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Domestic application of international human rights norms

The Commonwealth Secretariat in London has distributed the concluding statement of a high level conference held in Bangalore, India in February 1988 under the auspices of the Commonwealth Secretariat and the Government of India. The conference was convened by Justice P N Bhagwati (former Chief Justice of India) to consider the domestic application of international human rights norms. One of the most notable legal phenomena of the period since the Second World War has been the drafting, ratification and bringing into force of large numbers of international human rights conventions.

In Europe, the European Convention on Human Rights has built up an established jurisprudence both in the European Court of Human Rights and the Commission in Strasbourg. Under the auspices of the United Nations, a number of international treaties have been opened for signature, some of which have been ratified by Australia. The most significant of these is probably the International Covenant on Civil and Political Rights. But Australia has also ratified the International Covenant on Economic, Social and Cultural Rights; the

International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention on the Prevention and Punishment of the Crime of Genocide; the Convention on the Status of Refugees and several others relevant to this note.

The purpose of the Bangalore conference was to give consideration to the long term implications of these developments of public international law for the domestic law of countries of the common law system. Participants in the Bangalore meeting included the Chief Justices of Pakistan and Zimbabwe, the Deputy Chief Justice of Papua New Guinea, the Lord President of the Supreme Court of Malaysia and Judges from India, Malaysia, Mauritius, Sri Lanka and the United States. Justice Michael Kirby, President of the New South Wales Court of Appeal participated from Australia.

The position of international law in its relationship to Australian domestic law is inconclusive. (Cf Chow Hung Ching & Anor v The King (1948) 77 CLR 449, 462, 477 and Polites v The Commonwealth (1945) 70 CLR 60, 80.) Generally, however, it has been considered that, unless specifically incorporated by a valid federal law, international rules (whether of treaties or of customary law) are not, as such, part of Australian domestic law. The substantial legislative power of Federal Parliament under the "external affairs" placitum of the Constitution (s 51(xxix)) has opened up a previously unsuspected and largely still unused head of federal power for the enactment in Australia of international norms applicable to areas of the law hitherto considered the province of State regulation. See eg

The Commonwealth of Australia & Anor v Tasmania & Ors (1983) 158 CLR 1 (The Tasmanian Dams case) and the recent judgment in Queensland v The Commonwealth (1988) 62 ALJR 143.

It is against this background that the consideration of new possible relevance in domestic law of international treaties is worthy of note.

The participants at the conference in Bangalore had a number of papers before them relevant to the issues under consideration. One, by Justice Bhagwati examined "Fundamental Rights in the Economic Social and Cultural Context". Another by Justice Raj Soomer Lallah of the Supreme Court of Mauritius titled "International Human Rights Norms" described the current state of international conventions on human rights. A third paper by Justice Kirby examined "The Role of the Judge in Advancing Human Rights". The last mentioned paper examined both the theoretical and practical arguments for and against judicial "activism" in promoting human rights, particularly by reference to norms established by international law.

After consideration of the above papers, and others, the participants agreed in a concluding statement by the Chairman (Justice Bhagwati) which contains an assertion that may be regarded as controversial, at least in some legal circles in Australia. After recounting the universal character of fundamental human rights and the guidance concerning their scope to be derived from international human rights instruments and jurisprudence, the statement concludes that there has been:-

> "a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law - whether constitutional, statute or common law - is uncertain or incomplete."

The statement welcomes this development and calls for the norms contained in international human rights instruments to be more widely recognised, including by the courts and the legal profession. There then follow three paragraphs which are worth recording in full:-

> "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.
>
> However, where national law is clear, and inconsistent with the international obligations of the State concerned, in common law countries the national court is obliged to give effect to national law. In such cases the court should draw such inconsistencies to the attention of the appropriate authorities since the supremacy of national law in no way mitigates a breach of an international legal obligation which is undertaken by a country.
>
> 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."

The Statement then calls for practical measures to promote knowledge of international human rights norms throughout the judiciary and the legal profession. Steps in this direction are presently being taken in Australia by the Human Rights and Equal Opportunity Commission which is investigating ways in which Australia's international legal obligations can be drawn to the attention of the judiciary and the legal profession.

It is worth noting that in a number of common law countries, the process has begun by which domestic courts refer

to international treaties ratified by their country as a source of guidance in constitutional and statutory construction and in the development of the principles of the common law. Nowhere is this development more clearly seen than in England. The coexistence of English law with the jurisprudence of the European Court of Human Rights in Strasbourg since 1952, together with, more lately, the coexistence of English law and laws developed under the Treaty of Rome, have produced an international outlook which is not always noted in Australia and other common law countries without the same international experience. Thus, it is worth contrasting the judgments of the English Court of Appeal in one of the Spycatcher cases with the decisions of the Australian courts. No mention is made in the Australian courts of the starting point arguably provided by the obligations assumed by Australia under the International Covenant on Civil and Political Rights regarding freedom of expression. See, for example, Article 19.2 and compare Article 19.3.(b). However, in Attorney General v The Observer Limited & Ors [1988] WLR (forthcoming), Sir John Donaldson MR (as his Lordship then was) Dillon LJ and Bingham LJ each took pains to demonstrate the consistency of their decisions with the obligations assumed by the United Kingdom in respect of freedom of expression under Article 10 of the European Convention on Human Rights (see ibid). In England, it is now well established doctrine that, in construing local statutes and in developing the common law, the judge should normally seek to ensure compliance by the court with the international obligations of the jurisdiction in which he or she operates.

See R v Secretary of State for the Home Department; Ex parte Phansopkar [1976] QB 606, 626; R v Secretary of State for the Home Department & Anor; Ex parte Bhajan Singh [1976] QB 198. Although these principles have been developed largely in the context of the European Convention, breaches of which may be taken by United Kingdom citizens to Strasbourg, the basic issue appears to be the same in Australia in respect of international human rights norms contained in treaties ratified by Australia. In neither case is the relevant norm made part of domestic law. The existence of a tribunal with an accepted jurisdiction may explain why such law will be taken into account by the English courts. But the status of that law in England is precisely the same as the status in Australia of the international covenants and treaties which Australia has ratified but not specifically incorporated into municipal law.

The importance of the Bangalore Statement (above) is that it recognises these developments in English and other domestic courts and puts them forward to all of the jurisdictions of the common law as relevant to judicial technique in decision making. In many countries constitutional Bills of Rights provide vehicles for adapting and incorporating international jurisprudence into local law. In Australia, there is no such Bill of Rights. The use of international treaties has, at least until lately, been politically controversial.

However, the growth in the number of international treaties ratified by Australia, the development of an increasingly large jurisprudence around such treaties and the growing pace of internationalisation which has accompanied

technological developments of travel and telecommunications all make it likely that the judges and lawyers in every land will pay increasing attention in the future to the backdrop of international legal norms, including those dealing with human rights. In default of a constitutional statement of human rights this development may have special significance in Australia. International statements prepared by appropriate experts, agreed to by the international community and ratified by Australia may well provide to judges and other lawyers useful starting points for the tasks of statutory construction and common law development. The Bangalore Statement, together with the initiatives being taken in Australia by the Human Rights and Equal Opportunities Commission, may provide an important impetus to these moves. Already references are appearing to international conventions in Australian court decisions. See eg S & M Motor Repairs Pty Limited & Ors v Caltex Oil (Aust) Pty Limited & Anor (1988) 10 NSWLR (forthcoming). In this development, Australian courts are simply following, belatedly, developments which are well established in courts in England, India, Canada and elsewhere.