

INTERNATIONAL SEMINAR ON HUMAN RIGHTS

BELFAST, MAY 1998

THE JUDGE'S ROLE

The Hon Justice Michael Kirby AC CMG

Justice of the High Court of Australia

INTERNATIONAL SEMINAR ON HUMAN RIGHTS

BELFAST, MAY 1998

THE JUDGE'S ROLE

The Hon Justice Michael Kirby AC CMG

Justice of the High Court of Australia

Judges are constantly engaged in the application of fundamental human rights. They do so at every level of the judiciary hierarchy. They have special opportunities and responsibilities in the highest appellate courts.

In many countries, judges are required to give meaning and application to constitutional, statutory and common law expositions of fundamental human rights. There is normally no surprise to a lawyer brought up in the tradition of Anglo-American common law when the requirements of international and regional human rights obligations are studied. This may be because of the major role played by lawyers of the common law tradition in drafting most of the international and regional human rights instruments now in force. Where a provision of a national constitution reflects a fundamental and universal human right, declared in an international or regional instrument, it is natural

and useful for judges now to draw upon the growing body of jurisprudence collecting around the international and regional statements of law. In this way, a common and global jurisprudence of human rights is being developed. This has the additional merit of drawing upon the legal traditions of countries outside the common law system.

In addition to giving meaning to constitutional guarantees, a question arises as to whether judges should construe ambiguous provisions of national constitutions so as to accord, as far as possible, with universal human rights jurisprudence. In a recent decision of the Australian High Court, I held that a modern approach to the construction of ambiguities in a national constitution will take into account universal human rights norms. See *Newcrest Mining (WA) Pty Ltd v The Commonwealth* (1997) 71 ALJR 1346 at 1423-1426.

In a small number of countries (such as Australia) where there is no general charter of fundamental rights, the role of the judge in applying the law may be more circumscribed. But for such a judge, the *Bangalore Principles* 1988 offer guidance for a legitimate approach for the introduction of human rights jurisprudence. Simplified, these *Principles* provide that where a local statute is ambiguous or where there is no exactly applicable common law principle, the judge may resolve the ambiguity or fill the gap in the common law by reference to universal human rights jurisprudence where this is relevant. An increasing number

of judges in common law countries are now doing this. The examples extend from England to India, from Australia to New Zealand and far beyond. Illustrations will be given.

In addition to the work of the judge in conducting trials and deciding cases, there is the role of the judge as an intellectual leader and citizen. By his or her conduct in the courtroom and elsewhere, the judge should uphold respect for universal human rights. By activities in the legal profession and in contact with judicial and legal colleagues overseas, the judge, inescapably, has a leadership role. Opportunities may present for the judge to take part in appropriate international activity designed to protect and advance universal human rights. Increasingly, judges are doing this. Whilst avoiding partisan involvement in purely political activities or potential embarrassment with cases that may come before the court, there is a large role for the modern judge in interpreting and explaining fundamental human rights both to the legal profession and to the general community and in helping people in countries less fortunate.

Necessarily, the judicial role is subordinate to the Constitution and the law. It is controlled by convention and strong traditions. But at the end of a century which has seen fearful abuses of human rights, the role of the judge as a guardian and expositor of fundamental rights is changing. Judges must be given the materials and assistance they need to perform new and enlarged functions.