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THE UNIVERSITY OF SYDNEY

FACULTY OF LAW

CONTINUING LEGAL EDUCATION 1988

CHANGE THE CONSTITUTION?

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The Hon Justice Michael Kirby CMG
Acting Chief Justice of New South Wales

This is probably the most interesting, and in one sense the most important, session of this Conference. It is not my task as Chairman to introduce the subject. I shall therefore refrain from doing so.

However, I do wish to say something on one facet of the diamond which is otherwise likely to be unsaid. I refer to the need to be aware of the international perspective of the debate which is about to unfold.

One of the most significant features of the development of international law since the catastrophe of the Second World War, has been the development of international statements of human rights. Australia has adhered to many of these statements. It has, for example, ratified the International Covenant on Civil and Political Rights, 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 etc.

It may be said that these conventions have been ratified and brought into effect by countries which typically do not themselves respect human rights. I do not comment on this. But it is important to note that the conventions exist in the mainstream of the Western liberal tradition. Their impetus can be traced directly to the statements of human rights which accompanied the American and French revolutions. The new impetus to state them grew out of the ashes of the Second World War. Then, the fragility of human rights was recognised anew, even in countries with a long record of civilisation and respect for legality. The international conventions were drafted by experts. In their drafting and refinement, Australians took a notable and active part. And above all, they have been ratified by our country. In that sense, they have been solemnly accepted as part of international law. Even without ratification by Australia, they might become part of customary international law. But where Australia has ratified them they should, as it seems to me, be taken seriously. Subject to our own Constitution and domestic laws, these conventions should become part of the backdrop of international law against which Australian laws are developed and interpreted. It is in this way that, although Australia does not have a Bill of Rights, international statements of human rights may become relevant to lawyers and courts and thus to citizens in this country.

It is interesting to contrast the series of decisions about the book Spycatcher by Mr Peter Wright. In the English cases, great attention has been paid by the English judges to the international obligations accepted by the United Kingdom under the European Convention on Human Rights. There is no mention in the Australian, Hong Kong or New Zealand decisions to the International Covenant on Civil and Political Rights. It is true that, by the European Convention, the United Kingdom can be taken to the European Court of Human Rights in Strasbourg to answer for alleged breaches of the European Convention. No such mechanism exists in this country for alleged breaches by Government - Federal or State - of the International Covenant. However, the status of the international convention in each case remains the same in the United Kingdom and Australia. It is not, as such, part of domestic law. Yet in the English decisions (despite the resistance in that country to the notion of fundamental human rights) there is a growing willingness of the judges to take as a starting point of their reasoning the statement of fundamental principles contained in the European Convention.

Recently in the Court of Appeal we had to answer the question whether there was a fundamental "right" to speedy trial in New South Wales. See Jago v The District Court of New South Wales & Ors, unreported, CA, 10 May 1988; (1988) NSWJB 67. The approaches of the judges differed. So did the answer we gave. A majority held that there was no such right, either

by statute or common law. There was, of course, no constitutional principle to which appeal could be made, either in the Australian Constitution or the State Constitution. The answer to the question was found by two of the judges who examined the history of criminal prosecution and trial in the constitutional history of England. They traced the suggested "right to speedy trial" back to Magna Carta and to the doings of the justices of eyre in England in the reign of King Richard II. It was my view that a more apt starting point to the consideration of the question was the statement of basic principle accepted by the international community, adopted by relevant experts and ratified on behalf of Australia by a Government having undoubted constitutional power to do so. I am sure that, in due course, we will find in the Australian courts and community a greater willingness to draw on the international statements of human rights than has existed hitherto.

These remarks puts this session into its proper perspective. Since Hiroshima, parochial attitudes to statements about human rights and the law have become outmoded - even possibly dangerous. We must all become more internationalist in our approach to the law, as to life. In the international domain, there is a well established and highly developed series of statements of fundamental human rights. The moves towards to utilisation of such statements in the interpretation and development of Australian law should be

seen in that context. Australia is part of the international community. That community has increasingly accepted the need to state, respect and enforce basic rights - putting them above the erosion or assaults, even of the tyranny of transient majorities.

Australians may reject the frank incorporation of fundamental rights in our Constitution, or the greater elaboration of those which already exist. But if we do so, we should recognise that we swim against the stream of the international community - including as signified by the many relevant international agreements which Australia has already ratified. Sooner or later there must be harmony between the basic rights we accept as part of international law and the basic rights we accept and enforce, as part of the domestic law of Australia. Despite occasional evidence to the contrary, Australia is part of a wider world. We should not forget the international context of the international concept of the rights of human beings as we consider changes proposed to the Australian Constitution. Instead, we should lift our eyes from the often parochial concern of local jurisdiction which bedevil lawyers as a group. All too often in the past it is this provincialism which has shackled Australians. The debate about the recognition of human rights has an international aspect. We do well to approach the issue with that fact in mind.