

GRIFFITH UNIVERSITY
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GLOBALISING THE RULE OF LAW?
GLOBAL CHALLENGES TO THE TRADITIONAL IDEAL OF THE
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TRADITION AND REALITY

The traditional ideal of the rule of law in a society such as Australia, is relatively straight-forward. Law represents the ultimate authority and expression of power of the nation state. Formally, it

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derives its legitimacy by being traced, or traceable, to the national constitution. In a federal country, that constitution will provide for a federal or national polity and subnational polities. These enjoy powers in respect of each other as provided by the constitution. Conventionally, there are three branches of government in each polity that makes up the nation. These are the legislature, the executive and the judiciary. Whereas the judiciary is independent of the other two branches, the executive is dependent on the legislature. Ministers in the executive government must, within a short time of their appointment, be elected to the legislature.

Each branch of government makes law that must be respected by everyone. That law may, ultimately, be enforced coercively by the agencies of the state. The major lawmaker is the legislature. But it may delegate powers of lawmaking to the executive. The main function of the judiciary is to interpret the constitution and the laws and to vindicate the claims that are made under the law. But even the judiciary has, in the minor key, a power of lawmaking. In a common law country, the judges have the responsibility of declaring the principles of the common law. Subject to the constitution and valid statute law, those principles must be obeyed.

It is left to the judiciary to settle disputes about the boundaries of law. These include disputes concerning the validity of national and subnational laws (in the case of a federation). They also include disputes concerning the meaning of the constitution, of statute law and of the residual common law that operates in the society. Once

the judiciary has spoken on the subject, the other branches of government, and those who comprise them, conform to the judicial pronouncement. So must ordinary individuals - both natural persons and corporations.

Everyone is taken to be subject to the law. No one is so high as to be above it. Obedience to law permeates society. It renders everyone in society ultimately accountable. Subject to the Constitution, laws made by the legislature, the executive or the judicial branch may be changed at the will of the people. If they do not like a law they can secure the passage of amendments, thereby reflecting the democratic will. Even where the Constitution stands as a barrier to such change of the law, the people's will can ultimately be vindicated in accordance with the procedures for constitutional amendment. Such procedures may be relatively straightforward, as they are under the Basic Law of the Federal German Republic¹. Or they may be weighted in favour of the *status quo* and resistant to

¹ K Young, "The Implementation of International Law in the Domestic Laws of Germany and Australia: Federal and Parliamentary Comparisons" (1999) 21 *Adelaide L Rev* 177 at 179. The Basic Law, Art 79(2) requires a two-thirds majority in both the Bundestag and Bundesrat for amendment of the Constitution. This procedure has been successful on forty occasions. Amendment of the Australian Constitution has only been achieved in accordance with s 128 eight times in forty-four proposals since 1901: T Blackshield and G Williams, *Australian Constitutional Law and Theory* (2nd ed, 1998), 1183.

change, as is the case with the Constitution of the United States of America and Australia².

The symbol of the rule of law is the declaration, chiselled in marble on the façade of the Supreme Court building in Washington and expressed in a more low key way in a country such as Australia. It reads "Equal Justice Under Law". Because the law is ultimately accountable to the people it is expected to reflect the people's sense of justice. Where it does not, it is assumed that the democratic process will change the law so that justice may be secured in the future. Increasingly, it is accepted for these reasons, that within the nation state the people are sovereign, whatever may be the formal legal arrangements. The monarch may be called sovereign. The legislature may be called sovereign. But, ultimately, in a modern nation state it is the people who are taken as sovereign because, ultimately, in the matter of law, their will can be done.

There is much truth in the foregoing description of the rule of law, at least so far as Australia is concerned. But the realities are often somewhat different from the appearances. The "sovereign" Parliament has lost power in recent decades to the executive government. The executive government, in turn, has lost much

² K E Palmer (ed), *Constitutional Amendments - 1789 to the Present* (1999), 591.

power and influence to the cabinet and the head of government to political parties, as well as to the permanent officials who "advise" government and strongly influence law and policy making. The judiciary is not always accessible to ordinary citizens. Vindication of the rule of law may exist on paper but, as a matter of practice, may sometimes be out of reach. Proposals for reform, to secure justice under law, may be ignored by all branches of government. The law that rules may be out of date, out of touch, unjust. Increasingly within the nation state other realities are recognised. These include the great power of bodies difficult to subject to law: the multinational corporations and the media, not for nothing called the fourth estate.

In addition to such internal challenges to the rule of law to which I have referred, now the nation state must increasingly face challenges from beyond its borders. These may come from the international bodies of growing significance in connection with global and regional trade and economics (such as the World Trade Organisation, the World Bank, the International Monetary Fund, the Organisation for Economic Cooperation and Development (OECD)). Or they may come from the international agencies of human rights (such as the Commission on Human Rights, the UN Human Rights Committee, the Special Rapporteurs and Representatives of the United Nations and particular agencies of that Organisation). The

power and influence of such bodies and of the political arms of the United Nations are felt increasingly within the borders of the nation state³.

Even the most powerful nations cannot ignore the actions of international bodies. Sometimes such bodies reflect and direct changes which narrow the scope for lawmaking by the organs of government of the nation state. To the extent that this happens, the old paradigm is challenged. The lawmakers of the nation state are no longer fully able to control the legal destiny affecting the persons living within the borders of the nation state. This development presents a number of problems for the assumptions about government that have been held until now. Those assumptions have been based on an organisation of the world around its nations. The impact of globalism and regionalism affects the capacity of the lawmaking organs of the state to respond to the democratic will of its people.

The recognition that this has happened, in a comparatively short space of time, has a number of consequences. We need to revise the institutional model for the rule of law. What is the law that

³ C Sampford, "Democratic and Global Challenges to the Concepts of 'Sovereignty' and 'Intervention', as yet unpublished paper for the 19th World Congress on Philosophy of Law and Social Philosophy, New York, June 1999.

rules if those who make that law are not directly accountable to the people governed by it? If they are not removable where the people are discontented with their law? How can the international organs of rule-making avoid the perils of unaccountability? How can they be made humble by periodic review and challenge? In short, how does the notion of the rule of law operate in the realities of the world we now live in?

Others with different experience or a yearning to preserve the certainties of the past may be pessimistic about the paradigm shift that is occurring. The reasons for such pessimism, and even for anxiety, are understandable enough. However, my thesis is twofold. First, the shift is unstoppable. It is urged forward by developments in technology (whether nuclear fission, cyberspace or the genome) and by a recognition of many problems which simply cannot be solved within the boundaries of a nation state (such as genocide, global weather change and responding effectively to HIV/AIDS).

My second thesis is that we need not be unduly pessimistic about what is. In fact, the developments are natural to the realities of the world we live in. They respond to the features of that world.

I cannot speak of the political agencies of the United Nations or of the trade and security bodies, global and regional, that have such a large and growing impact on the governance of every nation. But I can describe other places where the paradigm shift is happening. I refer to the international agencies and municipal courts

in which, today, the influence of international law is growing and strengthening. My own observations lead me to a sense of optimism. I will recount what I have myself seen. I will do so, not because my role is, in the large picture, important. Instead, I do so because my experience may help to illustrate the highly practical, useful and right respecting character of international law as it is now being felt in a country such as Australia. I will start first with some experiences in international agencies. Then I will mention a few experiences in which, in the Australian courtroom, international legal questions arise and inform the Australian legal system directly, in a way that is useful and even beneficial.

THE AGENCIES

For me, it all began when I was appointed chairman of the Australian Law Reform Commission twenty-five years ago. Soon afterwards, the Commission was required by the Federal Attorney-General to prepare a report for the Australian Parliament on privacy protection. This task coincided with the establishment by the OECD of an Expert Group to develop guidelines on privacy protection in the context of transborder data flows. That was an unusual task for the OECD. Looking back, we can see it as an early portent of the increasing moves in recent years of hard-nosed economic and trade

bodies into areas of governance without which economic advancement will be a hollow achievement, if it is attainable at all⁴.

I was elected chairman of the OECD group. We prepared our guidelines⁵. They were adopted by the Council of the OECD. They were as much designed to prevent the economic inefficiency of disparate municipal regulation of the new information technology as to defend fundamental human rights. Eventually most OECD countries, including Australia, accepted the guidelines. In this country they provided the basis for privacy principles incorporated in privacy protection legislation⁶. Through the Law Reform Commission, I was able to see the highly practical way in which a legal project at an international level could assist and influence municipal law-making. After that, I could never accept that international law - even soft law - was a matter for scholars and theorists alone. In countries as far apart as Japan, the Netherlands and Australia, the deliberations of our group in Paris had a real, practical and beneficial effect on local law and international cooperation.

⁴ J Kelsey, "Global Economic Policy-making: A New Constitutionalism?" (1999) *Otago L Rev* 535 at 539.

⁵ OECD, *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*, Paris, 1980. cf "Privacy in Cyberspace" in M D Kirby, *Through the World's Eye* (2000), Ch 5, 52.

⁶ *Privacy Act*, 1988 (Cth), s 14. By the operation of s 5 each Principle is treated as if it were a section of the Act.

In the manner of these things, one engagement leads to another. Soon after the OECD work was completed I took part in the general conference of UNESCO, also in Paris. That organisation was in the bitter throes of what became the withdrawal of the United States and the United Kingdom, the former alas not yet repaired. One of the given reasons for the United States withdrawal was the insistence of Director-General M'bow that UNESCO should continue the exploration of the meaning in the common first articles to the *International Covenant on Civil and Political Rights* the *International Covenant on Economic, Social and Cultural Rights* which promise the self-determination of peoples. Who were a "people" for this purpose?

It was strange that the United States should have opposed the exploration of this idea, given the famous opening words of its *Declaration of Independence*. But the United States quit UNESCO and, to its great credit, that organisation went on with examining the issue of self-determination. I was appointed to the group, and ultimately elected as rapporteur and chairman. Ours was, and is, a highly controversial topic. It is uncongenial to many nation states. It is even unwelcome to some people in Australia. But who can doubt, looking at the real causes of conflict in the world today, that this is one of the great issues of international law - from East Timor to Aceh; from Burma to Tibet; from Palestine to Kosovo; from Corsica to Ulster; from the Falklands to Nunavut; and most recently from Fiji, Bougainville, West Irian and Solomon Islands to Aboriginal Australia.

This is an issue that circles the earth. It goes to the heart of most contemporary dangers to international peace and security. It concerns the rights of peoples but also the human rights of the individuals who make up those peoples.

The UNESCO expert group completed its task. It identified four elements necessary to constitute a "people" for international law purposes⁷. It is a misfortune that many who are unaware of the body of international law on this subject mistake self-determination for total national independence. That is a possible, but not a necessary, attribute of self-determination. This is a message from international law that needs to be learned in many countries.

By the time the work of the UNESCO groups was completed the HIV/AIDS pandemic was upon the world. I was called to serve on the World Health Organisation Global Commission on AIDS. The Global Commission established principles for the management of the HIV epidemic, now being pursued by that unique inter-agency body, UNAIDS. Implementing the guidelines has been by no means easy, given the cultural and religious impediments that exist in

⁷ UNESCO, International Meeting of Experts for the Elucidation of the Concepts of Rights of Peoples (1985-91) (Final Report SHS-85/Conf.613/10). See also UNESCO, Report of the International Conference of Experts, Barcelona 21-27 November 1998, "The Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention" (1999).

various countries. It has fallen on some of the participating agencies, such as the United Nations Development Programme (UNDP) to attempt to persuade governments and bureaucracies in affected countries to adopt the bold strategies that will help reduce the spread of the virus. Significantly, those countries which have done so (including Australia) have seen the graph of sero-conversions to HIV plateau and even fall. Those countries which have not (particularly in sub-Saharan Africa and parts of Asia) have witnessed rapid escalation in the spread of the virus.

UNAIDS guidelines⁸ worked out in 1997 at meetings held in concert with the United Nations Centre for Human Rights which I chaired, provide reflections of consensus amongst the most informed public health and epidemiological experts in the world. The guidelines afford a stimulus to the recalcitrant or the ignorant leaders and officials of nation states. This is not international law in the traditional sense. But the influence of such guidelines, carried into municipal bureaucracies by WHO and UNAIDS experts, fired with a zeal to prevent the ravages of AIDS, can sometimes have a direct local impact far greater than high-sounding treaties or well-meaning laws. This is international cooperation and principle turned to the vital effort to save human lives. It can influence local law and policy

⁸ UNAIDS/Centre for Human Rights *Guidelines on Implementation of HIV/AIDS Strategies* (Geneva, 1997).

in profound and useful ways, beyond local popularity. Without international law and international agencies it would just be a dream.

In two other specialised agencies of the United Nations I have also witnessed the practical helping hand that can sometimes be offered to domestic law-making. In 1991-92 I participated with two other judges in the International Labour Organisation (ILO) Fact-Finding and Conciliation Commission on Freedom of Association. Our particular task, just before the achievement of constitutional change, was to examine the labour laws of South Africa and to advise on the standards they had to attain in order to conform to ILO Conventions. Having walked out of the ILO rather than be expelled during the apartheid years, South Africa's labour laws had fallen into serious disrepair. South Africa was keen to repair its relationship with international legal norms⁹. The ILO mission examined closely the letter and practice of the South African law. Its report, delivered to the de Klerk government was subsequently acted upon by the Mandela government. A new *Labour Relations Act* was adopted, complying with ILO standards¹⁰.

⁹ cf A Stemmett, "The Influence of Recent Constitutional Developments in South Africa on the Relationship Between International Law and Municipal Law" (1999) *The International Lawyer* at 47.

¹⁰ International Labour Organisation, Report on the Mission to South Africa (1992).

In 1994, UNDP arranged my participation in a number of meetings leading up to the constitutional conference in Malawi. It was that conference which agreed on the text of constitutional changes designed to usher in a multi-party democracy in the place of the one-party rule of President Hastings Banda. After a referendum and elections, a peaceful change of government was accomplished in Malawi. I pay tribute to the fine officers of UNDP and other agencies who facilitated this remarkable change in Malawi and in other lands. This was truly a translation of the universal principles of human rights into action in a particular country. I do not believe that it could have happened without the skills of United Nations agencies which I saw in operation at first hand.

In more recent years I have served in the International Bioethics Committee of UNESCO. That body has been grappling with some of the most difficult legal and ethical questions confronting humanity. I refer to the quandaries presented by genomic science and the development of the Human Genome Project. The UNESCO Committee in 1998 adopted the *Universal Declaration of Human Rights and the Human Genome*. This contains a number of basic norms aimed to provide a framework for a global response to legal

and ethical questions relevant to the entire human species¹¹. It is possible that, in due course, this *Universal Declaration* will lead on to a treaty, as others in the past have done. The point to be made is that an international agency, calling on diverse expertise and viewpoints from different religions and cultures, is seeking to design an effective universal response. The difficulties of securing such a response in a world of so many different starting points and where large investments and differing national intellectual property regimes apply, is not to be under-estimated.

Most recently, in April 2000, I was called to Vienna by the United Nations Office for Drug Control and Crime Prevention. Under the aegis of that agency, a Global Programme Against Corruption has been established. Several international agencies, including the OECD, the World Bank, the IMF and the World Trade Organisation, have been concerning themselves with the problem of corruption and its insidious effect on municipal governmental institutions. A judicial group on strengthening judicial integrity has now been established in Vienna working directly to the United Nations office there.

¹¹ *Universal Declaration on Human Rights and the Human Genome* (1998). cf "The Human Genome" in M D Kirby, *Through the World's Eye* (2000), Ch 4, 41.

This group comprises four chief justices from Asia and four from Africa. At present, all of them are from countries of the common law tradition. The intention, in due course, is to establish similar groups in Latin America, Central and Eastern Europe, the former Soviet Union and perhaps elsewhere. The task is to draw up strategies, including a universal minimum code of judicial conduct. Wisely, the Vienna agency is leaving the task to the judges themselves, supported by research and other staff, as well as by informed non-governmental organisations, such as Transparency International in London and the Centre for the Independence of Judges and Lawyers within the International Commission of Jurists in Geneva.

In due course it may be expected that the Vienna Group will draw up judicial guidelines. These will afford a framework for action by United Nations agencies and member countries. Whether these guidelines lead to treaty obligations or be given effect as conditional requirements imposed by the OECD, the World Bank, the IMF or the World Trade Organisation, remains to be seen. Effective international law cannot be dismissed. Pursuant to an OECD Convention, long arm legislation has been enacted both in the United States and Australia, to render it a crime for nationals of those countries to engage overseas in corruption of foreign officials. The point to be made is that, once again, an issue of common concern has attracted a universal response under and outside the aegis of the United Nations. The development may override powerful local interests which resist effective rules against corruption. The sharing

of research and knowledge and the pooling of ideas will contribute to global standards and hopefully effective action, not just papers and talk. The beneficiaries, it may be hoped, will ultimately be the people.

I tell these stories to illustrate, by reference to some activities with which I am familiar, the rapid advance of international initiatives, many of them relevant to law, indeed the rule of law. What, only forty years ago, was basically the concern and responsibility of the nation states has increasingly become an issue for international cooperation, the development of universal guidelines, the involvement of people and their organisations and, sometimes, international law. These developments gather pace. We are witnessing the opening phase of them. But we are privileged, in effect, to be there at the creation.

POLICING UNIVERSAL HUMAN RIGHTS

One of the most remarkable developments of international law in recent decades, which has clearly affected local rule-making, has been the growing impact of international human rights treaties on municipal law and practice. I have observed this at three levels. I want to mention each. I acknowledge that each challenges the unbridled power of the branches of government in nation states to do as they please, including where what they please offends the universal norms of human rights. But it has been my experience that the changes that are occurring are beneficial, uphold fundamental

norms, emphasise basic rights and stimulate the legal systems of nation states to do likewise.

The Special Rapporteurs and Special Representatives

Between 1993 and 1996 I served as Special Representative of the Secretary-General of the United Nations for Human Rights in Cambodia. That function arose in the aftermath of the successful completion of the UNTAC phase, as a requirement agreed between Cambodia and members of the international community and given effect in the Paris Peace Accords¹². Twice a year, in Geneva in April and in New York in November, it was my duty to report on the state of human rights in Cambodia to the Commission on Human Rights and to the General Assembly. I was one of about thirty United Nations Special Representatives and Special Rapporteurs. I saw at first-hand the operations of the UN Centre for Human Rights. I worked closely with the High Commissioner for Human Rights. The criteria for my visits and reports were not intuitive beliefs of my own about civilised standards. They were the principles laid down in the international treaties which together establish the basic framework of international human rights law.

¹² The 1991 Paris Peace Agreements are referred to and the work of the author as Special Representative explained in "Cambodia: The Struggle for Human Rights" in M D Kirby, *Through the World's Eye* (2000), Ch 3, 24.

Despite various difficulties, I have no doubt that my work and that of the United Nations Office of Human Rights in Cambodia, stimulated, cajoled and encouraged domestic law and practice in that country to conform with the international treaty obligations which Cambodia increasingly accepted. In a land that had been racked by revolution, war, genocide and invasion, there was a deep thirst for guidance and support. I wish that time permitted me to tell you of the noble servants of the United Nations with whom I worked during those years. Of "Shorty" Coleman, an Australian soldier supervising landmine clearance. Of Christoph Peschoux, human rights officer, who investigated dangerous cases of abuse of power. Of Basil Fernando, who instituted programmes for training prison officers and police. Of Ms Kek Galebru who helped establish non-governmental organisations to assert and uphold the rights of women.

Let no one say that the United Nations is only made up of time servers. I have seen with my own eyes the dedicated and idealistic servants of international human rights law, often working in most trying and even dangerous situations. That work goes on. Many of the Special Rapporteurs of the United Nations have suffered retaliation for their actions, including the Special Rapporteur on the Independence of the Judiciary (Dato' Param Cumaraswamy) whose

case was recently taken to the International Court of Justice¹³. The bureaucracy of the United Nations is often trying. The frustrations and defeats are sometimes dispiriting. But let no one say that it is all talk. At least in the case of Cambodia, there was action. Even for more oppressive nation states, it is a salutary requirement of international institutions and practice today that the autocrats and their representatives must come before the bar of the United Nations and answer to charges of infractions of international human rights law. There is progress in that fact alone.

The ICCPR First Optional Protocol

My second illustration brings little credit on me. Soon after it was announced that Australia would sign the First Optional Protocol to the *International Covenant on Civil and Political Rights* (ICCPR) (thereby rendering itself accountable to the United Nations Human Rights Committee on the communication of an individual), I was asked whether the gay and lesbian reform group in Tasmania should mount a complaint to the United Nations concerning the Tasmanian criminal laws against adult homosexual conduct between males¹⁴. I

¹³ International Court of Justice, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commissioner on Human Rights*, (United Nations v Malaysia), Advisory Opinion (1999), ICJ Reports 62.

¹⁴ Criminal Code (Tas), ss 122 and 123.

am ashamed to say that I expressed a view that such a communication was bound to fail. The intended complainant, Nicholas Toonen, had not been charged with an offence under the Tasmanian laws. He had not exhausted domestic remedies because no domestic process had been taken against him. I told him that his complaint was hopeless¹⁵. In fact, the Human Rights Committee upheld Mr Toonen's complaint against Australia¹⁶. In the ultimate result, the Australian Federal Parliament enacted a statute over-riding the Tasmanian laws¹⁷. Those laws were repealed and replaced by the non-discriminatory provisions now in force. Now, nowhere in Australia is there any law imposing criminal sanctions for adult private sexual conduct, although there are still serious inconsistencies in the treatment of who is an adult for this purpose.

¹⁵ In this respect I made the same mistake as was made by Justice Powell in the Supreme Court of the United States of America in *Bowers v Harwick* 478 US 186 (1986): He reportedly changed his opinion about the challenge in that case to the validity of a Georgia statute penalising sodomy on the basis that he was convinced that, because the statute was not being enforced the case was "frivolous". He later regretted his opinion, as I do mine. See C R Leslie, *Creating Criminals: The Injuries Inflicted by 'Unenforced' Sodomy Laws* 35 *Harvard civil Rights - Civil Liberties Law Rev* 103 at 107-108.

¹⁶ *Toonen v Australia* (1994) 1 *Int Hum Rts Reports* 97 (No 3) reproduced in H J Steiner and P Alston, *International Human Rights in Context* (1996), 545. See also "Same-Sex Relationships", Ch 6 in M D Kirby, *Through the World's Eye*, (2000), Ch 6, 64 at 67.

¹⁷ *Human Rights (Sexual Conduct) Act* 1994 (Cth). See also *Croome v Tasmania* (1997) 191 CLR 119.

The lessons of the *Toonen Case* are many¹⁸. For my immediate purposes, they show once again the practical operation of international human rights law, at least in a country such as Australia which has signed the First Optional Protocol to the ICCPR and is a good international citizen. As we do not have a general constitutional Bill of Rights and as there is no regional human rights court or commission for Asia or the Pacific¹⁹, the importance of the ICCPR could not be over-stated. Indeed, the significance of the *Toonen* decision runs far from Tasmania and Australia which, ultimately, would have corrected their legal aberration on homosexual offences. It brings hope to people in countries where individuals are still oppressed by reason of their sexuality²⁰. Because I am homosexual myself, I understand that oppression; indeed it helps me to understand all oppressions based on irrational and irrelevant grounds. I applaud the fact that two Australians,

¹⁸ E Evatt, "National Implementation - The Cutting Edge of International Human Rights Law", ANU Centre for International and Public Law, *Law and Policy Paper* No 12, 24.

¹⁹ The creation of an Asian Human Rights Commission under the aegis of ASEAN has been mooted but "not in the near future". See *Sunday Nation* (Bangkok) 23 July 2000, 2.

²⁰ See eg *Report of the Special Representative on Iran*, UN Doc E/CN.4/1991/35 para 59-60 recording how homosexual people are executed in the Islamic Republic of Iran based on the Islamic Shariat. See extract in H J Steiner and P Alston, *International Human Rights in Context* (1996) 411 at 415.

Nicholas Toonen and Rodney Croome, politely ignored my opinion and pressed on with their communication, invoking international law²¹.

I do not pretend that the *Toonen* decision, and its reasoning, passed without criticism in Australia or elsewhere. For example, some have seen it as an unwarranted and premature intrusion into Australia's domestic concerns and federal governmental arrangements, indeed to the rule of law in Australia. Some, of the other view, have considered that it did not go far enough. Thus, it has been suggested that it is fundamentally erroneous to rest a human rights response to oppression on the ground of sexuality on notions of privacy rather than on notions of full equality. This has been seen, by some observers, as little more than the "freedom" of a closeted human identity and one which tolerates the very public violence and discrimination suffered by many homosexual citizens when they move out of the privacy of the kind that ICCPR protects²².

²¹ See initiatives of Amnesty International, P Baehr, (1994) 12 *Neths QHR* 5 in Steiner and Alston, above 482 at 485.

²² W Morgan, "Sexuality and Human Rights: The First Communication by an Australian to the Human Rights Committee Under the Optional Protocol to the International Covenant on Civil and Political Rights" (1993) 14 *Aust Yearbook of International Law* 277; W Morgan, "Identifying Evil for What it is: Tasmania, Sexual Perversity and the United Nations" (1994) 19 *Melbourne University Law Rev* 740; P Mathew, "International Law and the Protection of Human Rights in Australia: Recent Trends" (1995) 17 *Sydney Law Rev* 177 at 185.

Australia's rule of law was challenged and tested. But the outcome was reform of that law which, now, most would regard as enlightened and just.

Bangalore Principles on Domestic Application of International Law

A most important development has occurred in Australia in the use that is being made of international human rights norms. It is a development new in a country which has hitherto adhered strictly to the "dualist" notion: that the norms of international law do not become part of the domestic law unless made so by the municipal lawmaker²³. The development to which I refer is sometimes described by reference to the Bangalore Principles²⁴. These were adopted at a conference mainly attended by Commonwealth judges in Bangalore, India in 1988. The Bangalore Principles acknowledge the dualist rule. International law is not in most countries, as such, part of domestic law. But in respect of international human rights norms, the Bangalore Principles accept that judges of the common

²³ R Higgins, "The Role of National Courts in the International Legal Process" in *Problems and Process: International Law and How we Use It* (1994), Ch 12, 205; T Buergenthal, "Modern Constitutions and Human Rights Treaties" 36 *Columbia Journal of Transnational Law* 211 at 213 (1997).

²⁴ cf Bangalore Principles (1988) 62 *Aust LJ* 531; (1988) 14 *Commonwealth Law Bulletin* 1196; Judicial Colloquium April 1989, Harare, Zimbabwe, on Domestic Application of International Human Rights Norms (1989) 63 *Aust LJ* 497.

law tradition may properly utilise such international rules in construing an ambiguous statute or in filling the gaps in the precedents of the common law.

In a former judicial post, I frequently invoked the Bangalore Principles, sometimes with, and sometimes without, the support of judicial colleagues²⁵. An important breakthrough occurred in Australian thinking on this subject in the *Mabo* decision which, for the first time, upheld the rights of indigenous peoples in Australia to title in land with which they could prove long association²⁶. One strand in the reasoning which led the majority of the High Court of Australia to reversing past judicial holdings and upholding that claim, was the serious breach that would otherwise arise in respect of Australia's international human rights obligations. Justice Brennan, who wrote the leading opinion in the *Mabo Case*²⁷, said:

"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

²⁵ *Gradidge v Grace Bros Pty Ltd* (1988) 93 FLR 414; *Young v Registrar, Court of Appeal [No 3]* (1993) 32 NSWLR 262. cf M D Kirby "The Australian use of international human rights norms: from Bangalore to Balliol, a view from The Antipodes" (1993) 16 *University of New South Wales Law Journal*, 363.

²⁶ *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

²⁷ (1992) 175 CLR 1 at 42.

common law doctrine founded in 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".

The High Court in *Mabo* acknowledged the impact which "the powerful influence of the Covenant" would increasingly come to play upon Australia's common law. This appreciation obliges a shift in the understanding of the dualist principle. In the past, it has ordinarily been voiced in terms that municipal law must await incorporation of international law by the municipal legislature. In a common law country, it should, I think, be candidly accepted that the judiciary also has a role. In the exercise of that role, the judiciary of the common law tradition may, in appropriate cases, play a part in moulding the common law to universal principles expressed in international human rights law. In doing so, they should not simply incorporate a complete treaty "by the back door"²⁸. However, the legitimate role of judicial elaboration using international law as an influence upon municipal common law is now increasingly understood and decreasingly controversial. This process will, I have no doubt, continue to gather pace. It is not a breakdown in the rule of law. It is simply a new way of expressing the rule.

²⁸ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 288 per Mason CJ and Deane J. cf J Bouwhuis, "International Law by the Back Door?" (1998) 72 *Aust LJ* 794.

In my reasons in a couple of decisions in the High Court of Australia, I have suggested that the Bangalore Principles might be appropriate for incorporation into reasoning about the meaning of the Australian Constitution itself²⁹. I have suggested that the Court "should adopt the meaning which conforms to the principles of universal and fundamental rights rather than an interpretation that it would involve a departure from such rights"³⁰. In elaborating this view I have suggested³¹:

"Where there is ambiguity, there is a strong presumption that the Constitution, adopted and accepted by the people of Australia for their government, is not intended to violate fundamental human rights and human dignity ... The Australian Constitution ... 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".

²⁹ cf E-U Petersmann, "How to Constitutionalise International Law and Foreign Policy for the Benefit of Civil Society" 20 *Michigan Journal of International Law* 1 (1998); J C Yoo, "Globalism and the Constitution: Treaties, Non Self-Execution and the Original Understanding", 99 *Columbia Law Review* 1955.

³⁰ *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 417. cf *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 655-657.

³¹ *Kartinyeri* (1998) 195 CLR 337 at 418 [166]-[167] citing *South West Africa Cases* (2nd phase) [1966] ICJR 3 at 293; cf E-U Petersmann, "How to Constitutionalise International Law and Foreign Policy for the Benefit of Civil Society" 20 *Michigan Journal of International Law* 1 (1998).

In due course I believe that this opinion will be vindicated. But it must be acknowledged that views of the kind which I have mentioned have attracted criticisms, especially from those who adhere to the "originalist" school of constitutional interpretation³², which I regard this as a form of legal ancestor worship³³. Two other Australian developments should also be stated. One is the introduction of a Bill designed to overcome a decision of the High Court and to render, as part of Australian federal law, the rule that "entering into an international treaty is not reason for raising any expectation that government decision-making will act in accordance with the treaty if the relevant provisions of the treaty have not been enacted into domestic law"³⁴.

The second development is the institution by the Australian government of a review of Australia's participation in six United Nations committees which oversee human rights treaties³⁵. This

³² G Craven, "The High Court of Australia: A Study in the Abuse of Power" (Alfred Deakin Lecture Trust, Melbourne, 1997), 33 noted H Charlesworth, "Dangerous Liaisons: Globalisation and Australian Public Law" (1998) 20 *Adelaide L Rev* 57 at 65.

³³ M D Kirby, "Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?" (2000) 24 *Melbourne Uni L Rev* 1. cf *Grain Pool (WA) v The Commonwealth* (2000) 74 ALJR 648 at 669-673 [110]-[129].

³⁴ Administrative Decisions (Effect of International Instruments) Bill (1999) (Cth).

³⁵ "UN urges Howard to review state jail laws", *Sunday Telegraph*, 26 March 2000 at 19.

review has followed, in point of time, criticism of Australia in the Committee on the Elimination of All Forms of Racial Discrimination in respect *inter alia* of mandatory sentencing laws that were partly copied from the United States. The work of the United Nations human rights committees has been defended by the President of the Australian Human Rights and Equal Opportunity Commission³⁶. The outcome of the review is not yet known.

So far as domestic application of international law by the judges is concerned, Professor Hilary Charlesworth has said, accurately I believe, that the suggested "threat of international law to the Australian legal system is much exaggerated"³⁷. She has described the highest court as being "very cautious in its embrace of international law; it has kept its gloves and hat on at all times"³⁸. If, occasionally, I have lifted my hat to pay passing respect to international law it is because my experience over twenty years has brought me into close familiarity with the operations of international law and international institutions - especially in the field of human rights. That operation is by no means alien to lawyers of the Anglo-

³⁶ A Tay, "Walk Tall in a Wicked World", *Sydney Morning Herald*, 26 March 2000 at 17.

³⁷ H Charlesworth, "Dangerous Liaisons: Globalisation and Australian Public Law" (1998) 20 *Adelaide L Rev* 57 at 66.

³⁸ *Ibid*, at 66.

American tradition. The influence of such lawyers upon the texts and jurisprudence, from the beginnings of Mrs Roosevelt's *Universal Declaration of Human Rights* up to the present time, has been profound. In a sense, as Judge Buergenthal said in 1997³⁹:

"It is ironic that western countries which have a cultural and geopolitical interest in global respect for human rights, have lately come to apply brakes to the domestic application of international norms. By way of contrast, some States which have suffered from past dictatorial regimes have played an important role in encouraging the adoption of domestic constitutional mechanisms that strengthen the power of the independent judiciary to enforce international human rights guarantees in conflict with national law and to implement the rulings of international tribunals".

CONCLUSIONS

No sitting of the High Court of Australia now passes without some relevant international legal principle being invoked as an aspect of a domestic legal problem.

Thus on 4 August 2000 the Court refused special leave to appeal from a decision of the Full Court of the Federal Court in *Nulyarimma v Thompson*⁴⁰. That was a case in which a number of Australian Aboriginals had complained that they had suffered

³⁹ Buergenthal, above, 212-213.

⁴⁰ (1998) 165 ALR 621.

"genocide" in terms of the *Genocide Convention* and international customary law. They contended that the applicable principles of international law were reflected in, and recognised by, Australia's municipal law. The "genocide" of which they complained was a form of "cultural genocide" arising from alteration of their native title rights to land and a decision of the federal government not to proceed with listing certain traditional lands on the World Heritage List. The Court (comprising Justices Gummow, Hayne and myself), in refusing special leave, expressed no opinion on the general question of the incorporation of international law in municipal law otherwise than by treaty or on the special question of the incorporation of the universal crime of genocide. The Court acknowledged that these were important legal questions but held that they did not arise in the instant case. It is in this way that, typically, issues of this nature come to be considered before Australian courts.

Many cases come before the High Court concerning the *Refugees Convention* which, in Australia, has been incorporated into municipal law in respect of the definition of "refugees"⁴¹. Beyond

⁴¹ See eg *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225; *Minister for Immigration and Ethnic Affairs v G* (1998) 191 CLR 559; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259. cf C Ward, "A" v *Minister for Immigration and Ethnic Affairs: Principles of Interpretation Applicable to Legislation Adopting Treaties* (1998) 26 *Federal Law Rev* 207; P Matthew, "International Law and the Protection of Human Rights in Australia: Recent Trends" (1995) 17 *Sydney Law Rev* 177.

this, important questions are regularly presented to the courts concerning extradition law⁴², the *Convention on the Civil Aspects of International Child Abduction*⁴³, the international intellectual property protection regimes⁴⁴, various conventions of the International Labor Organisation to which Australia is a party⁴⁵, the *Hague Rules* and the *Brussels Convention for the Unification of Certain Rules of Law Relating to Bills of Lading*⁴⁶, and the *Closer Economic Relations Treaty* between Australia and New Zealand⁴⁷. Most of these cases are collected each year in the *Year Book of International Law*. Each year this chapter grows larger.

Even if municipal judges today in countries such as Australia were personally disinclined to lift their eyes to the burgeoning growth

⁴² *Director of Public Prosecutions (Cth) v Kainhofer* (1995) 185 CLR 528; *Attorney-General for the Commonwealth v Tse Chu-Fai* (1998) 193 CLR 128.

⁴³ *De'L v Director General (Department of Community Services)* (1996) 187 CLR 640.

⁴⁴ *Telstra Corporation Ltd v Australasian Performing Right Association Ltd* (1998) 191 CLR 140; *Phonographic Performance Co of Australia Ltd v Federation of Australian Commercial Television Stations* (1998) 195 CLR 158; *Grain Pool (WA) v The Commonwealth* (2000) 74 ALJR 648.

⁴⁵ *Victoria v The Commonwealth* (1996) 187 CLR 416; *Qantas Airways Ltd v Christie* (1998) 193 CLR 280.

⁴⁶ *Great China Metal v Malaysia Shipping* (1998) 196 CLR 161.

⁴⁷ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

of international law, their ordinary judicial duties will increasingly confront them with the realities that come with global transport, interactive technology and international problems. International law is no longer a realm of princes, diplomats and nations. The global economy and the global village have brought international law into the courtrooms at every level. It is inevitable that, in this way, international law comes increasingly to affect the rule of law in Australia.

The old ideology of the traditional concept of the rule of law in the nation state was flawed by weaknesses within each nation. Increasingly that ideology has been from outside in the form of transnational corporations and media. Now the challenges are being felt from global and regional organisations, especially in the field of economics and trade but also in the contexts of international security and human rights.

The nature of the interconnected world, with global and regional problems, makes it impossible to turn back the clock. Accordingly, there will thus be no return to the idealised notion of the rule of law in the nation state with the "sovereign" people of each state able to control, without restriction, the law by which they are governed. Even the strongest of the "strong" states of the world is now unable to ignore the dynamic of globalism. This is because the dynamic grows out of universal phenomena - global technology and the urgent need for solutions to global problems in which the world or many states are concerned.

This being the case, the growing interaction of municipal legal systems and international law is inevitable. Its impact of the rule of law is inescapable. In my experience, at least, in the field of human rights, it is usually beneficial. Whether this is universally so, and in particular in matters of trade and economics where the big players have a disproportionate clout, remains to be seen.

The challenge before us is to readjust our thinking within nation states to the reality of the world in which those polities, and their lawmaking institutions, must now operate. And to inculcate, in global and regional institutions, the mechanisms for effective accountability, a respect for matters in which there is, or should be, sharing about the common heritage of humanity and deference to universal principles of human rights which should lie at the heart of the New World Order.