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**FOURTH INTERNATIONAL CONFERENCE OF CHIEF JUSTICES OF
THE WORLD ON ARTICLE 51 OF THE CONSTITUTION OF INDIA**

THE IMPORTANCE OF CONSTITUTIONS AND JUDGES

**The Honourable Justice Michael Kirby AC CMG
(Australia)**

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Article 51 of the Indian Constitution, and similar provisions in other constitutions (such as that of South Africa) represent important directions to a country and its judiciary to look outwards, across the horizon. They constitute a reminder of the need to develop our own national laws, including the law of the constitution, in harmony with international law: specifically the international law of human rights.

Not every country's constitution is so forward looking. Constitutions drawn in an earlier age - like those of the United States (1786) and Australia (1900) do not contain explicit provisions such as Article 51 of the Indian Constitution. However, that does not mean that judges and people in such countries are without tools by which to protect the liberty of the individual and to ensure that

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international law, including that relating to human rights, is respected and upheld.

In 1951, the High Court of Australia was called upon to decide the constitutional validity of the *Communist Party Dissolution Act* 1950. That Act was passed by the Australian Parliament soon after the election of a new Government in 1949. The Government had an electoral mandate to introduce laws against communists. There was much support in the community for doing so. The world had just witnessed the Berlin blockade. There was great fear of the communist peril. Shortly, Australian forces were to serve with the United Nations in Korea. In such circumstances, the law against communists was favoured by about 80% of the population.

However the law was challenged in the High Court of Australia as going beyond the powers of the Federal Parliament which had enacted it. The Australian Constitution includes no general Bill of Rights. One cannot find there express guarantees, such as exist in the United States and Indian Constitutions, of freedom of expression and freedom of association¹. In the United States, in *Dennis v United States*², the Supreme Court had upheld as valid the *Smith Act* which was in some ways similar to the Australian anti-communist

¹ United States Constitution, Amendment I.

² 341 US 494 (1951).

legislation. It, in turn, had borrowed elements from a South African law which subsequently became the model for "suppression of terrorism" laws in a number of British colonies³. The challenge in the High Court of Australia did not, therefore, look particularly promising.

Nevertheless, by six Justices to one, the Australian apex court struck down the legislation. It found that it went beyond the constitutional grant of power to the Federal Parliament. Moreover, it conflicted with implications which the judges in the majority found in the text of the Constitution. These were implications defensive of the role of the separate judicial branch of government and defensive of the rule of law⁴.

The lesson of the *Communist Party* case in Australia is that, whilst constitutional texts are very important, as important as written words is the commitment of the judiciary to liberty and to judicial neutrality and independence. Even without a Bill of Rights, it is sometimes possible to protect fundamental rights if the judges have a clear idea about the essentials of human rights and human dignity. Text is vital. But it is not everything. Sometimes it is not enough.

³ *Suppression of Communism Act 1950* (SAf).

⁴ *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.

THE JUDICIAL DEFENCE OF BASIC RIGHTS

In all common law countries, like Australia and India, it is a fundamental principle of interpretation that courts will presume that parliament ordinarily intends to respect and uphold fundamental human rights and human dignity. In the event of ambiguity in the law, courts will give meaning to the law in a way that respects civil rights, unless the law, as made, validly derogates from such rights and makes its purpose absolutely clear⁵.

From early times in Australia, the courts have also followed the principle that local legislation will be construed, so far as possible, to conform with international law, including the international law of human rights⁶. These are basic tools for performing the judicial craft. They can often assist judges to avoid manifestly unjust and objectionable outcomes.

⁵ *Plaintiff S 157/2002 v The Commonwealth* (2003) 211 CLR 492 [29]-[31]; *Daniels Corporation International v ACCC* (2002) 77 ALJR 40 at 59-61 [101]-[160]; 59 ALR 561 at 587-590; *Attorney-General (WA) v Marquet* (2003) 78 ALJR 105 at 138 [184]-[186]; 202 ALR 233 at 278-279.

⁶ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38.

In 1988, in Bangalore, in this beautiful country, I attended a conference on the domestic application of international human rights norms. Most of the judges were from the Commonwealth of Nations. One United States federal judge attending was Judge Ruth Bader Ginsburg. This was before her appointment to the Supreme Court of the United States and my appointment to the High Court of Australia.

The propositions that we considered in Bangalore became known as the *Bangalore Principles*. According to these *Principles*⁷, where a law is ambiguous or the common law is unclear, a judge may construe the written law or develop the common law using the international law of human rights as a guide. This was a particularly important proposition for a country like Australia where there is no elaborated Bill of Rights. Looking to the growing field of international law to help express the principles inhering in local law was a new idea. It gave the international law of human rights a new and affirmative role to play, not simply a negative or restrictive role.

In the important case of *Mabo v Queensland [No 2]*⁸, the High Court of Australia was faced with a challenge to hitherto established

⁷ M D Kirby, "The Australian Use of International Human Rights Norms: From Bangalore to Balliol" (1993) 16 *University of New South Wales Law Journal* 363.

⁸ (1992) 175 CLR 1.

rules of land law. These had traditionally maintained that, upon British acquisition of sovereignty over the Australian continent, the rights of the indigenous peoples to their land were extinguished. That proposition had been accepted because of a belief that the indigenous peoples of Australia were purely nomadic, with no real interest in land or established legal or social systems. As factual propositions, it came to be understood that nothing could have been further from the truth so far as the Australian Aborigines were concerned.

In the course of reasoning, the majority of the High Court of Australia adopted a principle similar to that expressed in the *Bangalore Principles*. Justice F G Brennan put it this way⁹:

"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 settlement of a colony, denies them a right to occupy their traditional lands".

⁹ (1992) 175 CLR 1 at 42.

The influence of the *Bangalore Principles* has expanded in many countries of the Commonwealth of Nations, including India¹⁰, since 1988. In more recent times, it is important to observe the extent to which international expositions of human rights law have been invoked by majorities of the Supreme Court of the United States in explaining the meaning of provisions of the United States Constitution¹¹. Justice Ruth Ginsburg was a party to majority opinions in these decisions.

Thus, in 2002, in *Atkins v Virginia*¹², Justice Stevens (with whom Justices O'Connor, Kennedy, Souter, Ginsburg and Breyer agreed) held that it was a valid step, in construing the United States Constitution, to determine whether a mentally handicapped prisoner, whose offences occurred when he was a minor, could be the subject of capital punishment. By reference to the experience of countries and legal systems around the world, the majority of the American Supreme Court held that the prisoner could not be executed. It held that this would be contrary to the United States Constitution. This was a new and important step for the United States Supreme Court

¹⁰ See eg *Vishaka v State of Rajasthan & Ors*, Supreme Court of India, August 1997.

¹¹ See eg *Atkins v Virginia* 70 USLW 4585 at 4589 and *Lawrence v Texas* 539 US 1 at 16 (2003).

¹² 70 USLW 4585 at 4589 fn 21 (2002). See also the dissents of Rehnquist CJ at 4591, Scalia J at 4598 (with whom Thomas J joined).

to take. Until that decision, the Supreme Court of the United States was not inclined to refer to overseas or international legal principles to elucidate the meaning of the Constitution.

Similarly, and even more powerfully, in *Lawrence v Texas*¹³, the issue arose as to whether a criminal law of Texas, penalising adult private homosexual acts, was consistent with the United States Constitution. On this occasion, Justice Kennedy, for the Court, referred to decisions of the European Court of Human Rights concerning the limits of legal intrusion in the human rights of homosexuals. Justice Kennedy said that it was legitimate for the Court to look to decisions elsewhere to clarify the "values shared with a wider civilisation". There were dissentients. But the Supreme Court of the United States spoke with a clear majority. These decisions indicate the growing influence of international law in the clarification of national law, including the national law of the Constitution. The principle adopted is consistent with the *Bangalore Principles*. It helps to show the power of an idea whose time has come.

This is a clear indication, if ever there should be doubt, that it is important and useful for judges of final courts (or those who may end up there or serve elsewhere in the judiciary) to attend

¹³ 539 US 1 (2003).

international meetings and to engage in dialogue with judicial colleagues, legal practitioners and scholars. Conferences like this stimulate new thoughts and help share important experiences.

By bringing together chief justices and judges from many countries, to share experiences and knowledge, the CMS Lucknow contributes greatly to the fostering of respect for international law. When we return to our home countries and courts we carry in our minds the lessons we have learned. We take in our hearts the love and encouragement of the staff and children of the School.