

PHILIPPINE JUDICIAL ACADEMY

**CHIEF JUSTICE HILARIO G DAVIDE, Jr DISTINGUISHED LECTURE
SERIES**

SUPREME COURT OF THE PHILIPPINES

MANILA, APRIL 15, 2005

**INTERNATIONAL HUMAN RIGHTS AND CONSTITUTIONAL
INTERPRETATION**

The Hon Justice Michael Kirby AC CMG

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HONOURING CHIEF JUSTICE DAVIDE

It is a great pleasure for me to give a lecture in the series dedicated to a celebration of the life and work of Chief Justice Hilario G Davide Jr, Chief Justice of the Philippines.

We first met in Colombo, Sri Lanka, in January 2003. We were attending the third meeting of Chief Justices sponsored by the Judicial Group for the Strengthening of Judicial Integrity. This was a

* Justice of the High Court of Australia. Parts of this lecture draw upon the author's 7th Annual Grotius Lecture, delivered to the American Society of International Law and the American University (Washington College of Law) in Washington, DC, March 29, 2005.

body initially formed as an initiative of the United Nations Global Programme Against Corruption (UNCICP), based in Vienna. It began its work with a series of meetings involving the Chief Justices of eight countries of the Commonwealth of Nations. I was elected rapporteur. It was then expanded to include other distinguished judicial participants. Chief Justice Davide was the first of these. It was a great pleasure to meet, and to get to know, him and Mrs Davide. The Chief Justice and I worked together on the refinement of a draft of the *Bangalore Principles on Judicial Integrity*¹. As Dr Nihal Jayawickrama has said, in an earlier lecture in Manila, when the Judicial Group reached several points where there was a divergency of views it was the deft drafting of Chief Justice Davide, and his ability to forge a consensus, that helped resolve our differences and caused disagreements to melt away². Chief Justice Davide is known in the region not only for his keen interest in judicial standards and in combating corruption. He is respected for his initiatives in the computerization of court records, in the establishment of a public information officer for the courts and in his views on development of the law of standing in legal proceedings for the poor and vulnerable who approach the courts for judicial relief.

¹ These principles became the basis for the *New Code of Judicial Conduct for the Philippine Judiciary* promulgated April 27, 2004 (AM No 03-05-01-5C).

² N Jayawickrama, "The Bangalore Principles of Judicial Conduct", unpublished paper for a symposium of the Philippine Judicial Academy, Law School Faculty, November 11, 2004, 10.

The chairman of the Judicial Integrity Group is His Excellency, Judge Christopher Weeramantry. He was one-time Judge of the Supreme Court of Ceylon, later a Professor of Law in the Monash University in Melbourne, Australia. Later still, he was a Judge, and eventually Vice-President, of the International Court of Justice. He is another fine lawyer with a keen interest in the developments of international law and global cooperation.

In 1999, Judge Weeramantry participated in the delivery of the first Grotius Lecture for the American Society of International Law and the American University in Washington. He spoke in tribute to Hugo Grotius, often regarded as the founder of the modern discipline of international law³. Two weeks ago, in Washington, I followed Judge Weeramantry, delivering the Seventh Grotius Lecture in Washington. It was on the theme of the impact of international law on national constitutions.

As it transpired, my theme, chosen earlier, could not have been more relevant for the United States audience. A controversy has broken out in that country concerning the extent, if at all, that

³ C Weeramantry, "Opening Tribute to Hugo Grotius" (First Grotius Lecture, 1999) 14 Am Uni Int'l L Rev 1515 at 1516 (1999) ("Weeramantry"). See also Moisés Naim in the 4th Grotius Lecture, "Five Wars of Globalisation", 18 Am Uni Int'l L Rev 1 at 17-18 (2002).

the Supreme Court of the United States (and other courts) might look to international and foreign sources in explaining, elaborating and applying the Constitution of that country. The issue has proved extremely controversial, revealing deep divisions amongst the Justices of the Supreme Court of the United States. In the Congress, a law was introduced, purporting to give a legislative command to the judicial branch of government, not to pursue this course⁴. A few weeks before my address, Justices Antonin Scalia and Stephen Breyer participated in a remarkable public debate about this subject⁵.

Then, as if to underline the importance of my chosen theme, the Supreme Court of the United States in February 2005, shortly before my arrival, delivered its decision in *Roper v Simmons*⁶. There, the Court, dividing once again on now familiar lines, decided by majority that it was permissible to invoke the international law of human rights to assist in the interpretation of the Eighth Amendment to the Constitution of the United States.

⁴ See Resolution 568 of March 17, 2004 discussed A Scalia, "Keynote Address: Foreign Legal Authority in the Federal Courts", ASIL Proceedings" 2004, 305.

⁵ Transcript of discussions between US Supreme court Justices Antonin Scalia and Stephen Breyer, American University, Washington College of Law, January 13, 2005, US Association of Constitutional Law ("Transcript"). The conversation was widely reported: *Washington Post*, January 14, 2005, 1.

⁶ 543 US 1 (2005); 73 USLW 4153 (2005).

I will not, in this lecture, pretend to a knowledge of the constitutional law of the Republic of the Philippines which I do not have. However, the Constitution of the Republic of the Philippines, in Article 2, Section 2, contains amongst the "Declarations of Principles of State Policies" a provision, not unlike that of other modern constitutions, adopting "the generally accepted principles of international law as part of the law of the land: It commits the nation to adherence to the "policy of peace, equality, justice, freedom, cooperation and amity with all nations". Because of the historical links between the Philippines and the United States of America - and the insight which those links have given to Philippine judges and lawyers to understand the world of the common law - I will explain the present controversies over the domestic application of international human rights law in constitutional adjudication in the United States and Australia. It will be for Philippine lawyers to judge whether those controversies have relevance to the judicial tasks in this country, in which Chief Justice Davide has laboured with such distinction over his judicial life.

BANGALORE PRINCIPLES AND THEIR APPLICATION

I want to talk of *Bangalore Principles*, adapted earlier than those concerning judicial integrity, that brought Chief Justice Davide and me together in 2003. I refer to the *Bangalore Principles on the Domestic Application of International Human Rights Norms* (the

Bangalore Principles) that were agreed in Bangalore, India, in February 1988⁷. The meeting at which these principles were adopted was organised by the Commonwealth Secretariat in London and by Interights, a global body dedicated to the legal application of fundamental human rights. The meeting in Bangalore was chaired by Justice P N Bhagwati, former Chief Justice of India, later Chairman of the United Nations Human Rights Committee.

I attended that meeting, as did Commonwealth judges from India, Malaysia, Mauritius, Pakistan, Papua New-Guinea, Sri Lanka, the United Kingdom and Zimbabwe. This Bangalore meeting helped to rescue my mind from the rigid dualism developed by the English common law over the role of international law in relation to domestic law.

For what was to happen subsequently, it is relevant that at Bangalore, almost uniquely, one non-Commonwealth judge participated in our meeting. This was the Hon Ruth Bader Ginsburg. Like me, she had not, at that stage, been appointed to the final court. She was a member of an intermediate appellate court. She

⁷ The *Bangalore Principles* are reproduced in (1988) 62 *Australian Law Journal* 531 and (1988) 14 *Commonwealth Law Bulletin* 1196. The Bangalore meeting was followed by seven later meetings of Commonwealth judges. Human rights decisions of Commonwealth courts are now shared widely through the work of Interights, an international centre based in London and the publication of the *Law Reports of the Commonwealth* series. See <www.interights.org>.

was a practical working judge, used to discharging a heavy caseload, acting under pressure and bound in the exercise of her jurisdiction by the rulings of the apex court of the nation.

The crucial idea of the *Bangalore Principles* of 1988 was that international human rights law might sometimes provide guidance to judges in cases concerning human rights and fundamental freedoms. The *Principles* noted the "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". They accepted that, where national law was clear and inconsistent with the international obligations of the State concerned, national courts in common law countries were obliged to give effect to their local laws, although they might call the disparity to the notice of the legislature and governments.

This international declaration of judges, each one of them imbued with practical realities and alert to the limited functions of the judiciary in the common law tradition, accompanied me on my return to my then office of President of the New South Wales Court of Appeal. This was, and still is, the busiest general appellate court in Australia.

As cases came before me in my Court, I began to see the way in which a reference to international law, specifically as that law

concerned fundamental human rights, could sometimes cast light on the workaday problems that confronted me in my role as a judge. The same was to happen in many countries, particularly in the Commonwealth of Nations⁸.

EARLY AUSTRALIAN CASES TO MABO

An early instance that came before me was *Gradidge v Grace Bros Pty Ltd*⁹. There, the applicant before a Compensation Court in Sydney was a deaf mute. A member of the government panel of interpreters had been provided for the hearing of her evidence. During that hearing, an argument arose between the lawyers. It concerned a point of law. The insurers' lawyer indicated that the exchange did not need to be interpreted. The applicant's legal representative raised no objection. The trial judge told the interpreter that he did not require interpretation. When the interpreter persisted in her translation, the judge directed her to desist. She refused, saying that she would continue to interpret for the applicant so long as she was in open court. The judge declined to continue the proceedings. He insisted on his control of the hearing. There was no statutory or common law *right* to

⁸ N Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence*, (Cambridge, 2002).

⁹ (1988) 93 FLR 414 (NSWCA).

interpretation. There was a discretion in the trial judge to permit it where necessary in the interests of justice¹⁰. There were strong common law principles defensive of a trial judge's control of the proceedings.

On an urgent motion for relief in the Court of Appeal, the resolution of the case took me, in default of a clear local rule, to the *International Covenant on Civil and Political Rights*¹¹ (ICCPR). Australia had ratified that treaty and, in any case, it probably stated customary international law in this respect. I held that, in developing the Australian common law in a novel case, it was desirable that such law should, so far as possible, be in harmony with the ICCPR provisions, including Art 14¹² and the jurisprudence gathered around it¹³. The two other judges sitting with me agreed. One of them pointed to the fact that, although not expressly incorporated into Australian law, the ICCPR was scheduled to a federal statute

¹⁰ *Dairy Farmers' Cooperative Milk Co Ltd v Acquilina* (1963) 109 CLR 418 at 464.

¹¹ Arts 14.1, 14.3(a) and 14.3(f).

¹² Art 14.1 provides that "all persons shall be equal before the courts and tribunals". It also provides for a "fair and public hearing" and requires that the decision-makers be "competent, independent and impartial". Art 14.3, whilst specifically related to criminal process, includes a specific requirement that the party be "informed promptly and in detail in a language which he understands" the nature and cause of the matter.

¹³ Applying an earlier consideration of the *Bangalore Principles* in *Jago v District Court of New South Wales* (1988) 12 NSWLR 558 at 570 (NSWCA).

defining the powers and duties of the national Human Rights and Equal Opportunity Commission¹⁴.

Thereafter, in further cases, where I reached a point of decision upon which any local statute or subordinate statutory rule were ambiguous¹⁵ or the common law was obscure and unilluminating, I reached for the statement of basic principles about universal human rights and fundamental freedoms expressed in the ICCPR and like instruments. And as a busy working judge, I quite often found these sources to be extremely helpful.

Whereas, at first, my approach seemed quite heretical to many Australian lawyers, the tide turned in 1992 when the High Court of Australia decided *Mabo v Queensland [No 2]*¹⁶. That case related to the question whether the common law of Australia gave any recognition to the title to land of indigenous people, derived from a time prior to the British acquisition of Australia. The conventional view to that time, supported by nineteenth century court decisions, was that it did not. The key that unlocked the door that permitted the Court to overcome these decisions was a recognition that they

¹⁴ (1988) 93 FLR 414 at 416 (NSWCA), per Samuels JA.

¹⁵ eg *Young v Registrar, Court of Appeal (NSW) [No 3]* (1993) 32 NSWLR 262 (NSWCA).

¹⁶ (1992) 175 CLR 1. The significance was noted at the time: (1992) 66 *Australian Law Journal* 551 at 552.

were fundamentally incompatible with universal principles, accepted by international law, denying prejudicial deprivation of basic rights on the grounds of race or ethnic origin.

Between Bangalore and *Mabo*, Australia had acceded to the First Optional Protocol to the ICCPR. That instrument gives individuals the right to communicate with the United Nations Human Rights Committee about alleged non-conformity between Australia's domestic law and the principles accepted in the ICCPR. It was this legal development that caused Justice F G Brennan (with the concurrence of Chief Justice Mason and Justice McHugh) in the leading opinion in *Mabo*, to say of the ICCPR so enhanced¹⁷:

"[It] 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".

I now reach the question whether, in some way, constitutional law is disjoined for this purpose from this evolution of the common law and statute law. The *Bangalore Principles* asserted that every part of law, including constitutional law, is open to the propounded

¹⁷ (1992) 175 CLR 1 at 42.

use of international law in shaping basic legal principles. After my appointment to Australia's highest court in 1996, this question was soon posed for me.

In 1997, in a closely divided decision, a question arose concerning the resolution of an ambiguity in the Australian Constitution about whether one of the few express rights, dealing with the necessity to pay just terms for federal acquisitions of property¹⁸, extended to public acquisitions by the government of a self-governing federal territory. The Australian Constitution could be read either way. There were conflicting holdings over the century of its existence. In expounding the way that I came to my conclusion as part of the majority in the Court, favourable to the right to just terms, I invoked the *Bangalore Principles* in the resolution of the constitutional ambiguity¹⁹.

I later repeated the same approach in resolving what seemed to me to be an ambiguity in the "races" power in the Australian Constitution²⁰. Doing so avoided an interpretation of the Constitution which, if adopted, would permit the enactment by the

¹⁸ Australian Constitution, s 51(xxxi).

¹⁹ *Newcrest Mining (WA) Pty Ltd v The Commonwealth* (1997) 190 CLR 513 at 657 at 661.

²⁰ Australian Constitution, s 51(xxvi) [to make laws with respect to ... the people of any race for whom it is deemed necessary to make special laws"].

Australian Parliament of laws not for the benefit and protection of persons of particular "races" but laws to the disadvantage and prejudice of those of a particular race.

None of the other six current members of the High Court of Australia has so far accepted this principle of constitutional interpretation²¹. Observations exist in cases from the Second World War that reject the notion that the national Constitution contains an implication that it should be construed to conform with the rules of international law²². Antipathetic views have been stated in more recent times²³, including (as I shall show) in response to my own remarks in recent cases²⁴.

In many decisions over the past decade, I have referred to the relevant principles of the international law of human rights in expounding the meaning and operation of the Australian Constitution²⁵. In such cases the other members of my Court have

²¹ See eg *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 417-418.

²² See eg *Polites v The Commonwealth* (1945) 70 CLR 60 at 69, 74, 75, 79, 82-83.

²³ eg *Horta v The Commonwealth* (1994) 181 CLR 183 at 195.

²⁴ *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 386 [101].

²⁵ See eg *Austin v The Commonwealth* (2003) 215 CLR 185 at 291-293 [252]-[257].

not found such considerations to be of assistance. For the most part, they have ignored them.

The non-dialogue between judges of different persuasions on this subject might have continued in Australia but for the developments in the United States discourse on the same topic. According to a commentator²⁶, the *Bangalore Principles* are "immensely popular in the law schools, and with many barristers. Nothing is more predictable than that [they] will have many future outings"²⁷. However, getting them accepted and applied by the current generation of judges is another matter.

In *Al-Kateb v Godwin*²⁸, late in 2004, one of my colleagues, Justice Michael McHugh, responded to this question. In language reminiscent of that voiced by Justice Scalia for the dissenters in the United States Supreme Court in *Atkins v Virginia*²⁹, *Lawrence v Texas*³⁰ and most recently in *Roper v Simmons*³¹, Justice McHugh

²⁶ G Craven, "Judicial Activism: The Beginning of the End of the Beginning" in *Upholding the Australian Constitution* (Proceedings of the 16th Conference of the Samuel Griffith Society) (March 2004, 16), 153 at 169.

²⁷ *Ibid*, at 169.

²⁸ (2004) 78 ALJR 1099.

²⁹ 536 US 304 at 347-348 (2002).

³⁰ 539 US 558 at 586 (2003).

³¹ 543 US 1 (2005).

entered the debate. He rejected the suggestion that the Australian Constitution could be read by reference to the provisions of international law, adopted after the Constitution came into force in 1900³². He declared that this was heresy so far as past Australian authority was concerned³³. He expressed concern at the possibility of the huge body of treaty and other law being used to introduce "general principles of law recognised by civilised nations" into Australian constitutional elaboration³⁴. He acknowledged that the Constitution could sometimes have meanings different from those accepted in earlier times³⁵. However, it was one thing to take into account "political, social and economic developments in the intervening period" and quite another to accept the authority of *rules* of international law³⁶.

The case of *Al-Kateb* concerned the power of the Australian Parliament, and Executive, to detain indefinitely a stateless person who, as an alien, had entered the country unlawfully. The issue was whether the federal *Migration Act* 1988 should be read down to avoid such a consequence or whether the Constitution itself

³² (2004) 78 ALJR 1099 at 1112 [62].

³³ (2004) 78 ALJR 1099 at 1112 [63].

³⁴ (2004) 78 ALJR 1099 at 1113 [64]-[65].

³⁵ (2004) 78 ALJR 1099 at 1114 [69].

³⁶ (2004) 78 ALJR 1099 at 1115 [71]. (Emphasis added)

reserved prolonged detention to the cases of those whose imprisonment was ordered by a court, in application of the law. My Court divided on the outcome. The lawfulness of the detention was upheld by the narrowest margin³⁷.

In my reasons, I sought to respond to Justice McHugh's criticisms. In doing so, I invoked the way in which, in recent times, successive majorities in the Supreme Court of the United States have used the universal principles of human rights and fundamental freedoms to confirm the judges' understandings of the meaning of the United States Constitution. They have done so using the light thrown by what Justice Kennedy, for the Court, in *Lawrence* has described as "a wider civilisation"³⁸. In *Al-Kateb*, I said³⁹:

"[T]he willingness of national constitutional courts to look outside their own domestic legal traditions to the elaboration of international, regional and other bodies represents a paradigm shift that has happened in municipal law in recent years. There are many illustrations in the decisions of the courts of, for example, Canada, Germany, India, New Zealand, the United Kingdom and the United States"⁴⁰.

³⁷ McHugh, Hayne, Callinan and Heydon JJ; Gleeson CJ, Gummow J and myself dissenting.

³⁸ *Lawrence*, 539 US 558 at 576 (2003).

³⁹ (2004) 78 ALJR 1134 [citations omitted].

⁴⁰ With reference to the extracurial remarks of Ginsburg J in R B Ginsburg and D J Merritt, "Fifty-First Cardozo Memorial Lecture - Affirmative Action: An International Human Rights Dialogue" 21 *Cardozo Law Review* 253 at 282 (1999).

What is being attempted by this form of reasoning is not an amendment of the national Constitution but an elaboration and enforcement of it, properly understood in the context of the world of today in which any national constitutional text must now operate:

RESPONDING TO THE CRITICS

Any large development in legal thinking and judicial technique will inevitably be controversial in some circles. Lawyers tend to be cautious people. They are often resistant to new ideas. Moreover, at least to varying extents, the jurisdiction-bound way of thinking has tended, in the past, to make most lawyers satisfied with the law as found within their own system, if not sometimes positively xenophobic. So what are the arguments that have been voiced against the use of the international law of human rights in expressing domestic law? And what are the answers offered to those arguments?

First, there is the view espoused by opponents of the idea in the United States, that of its nature, a national constitution is a unique document, designed specifically for the governance of the people of the nation to which it applies and only them. Thus, Judge Richard Posner has argued that "the judicial systems of the rest of

the world are immensely varied"⁴¹. They give rise to foreign judicial decisions that "emerge from a complex socio-historico-politico-institutional background of which our judges ... are almost entirely ignorant"⁴². They should be given their own peculiar operation.

Taken at face value, there is force in these arguments. If constitutional provisions are different and if societies are distinguishable, the utility of international law sources will frequently be confined. But this does not mean that they need be ignored⁴³. The United States, Australia and other countries, including the Philippines, share aspects of the common law heritage, tradition and history with many foreign constitutional systems⁴⁴. Furthermore, the United States Constitution, including the Bill of Rights, has itself greatly influenced foreign constitutional texts. Courts around the world use American judicial elaborations all the time as you do in the

⁴¹ R Posner, "Could I interest You in Some Foreign Law? No Thanks, We Already Have Our Own Laws" *Aug Legal Affairs* 40 at 41-42 (2004) ("Posner").

⁴² Posner, *ibid* at 42.

⁴³ G L Neuman, "The Uses of International Law in Constitutional Interpretation" 98 *American Journal of International Law* 82 at 87 (2004) ("Neuman").

⁴⁴ H H Koh, "International Law as Part of our Law" 98 *American Journal of International Law* 43 at 47 (2004) ("Koh").

Philippines. In the current era of globalism, why should the process not be reciprocal⁴⁵?

Secondly, concern is sometimes expressed that international law is used selectively, merely to support the subjective opinions of the judges invoking it.

This criticism is rightly targeted at any unbalanced use of international law. However, the answer to this argument is that a proper use of this source can sometimes actually help to reduce subjectivity. In his recent public "conversation" with Justice Scalia, Justice Breyer answered this concern⁴⁶:

"[T]hat kind of problem arises in any sort of citation. A judge can do what he's supposed to do, or not. ... Would I try to refer to both sides? Of course I would".

Thirdly, opponents have suggested that reference to international law may involve, or lead to, a loss of national sovereignty. Thus, Justice Scalia has denied emphatically that "we want to be governed by the views of foreigners"⁴⁷. There are many answers to this attitude. I will confine myself to some of them.

⁴⁵ M Wells, "International Norms in Constitutional Law", 32 *Georgia Journal of International and Comparative Law* 429 at 429-430 (2004) (Wells).

⁴⁶ Breyer and Scalia JJ, Transcript, p 40.

⁴⁷ Breyer and Scalia JJ, Transcript, p 7.

If one accepts a precondition of constitutional ambiguity, the invocation of international law is self limiting⁴⁸. By the act of municipal judges utilising and explaining applicable principles of international and comparative law, the process derives its municipal legitimacy⁴⁹. Moreover, it involves participation within one's own constitutional discourse in an interactive dialogue now occurring between the constitutional courts of many countries⁵⁰. It is from such a dialogue that a transnational law is emerging, especially on common issues concerning human rights. Over time, such a law may help to merge the national and the international, in some areas at least⁵¹.

Fourthly, opponents point to the fact that the making of international law is substantially in the hands of the Executive Government, which ordinarily initiates involvement in the process of

⁴⁸ A Simpson and G Williams, "International Law and Constitutional Interpretation" (2000) 11 *Public Law Review* 205 at 225. (Simpson and Williams).

⁴⁹ K Knop, "Here and There: International Law in Domestic Courts" 32 *NYU Journal of International Law and Policy* 501 at 505-506 (2000) ("Knop").

⁵⁰ A Chayes and A Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* 27 (1995).

⁵¹ H H Koh, "International Law as Part of Our Law", 98 *American Journal of International Law* 43 at 53 (2004) (Koh).

treaty negotiation and commences or controls the procedures of ratification.

In part, the answer to this concern is an improvement in national procedures for the ratification of treaties. In any case, courts are aware that it is not their role to incorporate an entire treaty, or body of international law, into municipal law, still less into constitutional interpretation, "by the back door"⁵². The contrary suggestion is fanciful.

Fifthly, it is argued by critics that international law is usually ambiguous and therefore unhelpful⁵³. Whilst this is sometimes true, in many cases the applicable principles of international law are detailed, clear and well reasoned. This is particularly so in many areas the subject of decisions of the European Court of Human Rights and the Inter-American Court of Human Rights.

Sixthly, it is certainly the case that interpreting a constitution in the light of the developing principles of international law may sometimes involve conflict with other interpretative principles⁵⁴. Yet

⁵² *Teoh v Minister for Immigration* (1995) 183 CLR 273 at 288.

⁵³ Simpson and Williams, *ibid* (2000) 11 *Public Law Review* 205 at 218.

⁵⁴ Simpson and Williams (2000) 11 *Public Law Review* 205 at 222.

all interpretative principles are simply guides to the decision-maker. They are not, as such, binding rules that solve every problem in a mechanical way.

Seventhly, a more weighty criticism concerns the so-called "democratic deficit". In part, this involves acknowledgment of the typical lack of legislative participation in the treaty-making process in most countries⁵⁵. But, in part, this objection rests on a broader footing. Thus, Judge Posner complains that "the judges of foreign countries, however democratic those countries may be, have no democratic legitimacy here [in the United States]"⁵⁶.

There are many answers to these anxieties. The function of a judiciary is inescapably elitist, at least to some extent. Like it or not, judges' values are shaped and influenced by a huge range of information, bombarding them from many sources. Thus, Justice Breyer, not wholly in jest, gave this answer during his recent "conversation"⁵⁷:

"You're always referring to materials, even if its Blackstone or whoever. The material doesn't have to

⁵⁵ M D Kirby, "The Role of International Standards in Australian Courts" in Alston and Chiam (eds), *Treaty-making and Australia: Globalisation versus Sovereignty?* (1995) at 87.

⁵⁶ Posner, *Aug Legal Affairs* 40 at 42 (2004).

⁵⁷ Breyer and Scalia JJ, Transcript, p 40.

have a democratic base. You reason all the time. You read law professors. They're not elected".

It is inevitable that contemporary and future judges will be more aware of developments of international law and of international and foreign courts and other bodies of high authority explaining and applying that law. If this is so, the real issue is not whether such sources will inform municipal judges in their decision-making. Of course, they will. It is whether such judges should disclose - and be ready to debate - this operation on their thinking or keep it secret.

Eighthly, some critics deny that human rights are universal or founded on a higher principle, such as human dignity or natural law. They see this as a discredited theory, incompatible with national sovereignty⁵⁸.

There are several responses to this complaint. It always remains for the municipal judge to evaluate the utility that will be derived from the jurisprudence of international courts and treaty bodies. Even if the character of human rights as "natural" or "innate" is disputable, the international law of human rights is already having a large impact on the values and ideals of judges, lawyers and other citizens in many countries⁵⁹.

⁵⁸ Wells, 32 *Georgia Journal of International and Comparative Law* 429 at 434 (2004).

⁵⁹ S. Breyer, "Keynote Address", 97 *American Society of International Proceedings*, 265 (2003).

Ninthly, critics point to the typical lack of knowledge of international law amongst the personnel of domestic courts and thus to the risk of mistakes and misunderstandings, or selective and incomplete presentations of the "true state of international and foreign affairs"⁶⁰.

An institutional incapacity to engage in scrutiny of such materials does indeed present risks. However, an increasing number of judges of national courts are embarking on the task. Given the extensive use of international and transnational law in most courts of the world, it could not be maintained persuasively today that judges are unable to learn how to find applicable sources of international law on a given matter where those sources are deemed relevant and helpful.

Tenthly, there is a counterpoint argument that needs to be noticed. Some commentators, generally sympathetic to the use of sources founded in international human rights law, have expressed concern at the risks of arming an increasingly conservative judiciary with broadly stated principles of international human rights law with

⁶⁰ R P Alford, "Misusing International Sources to Interpret the Constitution" 98 *American Journal of International Law* 57 at 64 (2004).

which they may inflict on the national constitution wounds that may be difficult to repair⁶¹.

Whilst this argument introduces an element of *Realpolitik* into the debate, it founders on its assumption of judicial dishonesty. Judges, if they like, can use *any* source materials dishonestly. We assume that they will not do so. The contemporary body of international human rights law has grown out of the common law jurisprudence that dominated the United Nations in the years after 1945 in which the basic instruments were drafted and adopted. It is there to be used. Courts in many lands are now using it. They are doing so in reasoning in constitutional cases. The resulting question is whether some national courts should continue to hold out and to treat such materials as irrelevant *per se*?

SOME POSITIVE ARGUMENTS

So far, I have responded to the critics. Now let me say some affirmative things.

First, it has been accepted by courts in many countries that, where their constitutional text itself refers to fundamental rights and freedoms, it is proper, and useful, to have access to expert

⁶¹ cf R Hasen, "The Supreme Court and Election Law: Judging Equality from *Baker v Carr* to *Bush v Gore*", 164 (2003).

elaborations of the same, or like, provisions in other national constitutions and in international courts and tribunals. The reference to international law in the Philippine Constitution appears to give an express endorsement of reference to the international law of human rights where it is relevant to the judicial task in hand.

That great judge, Chief Justice Dickson, in the Supreme Court of Canada, in the early years of the *Canadian Charter of Rights and Freedoms*, said that such access would provide "relevant and persuasive sources for interpretation"⁶². So it has been ever since⁶³.

An identical approach has been taken to the elucidation of human rights provisions in the national constitutions (or equivalent documents) by the Judicial Committee of the Privy Council, for example, in respect of Trinidad and Tobago⁶⁴ and by the final

⁶² *Reference re Public Service Employees Relations Act* (Alberta) [1987] 1 SCR 313 at 348 [57].

⁶³ A Lamer, "Address at the International Conference on Enforcing International Human Rights Law: The Treaty System in the 21st Century" (22 June 1997), quoted in K Knop, 32 *NYU Journal of International Law and Policy* 501 at 518 (2000); C L'Heureux-Dubé, "The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court" 32 *ULSA Law Journal* 15 at 24 (1998).

⁶⁴ *Mathew v The State (Trinidad and Tobago)* [2004] 3 WLR 812 at [13].

appellate courts of Germany⁶⁵; India⁶⁶; Papua-New Guinea⁶⁷; Hong Kong⁶⁸; Namibia⁶⁹; Zimbabwe⁷⁰ and doubtless many other countries.

In constitutional interpretation, especially, the courts of most countries have accepted, in the words of Justice Aharon Barak, President of the Supreme Court of Israel, that "the Constitution is intended to solve the problems of the contemporary person, to protect his or her freedom"⁷¹. In that task, the international law of human rights is often of great assistance.

⁶⁵ *Presumption of Innocence and the European Convention on Human Rights* (1987) B ver f GE 74, 358, translated into English in decisions of the Bundesverfassungsgericht - Federal Constitutional Court - Federal Republic of Germany, Vol 1/ii(1992) at 637-638.

⁶⁶ *Vishaka v State of Rajasthan* 1997 AIR SC 3011 at 3015. See G P Singh, *Principles of Statutory Interpretation* (9th ed, 2004), 529ff.

⁶⁷ *Hiiveta, Leader of Opposition v Wingti, Prime Minister* [1994] PNGLR 197.

⁶⁸ *Schum Kwok Sher v H K SAR* [2002] 2 HK LKRD 793 at [59] per Mason NPJ.

⁶⁹ *Ex parte Attorney-General (Namibia): In re Corporal Punishment* 1991 (3) SA 76 at 86.

⁷⁰ *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General, Zimbabwe* 1993 (4) SA 239 at 247-248 per Gubbay CJ.

⁷¹ A Barak, "Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy", 116 *Harvard Law Review* 16 at 69 (2002) ("Barak").

In constitutional elaboration, international law, like the law of foreign states, does not *control* the decisions of municipal judges. It is left to them to decide whether they can derive assistance from its exposition and reasoning. Many fine judges in many countries have found such assistance useful. Thus, Chief Justice Dickson in Canada declared that "international law provides a fertile source of insight"⁷². Chief Justice Chaskalson in South Africa has said that "international and foreign authorities are of value because they analyse arguments ... and show how courts of other jurisdictions have dealt with this vexed issue"⁷³. To like effect, President Barak has written⁷⁴:

"[C]omparing oneself to others allows for greater self-knowledge ... Examining a foreign solution may help a judge choose the best local solution ... The benefits of comparative law is in expanding judicial thinking about the possible arguments, legal trends, and decision-making structures available".

A lot of very clever people, in many lands and sometimes in international courts and tribunals, are now engaged in elucidating the meaning and application of common or identical principles in the case of social problems that have a tendency to present themselves,

⁷² *Ref Re Public Service Employee Relations Act (Alberta)* [1987] 1 SCR 313 at 348.

⁷³ *S v Makwanyane* 1995 (3) SA 391 at 413 [34] (a case on the death penalty).

⁷⁴ Barak, 116 *Harvard Law Review* 16 at 110 (2002).

in different countries, at the same time. So far as international and regional human rights law are declared by such people, in principled decisions supported by detailed reasons, it is unconvincing to suggest that they should be ignored in an unworthy self-denying ordinance of intellectual restriction⁷⁵.

Far from increasing idiosyncratic decision-making, the reference to such sources in international law is a check against "strong passion or momentary interest"⁷⁶. The use of such materials, far from undermining the legitimacy of municipal constitutional jurisprudence, contributes to "greater legitimacy by virtue of having paid due respect to the decisions of others" and this is so even if those others happen to be foreigners and the conclusion is different⁷⁷.

It follows that engaging in the analysis of analogous points with the opinions of judges and other writers in many countries, helps ensure a national supreme court against intellectual isolation

⁷⁵ G A Christenson, "Using Human Rights Law to Inform Due Process and Equal Protection Analyses" 52 *University of Cincinnati Law Review* 3 at 17 (1983).

⁷⁶ D Bodansky, "The use of International Sources in Constitutional Opinions", 32 *Georgia Journal of International and Comparative Law* 421 at 421 (2004).

⁷⁷ D M Amann, "'Raise the Flag and Let it Talk': On the use of External Norms in Constitutional Decision Making" 2 *International Journal of Constitutional Law* 597 at 606 (2004).

and, consequentially, a diminished influence of its own in the world of ideas⁷⁸. Of course, this objective may be of no interest to those who are satisfied to live exclusively within their own national intellectual cocoon. But that attitude hardly accords with the world trends of globalism in economics, transport and communications that have contributed so significantly to the advance of freedom in every corner of the planet⁷⁹.

A NEW DIMENSION OF LAW?

The outcome of the controversy that I have outlined, concerning the relationship between international law and municipal courts, is still to be written. At least, it is still to be written in countries such as Australia, the United States and the Philippines. This is an important debate because, as the international legal order is enlarged, as its subject matter comes increasingly to concern individuals, as it provides machinery for scrutiny of complaints and findings, the expectations of an accommodation with international law are enlarged.

⁷⁸ L'Heureux-Dubé, "Realizing Equality in the Twentieth Century: The Role of the Supreme Court of Canada in Comparative Perspective" 1 *International Journal of Constitutional Law* 35 at 36 (2003).

⁷⁹ cf J C Clifford, "Globalization and Judicial Education" 28 *Yale Journal of International Law* 355 at 360 (2003).

It is possible, in the end, that the rhetorical contests over these questions display less real division about utilisation of international law in domestic jurisdiction than might sometimes appear on the surface of the competing judicial and academic opinions⁸⁰. For some, the debate is a battle over transparency in judicial reasons. For others, it involves clarification of the limited function of international borrowings. Still others, require reassurance that domestic law, with its longer history and its democratic foundations, will ultimately prevail within their own country. But, particularly in the world of human rights and fundamental freedoms, there is a need to engage in a global dialogue. Increasingly, such a dialogue is happening amongst judges of final courts. They meet in person. Their minds meet in the internet. They read each other's opinions. Their discourse about international law is no longer an indulgence or an esoteric legal specialty. As Justice O'Connor has said, it is now "becoming a duty"⁸¹.

What I have described in this Davide Lecture is an intellectual movement. It is a source of analysis and ideas. It is a font of

⁸⁰ *Al-Kateb v Godwin* (2004) 78 ALJR 1099 at 1132 [173].

⁸¹ S D O'Connor, Keynote Address to the American Society of International Law Proceedings, 96 *Am Soc'y Int'l Proc* 348 at 351 (2002).

shared wisdom. It is irreversible, as human reason itself is⁸². Its momentum is unstoppable. It identifies the next phase in the advancement of international law and the advance of the international rule of law.

It is great judges of our legal tradition who are willing to think with originality and to scrutinise old ways of examining problems by reference to the new legal context and the materials now available to expand the horizon of judicial thinking. Chief Justice Hilario G Davide Jr, when he lays down his responsibilities, will be succeeded by others, as every judge is. My own retirement from judicial office is not far behind his. None of us, in our several periods of judicial service, can complete the task of refining the common law, clarifying the statutes and elaborating the Constitution. That task goes on after us. Yet none of us is exempt from the obligation to do our best. Of Chief Justice Davide, it can be said that he did his best. The improvement of standards, the increase of accountability and the embrace of new ideas is a hallmark of a great judicial leader. I am glad to have this chance in Manila to pay tribute to Chief Justice Davide and to participate in the lecture series that bears his name.

⁸² O Fiss, "The Irrepressibility of Reason" in *The Law as It Could Be* (2003) 221 at 228.