

THE ROAD FROM BANGALORE
THE FIRST TEN YEARS OF THE *BANGALORE PRINCIPLES* ON
THE DOMESTIC APPLICATION OF INTERNATIONAL HUMAN
RIGHTS NORMS ¹

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MONISM AND DUALISM

In a chapter on "The Role of National Courts in the International Legal Process" in *Problems and Process - International Law and How We Use It* ³ Judge Rosalyn Higgins of the International Court of Justice explains the need for a good grounding in both municipal and international law if there is ever to be a real understanding of the relationship between the two. But suddenly, things are happening.

Different theories about the relationship of domestic and international law compete for acceptance. Monists assert that there is but one system of law, with international law as an element "alongside all the various branches of domestic law" ⁴ . For the monist, international law is simply part of the law of the land, together with the more familiar areas of national law. Dualists, on the other hand, assert that there are two essentially different legal systems. They exist "side by side within different spheres of action - the international plane and the domestic plane".

A culture of monism or dualism is inherited from our place of birth or adoption. I was raised in the dualist school. Whilst international law was a subject taught at university, and was regarded as true law, it was on a different plane. It addressed itself to States and international organisations and their concerns. Rarely did it impinge upon domestic law, doubtless because of the dualist theory and the discouraging attitude of the legal profession. The negative response was nurtured in the soil of dualism.

Thanks in large part to a remarkable series of judicial colloquia organised by the Commonwealth Secretariat in London - with the assistance of Interights - the culture of resistance, or indifference, to international law is changing. If one asks for the vision of the legal order in the twenty-first century, an aspect of great relevance is the growing rapprochement which can be detected between international and domestic law. This is happening as a natural and inevitable result of the increasing influence of international law upon the municipal legal system, including the influence of the international law of human rights.

The High Court of Australia, on which I serve, has long paid great respect to the opinions of the International Court of Justice as expositions of the principles of international law where those principles have arisen for consideration in Australian cases. Sir Gerard Brennan, the former Chief Justice of Australia, recently collected some of the cases and referred to their use ⁵ . Chief Justice Brennan cited, with apparent approval, the remark of his predecessor, Sir Anthony Mason, describing the gradual erosion, in Australia, of the strict theory of dualism. Sir Anthony had suggested that it was "an overhang of the old culture in which international affairs and

national affairs were regarded as disparate and separate elements". He foresaw that culture giving way to "the realisation that there is an ongoing interaction between international and national affairs, including law" ⁶ .

In *Mabo v State of Queensland [No 2]* ⁷ , as a step in his reasoning towards the conclusion that the "native title" to land of Australia's indigenous peoples had survived the acquisition of sovereignty over the continent by the British Crown and its settlement by the European colonists, Justice Brennan said of the influence of international human rights law:

"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 indiscriminatory document 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* ⁸ 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 land".

In Australia, New Zealand, Britain and other countries of the common law which, until now, have adhered scrupulously to dualism, a change is gradually coming about. It is the impact of universal notions expressed in international law, as they affect municipal law that I wish to explore in this essay. This is one of the most interesting developments occurring in the domestic law of many countries at this time. The development has its critics as well as its supporters. I will describe the developments in some of the jurisdictions which I know best. I will then attempt to draw some general conclusions.

THE BANGALORE PRINCIPLES

The traditional view of most common law countries has been the dualist one described by Rosalyn Higgins: that international law is not part of domestic law. Blackstone in his *Commentaries* , suggested that:

"... the law of nations (whenever any question arises which is properly the object of its jurisdiction) is here [in England] adopted in its full extent by the common law, and is held to be part of the law of the land ..." ⁹ .

Save for the United States of America, where Blackstone had a more lasting influence, his view came to be regarded, virtually universally in common law legal systems, as being "without foundation" ¹⁰ .

In Australia, in 1982, writing judicially, Justice Mason explained the traditional doctrine in these terms:

"It is a well settled principle of the common law that a treaty not terminating a state of war has no legal effect upon the rights and duties of Australian citizens and is not incorporated into Australian law on its ratification by Australia ... [T]he approval 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 a Commonwealth or State statute. Section 51(xxix) [the external affairs power] arms the Commonwealth Parliament ... to legislate so as to incorporate into our law the provisions of [international conventions]" ¹¹ .

A new recognition has now come about concerning the use which may be made by judges of international human rights principles and of their exposition by the international courts, tribunals and other bodies established to give them content and effect. This has happened as a reflection of the growing body of international human rights law, of the instruments both regional and international which give effect to it, and as a result of the recognition of the importance of its content for people everywhere.

An expression of the new approach was given in February 1988 in Bangalore, India in the so-called *Bangalore Principles* . These were agreed by a group of lawyers, mainly from Commonwealth countries, in the first in the series of colloquia to which I have referred. The meeting in Bangalore was chaired by Justice P N. Bhagwati, former Chief Justice of India. I was the sole participant from Australasia. Amongst the other participants were Mr Anthony Lester QC (now Lord Lester of Herne Hill), Justice Rajsoomer Lallah (later Chief Justice of Mauritius) and Justice Enoch Dumbutshena (then Chief Justice of Zimbabwe). Joining the Commonwealth participants was a judge of the Federal Circuit Court in the United States, Ruth Bader Ginsburg (now a Justice of the Supreme Court of the United States).

Relevantly, the *Bangalore Principles* state, in effect:

- (1) International law (whether human rights norms or otherwise) is not, as such, part of domestic law in most common law countries;
- (2) Such law does not become part of domestic law until Parliament so enacts or the judges (as another source of law-making) declare now the norms thereby established are part of domestic law;
- (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 material, the judge may ascertain and declare what the relevant rule of domestic law is. It is the action of the judge, incorporating the rule into domestic law, which then makes it part of domestic law ¹² .

In terms, the *Bangalore Principles* declare ¹³ :

"[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. 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" ¹⁴ .

Some Australian lawyers (and not a few judges), brought up in the tradition of the strict dualism were inclined, at first, to regard the *Bangalore Principles* as completely heretical ¹⁵ . They cling to such decisions as *R v Secretary of State for the Home Department; Ex parte Bhajan Singh* ¹⁶ and regard with much scepticism the assistance to be derived from an international treaty, other international law or the pronouncements of international or regional courts, tribunals and committees. In doing so they observe the classical response of the dualists. But their views will not prevail.

HIGH JUDICIAL PRONOUNCEMENTS

In the ten years since the *Bangalore Principles* were formulated, something of a sea change has come over the approach of courts in England, Australia, New Zealand and other countries of the common law. The clearest indication of the change in Australia can be found in the remarks of Justice Brennan (with the concurrence of Chief Justice Mason and Justice McHugh) in *Mabo v Queensland [No. 2]* ¹⁷ already cited ¹⁸ .

To similar effect were the observations of the English Court of Appeal in *Derbyshire County Council v Times Newspapers Limited* ¹⁹ , a decision later affirmed by the House of Lords, although with somewhat different reasoning ²⁰ . In a sense, the Court of Appeal decision paved the way for the reasoning of Justice Brennan in *Mabo* and was referred to by him. The question in *Derbyshire* concerned the question whether a local government authority was entitled, by the law of England, to sue for libel to protect its corporate reputation (as distinct from that of its members). The trial judge (Justice Morland) had held that it was ²¹ . His decision was reversed by the Court of Appeal. In the course of his reasoning, Lord Justice Balcombe ²² referred to article 10 of the *European Convention on Human Rights* to which the United Kingdom is a party. That article relates to freedom of expression. His Lordship said:

"In my judgment ... where the law is uncertain, it must be right for the court to approach the issue before it with a predilection to ensure that our law should not involve a breach of article 10. That was the approach of Lord Oliver of Aylmerton in *In re K D (a Minor) (Ward: Termination of Access)* [1988] AC 806 where, in relation to an argument based on articles 6 and 8 of the same Convention and a previous decision of the European Court of Human Rights, ... he cited with approval the argument of counsel in the following passage at p 823: 'Although this is not binding upon your Lordships, the United Kingdom is, of course, a party to the Convention for the Protection of Human Rights and Fundamental Freedoms and it is urged that it is at least desirable that the domestic law of the United Kingdom should accord with the decisions of the European Court of Human Rights under the Convention'".

The remarks of Lord Justice Butler-Sloss in *Derbyshire* were to similar effect ²³ .

After *Derbyshire* was decided, a similar question arose in the New South Wales Court of Appeal in *Ballina Shire Council v Ringland* ²⁴ . The new Chief Justice of Australia,

Chief Justice Gleeson, and I, were at that time members of that Court. A majority (Chief Justice Gleeson and myself; Justice Mahoney dissenting) followed *Derbyshire* and the earlier similar judgment of the Appellate Division of the Supreme Court of South Africa in *Die Spoorbond v South African Railways* ²⁵. In coming to our respective conclusions, both Justice Mahoney ²⁶ and I ²⁷ referred to the provisions of article 19.2 of the *International Covenant on Civil and Political Rights* which Australia had ratified. Following, as it did, the decision of the High Court of Australia in *Mabo*, nobody questioned the relevance of a consideration by the Court of applicable or relevant international human rights principles in assisting it to come to its conclusions about the content of Australian common law.

In New Zealand, a similar trend has also emerged. In that country, the position is somewhat different from that of Australia and England, by reason of the enactment of the *New Zealand Bill of Rights Act* 1990 ²⁸. In *Ministry of Transport v Noort; Police v Curran* ²⁹, the New Zealand Court of Appeal was required to consider whether the provisions of the *Transport Act* 1962 (NZ), ss 58B, 58C and 58D, relating to breath and blood testing were inconsistent with the right to legal advice under the *New Zealand Bill of Rights Act*. The Court, by majority (Justice Cooke, President; Justices Richardson, Hardie-Boys and McKay; Justice Gault dissenting) dismissed the appeal, holding that there was no relevant inconsistency. The reasoning of the judges differed. Justice Cooke (as Lord Cooke of Thorndon then was) referred to the "cardinal importance", in giving meaning to the *New Zealand Bill of Rights Act* to "bear in mind the antecedents":

"The International Covenant on Civil and Political Rights speaks of inalienable rights derived from the inherent dignity of the human person. Internationally there is now general recognition that some human rights are fundamental and anterior to any municipal law, although municipal law may fall short of giving effect to them: see *Mabo v Queensland* (1988) 166 CLR 186, 217-218. The right to legal advice on arrest or detention under an enactment may not be quite in that class, but in any event it has become a widely-recognised right ... Subject to contrary requirements in any legislation, the New Zealand Courts must now, in my opinion, give it practical effect irrespective of the state of our law before the Bill of Rights Act" ³⁰

The extent of a possible obligation on the part of New Zealand Ministers to have regard to international human rights norms was again considered by the New Zealand Court of Appeal in *Tavita v Minister of Immigration* ³¹. That case involved the consideration of the relevance of international norms to administrative decision-making, as distinct from the interpretation and application of the Bill of Rights Act. Mr Tavita had overstayed his permit to be in New Zealand. He applied to the Court to set aside a removal order. He argued that the Minister, and the Immigration Service had failed, although obliged by law, to have regard to the international obligations relating to a child born to the applicant and his family in New Zealand. He was thus entitled to stay in New Zealand. The Crown argued that the Minister and the Department were entitled to ignore international obligations whether of the *International Covenant on Civil and Political Rights*, the *First Optional Protocol* or the *Convention on the Rights of the Child* 1989, all ratified by New Zealand.

Delivering the interim judgment of the New Zealand Court of Appeal, Justice Cooke stopped short of deciding that international obligations *must* be considered in the performance of the administrative decision-making process ³². Nevertheless, he

reviewed the relevant jurisprudence under the *European Convention* established by decisions of the European Court of Human Rights ³³ . He went on to describe the Minister's submission as:

"... an unattractive argument, apparently implying that New Zealand's adherence to the international instruments has been at least partly window-dressing. Although, for the reasons to be mentioned shortly, a final decision on the argument is neither necessary nor desirable, there must at least be hesitation about accepting it. The law as to the bearing on domestic law of international human rights and instruments declaring them is undergoing evolution. For the appellant [counsel] drew our attention to the Balliol Statement of 1992, the full text of which appears in 67 ALJ 67, with its reference to the duty of the judiciary to interpret and apply national constitutions, ordinary legislation and the common law in the light of the universality of human rights. It has since been reaffirmed in the Bloemfontein Statement of 1993."

If and when the matter does fall for decision, an aspect to be borne in mind may be one urged by counsel for the appellant: that since New Zealand's accession to the Optional Protocol the United Nations Human Rights Committee is in a sense part of the country's judicial structure, in that individuals subject to New Zealand jurisdiction have direct rights of recourse to it. A failure to give practical effect to international instruments to which New Zealand is a party may attract criticism. Legitimate criticism could extend to the New Zealand Courts if they were to accept the argument that, because a domestic statute giving discretionary powers in general terms does not mention international human rights norms or obligations, the executive is necessarily free to ignore them ³⁴ .

The *Balliol Statement* and the *Bloemfontein Statement*, referred to in the foregoing passages, were agreed at meetings of the judicial colloquia to which I have referred. Like the earlier similar statements, issued after meetings in Harare, Zimbabwe and Abuja, Nigeria, they accepted and endorsed the *Bangalore Principles* ³⁵ . A meeting in 1996 in Georgetown, Guyana, also endorsed those principles. The tenth anniversary in 1998 saw a colloquium assemble in Bangalore once again, organised by Interights. The participants were able to review a remarkable record of success in the application of the *Bangalore Principles*. I turn to a description of the Australian cases, in which the approach of the *Principles* has been followed, to several of which I have been privileged to contribute.

CASES APPLYING THE

BANGALORE PRINCIPLES

I have previously collected a number of decisions of the High Court of Australia and of the New South Wales Court of Appeal in which reference had been made to international human rights principles in the development of the understanding of the local common law in Australia ³⁶ . In the Court of Appeal, the cases included:

A case involving a suggested ambiguity of the *Bankruptcy Act* 1966 (Cth) whereby civil proceedings were stayed on bankruptcy and whether the Act should be interpreted so as to exclude any applications to public law proceedings brought for the vindication of a public (as distinct from private) right ³⁷ .

A case concerning imputed bias by reason of a judge's earlier retainer, whilst a barrister, for a party to litigation in suggested breach of the requirement in article 14.1

of the *ICCPR* that a person have a "fair and public hearing by a competent *independent and impartial* tribunal established by law" ³⁸ .

A case concerning whether the common law provides an enforceable right to speedy trial ³⁹ having regard to the terms of article 14.3 of the *ICCPR* .

A case concerning a right of a mute person to have an interpreter assist her understanding of evidence and argument given in open court in proceedings concerning her, having regard to the terms of articles 14.1, 14.3(a) and (f) of the *ICCPR* ⁴⁰ .

A case involving the right of a litigant in person to have, as costs, expenses necessary for attending court by reason of the promise of "equality" before the courts and tribunals under Article 14.1 of the *ICCPR* ⁴¹ , notwithstanding earlier court decisions to the contrary in England.

A case involving the imposition of a fine upon a bankrupt, invalid pensioner prisoner of \$60,000.00 as punishment for contempt of court, having regard to the prohibition on "excessive fines" in the still applicable *Bill of Rights* 1688 (GB) ⁴² .

An appeal by a convicted contemnor involving an asserted denial of his right to have his conviction and sentence reviewed by a higher tribunal according to law as article 14.5 of the *ICCPR* requires, when all that was provided was an entitlement to seek special leave from the High Court of Australia to appeal against conviction ⁴³ .

There are many other Australian cases which could be mentioned in this context, including cases in the Federal Court of Australia ⁴⁴ , the Family Court of Australia ⁴⁵ and in the Court of Criminal Appeal of New South Wales ⁴⁶ . In many of the lastmentioned decisions, a feature of the reasoning is the reference by the judges, not only to the text of a relevant international instrument, but also to the development of the jurisprudence by courts, tribunals and committees - particularly the European Court of Human Rights - which elaborate and explain the fundamental norms.

In New Zealand, the vehicle of the *New Zealand Bill of Rights Act* , although not constitutionally entrenched, gives an established framework for the reference to analogous jurisprudence developed around similarly expressed provisions in international law. The same is true of India Sri Lanka and countries of the "new Commonwealth" which have written constitutions incorporating a detailed Bill of Rights. In Australia and England there is no similar charter of enforceable rights although a Bill has been introduced into the United Kingdom Parliament to incorporate the European convention into domestic law. Meanwhile, the absence of a constitutional charter has not stopped the courts, in the manner suggested in the *Bangalore Principles* , from utilising international law where a relevant gap appears in the common law where a statute falls to be construed which is ambiguous.

A CONSTITUTIONAL INTERPRETIVE PRINCIPLE

There is one further development which should be mentioned. It represents a further step in the logic of the *Bangalore Principles* and one to which I have recently given expression. It involves the adoption of an "interpretative principle" for the construction of constitutional texts, so that the text is construed, as far as possible, to resolve any ambiguities that may exist, in favour of a construction which upholds universal human rights in preference to one which does not.

Consider the two Australian cases in which this "interpretative principle" has been stated. The first, *Newcrest Mining (WA) Ltd v The Commonwealth* ⁴⁷, concerned a longstanding controversy about the interpretation of two sections of the Australian Constitution. One section, s 51(xxxi) limits the power of the Australian Federal Parliament to make laws providing for compulsory acquisition of property otherwise than on just terms. In that sense it reflected the commitment to lawfulness, due process and fair compensation expressed in international law including in the *Universal Declaration of Human Rights* Art 17.2 ⁴⁸. The other (s 122) affords the Federal Parliament plenary power to make laws for the government of the Australian territories. The question was whether the restriction in the list of federal powers carried over to control laws made for the Northern Territory which had the effect of the compulsory acquisition of property. Were such laws in the territories exempt from the federal requirements?

A previous decision of the High Court of Australia had held that they were exempt ⁴⁹. That decision was challenged. The Court divided in its opinions. The constitutional text appeared to be ambiguous. In reaching my conclusion that the territories power was to be read as subject to the requirements governing compulsory acquisitions, I invoked an "interpretative principle" whose provenance may be traced to Bangalore ⁵⁰:

"Where the Constitution is ambiguous, this Court should adopt that meaning which conforms to the principles of fundamental rights rather than an interpretation which would involve a departure from such rights. Australian law, including its constitutional law, may sometimes fall short of giving effect to fundamental rights. The duty of the Court is to interpret what the Constitution says and not what individual judges may think it should have said. If the Constitution is clear, the Court must ... give effect to its terms. Nor should the Court adopt an interpretative principle as a means of introducing, by the back door, provisions in international treaties or other international law concerning fundamental rights not yet incorporated into Australian domestic law. However, ... the inter-relationship of national and international law, including in relation to fundamental rights, is 'undergoing evolution'. ... [I]nternational law is a legitimate and important influence on the development of the common law and constitutional law, especially when international law declares the existence of universal and fundamental rights. To the full extent that its text permits, Australia's Constitution, as the fundamental law of government in this country, accommodates itself to international law, including in so far as that law expresses basic rights".

No other Justice of the Australian High Court in *Newcrest* embraced this principle. However, in a recent comment, Sir Anthony Mason has remarked that the approach adopted by me "is entirely consistent with the principles of statutory construction adopted in *Coco v The Queen* ⁵¹ and it shares something in common with the use of international law and conventions as a source for development of the common law, as expounded by [Justice] Brennan in *Mabo [No 2]* ⁵² and subsequently by other Justices in *Dietrich v The Queen* ⁵³ and [*Minister for Immigration and Ethnic Affairs*] v *Teoh* ⁵⁴". Sir Anthony added some cautionary remarks: "Whether this approach will be adopted and, if so, whether it will make a significant difference remains to be seen. If the approach is adopted, the question in each case is essentially particular: Is there any ambiguity? And, if the ambiguity can be resolved by recourse to history, tradition and

Convention Debates, are they to be over-ridden by the presumptive rule of construction?"

A more recent decision on this point concerned the meaning of s 51(xxvi) of the Australian Constitution ("the race power"). That provision permits the Australian Federal Parliament to make special laws with respect to the people of any race. In my reasons I returned to the "interpretative principle" ⁵⁵. In rejecting the argument that such "special laws" could be adverse and detrimental to persons on the ground of their race, I said ⁵⁶:

"[T]he Australian Constitution, which is a special statute, does not operate in a vacuum. It speaks to the people of Australia. But it also speaks to the international community as the basic law of the Australian nation which is a member of that community. If there is one subject upon which the international law of fundamental rights resonates with a single voice it is the prohibition of detrimental distinctions on the basis of race. I consider that Judge Tanaka was correct in the International Court of Justice, when he declared that ⁵⁷:

'[T]he norm of non-discrimination or non-separation on the basis of race has become a rule of customary international law' ⁵⁸."

Where, unlike in Australia, a constitutional text exists which contains a comprehensive statement of fundamental rights, the path of judicial construction, conformable to the interpretative principle which I have propounded, is much simpler. Where such a constitutional text makes reference to fundamental human rights, as also recognised in international law, it is highly desirable, indeed obligatory, for judges within municipal systems to familiarise themselves with the international jurisprudence collecting around the same words in international and regional bodies devoted to expounding their meaning.

Although the "interpretative principle" to which I have referred probably represents, at this time, a minority opinion in Australia, it seems likely to me that it will ultimately be accepted as the rapprochement between international law (including that of human rights) and domestic law gathers pace in the coming millennium ⁵⁹. But, in considering this possibility, it is necessary to acknowledge the views of critics who approach the *Bangalore Principles* with suspicion and caution.

CAUTIONARY WORDS

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

(1) Treaties are typically negotiated by the Executive Government, as the modern manifestation of the Crown. They may or may not reflect the will of the people, expressed by their representatives in Parliament;

(2) The processes of ratification are often imperfect. In Australia, for example, the Federal Government deposited the instrument of accession to the first *Optional Protocol* to the *ICCPR* before tabling the instrument in Parliament. This was described by one observer as "extraordinary ... without any public debate or even public awareness of its existence, let alone its scope and significance" ⁶⁰. There is now, in Australia, a lively discussion of the need to improve the procedures for the

ratification of international treaties and to provide for pre-ratification scrutiny by the Federal Parliament ⁶¹ ;

(3) In federal countries special concern has been expressed that the ratification of international treaties may be used as a means to undermine the distribution of powers between the Federal and State legislatures in a way never contemplated by the drafters of the Constitution ⁶² . One reason commonly advanced for awaiting legislation to introduce an aspect of international law into domestic law in a federation, is that such a course will permit the constitutional validity of the statutory introduction of the norm to be tested in the courts;

(4) Then it is suggested that judicial introduction of human rights norms may divert the community from the more open, principled and democratic adoption of such norms in constitutional or statutory amendments which have the legitimacy of popular endorsement. The recent exposition by the High Court of Australia of fundamental rights to be implied from the nature and purposes of the Australian *Constitution* has sometimes been criticised on this ground ⁶³ . Those who hold to this view urge that it would be preferable to engage in a candid national debate and to accept openly an enacted Bill of Rights rather than to accept such a development from the judiciary;

(5) Some commentators have also expressed scepticism about the international courts, tribunals and committees which pronounce upon human rights. They assert that they are typically made up of persons from legal regimes quite different from our own. In *R v Jefferies* ⁶⁴ Justice Richardson, now President of the New Zealand Court of Appeal, observed that, whilst the jurisprudence of Canada in the area of human rights and that of the European Court of Human Rights have offered undoubted assistance in the interpretation and application of the *New Zealand Bill of Rights Act* , New Zealand should nonetheless be wary. It should not forget its own legal and social history which has disdained federation and, so far, has declined to accept an entrenched statement of rights with overriding constitutional force;

(6) To similar effect, critics have pointed to the generality of the expression of many of the provisions contained in international human rights instruments. Of necessity, these are stated in language lacking in precision. This means that those who use them may be tempted to read into the broad language what they hope, expect or want to see. Whilst the judge of the common law tradition has an indisputable creative role, such creativity must be restrained. It must proceed in a judicial way. It must not undermine the primacy of democratic law-making by the organs of government, directly or indirectly accountable to the people ⁶⁵ ; and

(7) Finally, the world, in the matter of rights protection, is by no means monochrome. We are now at pains to protect the bio-diversity of fauna and flora. The principle of self-determination of peoples is a reflection of the fundamental right of every people to be governed in a way acceptable to a majority of the population. It would be ironic if the advance of international human rights principles were to undermine the variety of human legal systems and democratic accountability which is itself an important right which courts should loyally respect ⁶⁶ .

SUPPORT FOR THE BANGALORE PRINCIPLES

As against the foregoing criticisms and cautionary words, the supporters of the *Bangalore Principles* point to a number of factors which must be kept in mind in evaluating the evolving jurisprudence:

(1) The *Bangalore Principles* do not undermine the sovereignty of national law-making institutions. They acknowledge that if those institutions have made (by constitutional, statutory or common law decision) a rule which is unambiguous and binding, no international human rights principle can undermine or overrule the applicable domestic law. To introduce such a principle requires the existence of a gap in the common law or ambiguity in a local statute. Then, by direct legislation or indirect introduction by the judicial branch of government, the principle can be imported into the law of the sovereign country. Far from being a negation of sovereignty, this is an application of it;

(2) The process which the *Bangalore Principles* endorse is, in a sense, as Justice Brennan described it in *Mabo*, an inevitable one. As countries, such as New Zealand and Australia, by subscription to the *First Optional Protocol*, submit themselves to the external scrutiny and criticism of their laws by the United Nations Human Rights Committee, the results must be addressed. If a domestic law is measured and found wanting, a country must bring its law into conformity or be revealed engaged in human rights "window-dressing";

(3) Modern notions of democracy are more complex than formerly was the case. They involve more than the reflection in law-making by the will of the majority, intermittently expressed upon a broad range of issues at general elections. Now, it is increasingly appreciated that the legitimacy of democratic governance depends upon the respect by the majority for the fundamental rights of minorities⁶⁷. Therefore, in so far as courts give effect at least to fundamental rights, they are assisting in the discharge of their governmental functions to advance the complex notion of democracy as it is now understood;

(4) So far as federal states are concerned, their constitutions do not stand still. The view has been expressed that a federal parliament and government is a trustee for the international standards of the world community in which it is the responsibility of the federal polity to be the nation's voice⁶⁸. The power of a constitutional court to strike down excessive laws and to measure all laws against the standards of the *Constitution* as understood from time to time, ensure that such laws meet the requirements of constitutionality. But federal constitutions must themselves adapt to the world in which the federal state now finds itself. This, indisputably, is a world of increasing interrelationships in matters of security, economics and of human rights. Judges, like legislatures and governments, cannot ignore the international reality within which their legal systems now operate;

(5) Giving effect to international law where a country has formally ratified a relevant treaty, does no more than give substance to the act which the executive government has taken. The knowledge that the judicial use of international law in this way is now becoming more frequent may have the beneficial consequence of discouraging ratification where there is no serious intention to accept a prospect of incorporation of the principles contained in the treaty;

(6) The international impact upon local law is already occurring outside the judiciary. For example, international human rights principles are being introduced into domestic

law by express legislation ⁶⁹ . Sometimes that legislation follows determinations of a relevant international body, as was the case of the recent Australian statute: *Human Rights (Sexual Conduct) Act* 1994 (Cth). That Act followed the decision of the United Nations Human Rights Committee in determining a complaint by Mr Nicholas Toonen against Australia in respect of the Tasmanian laws on homosexual offences. Similar laws had been repealed everywhere else in Australia ⁷⁰ . Given that other branches of government are giving effect to international human rights law, it is scarcely surprising that the courts, as a branch of government, are also taking such law into account in appropriate cases and in permissible circumstances; and

(7) The developments just described are hardly surprising or threatening, at least to judges and lawyers of the common law tradition. The basic international human rights instruments were, for the most part, drafted lawyers of that tradition. In countries such as Australia, Britain, Canada, India, New Zealand and Sri Lanka and so forth, their concepts are enshrined, to varying extents, in constitutional, statutory or common law principles. It is the jurisprudence which is now collecting around these broad concepts that is often helpful in facing the kinds of problems which societies must solve today ⁷¹ . That is why it is appropriate and useful for the common law now to modify its earlier monistic principle of strict separation of international and domestic law. It is timely that a *rapprochement* between these systems of law should be gradually developed. As we enter a new millennium where there will be increasing international law of every kind, it is part of the genius of the national legal systems that the courts should have found a way to take cognisance of international jurisprudence in appropriate circumstances and by orthodox and familiar techniques of judicial reasoning.

TOWARD THE NEW MILLENNIUM

As international law grows in quantity, variety, subject matter and importance, it is both inevitable and proper that national legislatures will seek (where their Constitutions do not already so provide) to have a more effective say in the consideration of ratification of treaties ⁷² and in their impact on domestic law. The task of reconciling the growing body of international law with the domestic legal system remains an important and acute one. In the process of reconciliation, the three branches of government have their respective functions to perform. The judicial branch can scarcely ignore the developments of international law relevant to the cases before the judges. In the matter of fundamental human rights of universal application, it is inevitable, as Justice Brennan said in *Mabo* ⁷³ , that the influence of international law will increase and that the mutual adjustment of the two universes will continue.

Each modern judge and lawyer has a duty to contribute to this process. It is the way of the future. That is why it is unsurprising that the influence of the *Bangalore Principles* throughout the world continues to gather pace. The achievements of the first decade will seem insignificant when the second decade closes.

¹ **Parts of this contribution appeared in an earlier form in a paper by the author "The Impact of International Human Rights Norms: 'A Law Undergoing Evolution'" (1995) 25 *Western Australian Law Rev* 130.**

² Justice of the High Court of Australia. Formerly President of the International Commission of Jurists and Special Representative of the Secretary-General of the

United Nations for Human Rights in Cambodia.

³ Clarendon, Oxford, 1994 at 205.

⁴ *Loc cit.*

⁵ F G Brennan, *Fiftieth Anniversary of the International Court of Justice*, Opening of Colloquium in *Papers of the Colloquium* published by the Australian Branch of the International Law Association pp 7-17.

⁶ A F Mason, "The Influence of International and Transnational Law on Australian Municipal Law" (1996) 7 *Public Law Review* 20 at 23. cf J Crawford and W R Edeson, "International Law and Australian Law" in K W Ryan (ed) *International Law in Australia*, 2nd ed, 1984, Sydney, 71 at 80-82.

⁷ (1992) 175 CLR 1 at 42.

⁸ See Communication 78/1980 in Selected Decisions of the Human Rights Committee under the Optional Protocol, Vol 2, 23.

⁹ Quoted in *Chow Hung Ching v The King* (1948) 77 CLR 449 at 477.

¹⁰ *Ibid.*

¹¹ *Koowarta v Bjelke-Petersen* (1983) 153 CLR 168 at 224-225: see comment by P J Downey "Law and the International Year of the Family" [1994] *NZ Law Journal* 433-434.

¹² M D Kirby, "The Australian Use of International Human Rights Norms: From Bangalore to Balliol - A View from the Antipodes" (1993) 16 *UNSW L Journal*, 363.

¹³ *Bangalore Principles*, Principle 4: see (1988) 14 *Cth Law Bulletin* 1196; cf (1988) 62 *Aust L Journal* 531.

¹⁴ *Ibid.*, Principle 7.

¹⁵ Eg *Jago v District Court of NSW* (1988) 12 NSWLR 558 per Samuels JA, 580. cf *Young v Registrar [No 3]*, (1993) 32 NSWLR 262 per Powell JA, 291-293.

¹⁶ [1976] 1 QB 198, 207.

¹⁷ (1992) 175 CLR 1 at 42.

¹⁸ See also *Dietrich v The Queen* (1992) 177 CLR 292, 330, 337, 365. cf G Triggs, "Customary International Law and Australian Law" in M P Ellinghaus, A J Bradbrooke & A J Duggan (eds) *The Emergence of Australian Law* (Sydney: Butterworths, 1989) 376, 381; B F Fitzgerald, "International Human Rights and the High Court of Australia" (1994) 1 *JCU L Rev* 78.

¹⁹ [1992] 1 QB 770.

²⁰ [1993] AC 534.

²¹ [1992] 1 QB 775.

²² *Id.*, at 812.

²³ *Id.*, at 830.

²⁴ (1994) 33 NSWLR 680.

²⁵ [1946] AD 999.

²⁶ (1994) 33 NSWLR at 721.

²⁷ *Id.*, at 698-699.

²⁸ cf M Mulgan, "Implementing International Human Rights Norms in the Domestic Context: The Role of a National Institution" (1993) 5 *Canterbury L Rev* 235; J

Craig, "The 'Bill of Rights' Debates in Australia and New Zealand - A Comparative Analysis" (1994) 8 *Legal Studies* 67; cf *R v Goodwin* [1993] 2 NZLR 153 at 168.

²⁹ [1992] 3 NZLR 260.

³⁰ *Ibid*, 270.

³¹ [1994] 2 NZLR 257.

³² *Ibid*. See B O'Callaghan 'Note: *Tavita v Minister for Immigration*' (1994) 7 *Auckland Uni L Rev* 762, 764. See now, in Australia, *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273. The High Court of Australia warned against "judicial development ... as a backdoor means of importing an unincorporated convention into Australian law" *ibid* 288, per Mason CJ and Deane J.

³³ *Eg Berrehab v Netherlands* (1989) 11 EHRR 322; *Beldjoudi v France* (1992) 14 EHRR 801; *Lamgiundaz v UK* [1993] TLR 483.

³⁴ cf *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 288.

³⁵ See Cth Secretariat *Developing Human Rights Jurisprudence* (London, 1991) where these instruments are collected.

³⁶ Kirby, above n 10.

³⁷ *Daemar v Industrial Commission of NSW* (1988) 12 NSWLR 45.

³⁸ *S & M Motor Repairs Pty Ltd v Caltex Oil (Aust) Pty Ltd* (1988) 12 NSWLR 358.

³⁹ *Jago v District Court of New South Wales* (1989) 168 CLR 23 affirming (1988) 12 NSWLR 558.

⁴⁰ *Gradidge v Grace Bros Pty Ltd* (1988) 93 FLR 414.

⁴¹ *Cachia v Hanes* (1991) 23 NSWLR 304.

⁴² *Smith v The Queen* (1991) 25 NSWLR 1 at 15.

⁴³ *Young v Registrar, Court of Appeal [No 3]* (1993) 32 NSWLR 262.

⁴⁴ *Eg Minister for Foreign Affairs v Magno* (1993) 112 ALR 529, 534; *Premalal v Minister for Immigration* (1993) 41 FCR 117; *Teoh v Minister for Immigration* (1994) 121 LR 436 per Black CJ at 443.

⁴⁵ *Eg Re Marion* (1990) 14 Fam LR 427, 449; *Re Jane* (1988) 12 Fam LR 662.

⁴⁶ *Eg R v Greer* (1992) 62 A Crim R 442; *R v Astill* (1992) 63 A Crim R 148; *R v Sandford* (1994) 33 NSWLR 172, 177, 185. cf *DPP (Cth) v Saxon* (1992) 28 NSWLR 263; *Cannellis v Slattery* (1993) 33 NSWLR 104 (reversed (1994) 181 CLR 309).

⁴⁷ (1997) 71 ALJR 1346.

⁴⁸ For a non-constitutional case where the *Universal Declaration* was invoked, see *J v Lieschke* (1987) 162 CLR 447 at 463.

⁴⁹ *Teori Tau v The Commonwealth* (1969) 119 CLR 564.

⁵⁰ (1997) 71 ALJR 1346 at 1423-4. Footnotes deleted.

⁵¹ A F Mason, "The Role of the Judiciary in Developing Human Rights in Australia" Ch 1 in D Kinley (ed) *Human rights in Australian Law* 1998 at 18-19.

⁵² (1994) 179 CLR 427.

⁵³ (1992) 175 CLR 1 at 42.

⁵⁴ (1992) 177 CLR 292.

⁵⁵ (1995) 183 CLR 273. For discussion of the principle see K Walker, "Treaties and

the Internationalisation of Australian Law" in C Saunders (ed) *Courts of Final Jurisdiction* 1996 at 204.

⁵⁶ *Kartinyeri v The Commonwealth* (1998) 72 ALJR 722.

⁵⁷ *Ibid* at 766.

⁵⁸ *The South West Africa Cases (Second Phase)* [1966] 1 ICJR 3 at 293.

⁵⁹ See for example *Kruger v The Commonwealth* (1997) 146 ALR 126 at 190 per Gaudron J.

⁶⁰ A Twoomey, *The Procedure and Practice of Granting and Implementing International Treaties*, Parliamentary Research Service Background paper No 27 (1995) 9.

⁶¹ For the earlier Australian practice: see *Hansard* (H of R) 10 May 1961, 1693 (R G Menzies). For the proposals of the present Australian Government see *Treaty Making Reforms*, Discussion Paper, May 1996 and Joint Statement by the Australian Minister for Foreign Affairs and Minister for Justice, *The Effect of Treaties in Administrative Decision-Making* 25 February 1997.

⁶² See eg M D Kirby "Human Rights: the International Dimension", Aust Parl (Canberra, 17 February 1995).

⁶³ Eg D Rose "Judicial Reasonings and Responsibilities in Constitutional Cases" (1994) 20 *Monash L Rev* 195; A Fraser "False Hopes: Implied Rights and Popular Sovereignty in the Australian Constitution" (1994) 16 *Syd L Rev* 213; L Zines "A Judicially Created Bill of Rights?" (1994) 16 *Syd L Rev* 166.

⁶⁴ [1994] 1 NZLR 290, 299.

⁶⁵ Eg *Dietrich v The Queen*, supra n 16 per Brennan J, at 323.

⁶⁶ See eg *Building Construction Employees & Builders' Labourers Federation (NSW) v Minister for Industrial Relations* (1986) 7 NSWLR 372.

⁶⁷ H Charlesworth, "Protecting Human Rights" (1994) 68 *Law Inst Journal (Vic)* 462-463; C Caleo, "Implications of Australia's Access to the First Optional Protocol to the International Covenant on Civil and Political Rights" (1993) 4 *Public Law Review* 175.

⁶⁸ H Charlesworth, "The Australian Reluctance About Rights" In P Alston (ed) *Towards an Australian Bill of Rights* (Sydney: HREOC, 1994) at 53.

⁶⁹ Eg *Privacy Act 1988* (Cth). The scheduled Privacy Principles substantially incorporate into Australian law the OECD *Principles on Trans-Border Data Flows and the Protection of Privacy*, 1980.

⁷⁰ *Toonen v Australia* UN Doc CCPR/C/50/D/488/1992 (4 April 1994). For discussion, see A Funder, "The Toonen Case" (1994) 5 *Public Law Review* 156; G Selvanera "Gays in Private: The Problems with the Privacy Analysis in Furthering Human Rights" (1994) 16 *Adel L Rev* 331-340; W Morgan, "Protecting Rights or Just Passing the Buck?" (1994) 1 *Aust J Human Rights* 409.

⁷¹ For a recent case involving the use of international statements of human rights to define the content of the local common law see *The Queen v Swaffield; Pavic v The Queen* (1998) 151 ALR 98 at 136-137.

⁷² cf eg *Treaties (Parliamentary Approval) Bill* (1996) (GB) [Bill No 27 HL].

⁷³ (1992) 175 CLR 1 at 42.