

INTERNATIONAL BAR ASSOCIATION

SECTION ON GENERAL PRACTICE

25TH ANNIVERSARY CONFERENCE

BOSTON, USA, 2 JUNE 1999

JOINT SESSION COMMITTEES 3, 4, 6, 8, 10, 14, 17 & 19

EDUCATING THE LEGAL PROFESSION IN HUMAN RIGHTS -

PRACTICAL OR PIE IN THE SKY?

The Hon Justice Michael Kirby AC CMG

Australia

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A PRACTICAL SETTING

In December 1998, I participated in a celebration at Harvard University of the 50th anniversary of the *Universal Declaration of Human Rights*¹. One of the foremost educators of the legal profession in human rights, Professor Henry Steiner of the Harvard Law School, generously presented me with copy of his book, written

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¹ See M D Kirby, "The Right to Health Fifty Years On - Still Sceptical?" in 4 *Health and Human Rights* (1999) (forthcoming).

with the Australian Professor Philip Alston. The book is *International Human Rights in Context*². The authors' preface begins with the reminder that³:

"As little as two decades ago, rare was the university whose curriculum included human rights studies. Much has changed, to the point where one no longer questions why such studies should be offered but rather how they could be ignored. The human rights movement ... [including] governmental as well as non-governmental developments in human rights since 1945 - grew out of the disasters of World War II. A mere half century later human rights ideals deeply inform both the practise and theory of international law and politics".

My thesis is that the human rights movement is also having a profound, growing and beneficial impact upon domestic law and upon the professional activities of practising lawyers. The International Bar Association and its Section on Legal Practice, in a quarter century of outstanding initiatives, plays a large and growing role in encouraging this development. The establishment of the Human Rights Institute, its many world-wide initiatives including the recent publication of the basic texts on international human rights⁴,

² Clarendon Press, Oxford, 1996.

³ *Ibid*, v.

⁴ International Bar Association, *Human Rights and the Administration of Justice - International Instruments* (eds, C Gane and M Mackarel), 1998. Reviewed *Human Rights Institute Newsletter*, December 1998, 26-27; (1998) 72 *Aust LJ* 970.

are some of the most important activities which lawyers around the world are now taking in recognition of their professional obligation to practise human rights at home and to support human rights where they are endangered in every corner of the world.

A lawyer may have the right inclinations and even the intellectual conviction that initiatives of this kind should be taken. But without the basic source materials, he or she will make little progress. Without the support of a professional culture in which defence of fundamental human rights is seen as legally orthodox, respectable and professional, lawyers may lack the courage to advance their submissions and to conduct their cases with reference to the setting of global human rights.

That global setting is actually very practical. It has no time for pie in the sky. This message is brought home powerfully in the first chapter of the book by Steiner and Alston. That chapter is called "Global Snapshots". It is designed to demonstrate that challenges to human rights of ordinary human beings are part of the contemporary reality of the world we live in. They are not theoretical things of interest only to academic lawyers and misty-eyed dreamers who join idealistic fellow travellers in non governmental organisations devoted to starry-eyed ideals. Amongst the "snapshots" are reports of:

- ◆ The Special UN Rapporteur on Iraq's account of officially sanctioned amputations, maiming and branding of dissidents and military deserters in Iraq⁵.
- ◆ Of the denial of basic workers' rights to union membership of their choice under the Suharto regime in Indonesia⁶.
- ◆ Of the banning and confiscation in Turkey of a book by the nation's best known novelist because of a contribution he had made to a foreign magazine describing the oppression of fellow Kurds⁷.
- ◆ Of the proud boast of a Singapore Minister of the receipt of hundreds of letters and phone calls from the United States supporting corporal punishment by Singapore of an 18 year old American, beaten with a rattan, after conviction for car vandalism⁸.

⁵ H J Steiner and P Alston, *International Human Rights in Context - Law, Politics, Morals*, above n 2 at 4.

⁶ *Ibid*, 5.

⁷ *Ibid*, 6.

⁸ *Ibid*, 10.

- ◆ Of the persisting practice of dowry demands on women in India⁹.
- ◆ Of the Kenya Government's crack-down on the opposition, the press and the Legal Aid Centre which was fire bombed in 1995 after it published a report implicating a presidential adviser in murder¹⁰.

And lest it be thought that these instances have nothing to do with the countries of lawyers who have enough money to attend big international conferences, Steiner and Alston call to notice serious and continuing wrongs in Western countries:

- ◆ In the United States economic inequality has been on the rise since the 1970s. Especially since tax cuts in the 1980s, the gap between the rich and the poor has widened¹¹. The authors might have added reference to the continuing disadvantages suffered by ethnic minorities reflected in the high proportion of African Americans in prisons and exposed to HIV. Or the lack of an adequate national and

⁹ *Ibid*, 11.

¹⁰ *Ibid*, 13.

¹¹ *Ibid*, 13.

comprehensive healthcare system, astonishing in one of the wealthiest countries on earth.

- ◆ In Britain the age of consent for sex between homosexual men is 21, much higher than anywhere else in the European Union where it is usually 16 or below¹².
- ◆ In Israel, the government has continued a policy of demolishing or sealing houses on the West Bank in response to Palestinian resistance to Israeli military occupation¹³.
- ◆ Out of Serbia, long before the present crisis in Kosovo, have come horror stories of the plight of survivors of Serb run concentration camps - of prisoners who were made to watch all manner of cruelties: fathers forced to have oral sex with their sons; women raped in front of their husbands and sons; people quartered after their limbs were tied to cars that drove off in different directions; others with their fourth and fifth fingers cut off at the knuckle, leaving the remaining fingers

¹² *Ibid*, 15. Recent attempts at reform have been blocked in the House of Lords.

¹³ *Ibid*, 16.

fixed in the traditional two fingered salute of Serbian nationalism¹⁴.

Lawyers need to be in the forefront of international and local efforts to respond to these affronts to fundamental human rights, wherever they occur. Often, lawyers are there, working in courtroom and offices, in legal aid and pro bono activities, in NGOs, Bar Associations, in legislatures, in the United Nations, at international conferences, on the Bench and in their ordinary lives. Although it is not universally true, it is sufficiently often the fact that it can be said that many lawyers were first attracted to a life in the law by the law's basic commitment to the ideal of equal justice for all. It is justice according to law, that is true. That is what the rule of law means. But it is the business of lawyers to strive for justice and to work to ensure that, wherever possible, there is harmony between the rules of law and the needs of justice. It is the quest for justice, which includes the defence of fundamental human rights, that gives the legal profession, the practice of law and the judicial vocation their claims to nobility.

¹⁴ *Ibid*, 17.

THE GLOBAL CIVIL SOCIETY

Most countries of the world either include in their written constitutions a charter of basic human rights or (like New Zealand¹⁵ and lately the United Kingdom¹⁶), have a statute-based bill of rights to be used in construing other legislation and otherwise in advancing protection of fundamental human rights. Australia is now one of the few countries which has neither of these systems, although, as a matter of practicality, there is a high level of human rights respect, protected by specific legislation, judicial decisions and constitutional interpretation¹⁷. Every lawyer, in his or her own jurisdiction, will be generally familiar with these legal rules. In appropriate cases, they may be invoked to protect a client's rights and thereby to defend human rights more generally.

¹⁵ New Zealand *Bill of Rights Act* 1990 (NZ). See eg J Burrows, "freedom of the Press under the *New Zealand Bill of Rights Act* 1990" in P A Joseph, *Essays on the Constitution*, Broker, Wellington, 1995 at 286.

¹⁶ *Human Rights Act* 1989 (UK). Cf J Cooper, "The *Human Rights Act* 1988" (1999) 15 *Amicus Curiae* 8.

¹⁷ A F Mason, "Closing Remarks", 50th Anniversary Conference on the *Universal Declaration of Human Rights*, 10 December 1998, Sydney, Australia. The High Court of Australia has found certain implications for free speech about political, economic and like matters as a consequence of the character of the representative democracy established by the Australian Constitution. See *Theophanous v Herald and Weekly Times Limited* (1994) 182 CLR 104; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 and *Levy v Victoria* (1997) 189 CLR 579.

Apart from the proliferation of newly minted national constitutions, in newly independent States emerging from colonialism, a distinct feature of the past fifty years has been the establishment, and growing influence, of regional bodies protecting human rights¹⁸ and of international institutions which play a part in the implementation of global human rights standards and the elaboration of international human rights jurisprudence.

The European Court of Human Rights and the Inter-American Court of Human Rights are the most notable of the regional bodies. In February 1998, African Ministers, meeting under the auspices of the Organisation of African Unity endorsed the text of a protocol for the creation of an African Court of Human and People's Rights¹⁹. Only my own region of the world, Asia and the Pacific, has proved recalcitrant in the face of this global movement.

So far as the international institutions for the defence of fundamental rights are concerned three stand out. The first is the Human Rights Committee of the United Nations, established under

¹⁸ Such as the European Court of Human Rights, the Inter-American Court of Human Rights and the African Commission on Human and People's Rights.

¹⁹ See 9 *African J Int'l and Comp L* 953-961 (1997) and note (1997) 11 *Interights Bulletin* 132.

the First Optional Protocol to the *International Covenant on Civil and Political Rights* (ICCPR). The second is the Commission on Human Rights, established under ECOSOC, to consider human rights issues and receive reports on human rights concerns. The third institution comprises the Special Rapporteurs and Special Representatives, appointed by the Secretary-General of the United Nations or elected by the Commission on Human Rights. Some of these officials investigate and report upon thematic subjects (as does the Special Rapporteur on the Independence of the Judiciary or on the Rights of Women or on Children's Rights). Others report on human rights concerns in particular countries.

For a time²⁰, I served as Special Representative of the Secretary-General of the United Nations for Human Rights in Cambodia. In that capacity, I reported to the United Nations twice yearly: in April in Geneva to the Commission on Human Rights and in November in New York to the General Assembly. The members of the Human Rights Committee and virtually all of the Special

²⁰ 1973-1976. Note the Advisory Opinion of the International Court of Justice dated 29 April 1999 upholding the legal immunity of Dato' Param Cumaraswamy, the Special Rapporteur on the Independence of Judges and Lawyers. The case was referred to the Court on 5 August 1998 by ECOSOC after Malaysian courts had expressed the conclusion that a certificate by the UN Secretary-General was merely an opinion which the courts could ignore. cf R Higgins, "The International Court of Justice and Human Rights" in K Wellens (ed) *International Law and Practice*, 1998, The Hague, 691.

Representatives and Rapporteurs are lawyers. Skills in legal analysis, in sifting facts, expounding the applicable rules, finding infractions and in presenting observations about unacceptable practices and procedures explain why lawyers dominate these fields of endeavour. In reports of this kind, on these topics, they have special skills.

As a result of the case decisions of the European Court of Human Rights, countries found in breach of their obligations under the European Convention on Human Rights are obliged to bring their laws into conformity. So indeed they do. In 1989 in *Norris v Ireland*²¹, the European Court of Human Rights, following an earlier like decision in *Dudgeon v United Kingdom*²², found that Senator Norris, by being exposed to penalties under Irish criminal law rendering him liable to punishment for consensual adult homosexual conduct in private²³, had suffered a violation of his rights to respect for his private life. As a consequence, Ireland in 1993 reformed its criminal law. It abolished the old offences and set a non-discriminatory age (17) for lawful sexual conduct of whatever sexuality. Not pie in the sky. Practical human rights achievements

²¹ (1989) 13 EHRR 186.

²² (1981) 4 EHRR 149.

²³ *Criminal Law Amendment Act 1885 (Ir) s 11.*

secured, in large part, by political agitation, community activism and good lawyering. One of Senator Norris's counsel was Mrs Mary Robinson SC, later President of the Irish Republic and now the United Nations High Commissioner for Human Rights.

Australia is not a party to the European Convention. There is no applicable regional treaty. But Australia did subscribe in 1993 to the First Optional Protocol to the ICCPR. This action led to a prompt complaint against Australia to the Human Rights Committee. It was brought by Mr Nicholas Toonen. He, and Mr Rodney Croome, were homosexual citizens of Australia living in Tasmania. That was the last Australian State to preserve laws criminalising adult consensual private homosexual conduct. With the aid of lawyers, the Toonen/Croome complaint was prosecuted before the Committee which found in their favour²⁴. The Committee rejected the suggestion that moral issues were exclusively a matter of domestic

²⁴ *Toonen v Australia* 1 *Int Hum Rts Reports* 97 (No 3 1994), extracted in Steiner and Alston above n 2 at 545-548. See also A Funder, "The *Toonen* case" (1994) 5 *Public Law Rev* 156; G Selvanera, "Gays in Private: The Problems with the Privacy Analysis in Furthering Human Rights" (1994) 16 *Adel L Rev* 331; W Morgan, "Protecting Rights or Just Passing the Buck" (1994) 1 *Aust J Human Rights* 409. Another example affecting Australia concerned the decision of the World Heritage Committee of UNESCO on 30 November 1998 to condemn the government of Australia for allowing a uranium mine to operate in close proximity to an Australian national park at Kakadu which had been designated as a World Heritage Site. See J Rabkin, "International Law vs. The American Constitution - Somethings Got to Give" in the *National Interest*, 30 at 35-37 (Spring 1999).

concern²⁵. It stated that if this were so it would "open the door to withdrawing from the Committee's scrutiny a potentially large number of statutes interfering with privacy". It concluded that the provisions of the then Tasmanian law²⁶, which the Parliament of Tasmania had failed to repeal, arbitrarily interfered with Mr Toonen's right to privacy under Article 17.1 of the ICCPR. The Committee called for a prompt report of action from the State party (Australia) as to the measures taken to give effect to its views²⁷.

The Australian Federal Parliament did not enjoy general constitutional power to enact laws with respect to crime in the State of Tasmania. But it did enact the *Human Rights (Sexual Conduct) Act 1994* (Aust). This provided that "sexual conduct involving only consenting adults acting in private is not to be subject, by or under any law ... to any arbitrary interference with privacy within the meaning of Article 1 of the [ICCPR]". The Act defined an adult as a person who is 18 years old or more. The legislation, and the Human Rights Committee, were criticised from many angles by Australian

²⁵ *Toonen v Australia*, above n 24 at par 8.6

²⁶ *Criminal Code* (Tas), ss 122, 123.

²⁷ *Toonen v Australia*, above n 24, par 12. The history and significance of the *Toonen* decision is reviewed in C F Stychin, "Relatively Universal: Globalisation, Rights Discourse and the Evolution of Australian Sexual and National Identities" (1998) 18 *Legal Studies* 534.

commentators²⁸. Further litigation ensued to test the State legislation in the light of the operation of the federal Act. In the wake of this, the Tasmanian Parliament ultimately repealed the old laws. Lawyers and lawyer-led civil liberties organisations prosecuted and led the challenges in the courts to the Tasmanian legislation²⁹. With the help of good lawyering, unimportant changes were achieved in the legislation and, perhaps even more importantly, in community attitudes. Not pie in the sky. Practical human rights protection.

In the United Kingdom, there have been many cases in the courts in recent years, calling on the principles in the European Convention and on the decisions on the ICCPR, designed to effect and secure decisions of the common law or of statutory interpretation in harmony with fundamental human rights. The issues considered have ranged from those related to the discharge of military personnel on the grounds of their sexual orientation³⁰, the

²⁸ Noted Steiner and Alston, above n 2, at 740-741.

²⁹ *Croome v Tasman* (1997) 191 CLR 119. It must be said that neither Mr Toonen nor Mr Croome are lawyers. For a more recent but unsuccessful challenge to discrimination against homosexuals: see *Grant v South-West Trains Ltd* [1998] All ER (EC) 193 where the European Court of Justice, despite a strong recommendation of its Advocate-General, dismissed a claim of work benefits discrimination. See L R Helfer, "Grant v South-West Trains" 93 *American JI Int'l Law* 200 (1999).

³⁰ *R v Ministry of Defence; Ex parte Smith* [1996] QB 517. This decision is noted by Sir Anthony Hooper, "The Impact of the *Human Rights Act* on Judicial Decision-Making" [1998] EHRLR (6) 676 at 678.

construction of prison rules relating to correspondence between a prisoner and his solicitor³¹; the public disclosure by police of names and addresses of persons who have been convicted of sexual offences against minors³²; the entitlement of criminal accused to confront witnesses giving evidence against them³³; the rules governing mandatory life sentences of imprisonment³⁴; and laws impinging upon legitimate freedom of expression³⁵.

Fifty years ago, in England, the then Lord Chancellor, Lord Jowitt, described the European Convention of Human Rights as a "half-baked scheme" which was "administered by some unknown court"³⁶. With the recent moves to incorporate the Convention into

³¹ *Campbell v United Kingdom* (1993) 15 EHRR 137, noted Hooper, above n 30, at 679.

³² *R v Chief Constable of North Wales Police and Ors; Ex parte AB and Anor* [1997] 4 All ER 691; noted Hooper, above n 30, at 680.

³³ *R v Thomas*, unreported, noted Hooper, above n 30, at 681.

³⁴ *R v Home Secretary; Ex parte Hindley* [1998] 2 WLR 505; noted Hooper, above n 30, at 681.

³⁵ The reference is to the Thalidomide case which led to the *Contempt of Court Act* (see Hooper, above n 30, at 681) and to *Brind and Ors v Secretary of State for the Home Department* [1991] 1 AC 696; and *Derbyshire CC v Times Newspapers Ltd* [1992] QB 770 at 813 (followed in Australia in *Ballina Shire Council v Ringland* (1994) 34 NSWLR 680). Cf *Die Spoorbond v South African Railways* [1946] AD 999.

³⁶ Cited Hooper, above n 30, at 682.

the domestic law of the United Kingdom³⁷ it will fall to United Kingdom lawyers and United Kingdom judges in the first instance, to give meaning to fundamental human rights. They will be obliged to approach the Convention as a "living instrument" to be "interpreted in the light of present day conditions"³⁸. This is an exciting moment for the law of the United Kingdom and a big challenge for its judges and lawyers. One of them has expressed quite bluntly the need for a radical change to the approach to statutory interpretation; another to the need for a change of the legal culture³⁹. A similar resort to international law, including in the context of fundamental human rights, has been occurring in the New Zealand courts⁴⁰.

Even in the United States of America, the last bastion of perceived human rights self-sufficiency (with the developed jurisprudence of the Bill of Rights now two centuries old) has begun to feel the growing influence of international human rights law. On 12 December 1998, the United States Supreme Court issued a stay order for the execution for Joseph Stanley Faulder, less than 30

³⁷ *Human Rights Act 1998* (UK).

³⁸ *Tyrer v United Kingdom* (1978) 2 EHRR 1 at 10.

³⁹ Hooper, above n 30, at 683. See also M Hunt, "The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession" (1999) 26 *Jl of Law & Society* 86.

⁴⁰ K Keith, "The Impact of International Law on New Zealand Law" (1998) 7 *Waikato L Rev* 1.

minutes before he was scheduled to die by lethal injection in Texas. The prisoner had been on death row for 21 years following the brutal killing of an old woman, an act which he never denied. The point in issue is that Mr Faulder was a Canadian citizen. This was something he had not mentioned to Texas officials at the time of his arrest. After many other legal arguments were found to be without merit, Mr Faulder's lawyers argued that his conviction had violated the *Vienna Convention on Consular Relations*. This obliges signatory States, such as the United States, when they arrest a foreign national for a serious crime, to notify the nearest consulate of the national's home country. Canadian officials were not notified of the case until 1991.

The Supreme Court's intervention in the Faulder case was noteworthy because, earlier in the same year, lawyers for a Paraguayan national (Angel Breard) appealing against his death sentence in Virginia, persuaded the government of Paraguay to file a claim against the United States in the International Court of Justice. That claim was based on the failure of the Virginian officials to notify the Paraguayan consular officers before or at the time of the trial of Mr Breard. The International Court asked that the execution be postponed whilst the matter was considered. Secretary of State Albright pleaded for the State of Virginia to do so out of respect for international law. Virginia refused. The United States Supreme Court declined a last minute request for its intervention. Yet in Mr Faulder's case, the Court ordered that his execution should be postponed to permit time for the issues to be considered.

A commentator on these cases remarks⁴¹:

"At the beginning of 1998, a UN Special Rapporteur issued a report condemning the United States for racist and abusive applications of the death penalty ... An Amnesty Report on human rights abuses in the United States, issued in 1998, devotes an entire chapter to abuses on the death penalty which it asserts be contrary to international law. ... The United States has been a hold out against many sorts of grand international ventures in this century - from the League of Nations to the Law of the Sea Treaty, from the Children's Rights Convention to the International Criminal Court. ... This is not a world that any of the American Founders looked back on with nostalgia. But it seems to appeal very much to the champions of global civil society. It remains unclear whether the Constitution can still keep the United States from joining it".

THE BANGALORE MOVEMENT

An important movement which has been occurring in the courts of domestic jurisdiction in many countries of the common law needs to be mentioned in this context. I refer to the movement which has grown out of a series of conferences amongst leading judges of common law countries. This series has been sponsored by the Commonwealth Secretariat in London and by Interights, the International Centre for the Legal Protection of Human Rights also

⁴¹ See Rabkin, above n 24, at 39-41.

based in London. The first meeting in the series was held in 1988 in Bangalore, India.

I attended the first Bangalore meeting, as did the Honorable Ruth Bader Ginsburg. Neither of us was at that time a member of the ultimate court of our country. I went to the meeting with the usual predilections of a lawyer brought up in the dualist school which upholds a strict divorce between domestic and international law⁴². The meeting adopted the *Bangalore Principles*⁴³. According to these principles⁴⁴:

"There is a growing tendency for national courts to have regard to these international norms [of human rights] for the purpose of citing 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".

⁴² R Higgins, *Problems and Processes - International Law and How we Use It*, Clarendon, Oxford, 1994, 205.

⁴³ (1988) 14 *Commonwealth L Bulletin* 196; (1988) 62 *Aust LJ* 531.

⁴⁴ *Ibid*, par 7.

When I returned to Australia, convinced that the *Bangalore Principles* provided a means of helping to reconcile the growing body of international human rights law and domestic law, I was met with scepticism on the part of most members of the legal profession. I faced a view on the part of some of my judicial colleagues that I was indulging in legal heresy⁴⁵. So it remained for a time. But in one of the most important decisions of Australia's highest court in recent years, in which the land rights of the indigenous Aboriginal peoples were recognised for the first time under the common law, Justice F G Brennan (later Chief Justice of Australia) perceptively acknowledged and explained the growing influence which international law in the field of human rights would inevitably have on the development of Australia's domestic common law⁴⁶:

"Whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the *International Covenant on Civil and Political Rights*, brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not

⁴⁵ cf *Jago v District Court of NSW* (1988) 12 NSWLR 558 at 580 per Samuels JA; *Young v Registrar [No 3]* (1993) 32 NSWLR 262 at 291-293 per Powell JA.

⁴⁶ *Mabo v State of Queensland [No 2]* (1992) 175 CLR 1 at 42.

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".

Although this is probably the clearest statement in an ultimate court of the Commonwealth of Nations of the way in which (as the *Bangalore Principles* had taught) international human rights law will increasingly come to influence domestic judicial decisions, there are other like statements in several other countries. These include the United Kingdom⁴⁷, New Zealand⁴⁸ and later decisions of Australia⁴⁹.

This is not to say that, especially in federal countries where power is divided and in societies where the Executive subscribes to treaties which may or may not have legislative backing, care must not be taken to respect the separate constitutional law-making roles of the several actors in the law-making drama. But there can be little doubt that the process set in train by the *Bangalore Principles* will

⁴⁷ *Derbyshire County Council v Times Newspapers Ltd* [1992] 1 QB 770.

⁴⁸ *Ministry of Transport v Noort*; *Police v Curran* [1992] 3 NZLR 260; *Tavita v Minister of Immigration* [1994] 2 NZLR 257. See note B O'Callaghan, "Tavita v Minister for Immigration" (1994) 7 *Auckland Uni L Rev* 762 at 764.

⁴⁹ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 288 per Mason CJ and Deane J.

continue to have its impact on the legal systems of the world, especially those which follow the common law methodology. In my own Court, in a case concerning the law on compulsory acquisition of property by federal authorities⁵⁰ and another case concerning the race power⁵¹, I have suggested that constitutional interpretation will also, in contemporary conditions, legitimately embrace the Bangalore approach⁵²:

"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 interpretive 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 where international law declares the existence of universal and fundamental rights. To the full extent that its text permits, Australia's Constitution, as the fundamental

⁵⁰ *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 657 ("Interpretative principle").

⁵¹ *Kartinyeri v The Commonwealth* (1998) 72 ALJR 722 at 766.

⁵² *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 657 ("Interpretative principle").

law of government ... accommodates itself to international law, including in so far as that law expresses basic rights".

More recently, I put it this way⁵³:

"[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".

Many and varied have been the instances where the international norms of fundamental human rights, and the jurisprudence which has gathered around those norms, have been invoked in court decisions in Australia involving ambiguities in legislation or gaps in the settled principles of the common law. Judges and lawyers now have a new source of intellectual stimulation to nudge our municipal law in a direction which conforms to fundamental human rights. This is a movement wholly in keeping with the forces of globalism and regionalism that are at work at an economic level and in technology. The question is whether the law and its practitioners will be exempt. It seems unlikely.

⁵³ *Kartinyeri v The Commonwealth* (1998) 72 ALJR 722 at 766.

The *Bangalore Principles*, when first formulated, recognised that the whole burden of this change of thinking cannot be left to the judiciary alone. Sometimes individual members of the judiciary, or even perhaps a majority of judges, may be resistant to new ideas of this kind. It will depend upon lawyers in their advocacy to press forward the universal norms. In 1988, the judges meeting in Bangalore observed⁵⁴:

"It is essential to redress a situation where, by reason of traditional legal training which has tended to ignore the international dimension, judges and practising lawyers are often unaware of the remarkable and comprehensive developments of statements of international human rights norms. For the practical implementation of these views it is desirable to make provision for appropriate courses in universities and colleges, and for lawyers and law enforcement officials, provision in libraries of relevant materials, promotion of expert advisory bodies knowledgeable about developments in the field; better dissemination of information to judges, lawyers and law enforcement officials; and meetings for exchanges of relevant information and experience".

In pursuance of these objectives, the IBA, the Commonwealth Secretariat, Interights, the International Commission of Jurists and other bodies have been assiduous in promoting knowledge of the Bangalore movement and its lessons. The meeting of 1988 has

⁵⁴ Bangalore Principle, No 9. See 62 *Aust LJ* at 532.

been followed by a succession of similar meetings⁵⁵. The most recent such meeting, held in Bangalore in December 1998, reviewed the progress which had been made. A key provision in the 1998 statement repeats the fundamental idea of the series⁵⁶:

"It is the vital duty of an independent, impartial and well-qualified judiciary, assisted by an independent, well-trained legal profession, to interpret and apply national constitutions and ordinary legislation in harmony with international human rights codes and customary international law, and to develop the common law in the light of the values and principles enshrined in international human rights law".

One point made in the 1998 statement needs to be brought home to practising lawyers. It is the indivisible inter-relationship of economic, social and cultural rights with the more familiar categories of civil and political rights that lawyers know well⁵⁷. A glance at the large number and wide variety of cases throughout the world where courts have been persuaded to adopt the approach of the *Bangalore Principles* should reinforce practising lawyers in every jurisdiction in a determination to enter the new millennium with a new legal principle that will help their legal systems to a more harmonious

⁵⁵ Bangalore (1998); Harare (1989); Banjul (1990); Abuja (1991); Balliol, Oxford (1992); Bloemfontein (1993); Georgetown (1996); and Bangalore (1998).

⁵⁶ "The Challenge of Bangalore: Making Human Rights a Practical Reality", unreported, Bangalore, 30 December 1998, par 3.

⁵⁷ *Ibid*, par 4.

relationship with international human rights law⁵⁸. This is an exciting change. It requires a leap of imagination and a new way of thinking on the part of the judiciary and lawyers. It needs a new legal and judicial culture. There is no doubt that this will occur in every jurisdiction in the coming century. But in every jurisdiction there is a need for judges and lawyers who will act as change agents as the old dualist thinking is modified and new approaches are taken which acknowledge the growing impact of international human rights norms on domestic law. The tide is coming in. It cannot be reversed.

OTHER WAYS OF ACTING

So far I have been concerned to describe the way that lawyers in court rooms may influence decisions by helping to ensure that they conform to human rights standards. Not every case will present a human rights question. Not every case which does so will permit of a solution that conforms to the applicable international jurisprudence. The law may be clear. Constitutional doctrine may

⁵⁸ M D Kirby, "The Australian Use of International Human Rights Norms: From Bangalore of Balliol - A View from the Antipodes" (1993) 61 *UNSWLJ* 363; M D Kirby, "The Impact of International Human Rights Norms: A Law Undergoing Evolution" (1995) 25 *Western Australian Law Rev* 130. See also A F Mason, "The Influence of International and Trans-National Law on Australian Municipal Law" (1996) 7 *Public Law Rev* 20; J Crawford and W R Edeson, "International Law and Australian Law" in A W Ryan (ed) *International Law in Australia*, 2nd ed, 1984, 71 at 80-82.

be settled. The legislation may be unambiguous. The precedents of common law may be unarguable and binding. Judges and lawyers must then apply the law even though it may be inconsistent with international human rights norms.

But lawyers, including judges, are not confined to the courtroom. Most legal problems never end in a contested trial. That still leaves a great mass of lawyerly activity to be influenced by human rights principles and attitudes. Attitudes of respect to the dignity of clients, including prisoners, to opponents and to the clients of opponents. Attitudes of respect to other human beings outside the legal office. Respect for legal colleagues and court officials.

Lawyers can contribute to the advance of human rights, and community education in human rights, by involving themselves in civil society organisations. This includes involvement in bodies of lawyers such as the IBA, the ICJ, the International Lawyers' Group and so on. And bodies which lawyers have helped to found and to flourish, such as Amnesty International, the Human Rights Watch organisations, the United Nations Associations and so forth. It may be that judges have to be more careful in participating in such organisations, lest demands are made that they recuse themselves

from participating in cases for ostensible bias⁵⁹. However that may be, such limitations do not affect the practising Bar. They should not affect most judges in most circumstances. It has long been traditional and accepted for judges to be associated, in proper ways, with bodies of lawyers and other citizens concerned with human rights, judicial and professional independence and the rule of law.

Lawyers can also play a part, through legal education, in promoting the values of human rights and in teaching the next generation of the way in which such rights can be secured in practice. The large expansion of law courses on human rights topics, described by Professors Steiner and Alston, give rise to opportunities which academic and practising lawyers should seize. Similarly, many opportunities present themselves for lawyers to take part at some stage in their careers, in the international activities of the United Nations and its agencies or in regional bodies with like concerns. Where such opportunities arise, lawyers with relevant skills should respond affirmatively. Many do.

When, at home, the fundamental rights of individuals are breached, it is the duty of lawyers to lift their voices. And they should always remain alert to the fact that the catalogue of human

⁵⁹ See *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2)* [1999] 1 All ER 577.

rights is not closed. When I was a young lawyer, few indeed were those, including in the legal profession, who spoke up for the fundamental rights of women, of people of colour, of Asians and of Aboriginal Australians. Absolutely no one spoke up for the fundamental rights of homosexual, bisexual and trans-gender people. We must learn from these silences of the past to be alert to the contemporary issues of human rights which, because of our mindset, we may not see clearly enough. The human rights of people living with HIV/AIDS. The human rights of people addicted to illegal drugs. The human rights of drug dependant people, occasional small users and the families of these citizens. The human rights of people with so-called "defective" genes. The human rights of all to privacy in cyberspace.

It is the responsibility of every lawyer in today's world to keep abreast of developments in human rights and of the challenges which abuses of human rights present in every land. The IBA, its Section on Legal Practice and its Human Rights Institute, provide practical means of breathing life into the universal human rights principles and upholding them in many and varied ways. I honour the IBA and the Section on the Silver Anniversary. I acknowledge the Human Rights Institute for its many achievements. The major challenges lie ahead.