extreme generality and are not susceptible to amendment or clarification in tune with changing attitudes, changing needs and changing times.

As I alighted from the plane in Bangalore, the images about me seemed to confirm this mood of self-assurance and even self-satisfaction with the common law tradition. The neat cantonment city bore many reminders of the certainties of British rule. The statue of the Queen Empress Victoria still dominated the broad avenue to the hotel. In Holy Trinity Church, I found many of the relics of Empire: reminding the visitor of the time, not so very long ago, when British rule and English law were taught to impressionable students as having the inestimable advantages of a superior global organisation with a distinctly civilising mission. I suppose I came to Bangalore with the intellectual and emotional baggage which most of the lawyers of my generation, and not only in Australia, carry concerning the superiority of the common law and of its institutions over the amorphous law of nations and institutions not part of the common law tradition. I was willing to allow that judges have leeways for choice in determining cases before them. In exercising their obligation to choose they could “sometimes draw upon international human rights statements”.<sup>2</sup> It was an extremely cautious view which I propounded at Bangalore. It reflected the legal tradition in which I had grown up - largely ignorant of the developments of Bill of Rights jurisprudence and of the case law and decisions of international courts and committees.

What Bangalore did was to expose me to the fast developing jurisprudence of international human rights norms. My teachers were the jurists who led the Bangalore meeting: Justice PN Bhagwati, former Chief Justice of India; Justice Rajsoomer Lallah of Mauritius; Anthony Lester QC of the United Kingdom and the other participants who gathered with me there.

The closing statement of the *Bangalore Principles* recognised that many lawyers of the common law world would, like me, be comparatively ignorant of the rapid advance in human rights jurisprudence. Thus, the closing statement called for reform of traditional legal teaching which “has tended to ignore the international dimension”. It acknowledged that “judges and practising lawyers are often unaware of the remarkable and comprehensive development of statements of international human rights norms”. It urged the provision of the necessary texts, case law and decisions to law libraries, judges, lawyers and law enforcement officials.<sup>3</sup> It acknowledged the “special contribution” which judges and lawyers

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2 MD Kirby “The Role of the Judge in Advancing Human Rights - By Reference to Human Right Norms” in Commonwealth Secretariat, *Developing Human Rights Jurisprudence - The Domestic Application of International Human Rights Norms*, record of the Judicial Colloquium in Bangalore (1988) 67 at 83.

3 The *Bangalore Principles* are published in (1988) 14 *Commonwealth Law Bulletin* 1196 and (1988) 62 *ALJ* 531. See Bangalore Principle 9. The *Bangalore Principles* have been re-affirmed successively by *The Harare Declaration of Human Rights* 1989; *The Banjul Affirmation* 1990; and *The Abuja Confirmation* 1991. See Commonwealth Secretariat, *Developing Human Rights Jurisprudence*, Interights (1991) where the four instruments are published.

have to make, in their daily work of administering justice, in fostering “universal respect for fundamental human rights and freedoms”.<sup>4</sup> It recognised that the application of international norms would need to take fully into account local laws, traditions, circumstances and needs.<sup>5</sup> But the truly important principles enunciated at Bangalore asserted that fundamental human rights were inherent in human kind and that they provide “important guidance” in cases concerning basic rights and freedoms<sup>6</sup> from which judges and lawyers could draw for jurisprudence “of practical relevance and value”.

The *Bangalore Principles* acknowledged that in most countries of the common law such international rules are not directly enforceable unless expressly incorporated into domestic law by legislation. But they went on to make these important statements:

- “[T]here 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”;<sup>7</sup>
- “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”.<sup>8</sup>

When I returned to Australia with the *Bangalore Principles* it seemed to me that they provided a timely corrective to the insularity to which any legal system is prone; but to which the Australian legal system, in particular, seems always susceptible. If the organised institutions of the international community reached conclusions upon issues analogous to those arising in my Court, and if the local law on the point was uncertain or ambiguous, it seemed (after Bangalore) self-evident that a judge would wish to inform himself or herself upon the thinking of jurists tackling like problems and drawing upon the developing jurisprudence of the international community.

Especially was this so because, so far, Australia had declined to adopt a general or constitutional Bill of Rights. The usual legal handles, to which could be attached the developing international jurisprudence, were simply not available in my country. Furthermore, although Australia had ratified the *International*

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4 *Ibid* Principle 10.

5 *Ibid* Principle 6.

6 *Ibid* Principles 1 and 2.

7 *Ibid* Principle 4.

8 *Ibid* Principle 7.

*Covenant on Civil and Political Rights* it had not, to that time, ratified the *First Optional Protocol*. By that protocol individuals, who have exhausted their domestic remedies, may complain to the United Nations Human Rights Committee. It may then determine whether the law, as found in the national courts, accords with the obligations accepted under the *International Covenant*.

The United Kingdom ratified the *European Convention on Human Rights* of 1950.<sup>9</sup> Complaints could thereafter be made to the European Commission and the European Court of Human rights concerning suggested departures by English law from the obligations established by that *Convention*. Many such complaints have been made. Of the twenty-seven cases in which the European Court has found against the United Kingdom (considerably more than any other signatory state) no fewer than twenty have involved legislation found to be in breach of the *Convention*.<sup>10</sup> Unsurprisingly, perhaps, the English courts are now beginning to adopt an approach to the significance of the *Convention* and its jurisprudence which is akin to the conclusions accepted by the jurists who gathered in Bangalore in 1988. The most important English breakthrough in this regard is *Derbyshire County Council v Times Newspapers Limited* decided by the Court of Appeal in 1992.<sup>11</sup>

When I came back from Bangalore, there was no similar facility for complaint in Australia. There is no convention in the Asia/Pacific region akin to the *European Convention*. There is no commission or court external to Australia to scrutinize, evaluate and criticise its laws and legal practices on human rights grounds. With determination of the last Privy Council appeals in 1988, the Australian legal system was now entirely indigenous. Promoting the Bangalore idea in such a climate presented significant difficulties. They were difficulties of legal attitudes of the kind which I have described and of which I had previously myself been victim. But there were also difficulties arising from legal authority and from special problems which must be confronted by the supporters of the *Bangalore Principles* in a Federation without an entrenched Bill of Rights to stimulate their acceptance.

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9 The *Convention for the Protection of Human Rights and Fundamental Freedoms*, adopted by the Council of Europe, Rome, 4 November 1950 entered into force in 1953. See generally T Opsahl "The Co-Existence Between Geneva and Strasbourg - Inter-Relationship of the *International Covenant on Civil and Political Rights* and the *European Convention on Human Rights* and Their Respective Organs of Implementation" [1991] *Canadian Human Rights Year Book* 151 at 153 f.

10 D Kinley "Legislation, Discretionary Authority and the *European Convention on Human Rights*" (1992) 13 *Statute Law Review* 63 at 70.

11 [1992] 3 WLR 28 (CA) at 43, 60. See A Clapham "The *European Convention on Human Rights* and the British Courts: Problems Associated with Incorporation of International Human Rights" in P Alston *International Human Rights Law in Comparative Perspective*, OUP Melbourne, 1992 (forthcoming).

## II. DIFFICULTIES OF AUTHORITY AND PRINCIPLE

The traditional view, adopted in common law countries which derived their legal tradition from England (as distinct from the United States of America), is that international law is not part of domestic law. This traditional view has been expressed in the High Court of Australia in a number of cases. In 1948 Dixon J said that the theory of Blackstone in his *Commentaries* that:

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

was now regarded as being "without foundation".<sup>12</sup>

In 1982 the present Chief Justice of Australia, then Mason J, put it this way:<sup>13</sup>

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. ...In this respect Australian law differs from that of the United States where treaties are self-executing and create rights and liabilities without the need for legislation by Congress (*Foster v Neilson* 2 Pet 253 at 314; 27 US 164, 202 (1829)). As Barwick CJ and Gibbs J observed in *Bradley v The Commonwealth* (1973) 128 CLR at 582-3, the approval by 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 of the Charter into Australian law. To achieve this result the provisions have to be enacted as part of our domestic law, whether by 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].

The differing approach to the direct application of international law in domestic law of the United States can probably be explained by the powerful influence of Blackstone's *Commentaries* upon the development of the common law in that country after the Revolution. Cut off from the English courts, judges and lawyers of the American republic were frequently sent back to Blackstone and other general text writers for guidance of legal principle. In many respects, the common law in the United States remains truer to the principles of the common law of England at the time of the American Revolution than does the common law in the countries of the Commonwealth. Both by reception and legal tradition those countries have tended to follow more closely the dynamic developments of legal principles in England well into the 20th century. That is certainly the case in Australia.

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<sup>12</sup> *Chow Hung Ching v The King* (1948) 77 CLR 449 at 477.

<sup>13</sup> (1982) 153 CLR 168 at 224-5. See also Gibbs CJ at 193. Cf *Kioa & Ors v West and Ors* (1985) 159 CLR 550 at 570, 604.

But it is not simply legal authority which is used to justify the necessity of positive enactment by the domestic lawmaker to bring an international legal norm into operation in domestic jurisdiction. At least two arguments of legal policy are usually invoked. The first calls attention to the different branches of government which are involved in the processes of effecting treaties which make international law, and making in local law. Treaties are made on behalf of a country by the Crown or the Head of State. This fact derives from history and the time when international relations were truly the dealings between sovereigns. That history is now supported by the necessity to have a well identified single and decisive voice to speak to the international community on behalf of a nation. Hence the role of the Crown, or its modern equivalent, in negotiating, signing and ratifying treaties.

In the modern state the Crown, or its equivalent, is normally symbolic. It represents, in this connection, the Executive Government. Thus, it is the executive branch of government which is, virtually without exception, involved in the international dealings of a modern state. This is so nowadays for the reason that international dealings are difficult enough without having to treat with the numerous factions and interests typically present in the legislative branch of the government of any country.

In some countries there may be little or no tension between the executive and the legislative branches of government. But in many countries there is a tension. For example, in Australia it is rare for the Executive Government, elected by a majority of representatives in the Lower House of Federal Parliament, to command a majority in the Upper House (Senate). At present, the Australian Government must rely upon the support of minority parties to secure the passage of its legislation through the Senate. Accordingly, it is perfectly possible for the Executive Government to negotiate a treaty which would have the support of the Executive and even of the Lower House but not of the Upper House of Parliament. The objects of a treaty, ratified by the Executive Government, may be rejected by the Senate. Legislation to implement a treaty, if introduced, might be rejected in the Senate. It might thus not become part of domestic law as such. If, therefore, by the procedure of direct incorporation of international legal norms into domestic law, a change were procured, this would be to the enhancement of the powers of the Executive. It would diminish the powers of the elected branch of government, the Legislature. As the Executive may be less democratically responsive than the Legislature, in its entirety, care must be taken in adopting international legal norms incorporated in treaties that the democratic checks necessitated by a requirement of legislation to implement the treaty, are not bypassed.

There is an old tension between the Crown [today the Executive] and Parliament. That tension exists in many fields. One of them is in the responsibility for foreign affairs and treaties. In the development of new principles for the

domestic implementation of international human rights norms, it is important to keep steadily in mind the differing functions of the Executive and of the Legislature respectively in negotiating treaties and making domestic law.

A second reason for caution is specifically relevant to federal states. There are many such states in the Commonwealth of Nations.<sup>14</sup> Writing of the division of responsibilities in respect of lawmaking in one such state, Canada, in the context of treaties and legitimate matters of international concern, the Privy Council in 1937 said this:<sup>15</sup>

...In a federal State where legislative authority is limited by a constitutional document, or is divided up between different Legislatures in accordance with the classes of subject-matter submitted for legislation, the problem is complex. The obligations imposed by treaty may have to be performed, if at all, by several Legislatures; and the Executive have the task of obtaining the legislative assent not of the one Parliament to whom they may be responsible, but possibly of several Parliaments to whom they stand in no direct relation. The question is not how is the obligation formed, that is the function of the Executive; but how is the obligation to be performed, and that depends upon the authority of the competent Legislature or Legislatures.

This particular problem for the domestic implementation of international norms expressed in treaties is one which arises in all federal states. In the context of the Australian Federation the difficulty posed is well appreciated. Thus, in *New South Wales v The Commonwealth*, Stephen J said:<sup>16</sup>

Divided legislative competence is a feature of federal government that has, from the inception of modern federal states, been a well recognised difficulty affecting the conduct of their external affairs...

Whatever limitations the federal character of the Constitution imposes upon the Commonwealth's ability to give full effect in all respects to international obligations which it might undertake, this is no novel international phenomenon. It is no more than a well recognised outcome of the federal system of distribution of powers and in no way detracts from the full recognition of the Commonwealth as an international person in international law.

The fear which is expressed, in the context of domestic jurisdiction of federal states, is that the vehicle of international treaties (and even of the establishment of international legal norms) may become a mechanism for completely dismantling the distribution of powers established by the domestic constitution. This was the essential reason behind the dissenting opinion of Gibbs CJ in an Australian case concerning the *Racial Discrimination Act 1975* (Cth). That statute was enacted by the Federal Parliament to give effect to the *International Convention on the Elimination of All Forms of Racial Discrimination*. Australia is a party to that

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14 For example, Australia, Canada, India, Malaysia, Nigeria, Tanzania etc.

15 *Attorney General for Canada v Attorney General for Ontario* [1937] AC 326 at 348 (PC).

16 (1975) 135 CLR 337 at 445-6.



Convention. Gibbs CJ (who on this issue was joined by Wilson and Aickin JJ) expressed the anxiety that, if a new federal law on racial discrimination could be enacted based upon such a treaty - simply because it was now a common concern of the community of nations - this would intrude the federal legislature in Australia into areas which, until then, had traditionally been regarded as areas of State lawmaking. Such an approach would allow "[n]o effective safeguard against the destruction of the federal character of the Constitution".<sup>17</sup>

The majority of the High Court of Australia held otherwise. It upheld the validity of the *Racial Discrimination Act*. But the controversy posed by the minority opinion is important in the present context. In federal states at least it must be given weight. The question it poses is this: if judges by techniques of the common law introduce principles of an international treaty or of other international human rights norms into their decision-making, may they not thereby obscure the respective lawmaking competence of the federal and state authorities? An international human rights norm may have been accepted by the Federal authority. But this may import a principle which is not congenial to the State lawmakers. In these circumstances, should the judge simply wait until the local lawmaker, within constitutional competence, has enacted law on the subject? Should the judge wait until the federal lawmaker has enacted a constitutionally valid law on the subject? Or is the judge authorised to cut through this dilatory procedure and to accept the principle for the purpose of interpreting ambiguous statutes or developing local common law?

These are not entirely academic questions, at least in Australia. There has been a large debate over more than a decade concerning whether there should be adopted a statutory or constitutional Bill of Rights such as is now common in most parts of the world and many parts of the Commonwealth. The Australian Constitution when enacted in 1901 included relatively few such rights. Proposals to incorporate them have not found popular favour. A referendum in 1988, to consider a proposal for incorporating provisions on freedom of religion and for just compensation for compulsory acquisitions of property in some circumstances, failed overwhelmingly. Many people in Australia believe that Bills of Rights are undemocratic and that assertion and elaboration of rights is a matter for the democratic Parliament not for unelected judges. This is not an eccentric view. Whether one accepts it or not, it has legitimate intellectual support including amongst lawyers.<sup>18</sup>

It is in the context of such debates that differences arise concerning the legitimacy of judges picking up internationally states human rights norms and

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17 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 200 (Gibbs CJ).

18 AC Hutchinson and A Petter "Private Rights - Public Wrongs: The Liberal Lie of the Charter" (1988) 38 *University of Toronto Law Journal* 298.

incorporating them in domestic law. If the people will not accept a Bill of Rights at an open referendum, do judges have the entitlement to adopt them by an indirect method, from statements in international instruments?

### III. INTERNATIONAL LAW IS A SOURCE OF LAW

Judges do make law. They make law just as surely as the Executive and the Legislature make law. The foregoing concerns are reasons for judges, in referring to international human rights or other legal norms, to attend carefully to the dangers which may exist in indiscriminately picking up a provision of an international instrument and applying it as if it had the authority of local law:

- i. Unless specifically implemented by domestic lawmaking procedures the international norm is not, of itself, 'part of' domestic law;
- ii. The international instrument may have been negotiated by the Executive Government and may never be enacted as part of the local law either because:
  - (a) The Executive Government which ratified it does not command, upon the subject matter, the support of the Legislature to secure the passage of a local law on the same subject; or
  - (b) In a federal state, the Executive which negotiated the treaty may for legal reasons, political reasons or conventions concerning the distribution of power within the Federation not have the authority or desire to translate the norms of the international instrument into authentic and enforceable rules having domestic legal authority; or
- iii. The subject matter of the international instrument may be highly controversial and upon it there may be strongly held differences of view in the local community. In such an event the judge, whether in construing ambiguous legislation or stating and developing the common law, may do well to leave domestic implementation of the international norm to the ordinary process of lawmaking in the legislative branch of government.

These cautions having been stated, they do not provide a reason to doubt the legitimacy of the *Bangalore Principles*. It cannot now be questioned that international law is one of the 'sources' of domestic law. So much was said as

long ago as 1935 by Professor JL Brierly.<sup>19</sup> It has been accepted in Australia by the High Court of Australia.<sup>20</sup> In the time of the British Empire, the Privy Council accepted that domestic courts would, in some circumstances at least, bring the common law into accord with the principles of international law.<sup>21</sup>

Commenting on the advice of the Privy Council in the case just mentioned, the biographer of Lord Atkin (who, it is noted, delivered the judgment of the Board) wrote:<sup>22</sup>

Lord Atkin's advice in this case is remarkable for its erudition. Because the subject matter was international law, the relevant rule neither needs nor could be proved in the same way as a rule of foreign law. The range of inquiry is necessarily wider; and here there is the far-ranging discussion of legal writings. Atkin placed most reliance on the decision of Chief Justice Marshall in *Schooner Exchange v M'Fadden* 7 Cranch 116, a judgment which he said 'has illuminated the jurisprudence of the world'. But he also made reference to evident enjoyment of the debate which took place in 1875 on the treatment of fugitive slaves and which was started by a letter to *The Times* from the Whewell Professor of International Law. ... In the course of his judgment Atkin said:

It must always be remembered that, so far, at any rate, as the courts of this country are concerned, international law has no validity save insofar as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules upon our own code of substantive law or procedure. The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and having found it, they treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statute or fully declared by their tribunals.

Atkin's statement provoked a number of fears on the part of academic writers at the time.<sup>23</sup> However, I agree with Atkin's biographer that the commentators misunderstood what His Lordship said. What he said is guidance for us today in approaching the *Bangalore Principles*. The rules are simple:

1. International law (whether human rights norms or otherwise) is not, as such, part of domestic law in most common law countries;
2. It does not become part of such law until Parliament so enacts or the judges (as another source of lawmaking) declare the norms thereby established to be part of domestic law;

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19 JL Brierly (1935) 51 *LQR* 31.

20 *Chow Hung Ching* note 12 *supra* at 477.

21 See *Chung Chi Cheung v The King* [1939] AC 160 at 168 (PC).

22 GG Lewis *Lord Atkin* (1983) at 97 f.

23 For example H Lauterpacht *International Law: Collected Papers* (vol 2), *The Law of Peace* at 560.

3. 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;
4. 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 seek guidance in the general principles of international law, as accepted by the community of nations; and
5. From this source of material, the judge may ascertain what the relevant rule is. It is the action of the judge, incorporating that rule into domestic law, which makes it part of domestic law.

There is nothing revolutionary in this, as a reference to Lord Atkin's judgment demonstrates. It is a well established principle of English law which most Commonwealth countries have inherited and will follow. But it is an approach which takes on an urgency and greater significance in the world today.

In 1936 in the High Court of Australia, Evatt and McTiernan JJ wrote of the growing number of instances and subject matters which were, even then, properly the subject of negotiation amongst countries and which resulted in international legal norms:<sup>24</sup>

[I]t is a consequence of the closer connection between the nations of the world (which has been partly brought about by the modern revolutions in communication) and of the recognition by the nations of a common interest in many matters affecting the social welfare of their peoples and of the necessity of co-operation among them in dealing with such matters, that it is no longer possible to assert that there is any subject matter which must necessarily be excluded from the list of possible subjects of international negotiation, international dispute or international agreement.

If this was true in 1936 how much more true is it today? Not only have the revolutions in communication proceeded apace to reduce distance and to enhance the numerous features of the global village, but we have, since 1936, seen the destruction during the Second World War, the terrible evidence of organised inhumanity during the Holocaust, the post-War dismantlement of the colonial empires, the growth of the United Nations Organisation and numerous international and regional agencies, the advent of the special peril of nuclear fission, the urgent necessity of arms control over weapons of every kind and now the end of the Cold War and dismantlement of the Soviet Empire. The wrongs of racial discrimination, apartheid and other forms of discrimination against people on the basis of immutable characteristics endanger the harmony of the international community. They also do offence to individual human rights. They are therefore of legitimate

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24. *The King v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 680-1.

concern to all civilised people. That includes judges. Judges must do their part, in a creative but proper way, to push forward the gradual process of internationalisation which the developments just mentioned clearly necessitate. This is scarcely likely to imperil the sovereignty of nations and the legitimate diversity of communities and cultures throughout the world. But it is likely to enhance, in appropriate areas, the common approach of judges in many lands to problems having an international character. Human rights represent one such field of endeavour. This is so because many cases coming before courts in every country raise basic questions of human rights. They are therefore the legitimate concern of lawyers and judges.

#### IV. EARLY AUSTRALIAN CASES ON INTERNATIONAL NORMS

Keeping the problems which have been mentioned in mind, it is appropriate for judges and lawyers today to have close at hand the leading international instruments on human rights norms. These include the *Universal Declaration of Human Rights*, the *International Covenant on Economic, Social and Cultural Rights*, the *International Covenant on Civil and Political Rights* and the *International Convention for the Elimination of All Forms of Racial Discrimination*. There are many other such instruments.

In Australia the process of making reference to these instruments, in the course of domestic decision-making, really began in the last decade. Leadership was given by Murphy J of the High Court of Australia. A number of his decisions can be cited as illustrations.

In *Dowal v Murray & Anor*<sup>25</sup> Murphy J came to a conclusion about the constitutionality of a provision relating to custody of children by making reference to two treaties to which Australia was a party. One, the *International Covenant on Economic, Social and Cultural Rights*, provides for the recognition of special measures for the protection and assistance of children and young persons without any discrimination for reasons of parentage. The other, the *International Covenant on Civil and Political Rights* contains in article 24 a provision relevant to the rights of the child.

In *McInnis v The Queen*<sup>26</sup> Murphy J wrote a powerful dissent concerning the right of a person charged with a serious criminal offence to have legal assistance at his trial. In his judgment he referred to the provisions of the *International Covenant on Civil and Political Rights*, article 14(3).<sup>27</sup> This provided the

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25 (1978) 143 CLR 410.

26 (1979) 143 CLR 575.

27 *Ibid* at 588.

intellectual setting in which he sought to place an understanding of the way in which the common law of Australia should be understood and should develop. In 1992 the High Court over-ruled *McInnis* as will be shown below.<sup>28</sup> Interestingly, the Appellate Division of the Supreme Court of South Africa recently declined an opportunity to fashion a principle to guarantee a legal right to counsel in serious criminal charges in that country.<sup>29</sup>

In *Koowarta v Bjelke-Petersen*,<sup>30</sup> Murphy J examined the *Racial Discrimination Act 1975* (Cth) in the context of the "concerted international action" taken after the Second World War to combat racial discrimination. He traced this action through the United Nations *Charter* of 1945, the work on the Commission on Human Rights established by the United Nations in 1946, the *Universal Declaration of Human Rights* adopted in 1948 by the General Assembly and the International Covenants. He asserted that an understanding of the "external affairs" power under the Australian Constitution could only be derived by seeing Australia today in this modern context of international developments and international agencies capable of lawmaking on a global scale.

In the *Tasmanian Dam* case<sup>31</sup> in 1985 the members of the High Court of Australia had to consider the operation in Australian law of a UNESCO Convention. It was tolerably clear by the time of that decision, that a majority in Australia's highest court had come to recognise the importance of ensuring that the Australian Federal Parliament had the power to enact legislation on matters which had become legitimate subjects of international concern.

The procedure of referring to international legal norms, particularly in the field of human rights, is gathering momentum in many countries of the common law. In 1987, courts in England, Australia and several other jurisdictions were confronted with the proceedings by which the Attorney General of England and Wales sought to restrain the publication of the book *Spycatcher*. I participated in a decision of the New South Wales Court of Appeal refusing that relief.<sup>32</sup> Our decision was later confirmed on appeal by the High Court of Australia. But neither in the High Court nor in the Court of Appeal was the argument presented in terms of the conflict between basic principles about freedom of speech and freedom of the press (on the one hand) and duties of confidentiality and national security (on the other). Yet in the English courts the fundamental principles established by the *European*

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28 See *Dietrich v The Queen* (1992) 67 ALJR 1.

29 See *S v Rudman & Anor* 1992 (1) SA 343 (AD). In Canada the right to counsel has long been ensured by decisions of the Supreme Court. See eg *Vescio v Rex* [1948] SCR 139 at 152 f.

30 (1982) 153 CLR 168.

31 *Commonwealth of Australia v Tasmania*. (The Tasmanian Dam Case) (1983) 158 CLR 1.

32 *Attorney General for the United Kingdom v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86 (CA) confirmed (1988) 165 CLR 30.

*Convention on Human Rights* (to which the United Kingdom is a party) were in the forefront of the arguments of counsel and the reasoning of the judges.

## V. AUSTRALIAN EXPERIENCE POST-BANGALORE

In Australia, since 1988, further steps towards acceptance of the *Bangalore Principles* have been taken, cautiously but with growing assurance. The caution may partly be explained by the federal nature of the Australian Constitution and the limited power which, it has long been assumed, the Federal Executive and Federal Legislature have over international treaties and participation in international lawmaking where this would conflict with the 'basic structure' of the Australian Constitution. That assumption must itself now be reconsidered in the light of recent decisions of the High Court to some of which I have referred<sup>33</sup>.

Other Justices of the High Court of Australia began to follow Justice Murphy's lead. In *J v Lieschke*,<sup>34</sup> Deane J had to consider the right of a parent to participate in proceedings which affected the custody of the child. He denied that the interests of the parents in such proceedings were merely indirect or derivative in nature.<sup>35</sup>

To the contrary, such proceedings directly concern and place in jeopardy the ordinary and primary rights and authority of parents as the natural guardians of an infant child. True it is that the rights and authority of parents have been described as 'often illusory' and have been correctly compared to the rights and authority of a trustee (see eg The Report by Justice, the British Section of the International Commission of Jurists, *Parental Rights and Duties and Custody Suits* (1975) pp 6-7). ...Regardless, however, of whether the rationale of the prima facie rights and authority of the parents is expressed in terms of a trust for the benefit of the child, in terms of the right of both parents and child to the integrity of family life or in terms of the natural instincts and functions of an adult human being, those rights and authority have been properly recognised as fundamental (see eg *Universal Declaration of Human Rights*, Arts. 12, 16, 25(2) and 26(3) and the discussion (of decisions of the Supreme court of the United States) in *Roe v Conn* 417 F Supp 769 (1976) and *Alsager v District Court of Polk Country, Iowa* 406 F Supp 10 (1975)). They have deep roots in the common law.

Deriving authority for fundamental principles (both of the common law and of international human rights norms) by reference to international treaties is now increasingly occurring in the Australian courts.

In *Daemar v Industrial Commission of New South Wales & Ors*<sup>36</sup> a question arose before me as to whether the *Bankruptcy Act* 1966 (Cth) provided that

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33 See eg *Koowarta* note 17 *supra*.

34 (1986-7) 162 CLR 447.

35 *Ibid* at 463.

36 (1988) 12 NSWLR 45; 79 ALR 591 (CA).

proceedings for the vindication of a public right were stayed during the bankruptcy of the petitioner. There was no doubt that Mr Daemar had been made bankrupt. He wished to bring proceedings, prerogative in nature, against a court of limited jurisdiction which had made an order against him. For default of compliance with that order (which he wished to challenge) he had been made bankrupt. He asserted that he should be entitled to argue the point concerning the jurisdiction of the Court, notwithstanding his supervising bankruptcy. The Court held that the provision of the Federal *Bankruptcy Act* providing for a stay in the event of bankruptcy was unambiguous. In the course of my judgment, by reference to the *International Covenant on Civil and Political Rights*, I expressed the opinion that, were the statute not unambiguous, the importance of a right of access to the courts would have suggested a construction that limited the effect of the statutory stay.<sup>37</sup>

The importance of an action for relief prerogative in nature for the vindication of duties imposed by law, the observance of which this Court supervises, needs no elaboration. It is obviously a serious matter to deprive any person of the important civil right of access to the courts, especially one might say where the public law is invoked and where an allegation is made that public officials have not performed their legal duties or have gone beyond their legal powers. This starting point in the approach by a court to the construction of the Act derives reinforcement from the *International Covenant on Civil and Political Rights*: see articles 14.1 and 17. Australia has ratified that covenant without relevant reservations. The entitlement of persons with a relevant interest to invoke the protection of the courts to ensure compliance with the law is so fundamental that the Act would be interpreted, whenever it would be consonant with its language, so as not to deprive a person of that entitlement.

The other judges of the Court did not refer to the *International Covenant*. But I took it as a touchstone for indicating the basic matters of approach which should be taken by the Court in tackling the construction of the statute. Had there been any ambiguity, the *Covenant* provisions would have encouraged me (as would the equivalent rules of construction of the common law) to adopt an interpretation of the *Bankruptcy Act* which did not deprive the individual of the right to challenge in the Court, the compliance of the Act complained of with the law.

In *S and M Motor Repairs Pty Limited & Ors v Caltex Oil (Australia) Pty Limited & Anor*<sup>38</sup> a question arose as to whether a recently appointed judge should have disqualified himself for reasonable apprehension of bias. It was discovered after the case was underway that the judge had, whilst a barrister two years earlier, been for many years on a retainer for the companies closely associated with the plaintiff. That company was seeking various remedies, including punishment for contempt against a subcontractor who was alleged to have breached a contract and

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<sup>37</sup> *Ibid* at 53; 599.

<sup>38</sup> (1988) 12 NSWLR 358 (CA).



a court order based on it. The judge was asked to stand aside. He declined to do so. The subcontractor was convicted of contempt. He appealed. The case raised important questions concerning judicial disqualification for the appearance of bias.

In the course of giving my minority opinion, to the effect that the judge ought to have disqualified himself in the circumstances, I referred to the importance of having a court manifestly independent and impartial:<sup>39</sup>

It would be tedious to elaborate the antiquity and universality of the principle of manifest independence in the judiciary. It is axiomatic. It goes with the very name of judge. It appears in the oldest books of the Bible: see eg *Exodus* 18:13-26. It is discussed by Plato in his *Apology*. It is elaborated by Aristotle in *The Rhetoric*, Book 1, Chapter 1. It is examined by Thomas Aquinas in Pt 1 of the Second Part (Q 105, AA2) of *Summa Theologica*. It is the topic of lambent prose in the *Federalist Papers* ... In modern times it has been recognised in numerous national and international statements of human rights. For example, it is accepted in Article 14.1 of the *International Covenant on Civil and Political Rights* to which Australia is a party. That article says, relevantly:

14.1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent *independent and impartial* tribunal established by law.

Again, the *International Covenant* became for me a starting point in the statement of principles which placed in context the dispute between the parties. It provided an international setting for the issues involved in the dispute.

In *Jago v District Court of New South Wales & Ors*<sup>40</sup> the question arose as to whether, under the common law of the State, a person accused of a criminal charge had a legally enforceable right to a speedy trial. There had been a delay of many years in bringing the accused to trial and he sought a permanent stay of proceedings. A majority of the Court (Samuels JA and myself) held that whilst there was a right to a fair trial, there was no right, as such, under statute or common law to a speedy trial. Speed was however an attribute of fairness. McHugh JA (now a Justice of the High Court of Australia) held that the common law did provide a right to speedy trial. Both Samuels JA and I referred to provisions of the *International Covenant on Civil and Political Rights*.

A great deal of the time of the Court in *Jago* was taken exploring ancient legal procedures in England back to the reign of King Henry II. In independent Australia, in 1988, this seemed to me a somewhat unrewarding search. I wrote:<sup>41</sup>

39 *Ibid* at 360-361. See also *Australian National Industries Ltd v Spedley Securities Ltd (In Liq) & Ors* (1992) 26 NSWLR 411 (CA) at 418.

40 (1988) 12 NSWLR 558 (CA).

41 *Ibid* at 569-70.

I regard it to be at least as relevant to search for the common law of Australia applicable in this State with the guidance of a relevant instrument of international law to which this country has recently subscribed, as by reference to disputable antiquarian research concerning the procedures which may or may not have been adapted by the itinerant justices in eyre in parts of England in the reign of King Henry II. Our laws and our liberties have been inherited in large part from England. If an English or Imperial statute still operate in this State, we must give effect to it to the extent provided by the *Imperial Acts Application Act 1969* ...But where the inherited common law is uncertain, Australian judges, after the *Australia Act 1986* (Cth) at least, do well to look for more reliable and modern sources for the statement and development of the common law. One such reference point may be an international treaty which Australia has ratified and which now states international law.

The *International Covenant on Civil and Political Rights* contains in Art 14.3 the following provisions:

- 14.3 In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees in full equality:
- (a) To be informed promptly...of the charge against him;
  - (b) To be tried without undue delay.

If the right to be tried without undue delay is appropriately safeguarded, a denial of the asserted "right" to a "speedy trial" would not bring a court's decision into conflict with the standard accepted by Australia upon the ratification of the Covenant. ...Australia appended a 'federal statement' to the ratification of the Covenant. This may affect the direct applicability of Article 14 to a criminal trial in this State. But it does not lessen the authority of the Covenant as a relevant statement of internationally accepted principles which Australia has also accepted, by ratification.

Samuels JA, on the other hand, conducted a careful analysis of the history of English law and procedures from which Australian law is derived. So far as the *Covenant* was concerned, his Honour was more cautious:<sup>42</sup>

I appreciate that the right to speedy trial, or to trial within a reasonable time, has now been entrenched by statute in many jurisdictions in both the common law and Romanesque systems. Moreover, there are international covenants and Conventions which prescribe such rights. For example, the *International Covenant on Civil and Political Rights* (to which Australia, with certain reservations and declarations, is a party), provides in Art 14(3)(c) that in the determination of any criminal charge against him everyone shall be entitled 'to be tried without undue delay'. The Covenant is not part of the law of Australia. Accession to a treaty or international covenant or declaration does not adopt the instrument into municipal law in the absence of express stipulation, such as that which may be derived from the *Racial Discrimination Act 1975* (Cth)... See the remarks of Lord Denning MR in *R v Secretary of State for the Home Department; Ex parte Bhajan Singh* [1976] QB 198 at 207... It was suggested nonetheless that international covenants of this kind might provide better guidance in a search for the principles of the common law than 800 hundred years of legal history; and reliance was placed upon what

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42 *Ibid* at 580-2.

Scarman LJ, as he then was, said in *R v Secretary of State for the Home Department; Ex parte Phansopkar* [1976] QB 606 at 626. However, the statement does not seem to me to support the proposition and has, in any event, been roundly criticised... Certainly, if the problem offers a solution of choice, there being no clear rule of common law, or of statutory ambiguity, I appreciate that considerations of an international convention may be of assistance. It would be more apt in the case of ambiguity although in either case it would be necessary to bear in mind not only the difficulties mentioned by Lord Denning but the effect of discrepancies in legal culture. In most cases I would regard the normative traditions of the common law as a surer foundation for development.

But granted that a convention may suggest the form of a rational and adequate solution it cannot explain whether a particular right was or was not an incident of the common law. That is the question in the present case.

The decision of the Court of Appeal was affirmed by the High Court of Australia, confirming the common law right to a fair trial. In that Court no reference was made to the international human rights instruments.<sup>43</sup>

Another case in which the *International Covenant* was considered was also one in which Samuels JA sat with me and with Clarke JA in *Gradidge v Grace Brothers Pty Limited*.<sup>44</sup> That was a case where a judge had ordered the interpreter of a deaf mute to cease interpretation of exchanges between the judge and counsel. The mute remained in court and was the applicant in workers' compensation proceedings. The judge refused to proceed when the interpreter declined to cease interpretation of the proceedings. The Court of Appeal unanimously held that the judge had erred. In doing so both Samuels JA and I referred to the *International Covenant on Civil and Political Rights*. I mentioned in particular, in criticising a certain earlier decision in Australia about the entitlement to an interpreter, the provisions of Articles 14.1, 14.3(a) and (f). I stated that those provisions are now part of customary international law and that it was desirable that "the [Australian] common law should, so far as possible, be in harmony with such provisions".

Samuels JA said this:<sup>45</sup>

For present purposes it is essential to balance what procedural fairness requires in circumstances such as this against the necessity to permit a trial judge to retain the ultimate command of order and decorum in his or her court. It seems to me that the principle which applies is clear enough: It must be that any party who is unable (for what want of some physical capacity or for lack of knowledge of the language of the court) to understand what is happening must, by the use of an interpreter, be placed in the position which he or she would be if those defects did not exist. The task of the interpreter in short is to remove any barriers which prevent understanding or communication... The principle to which I have referred so far as criminal proceedings are concerned is acknowledged by the *International Covenant*

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43 *Jago v District Court of New South Wales* (1989) 168 CLR 23.

44 (1988) 93 FLR 414 (CA).

45 *Ibid* at 425-6.

on *Civil and Political Rights*, Article 14, which is now to be found as part of Schedule 2 to the *Human Rights and Equal Opportunity Commission Act* (1986) (Cth).

A still further recent example of the use of the *International Covenant* is *Cachia v Hanes & Anor*.<sup>46</sup> A litigant in person had successfully appeared for himself in the court below to defend, in a number of levels of the court hierarchy, proceedings brought against him by his former solicitors. Various orders for 'costs' were made in his favour. Invoking such English decisions as *London Scottish Benefit Society v Chorley*<sup>47</sup> and *Buckland v Watts*,<sup>48</sup> the solicitors urged that the litigant in person should only recover expenses which were strictly out of pocket. He should be denied the loss of income in attending court because this was something which only a qualified lawyer could charge for. The argument succeeded with a majority of the Court (Clarke and Handley JJA). But I rejected it.

I preferred the view that a litigant in person could recover all costs and expenses, necessarily and properly incurred to represent himself in court. I derived support for my view from (amongst other things) the *International Covenant on Civil and Political Rights*, Art 14.1 That article provides that all persons "shall be equal before the courts and tribunals". I suggested that from this fundamental principle should be derived the principle that litigants should not suffer discrimination because they are not represented by lawyers. Equal access to the courts should be a reality and not a shibboleth. The case has been accepted for appeal by the High Court of Australia.

In 1991, a majority of the Court of Appeal upheld an application for a stay of proceedings in a disciplinary matter involving three medical practitioners. These practitioners had earlier secured a permanent stay of proceedings before the disciplinary tribunal on the basis of gross delays in the prosecution of the complaints.<sup>49</sup> Five years later, following a Royal Commission and public and political pressure, an attempt was made to revive the prosecution upon reworded particulars. The majority of the Court (Gleeson CJ and myself) maintained the order for a stay. We did so upon the basis that a revival of the case would be unfairly and unjustifiably oppressive. In the course of giving my reasons, I referred to a basic principle of the common law<sup>50</sup> that a person should not suffer double jeopardy. I went on:<sup>51</sup>

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46 (1991) 23 NSWLR 304.

47 (1884) LR 13 QBD 872.

48 [1970] 1 QB 27 (CA).

49 *Herron v McGregor* (1986) 6 NSWLR 246 (CA).

50 See eg *Green v United States* 355 US 184, 187 (1957) (USSC).

51 *Gill v Walton* (1991) 25 NSWLR 190 (CA) at 206 f.

...The European Court of Human Rights has stressed, as this Court also has, the importance of promptness in dealing with allegations of professional misconduct: see *Konig v Federal Republic of German* (1978) 2 EHRR 170; cf *The New South Wales Bar Association v Maddocks* (1988) NSWJB 143. Protection against double jeopardy is not only a fundamental feature of our legal system, reflected in the many circumstances collected in my reasons in *Cooke v Purcell* (1988) 14 NSWLR 51, 56 ff. It is also a feature of basic human rights found in the *International Covenant on Civil and Political Rights*, which Australia has ratified: see eg Article 14.7 Although expressed in the Covenant in terms of criminal charges, the principle applies equally, I believe, to an inquiry into the right of a person to continue the practice of his or her profession, the denial of which would have grave consequences for that person's reputation and livelihood.

Familiarity with basic principles of human rights (and the jurisprudence which has collected around their elaboration) will arm the judge with ready means to respond, with assurance and in a thoroughly professional way, to perceived injustice. It will provide the judge with a body of international principle by which to explain the reasons in a particular case.

Another recent decision of the Court of Appeal provides a further illustration of the trend. In *Arthur Stanley Smith v The Queen*<sup>52</sup> a prisoner had refused to take the oath in the trial of co-accused. He had appealed against his earlier conviction and sentence of life imprisonment, imposed after a separation trial upon a charge of murder. He was told that he could object to particular questions but not to taking the oath. Upon his persistent refusal, for suggested fear of self-incrimination, he was charged with and convicted of contempt and fined \$60,000. It was proved that he was a bankrupt, an invalid pensioner, had no assets and that his only income was \$12 per week as a gaol sweeper. The majority of the Court (Mahoney and Meagher JJA) upheld the sentence. But for me, it was an "excessive fine" forbidden by the *Bill of Rights* 1688 which still applies in Australian jurisdictions as part of the constitutional legislation inherited by Australia from England.<sup>53</sup>

In explaining my opinion, I was able to call upon the large body of jurisprudence which has gathered around the 8th Amendment to the Constitution of the United States of America, prohibiting excessive fines and cruel and unusual punishments. Reference was made to the laws of other countries in which similar human rights prohibitions on excessive fines and punishments exist. It is, after all, basic that a person should not be punished with a fine that he or she has absolutely no chance of every paying. The basal feeling that to fine a \$12 a week sweeper \$60,000 is absurd, finds its legal exposition by reference to applicable international human rights law. But I will not re-argue my dissenting opinion here. I will leave it to the law reviews and to other writers in them.

52 (1991) 25 NSWLR 1 (CA) at 15. See also *Carroll v Mijovich* (1992) 58 A Crim R 243 (CA).

53 In New South Wales by virtue of the *Imperial Acts Application Act* 1969, s 6, Schedule 2.

## VI. THE BREAKTHROUGH: THE *MABO* DECISION

For a time, I must confess, I felt somewhat lonely in the prosecution of the Bangalore cause in the Australian courts. In those cases in which I referred to international human rights jurisprudence, generally (but not always) the colleagues in my own Court reached their own (sometimes similar) conclusions by a different and, it should be said, more orthodox route. They found no need for assistance from the international principles. Often, they derived assistance, rather, from the statement of the same or a like principle in an English or Australian judicial authority. Unsurprisingly, the principles themselves were often similar to the point of identity. The question was thus the extent to which the technique of judicial decision-making rendered it acceptable or necessary to go beyond the chance existence of a statement of the relevant principle in the readily available casebooks, to find similar statements of similar (or identical) principles in the norms of international jurisprudence.

With the diligence with which St Paul wrote his many Epistles (I hope the reader will forgive this mild blasphemy) I continued to write my judgments invoking, where I thought it apt, the international jurisprudence relevant to the issue in hand. I did not confine myself to the *International Covenant*. Thus in *Ainsworth v Hanrahan*<sup>54</sup> my Court had before it the question whether a contempt of court was committed by a party who, in other proceedings, had received verified answers to interrogatories and had disclosed those verified answers to a third party for purposes unconnected with the proceedings for which they were provided. In deriving the applicable principle, I referred to the House of Lords decision in *Harman v Secretary of State for the Home Department*.<sup>55</sup> I expressed a respectful preference for the dissenting speech of Lord Scarman. To reach my conclusion I referred to the international human rights principle contained in the Guidelines on Privacy of the Organisation for Economic Cooperation and Development (OECD). Those Guidelines, which Australia has endorsed, and in Federal collections has enacted in the *Privacy Act 1988* (Cth) contain a "Purpose Specification Principle" and a "Use Limitation Principle" which supported the contention that a contempt had been committed. To use personal information which was not yet evidence in open court, for a purpose different for that for which it was provided under compulsion, was a breach of the basic principles. My judgment had the concurrence of Samuels and Handley JJA.

By about 1991 the tide of judicial opinion in Australia began to change. One signal of the change came with the appointment of a former Justice of the High

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54 (1991) 25 NSWLR 155 (CA).

55 [1983] 1 AC 280.

Court of Australia (Wilson J) to the influential post of President of the Australian Human Rights and Equal Opportunity Commission. In his new post, newly retired from the High Court, Sir Ronald Wilson expressed views supportive of the use of international jurisprudence in Australian curial decision-making:<sup>56</sup>

I suggest there is more indirect, but nevertheless important, impact that must be taken into account... [I]t is increasingly recognised that in appropriate cases international law may be of assistance notwithstanding that it has not been incorporated into municipal law. In cases involving statutory interpretation, where words to be interpreted are ambiguous or lacking in completeness, it will be right for the Court to consider whether the case is one where the search for the legislative purpose will be furthered by the assumption that Parliament would have intended its enactment to have been interpreted consistently with internal law...

In the Family Court of Australia, Chief Justice Nicholson (in a dissent later upheld on different grounds in the High Court of Australia) recanted an earlier adherence on his part to the "classical" or "statist" view of the role of international law in Australian domestic decision-making.<sup>57</sup> In *Re Marion*<sup>58</sup> Nicholson CJ revised this opinion. He concluded that the passage of the *Federal Human Rights and Equal Opportunity Commission Act*, together with its schedules including the *International Covenant on Civil and Political Rights*, constituted:

...a specific recognition by the parliament of the existence of the human rights conferred by the various instruments within Australia and, that it is strongly arguable that they imply an application of the relevant instruments in Australia.

This decision was appealed to the High Court of Australia. That Court's decision in the appeal<sup>59</sup> cast no new light on the duty of the Australian courts. But it did not contradict the adoption of the *Bangalore Principles*.

Then, in June 1992, came an important decision of Australia's highest court. In *Mabo v Queensland*,<sup>60</sup> the Court reversed the long-held understanding of the Australian common law. It decided that the form of native title of the Australian Aboriginals was recognised by the common law. In cases where it had not been lawfully extinguished, such title was protected, to the benefit of indigenous inhabitants. With a lone dissident (Dawson J) the Court held that, except for the operation of Crown leases, the land entitlement of the inhabitants of the Murray Islands in the Torres Strait north of Queensland was preserved as native title under the law of Queensland. The doctrine of *terra nullius* was exploded.

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56 RD Wilson "The Domestic Impact of International Human Rights Law", Address to the Australian Academy of Forensic Sciences, 29 October 1991 in (1992) 24 *Australian Journal of Forensic Science* 57.

57 *Re Jane* (1988) 12 Fam LR 662.

58 (1990) 14 Fam LR 427 at 449.

59 *Secretary, Department of Health and Community Services (NT) v JWB&SMB* (1992) 66 ALJR 300.

60 (1992) 175 CLR 1. The importance of the point has been drawn to the attention of the Australian legal profession in the leading editorial in (1992) 66 *ALJ* 551 at 552 (September 1992).

For present purposes it is sufficient to call attention to a remarkable passage in the judgement of Brennan J. Writing with the concurrence of Mason CJ and McHugh J, Brennan J said this:<sup>61</sup>

Whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the *Optional Protocol* to the *International Covenant on Civil and Political Rights* brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. *The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.* 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. (emphasis added)

This passage, and indeed the holding of the High Court in *Mabo* represented an extremely bold step. It pointed the way to the future development of the Australian common law in harmony with developing principles of international law, just as the *Bangalore Principles* had suggested.

Since *Mabo* I have taken the occasion, in a number of cases (I must confess with a vigour renewed by the *Mabo* decision) to point to the significance of international principles for the resolution of the case in hand.

In *Regina v Greer*<sup>62</sup> the question which arose concerned the rights of an appellant prisoner after he had dismissed two competent lawyers provided to him by the Legal Aid Commission. After his conviction by the jury, he appealed contending a denial of the facility of counsel. In my reasons I acknowledged the importance of that facility to the just defence of a person, particularly in a serious criminal charge. I mentioned specifically Article (14)(3) of the *International Covenant on Civil and Political Rights*. Para (d) of that Article reserves to a person the right:

... to defend himself in person or through legal assistance of his own choosing.

On the facts, it was found that Mr Greer had chosen to defend himself in person. But the starting point for consideration of his complaint against his trial was a reflection upon what the fundamental principles of the *International Covenant*

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61 *Ibid* at 422.

62 (1992) 62 A Crim R 442.



required. As *Mabo* acknowledges, those principles will increasingly influence Australian law, precisely because those disaffected by local decisions can now bring their complaints to the United Nations Human Rights Committee, after exhausting all their domestic remedies.

In *Regina v Astill*<sup>63</sup> the appellant secured a retrial after a judge excluded evidence of telephone conversations which were, upon one view, exculpatory. The judge had excluded the conversations upon the ground that they were hearsay evidence. In the course of my reasons, I referred to the provisions of the *International Covenant of Civil and Political Rights* by which a person accused of a criminal charge is entitled:

...To examine, or have examined, the witnesses against him...<sup>64</sup>

The equivalent provision of the *European Convention on Human Rights*<sup>65</sup> had been held by the European Court of Human Rights to require that an accused person should have the facility to question witnesses whose evidence might be exculpatory.<sup>66</sup> By reference both to international jurisprudence and local law the Court unanimously concluded that the accused should have had the opportunity to question witnesses upon the fact and contents of telephone conversations which allegedly took place at about the time of the offence.

In *Director of Public Prosecutions for the Commonwealth v Saxon*<sup>67</sup> an ambiguity arose in the *Proceeds of Crime Act 1987* (Cth) providing for the confiscation of the suspected profits of crime. With a reference to *Mabo* and to *Derbyshire County Council* I suggested (with the concurrence of Priestley JA) that the statute should be construed to exempt property needed to allow the accused person to defend himself by legal assistance of his own choosing, promised by Article 14.3(d) of the *International Covenant*.

In the course of my reasons I said:<sup>68</sup>

[The accused] should not be deprived of the use of his property for the proper defence of [the] proceedings unless the Act obliges such a course. If there is an ambiguity in the Act, it should be construed in such a way as to be compatible with the fundamental rights which are guaranteed by the common law, including as that law is illuminated by international principles of human rights.

After referring to Article 14 of the *International Covenant*, I observed:

Our law can readily over-ride such fundamental principles. But it must do so clearly. Where it does not, our courts will continue to impute to Parliament an

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63 (1992) 63 A Crim R 148.

64 Article 14.3(e).

65 Article 6.

66 *Unterpertinger v Austria* (1/1985/87/134).

67 (1992) 28 NSWLR 263.

68 *Ibid* at 18 ff.

intention to respect such fundamental rights because they are enshrined in the common law for centuries and now collected in fundamental principles which the Parliament which made the *Proceeds of Crime Act* has itself acknowledged.

In the *Liquor Administration Board of New South Wales & Anor v Macquarie Bank Limited & Ors*<sup>69</sup> the Court of Appeal was required to construe an ambiguous provision in a statute permitting regulations to be made "for and with respect to the time for payment of" liquor licence fees and for "penalties for late payment... or cancellation of a licence". Purportedly in pursuance of that power, a regulation was made providing for automatic cancellation of a licence following non-payment of the fee and the lapse of specified time. No provision was made for the holder of this valuable property interest to be first heard. No provision was made for excuses or explanations which could entirely justify the late payment. No provision was made for revival of the licence where explanation was given. All members of the Court of Appeal held, affirming the primary judge, that the regulation was beyond power. In reaching my conclusion, I referred to a number of rules which assist in determining such questions. Amongst them, I reverted to the Bangalore idea.<sup>70</sup>

Latterly, there has been an important, and in my view, beneficial development in the construction of ambiguous legislation in Australia. It is now increasingly accepted that, where legislation is ambiguous, meaning may be given to it keeping closely in mind any relevant principles of fundamental human rights law. This is a rule now accepted in Australia. ...In the present case, it is appropriate to recall that article 17(2) of the *Universal Declaration of Human Rights* provides:

17.2 No one shall be arbitrarily deprived of his property.

Such is also a pre-supposition of the common law. It finds reflection in numerous constitutional provisions, including in the *Australian Constitution* in the requirement to provide just terms for the acquisition of property. See s 51(xxxi).

It seems likely that, following *Mabo*, more lawyers will take more judges in Australia to relevant international jurisprudence to assist in the resolution of disputes before Australian courts. The incentive to do so has increased since the High Court has acknowledged more clearly than ever before, the existence of basic constitutional rights which are inherent in the very nature and structure of the Australian Constitution. It was upon this basis, in August 1992, that the High Court held invalid Federal legislative restrictions on political advertising by radio or television.<sup>71</sup> The Court concluded that the freedom enjoyed by citizens to discuss public and political affairs and to criticise Federal institutions were embodied by constitutional implication in an implied guarantee of freedom of

69 Unreported, Court of Appeal (NSW) 24 December 1992.

70 *Ibid* at 21.

71 *Australian Capital Television Pty Limited v The Commonwealth [No 2]* (1992) 66 ALJR 695.

communication as to public and political discussion. Because the Federal legislation substantially interfered with that freedom, and impeded the States in respect thereof, it was invalid. The judgments contain numerous references to basic human rights law. Justice Brennan, in particular, collects important decisions in the Canadian and United States Supreme Courts and in the European Court of Human Rights.<sup>72</sup> A like doctrine was involved in *Nationwide News Pty Limited v Wills*.<sup>73</sup>

Even more recently, the High Court has referred expressly to international human rights jurisprudence in determining what the common law of Australia requires. Thus in *Dietrich v The Queen*,<sup>74</sup> the decision which overruled *McInnes*,<sup>75</sup> the Court examined closely the provisions of article 14(3) of the *International Covenant on Civil and Political Rights* relating to the right to legal assistance at a trial. Australia had, by this stage, ratified the Covenant; scheduled it to the *Human Rights and Equal Opportunity Commission Act 1988* (Cth) and subscribed to the *Optional Protocol*. Mason CJ and McHugh J, in their reasons, referred to my opinion in *Jago* concerning the use by Australian judges of such instruments as an aid to the explication and development of the common law. They referred to the *Derbyshire* decision in the English Court of Appeal and continued:<sup>76</sup>

Assuming, without deciding, that Australian courts should adopt a similar, commonsense approach, this nevertheless does not assist the applicant in this case where we are being asked not to resolve uncertainty or ambiguity in domestic law but to declare that a right which has hitherto never been recognised should now be taken to exist.

In the end, their Honours upheld the accused's right to a fair trial which, depending on the circumstances, might not be attained if the accused was unrepresented. For present purposes, it is enough to notice the implicit approval of the 'commonsense' approach accepted at Bangalore, endorsed in *Mabo* and not doubted in *Dietrich*.

Justice Brennan (dissenting) in *Dietrich* reiterated his view in *Mabo*. Referring to the *International Covenant* he said:<sup>77</sup>

Although this provision of the Covenant is not part of our municipal law, it is a legitimate influence on the development of the common law. Indeed, it is incongruous that Australia should adhere to the Covenant containing the provision unless Australian Courts recognise the entitlement and Australian governments provide the resources required to carry that entitlement into effect. But the Courts

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72 *Ibid* at 707.

73 *Nationwide News Pty Limited v Wills* (1992) 66 ALJR 658. See also Note (1992) 66 ALJ 775.

74 *Dietrich v The Queen* (1992) 67 ALJR 1.

75 (1979) 143 CLR 575.

76 *Dietrich* note 74 *supra* at 7.

77 *Ibid* at 15.

cannot, independently of the Legislature and the Executive, legitimately declare an entitlement to legal aid.

See also Justice Dawson (dissenting)<sup>78</sup> and Justice Toohey.<sup>79</sup>

In *Chu Kheng Lim & Ors v The Minister for Immigration, Local Government and Ethnic Affairs and Anor*,<sup>80</sup> there was still more consideration of the domestic application of international human rights norms. That was a case which concerned the validity of certain provisions of the *Migration Act 1958* (Cth) affecting refugee 'boat people'. The provisions of s 54R of the Act by which Parliament purportedly provided:

54R A Court is not to order the release from custody of a designated person.

were held unconstitutional. One of the questions posed for the Court concerned whether the Minister was under a legal duty to decide the refugees' applications for release from custody, amongst other things, having regard to the *International Covenant on Civil and Political Rights*. The growing willingness of counsel to rely upon these issues will be noticed.

In the result, the High Court determined that the question did not have to be answered. The valid parts of the legislation were clear. Accordingly, no ambiguity invited resort to Australia's international obligations. But Brennan, Deane and Dawson JJ made their position abundantly clear:<sup>81</sup>

We accept the proposition that the courts should, in case of ambiguity, favour a construction of a Commonwealth statute which accords with the obligations of Australia under an international treaty. The provisions of [the relevant statute]... are, however, quite unambiguous.

See also the reasons of Justice Toohey<sup>82</sup> and McHugh.<sup>83</sup>

Parallel to these developments in the High Court, similar points have been argued before the Full Federal Court.<sup>84</sup>

## VII. CONCLUSIONS: LAW FOR A NEW MILLENNIUM

In Australia, both in the High Court and in the Court of Appeal of New South Wales, the busiest appellate courts in the country, it is not too much to say that the 'classic' or 'statist' notions of the divorce of domestic and international law are

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78 *Ibid* at 25.

79 *Ibid* at 31.

80 (1992) 67 ALJR 125.

81 *Ibid* at 143.

82 *Id* at 143.

83 *Ibid* at 154.

84 *Minister for Foreign Affairs and Trade & Ors v Geraldo Magno and Anor* (1992) 37 FCR 298 (FC).

breaking down. A need to develop Australia's law in harmony with international developments is increasingly recognised by judges of high authority. The rapid progress of the idea, enshrined in the *Bangalore Principles*, is all the more remarkable in Australia because of the strength of earlier legal authority; the high conservatism of the judiciary in matters of basic principle; the features of provincialism which are almost inescapable in a legal system now largely isolated from its original sources; the absence of an indigenous Bill of Rights to provide a vehicle for international developments; and the special problems of a Federal system of government where many matters relevant to fundamental rights still rest within the legislative powers of the States. Yet despite these impediments the Bangalore idea now has a firm footing. Mechanically, it secured that footing out of recognition of the inevitable consequence which must follow the adherence by Australia to the *Optional Protocol to the International Covenant on Civil and Political Rights*. Still more recently, the Federal Attorney-General has announced that Australia will make a declaration under the *Geneva Convention's Additional Protocol*, to recognise the jurisdiction of an International Fact-Finding Commission to investigate alleged violations of the *Geneva Conventions* by Australia.<sup>85</sup>

There are other compulsory processes of international investigation to which Australia is subject. Not the least of these exists in the International Labour Organisation which has a highly developed allegations procedure in which I have myself participated.<sup>86</sup> It is scarcely surprising, with international principles addressing international problems through international institutions that international human rights norms will exert their influence upon the development of domestic law, even of a country which has no Bill of Rights and which has refrained from incorporating those norms expressly into domestic law.

Fortunately, the common law provides a perfectly appropriate vehicle for introducing such basic rights, and the jurisprudence which collects around them, into the municipal legal system. It can be done, where it is appropriate, with perfect propriety, by the technique of judicial decision-making: construing an ambiguous statute or filling a gap in the common law by reference to developing international principles. There will be occasions where this technique will not be available. The common law will be perfectly plain. The statute will be relevantly unambiguous. The international norm may seem too controversial. It may seem more appropriate to require domestic legislation on the particular subject. But in

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85 News Release, Attorney General for Australia (Hon Michael Duffy MP) "Government to Provide Further Access to International Human Rights Scrutiny", 9/92, 13 March 1992. For criticisms see commentary by J Stone "Keeping Power in the People's Hands", *Australian Financial Review* (23 July 1992) 13.

86 The ILO procedures are described in ILO, Fact-Finding and Conciliation Commission on Freedom of Association, Report, *Prelude to Change: Industrial Relations Reform in South Africa*, ILO, Geneva, 1992, Chapter I.

many other cases, falling short of these exceptions, it will be useful to the judge to have access to international human rights jurisprudence.

If we stand back and view our discipline in its present historical condition, its potential to contribute to the gradual movement of internationalisation, in rendering solutions to common problems, is significant. It is especially apt for the world-wide judiciary of the Commonwealth of Nations to recognise this.

A group of distinguished Commonwealth lawyers put together an important report for consideration by the Commonwealth leaders meeting at their last meeting in Harare in 1991. The report was titled *Put Our World to Rights*.<sup>87</sup> Boldly, the report suggested:<sup>88</sup>

Human rights have always underpinned the Commonwealth. The evolution of the empire into the Commonwealth was itself a testimony of the most basic of human rights, self determination. The sense of family between peoples of diverse races within the Commonwealth was a powerful repudiation of one of the major threats to human rights, racism. Close and friendly relations between members of the Commonwealth have emphasised the common humanity of mankind, transcending differences of race, religion, language and culture. The Commonwealth has cooperated in pushing the frontiers of freedom internationally, particularly in its fight against colonialism and racism. ...The members of the Commonwealth share the legacy of the common law with its strong emphasis on the rule of law and procedural safeguards secured through an independent judiciary.

The writers of the report did not deceive themselves. They acknowledged that the record of many Commonwealth countries in the field of human rights had been "poor".<sup>89</sup> They urged the importance of converting the noble idea of international human rights norms into practical reality in the day-to-day work of lawyers and courts throughout the Commonwealth.<sup>90</sup>

It is essential to the effectiveness of the legal system that judges and lawyers should be well qualified, courageous and independent ... The courts must give a liberal and broad interpretation to human rights provisions, as many of them, including the Privy Council, have now accepted ... Human rights instruments and legislation and case law should be readily available.

None of this is to assert that judges of the Commonwealth should become proactive initiators of politicised human rights campaigns through the courts. This was never the idea behind the *Bangalore Principles*. Such a role would ill-become judges. They are sworn to uphold the law. But it is given to them to play an important part in declaring what that law is. Of course, they can persist with notions about the sources of law which were appropriate to earlier times. Or they

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87 Commonwealth Human Rights Initiative Advisory Group, *Put Our World to Rights*, 1991, London.

88 *Ibid* at 3.

89 *Ibid* at 6.

90 *Ibid* at 22.

can gradually adapt their activities to the age they live in: an age of interplanetary flight, nuclear physics, the microchip and global problems.

Because I have an abiding faith in the capacity of the common law to develop and adapt to changing times and different needs, I see the decisions of the High Court of Australia in *Mabo*, *Australian Capital Television* and *Dietrich* and of the English Court of Appeal in *Derbyshire County Council* as indications of the responsiveness of the common law judges to the times they live in. Further evidence of the coming enlightenment exists in recent *ex curial* papers given by distinguished English jurists<sup>91</sup> and in the reported remarks of Sir Thomas Bingham upon the announcement of his appointment as Master of the Rolls.<sup>92</sup>

Yet for the advance of the ideals behind the *Bangalore Principles*, it is not enough that the highest courts of Australia and other Commonwealth countries should sanction the use of international human rights norms in the work of the courts. Nor is it enough that judicial leaders should evince an internationalist attitude in keeping with the eve of a new millennium. It is essential that judicial officers at every level of the hierarchy, and lawyers of every rank, should familiarise themselves with the advancing international jurisprudence of human rights; that the source material for that jurisprudence should be spread through curial decisions, professional activity and legal training; and that a culture of human rights should be developed amongst all lawyers and citizens of the Commonwealth. By no means is this a movement alien to the judicial function or the tradition which the judges of Australia and the other countries of the Commonwealth of Nations have inherited from Britain. Instead, it is the expansion throughout the world of basic ideas of justice and fairness which have been expounded with high intelligence and integrity throughout the eight century tradition of the common law to which we are privileged to be heirs.

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91 See eg Lord Browne-Wilkinson "The Infiltration of a Bill of Rights" [1992] *Public Law* 397, 403 f; Sir John Laws "Is the High Court the Guardian of Fundamental Constitutional Rights", unpublished lecture to the Administrative Law Bar Association, 4 June 1992, London.

92 Note *The Times* (London) 14 August 1992 p 2. He called for incorporation of the European Convention into United Kingdom domestic law.