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The Hon Justice Michael Kirby CMG**

THE BANGALORE PRINCIPLES

In February 1988, in Bangalore, India, a number of principles were adopted concerning the role of the judiciary in advancing human rights by reference to international human rights norms. The principles were stated at the end of a judicial colloquium brought together by Justice P N Bhagwati, the former Chief Justice of India. The participants in the colloquium included the Chief Justice of Zimbabwe (Dumbutshena CJ) who has now taken the initiative of organising this colloquium of African judges. As in the case of the Bangalore meeting, the organisational skills of the Legal Division of the Commonwealth Secretariat have proved indispensable to bringing the meeting about. When the Bangalore Principles were formulated, the participants also included high judicial officers from India, Pakistan, Papua New Guinea, Mauritius, Sri Lanka, Malaysia, the United Kingdom and the United States of America. I attended from Australia. The meeting was not an exclusively Commonwealth

affair as the participation of judges from Pakistan and the United States shows. The link between us was the link of the common law.

The idea of the Bangalore meeting - and of this meeting in Harare - is to plant the seed of a very simple idea. In the world of jumbo jets, telecommunications and nuclear fission, it is vital that civilized leaders should contribute to, promote and stimulate an internationalist approach to common problems. International law must be seen not as a remote compilation of high sounding rules, political in character addressed to governments and not to people. It must be seen rather as the rules of humanity, defined by experts and deriving authority from international agencies and multi-national acceptance. In such a world, it becomes the duty of the judges in domestic courts, dealing with the practical problems of litigants before them, to endeavour, so far as possible, to bring their decisions into harmony with the developing body of international law. To do this, judges must become familiar with that body of law. Because many decisions in our busy courts depend upon the arguments which lawyers place before judges, it is also necessary in law schools, and in continuing education, that practitioners of the law should become familiar with the growing body of international law.[1] Of course, judges owe their first duty to their local constitutions and to the statutes and common law applicable in their own jurisdictions. Save possibly for Crimes against Humanity, there is no warrant for a local

judge to override the constitutional or other laws of the jurisdiction which he or she is sworn or affirmed to uphold.

This said, the Bangalore Principles recognise that, particularly in common law countries, judges typically have a wide leeway for choice in many decisions which they have to make. True, it is not always so. Sometimes the law is clear and the facts require but one outcome to a case. In such a circumstance, the judge's duty is plain, whatever may be the strictures of international law or of internationally accepted human rights norms. However, it is now increasingly recognised that the law is rarely so mechanical. Many are the choices which judges must make whether in developing the common law[2] or in giving meaning to statutes which are ambiguous.[3] The judge works with words. The English language, so rich in literature, is frequently ambiguous - a treasure-house of multiple meanings. In part, this is so because of the fact that, following the Norman Conquest, English became the marriage of two linguistic streams: the one Germanic and the other Romance. Ambiguity and uncertainty of meaning frequently give rise of the judge's opportunity. This is not an opportunity to indulge idiosyncratic opinions. Still less is it an occasion to fall prey to the temptations of social engineering by reference to a pre-conceived strategy. But is is important for judges, especially, to recognise the opportunities for choice and the obligations and responsibilities which those opportunities place upon them.

Once it was faithfully taught that the judicial task was almost exclusively automatic and mechanical in nature. But now, judges, scholars and other academics throughout the common law world teach otherwise.[4] They have done so with increasing conviction since Lord Reid in 1972 asserted that the declaratory theory of judicial decision-making was a "fairytale".[5]

Upon some subjects which come before domestic courts international law has little, if anything, to say. But one topic upon which a growing body of international law has developed since the Second World War has been that of human rights. The process which has occurred is well described by Stephen J, in the High Court of Australia, in these terms:

> "The post-war history of this new concern is illuminating. The present international regime for the protection of human rights finds its origin in the Charter of the United Nations. Prominent in the opening recitals of the Charter is a re-affirmation of 'faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women'. One of the purposes of the United Nations expressed in its Charter is the achieving of international co-operation in promoting and encouraging 'respect for human rights and for fundamental freedoms for all without distinction as to race...' Ch 1, Art, 1:3; see too Ch IX Art, 55(c). By Ch IX, Art 56 all member nations pledge themselves to take action with the Organisation to achieve its purposes. The emphasis which the Charter thus places upon international recognition of human rights and fundamental freedoms is in striking contrast to the terms of the Covenant of the League of Nations, which was silent on these subjects. The effect of these provisions has in international law been seen as restricting the right of member States of the United Nations to treat due observance of human rights as an exclusively domestic matter. Instead the human rights obligations of member States have become

a 'legitimate subject of international concern': Judge de Aréchaga, Recuil des Cours, vol 178 (1978) at p 177. Sir Humphrey Waldcock, also a judge of the International Court of Justice, had earlier noted this development in Recuil des Cours, vol 106 (1962) p 200. To the same effect are Lauterpacht's comments in International Law and Human Rights (1950), pp 177-178 and those in Oppenheim's International Law 8th ed (1958) vol 1 p 740. The views of other distinguished publicists are summarised in Schwelb in 'The International Court of Justice and the Human Rights Clauses of the Charter', American Journal of International Law, vol 66 (1972) 337 at pp 338, 341. He concludes at p 350 that the views of Lauterpacht and others on the effect of the human rights provision of the Charter were affirmed by the Advisory Opinion of the International Court in the Namibia case [1971] ICJ at p 51.... These matters having, by virtue of the Charter of the United Nations become at international law a proper subject for international action. There followed in 1958 the Universal Declaration of Human Rights and thereafter many General Assembly resolutions on human rights and racial discrimination ... There have also been various regional agreements on human rights, perhaps the leading example being the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950."

To the regional agreements on human rights which Stephen J mentioned, he could now have added the African Charter of Human and Peoples' Rights which has lately come into force with the deposit of the requisite number of ratifications.[7]

This brief sketch of the background to the development of international human rights law is essential to an understanding of the milieu in which judges in domestic jurisdiction today operate. It would, of course, be possible for those judges completely to ignore the developments of international law. They could leave it to their legislatures to provide, in domestic legislation, for the local operation

of the international law rule, giving no credence to the international law rule in the meantime. There are still many lawyers in the common law world who would adhere to this opinion.

The thesis of the Bangalore Principles was not that international legal norms on human rights are ipso facto incorporated as part of domestic law. Still less was it that domestic judges could override clear domestic law by reference to such international norms. But it was that judges should not ignore the international rules, safe in their parochialism. Instead, they should become familiar with the international norms. And when appropriate occasions present, either in the construction of an ambiguous statute or in the declaration and extension of the common law, they should attend to the international norms in the course of performing their duties.

If there is a choice, as is now increasingly recognised in studies of the judicial function, that choice must be made by reference to criteria. If the criteria are to be more than the whims of a particular judge, the last minute thoughts of busy barristers presenting the case or ideas snatched, often out of context, from earlier judicial decisions upon different topics, it is important to provide the judge with a coherent body of principle by which to make his or her choice on relevant occasions. The thesis of the Bangalore Principles is that, in matters touching human rights, judges do well to consider the implications of

international human rights norms. In them will usually lie the wisdom of scholars and other experts, the consensus of representatives from many nations and the guidance of distilled human experience.

I do not say that every nation obeys the fine principles adopted in the many international declarations now made on human rights questions. I do not say that fine words alone are enough. Nor do I overlook the fact that, quite frequently, such international statements appear in language of such generality as to give little immediate practical guidance for the resolution of a particular case. Often they leave a great deal of the content to be determined by the individual decision-maker. But not infrequently, the international instrument will provide an indication - pointing the decision-maker in the right direction. It will frequently be a direction of fundamental principle. Human rights, being universal in character inhere in the very nature of humanness. This is why we, the judges, do well to keep our eyes on fundamentals. Those fundamentals include the human rights principles which are finding their way into the body of international law. The ignorance in the legal profession, and let it be said, in the judiciary of most common law countries, concerning this large and growing body of international jurisprudence is alarming. One of the practical purposes of the Bangalore Principles was to turn this tide of ignorance. It was to put the basic principles on the shelf of every judge so that they are at the judge's

elbow to be used whenever the occasion arises. The purpose of this paper is to demonstrate how this is happening - and how it can be done by all of us.

PART OF LOCAL LAW?

It is important to recognise clear-sightedly the fact that the noting of such an indirect incorporation of international human rights norms into domestic lawmaking will engender resistance in some quarters. The traditional view adopted in common law countries which have derived their legal tradition from England other than the United States of America is that international law is not part domestic law. This traditional view has been expressed in the High Court of Australia in a number of cases.[8] Dixon J said in 1948 that the theory of Blackstone in his Commentaries[9] that:

> "The law of nations (whenever any question arises which is properly the object of its jurisdiction) is here (i.e. in England) adopted to its full extent by the common law, and is held to be part of the law of the land."

was now regarded as being "without foundation".[10]

More recently the present Chief Justice of Australia, then Mason J, put it this way[11]:

> "It is a well stated principle of common law that a treaty not terminating a state of war has no legal effect upon the rights and duties of Australian citizens and is not incorporated into Australian law by its ratification by Australia. ... In this respect Australian law differs from that of the United States where treaties are self-executing and create rights and liabilities without the need for legislation by Congress. Foster v Neilson 2 Pet. 253 at 314; 27 US 164, 202 (1829). As Barwick CJ and

> Gibbs J observed in Bradley v The Commonwealth (1973) 128 CLR at DP 582-3, the approval by the Commonwealth Parliament of the Charter of the United Nations in the Charter of the United Nations Act 1945 (Cth) did not incorporate the provisions of the Charter into Australian law. To achieve this result the provisions have to be enacted as part of our domestic law whether by Commonwealth or State statute. Section 51(xxix) [the external affairs power] arms the Commonwealth Parliament with the necessary power to bring this about. ...[That] power enables the Commonwealth Parliament to legislate so as to incorporate into our law the provisions of [international] conventions."

The differing approach to the direct application of international law in domestic law of the United States can probably be explained by the powerful influence of Blackstone's Commentaries upon the development of the common law in that country after the Revolution. Cut off from the English courts, judges and lawyers were sent back to Blackstone and other general text writers for guidance of principle. In many respects, the common law in the United States remains truer to the principles of the common law of England at the time of the American Revolution than does the common law in the countries of the Commonwealth. Both by reception and legal tradition those countries have tended to follow more closely the dynamic developments of legal principles in England well into the 20th century. That is certainly the case in Australia.

But it is not simply legal authority which is called in aid to justify the necessity of positive enactment by the domestic lawmaker to bring an international legal norm into operation in domestic jurisdiction. At least two arguments

of legal policy are usually invoked. The first calls attention to the different branches of government which are involved in the processes of effecting treaties which make the international law and making local law. Treaties are made on behalf of a country by the Crown or the Head of State. This fact derives from history and the time when international relations were truly the dealings between sovereigns. But that history is now supported by the necessity to have a well identified single and decisive voice to speak to the international community on behalf of a nation. Hence the role of the Crown or its modern equivalent, in negotiating, singing and ratifying treaties.

In the modern state the Crown or its equivalent is normally symbolic. It represents, in this connection, the Executive Government. Thus, it is the executive branch of government which is, virtually without exception, involved in the international dealings of a modern state. This is so nowadays for the reason that international dealings are difficult enough without having to treat with the numerous factions and interests typically present in the legislative branch of government of any country.

In some countries there may be little or no tension between the executive and the legislative branches of government. But in many countries there is a tension. For example, in Australia it is rare for the Executive Government, elected by a majority of representatives in the Lower House of Federal Parliament, to command a majority in

the Upper House. At present, the Australian Government must rely upon the support of minority parties to secure the passage of its legislation through the Senate. Accordingly, it is perfectly possible for the Executive Government to negotiate a treaty which would have the support of the Executive and even of the Lower House but not of the Upper House of Parliament. The objects of a treaty, ratified by the Executive Government may be rejected by the Senate. Legislation to implement a treatment, if introduced, might be rejected in the Senate. It might thus not become part of domestic law as such. If, therefore, by the procedure of direct incorporation of international legal norms into domestic law, a change were procured this would be to the enhancement of the powers of the Executive. It would diminish the powers of the elected branch of government, the legislature. As the Executive may be less democratically responsive than the legislature, in its entirety, care must be taken in adopting international legal norms incorporated in treaties that the democratic checks necessitated by a requirement of legislation to implement the treaty, are not bypassed.

There is an old tension between the Crown [today the Executive] and Parliament. That tension exists in many fields. One of them is in the responsibility for foreign affairs and treaties. In the development of new principles for the domestic implementation of international human rights norms, it is important to keep steadily in mind the differing

functions of the Executive and of the legislature respectively in negotiating treaties and making domestic law.

A second reason for caution is specifically relevant to federal states. There are many such states in the Commonwealth of Nations.[12] Speaking of the division of responsibilities in respect of lawmaking in such states, in the context of treaties and legitimate matters of international concern, the Privy Council in 1937, writing of the Canadian constitution said this:[13]

> .. In a Federal State where legislative authority is limited by a constitutional document, or is divided up between different Legislatures in accordance with the classes of subject-matter submitted for legislation, the problem is complex. The obligations imposed by treaty may have to be performed, if at all, by several legislatures; and the Executive has the task of obtaining the legislative assent not of the one Parliament to whom they may be responsible, but possibly of several Parliaments to whom they stand in no direct relation. The question is not how the obligation is formed, that is the function of the Executive; but how is the obligation to be performed, and that depends upon the authority of the competent legislature or legislatures."

This particular problem for the domestic implementation of international norms expresses in treaties is one which arises in all federal states. In the context of the Australian Federation the difficulty posed is well appreciated. Thus, in New South Wales v The Commonwealth, Stephen J said:[14]

> "Divided legislative competence is a feature of Federal Government that has, from the inception of modern Federal States, been a well recognised difficulty affecting the conduct of their external affairs... Whatever limitation the Federal character of the constitution imposes on

> the Commonwealth's ability to give full effect in all respects to international obligations which it might undertake, this is no novel international phenomenon. It is no more than a well recognised outcome of the Federal system of distribution of powers and in no way detracts from the full recognition of the Commonwealth as an international person in international law."

The fear that is expressed, in the context of domestic jurisdiction of federal states, is that the vehicle of international treaties (and even of the establishment of international legal norms) may become a mechanism for completely dismantling the distribution of powers established by the domestic constitution. this was the essential reason behind the dissenting opinion of Gibbs CJ in an Australian case concerning the Racial Discrimination Act 1975. That statue was enacted by the Federal Parliament to give effect to the International Convention on the Elimination of all Forms of Racial Discrimination. Australia is a party to that Convention. Gibbs CJ (who on this issue was joined by Wilson and Aickin JJ) expressed the fear that if a new federal law on racial discrimination could be enacted based upon such a treaty - simply because it was now a common concern of the community of nations - this would intrude the federal legislature in Australia into areas which, until then, had traditionally been regarded as areas of State lawmaking. Such approach would allow "no effective safeguard against the destruction of the federal charter of the constitution".[15]

The majority of the High Court of Australia held otherwise. It upheld the validity of the Racial

Discrimination Act. But the controversy posed by minority opinion is important in the present context. In federal states at least it must be given weight. The question is poses is this: if judges by techniques of the common law introduce principles of an international treaty or of other international human rights norms into their decision-making, may they not thereby obscure the respective lawmaking competences of the federal and state authorities? An international human rights norm may have been accepted by the Federal authority. But it may accept a principle which is not congenial to the State lawmakers. In these circumstances, should the judge simply wait until the local lawmaker, within constitutional competence, has enacted law on the subject? Should the judge wait until the federal lawmaker has enacted a constitutionally valid law on the subject? Or is the judge authorised to cut through this dilatory procedure and to accept the principle for the purpose of interpreting ambiguous statutes or developing local common law?

These are not entirely academic questions, at least in Australia. There has been a large debate in Australia over more than a decade concerning whether there should be adopted a statutory or constitutional Bill of Rights such as is now common in most parts of the world and many parts of the Commonwealth. The Australian constitution when enacted in 1901 included relatively few such rights. Proposals to incorporate them have not found popular favour. A referendum

in 1988, for the purpose of incorporating provisions on freedom of religion and for just compensation for compulsory acquisitions of property in some circumstances failed overwhelmingly. Many people in Australia believe that Bills of Rights are undemocratic and that the assertion and elaboration of rights is a matter for the democratic Parliament not for unelected judges. This is not an eccentric view. Whether one accepts it or not, it has legitimate intellectual support including amongst lawyers.[16]

It is in the context of such debates that differences arise concerning the legitimacy of judges picking up internationally stated human rights norms and incorporating them in domestic law. If the people will not accept a Bill of Rights at an open referendum, do judges have the entitlement to adopt them by an indirect method, from statements in international instruments?

IT IS A SOURCE OF LAW

Judges do make law. They make law just as surely as the Executive and the legislature make law. The foregoing concerns are reasons for judges, in referring to international human rights or other legal norms, to attend carefully to the dangers which may exist in indiscriminately picking up a provision of an international instrument and applying it as if it had the authority of local law:

(i) Unless specifically implemented by domestic lawmaking

procedures, the international norm is not, of itself, part of domestic law;

(ii) The international instrument may have been negotiated by the executive Government and may never be enacted as part of the local law either because:

(a) The Executive Government which ratified it does not command, upon the subject matter, the support of the legislature to secure the passage of a local law on the same subject; or

(b) In a federal state, the Executive which negotiated the treaty may for legal reasons, political reasons or conventions concerning the distribution of power within the Federation not have the authority or desire to translate the norms of the international instrument into authentic and enforceable rules having domestic legal authority; or

(iii) The subject matter of the international instrument may be highly controversial and upon it there may be strongly held differences of view in the local community. In such an event the judge, whether in construing ambiguous legislation or stating and developing the common law, may do well to leave domestic implementation of the international norm to the ordinary process of lawmaking in the legislative branch of government.

These cautions having been stated, they do not provide a

reason to doubt the legitimacy of the Bangalore Principles. It cannot now be questioned that international law is one of the sources of domestic law. So much was said as long ago as 1935 by Professor J L Brierly.[17] It has been accepted in Australia by the High Court of Australia.[18] In the time of the British Empire, the Privy Council accepted that domestic courts would, in some circumstances at least, bring the common law into accord with the principles of international law.[19]

Commenting on the advice of the Privy Council in the case just mentioned, the biographer of Lord Atkin (who delivered the judgement of the Board) wrote:

> "Lord Atkin's advice in this case is remarkable for its erudition. Because the subject matter was international law, the relevant rule neither need nor could be proved in the same way as rule of foreign law. The range of inquiry is necessarily wider; and here there is a far-ranging discussion of legal writings. Atkin placed most reliance of the decision of Chief Justice Marshall in Schooner Exchange v M'Fadden 7 Cranch 116, a judgment which he said 'has illuminated the jurisprudence of the world'. But he also made reference to evident enjoyment but the debate which took place in 1875 on the treatment of fugitive slaves and which was started by a letter to The Times from the Whewell Professor of International law. ... In the course of his judgment Atkin said:
>
> > 'It must always be remembered that, so far, at any rate, as the courts of this country are concerned, international law has no validity save insofar as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules upon our own code of substantive law or procedure. The Courts acknowledge the existence of a body of rules which nations accept amongst

> themselves. On any judicial issue they seek to ascertain what the relevant rule is, and having found it, they treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statute or fully declared by their tribunals.'[20]

This statement provoked a number of fears on the part of academic writers at the time.[21] However, I agree with Atkin's biographer that the commentators misunderstood what Atkin had said. what he said is guidance for us in approaching the Bangalore Principles. The rules are simple -

(i) International law (whether human rights norms or otherwise) is not, as such, part of domestic law in most common law countries;

(ii) It does not become part of such law until Parliament so enacts or the judges (as another source of lawmaking) declare the norms thereby established to be part of domestic law;

(iii) The judges will not do so automatically, simply because the norm is part of international law or is mentioned in a treaty - even one ratified by their own country;

(iv) But if an issue of uncertainty arises [as by a lacuna in the common law, obscurity in its meaning or ambiguity in a relevant statute] a judge may seek guidance in the general principles of international law, as accepted by the community of nations; and

(v) From this source of material, the judge may ascertain what the relevant rule is. It is the action of the judge, incorporating that rule into domestic law, which makes it part of domestic law.

There is nothing revolutionary in this, as a reference to Lord Atkin's advice demonstrates. It is a well established principle of English law which most Commonwealth countries have inherited and will follow. But it is an approach which takes on urgency and greater significance in the world today.

In 1936 in the High Court of Australia, Evatt and McTiernan JJ wrote of the growing number of instances and subject matters which were, even then, properly the subject of negotiation amongst countries and which resulted in international legal norms:[22]

> "It is a consequence of the closer connection between the nations of the world (which has been partly brought about by the modern revolutions in communication) and of the recognition by the nations of a common interest in many matters affecting the social welfare of their peoples and of the necessity of co-operation among them in dealing with such matters, that it is no longer possible to assert that there is any subject matter which must necessarily be excluded from the list of possible subjects of international negotiation, international dispute or international agreement."

If this was true in 1936 how much more true is it today? Not only have the revolutions in communication proceeded apace to reduce distance and to enhance the numerous features of the global village. We have, since 1936, seen the destruction during the Second World War, the terrible evidence of

organised inhumanity during the Holocaust, the post-War dismantlement of the colonial empires, the growth of the United Nations Organisation and numerous international and regional agencies, the advent of the special peril of nuclear fission and the urgent necessity of arms control over weapons of every kind. The wrongs of racial discrimination, apartheid and other forms of discrimination against people on the basis of immutable characteristics of such people, endanger the harmony of the international community. They also do offence to individual human rights. They are therefore of legitimate concern of all civilized people. That includes judges. Judges must do their part, in a creative but proper way, to push forward the gradual process of internationalisation which the developments just mentioned clearly necessitate. This is scarcely likely to imperil the sovereignty of nations and the legitimate diversity of communities and cultures throughout the world. But it is likely to enhance, in appropriate areas, the common approach of judges in many lands to problems having an international character. Human rights represent one such field of endeavour. This is so because many cases coming before courts in every country raise questions of human rights. they are therefore the legitimate concern of lawyers and judges.

HOW TO DO IT

Keeping the problems which have been mentioned in mind, it is appropriate for judges and lawyers nowadays to have

close at hand the leading international instruments on human rights norms. These include the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and the International Convention for the Elimination of all Forms of Racial Discrimination. There are many other such instruments.

In Australia the process of making reference to these instruments, in the course of domestic decision-making, really began in the last decade. Leadership was given in this respect by Murphy J of the High Court of Australia. A number of his decisions can be cited as illustrations.

In Dowal v Murray & Anor [23] Murphy J came to a conclusion about the constitutionality of a provision relating to custody of children by making reference to two treaties to which Australia was a party. One, the International Covenant on Economic, Social and Cultural rights, provides for the recognition of special measures for the protection and assistance of children and young persons without any discrimination for reasons of parentage. The other, the International Covenant on Civil and Political Rights contains in article 24 a provision relevant to the rights of the child.

In McInnis v The Queen,[24] Murphy J wrote a powerful dissent concerning the right of a person charged with a serious criminal offence to have legal assistance at his trial. In his judgment he referred to the provisions of the

International Covenant on civil and Political Rights, article 14(3).[24] This provided the intellectual setting in which he sought to place an understanding of the way in which the common law of Australia should be understood and should develop.

In Koowarta v Bjelke-Petersen[26], Murphy J examined the Racial Discrimination Act 1975 in the context of the "concerted international action" taken after the Second World War to combat racial discrimination. He traced this action through the United Nations Charter of 1945, the work of the Commission on Human Rights established by the United Nations in 1946, the Universal Declaration of Human Rights adopted in 1948 by the General Assembly and the International Covenants. He asserted that an understanding of the "external affairs" power under the Australian Constitution could only be derived by seeing Australia today in this modern context of international developments and international agencies capable of lawmaking on a global scale.

In the Tasmanian Dams case[27] the members of the High Court of Australia had to consider the operation in Australian law of a UNESCO Convention. It is now tolerably clear that by the time at least of this decision, a majority in Australia's highest court had come to recognise the importance of ensuring that the Australian Federal Parliament had the power to enact legislation or matters which by now had become legitimate subjects of international concern.

The procedure of referring to international legal norms, particularly in the field of human rights, is gathering momentum in many countries. Two recent instances in England deserve mention. In 1987 courts in England, Australia and several other jurisdictions were confronted with the proceedings by which Attorney General of England and Wales sought to restrain the publication of the book Spycatcher. I participated in a decision of the New south Wales Court of Appeal refusing that relief.[28] Our decision was later confirmed on appeal by the High Court of Australia. Neither in the High Court nor in the Court of Appeal was the argument presented in terms of the conflict between basic principles about freedom of speech and freedom of the press (on the one hand) and duties of confidentiality and national security (on the other). But in the English courts the fundamental principles established by the European Convention on Human Rights (to which the United Kingdom is a party) were in the forefront of the arguments of counsel and the reasoning of the judges. In Attorney General v Guardian Newspapers Limited & Ors (No 2) [29] both the trial judge (Scott J)[30] and the Judges of the Court of Appeal were at pains to demonstrate that their decisions were consistent with the obligations of the United Kingdom under the European Convention and the decisions thereon of the European Court of Human Rights. Counsel for the Attorney General argued that the judgments of the European Court did not bind an English Court concerning the construction of the relevant provisions

of the Convention. Scott J concluded:

> "But if it is right to take into account the government's treaty obligations under article 10, the article must, in my view, be given a meaning and effect consistent with the rulings of the court established by the treaty to supervise its application. Accordingly, in my judgment, Mr Lester is entitled to invite me to take into account article 10 as interpreted by the two judgments of the European Court that I mentioned. These authorities establish that the limitation of free speech and the interests of national security should not be regarded as 'necessary' unless there is a 'pressing social need' for the limitation and unless the limitation is 'proportionate to the legitimate aims pursued'.[31]

In the Court of Appeal Sir John Donaldson MR (as the Master of the Rolls was) likewise acknowledged the importance of bringing English domestic law into line with the European Convention:[32]

> "The starting point of our domestic law is that every citizen has a right to do what he likes, unless restrained by the common law including the law of contract, or by statute. ... The substantive right to freedom of expression contained in article 10 [of the European Convention] is subsumed in our domestic law in this universal basic freedom of action. Thereafter, both under our domestic law and under the Convention, the courts have the power and the duty to assess the 'pressing social need' for the maintenance of confidentiality 'proportionate to the legitimate aim pursued' against the basic right to freedom of expression and all other relevant factors. ... For my part I can detect no inconsistency between our domestic law and the Convention. Neither adopts an absolute attitude for or against the maintenance of confidentiality. Both contemplate a balancing of competing private and public interests."

There were similar considerations of the European Convention

by Dillon LJ[33] and by Bingham LJ[34]

It might be said that the particular English consideration of the European Convention arises from the fact that the United Kingdom may be taken to the European Court of Human Rights by any citizen of that country with standing to complain about the disharmony between the English law and the obligations of the Convention. Doubtless, this entitlement, together with the numerous cases in the European Court of Human Rights in which the United Kingdom has been held to be in breach of the Convention, explains the growing willingness of the English courts to attend to the convention and the developing jurisprudence which has built up around it.[35] However, whilst this may provide a practical explanation for the heightened sensitivity of English judges to the provisions of the European Convention, it does not affect the legal status, in England, of the Convention or its jurisprudence. So far as English domestic law is concerned, that status is precisely the same (federation apart) as the status in Australia of the International Covenant on Civil and Political Rights. Neither the European Convention nor the International Covenant are, as such, part of domestic law. Each is a source for domestic law. The point being presently made is that the English courts are increasingly looking to the source and deriving guidance from it for decisions on the content of domestic law.

Another recent case in England also demonstrates this trend. In In re K D (a minor) (Ward: Termination of

Access)[36], the House of Lords in 1988 had to consider an order terminating parental access to a ward of court. The mother appealed. She asserted that, unless access were affirmed as a parental right, English law would deny a parent a fundamental human right recognised by the European Convention. This argument was not met by the judges with the assertion that the European Convention was not part of English law and that its requirements were therefore irrelevant to the determination of that law. Instead, their Lordships took pains to reconcile their opinion (which was to dismiss the appeal) with consistency with the European Convention and the European Court of Human Right's view of its requirements. Lord Oliver of Aylmerton gave the judgments of their Lordships. He asserted that:[37]

> "such conflict as exists is ...semantic only and lies in differing ways of giving expression to the single common concept that the natural bond and relationship between parent and child gives rise to universally recognised norms which ought not be gratuitously interfered with and which, if interfered with at all, ought to be so only if the welfare of the child dictates it. ... [T]he description of ... familial rights and privileges enjoyed by parents in relation to their children as 'fundamental' or 'basic' does nothing in my judgment to clarify either the nature or the extent of the concept which it is sought to describe."

These and many other recent cases demonstrate the growing care that is paid in the United Kingdom to ensure that the international human rights norms established by the European Convention on Human Rights are translated into practical operation in the day to day business of the courts. Not only

in leading cases but many other instances, the English courts have taken pains to bring English law into harmony with international human rights norms.[38] The same should happen in other Commonwealth countries.

RECENT AUSTRALIAN EXPERIENCE

In Australia, the steps towards a similar movement have been taken somewhat more cautiously. This may partly be explained by the Federal nature of the Australian constitution and the limited power which, it has long been assumed, the Federal Executive and Federal Legislature have over international treaties and participation in international lawmaking where this would conflict with the "basic structure" of the Australian constitution That assumption must itself now be reconsidered in the light of recent decisions of the High Court to some of which I have referred.[38]

I have already mentioned the initiatives taken by Murphy J during the late 1970s and early 1980s to call attention to relevant international human rights norms. Now other Justices of the High Court of Australia are beginning to do likewise. In J v Lieschke[40], Deane J had to consider the right of a parent to participate in proceedings which affected the custody of a child. He denied that the interests of the parents in such proceedings were merely indirect or derivative in nature:

> "To the contrary, such proceedings directly concern and place in jeopardy the ordinary and primary rights and authority of parents as the

> natural guardians of an infant child. True it is that the rights and authority of parents have been described as 'often illusory' and have been correctly compared to the rights and authority of a trustee (see e.g. the Report by Justice, the British Section of the International Commission of Jurists, Parental Rights and Duties and Custody Suits (1975) pp 6-7 ... Regardless, however, of whether the rationale of the prima facie rights and authority of the parents is expressed in terms of a trust for the benefit of the child, in terms of the right of both parent and child to the integrity of family life or in terms of the natural instincts and functions of an adult human being, those rights and authority have been properly recognised as fundamental (see e.g. Universal Declaration of Human Rights, Arts. 12, 16, 25(2) and 26(3) and the discussion (of decisions of the Supreme Court of the United States) in Roe v Conn 417 F Supp 769 (1976) and Alsager v District Court of Polk County, Iowa 406 F Supp 10 (1975). They have deep roots in the common law."[41]

Deriving authority for fundamental principles (both of the common law and of international human rights norms) by reference to international treaties is now increasingly occurring in Australian courts.

In Daemar v The Industrial Commission of New South Wales & Ors a question arose before me as to whether the Bankruptcy Act 1966 enacted that proceedings for the vindication of a public right were stayed during the bankruptcy of the petitioner. There was no doubt that he had been made bankrupt. He wished to bring proceedings, prerogative in nature, against a court of limited jurisdiction which had made an order against him. For default of compliance with that order (which he wished to challenge) he had been made bankrupt. He asserted that he should be entitled to argue the point concerning the

jurisdiction of the Court, notwithstanding his supervening bankruptcy. The Court held that the provision of the Federal Bankruptcy Act providing for a stay in the event of bankruptcy was unambiguous. In the course of my judgment, by reference to the International Covenant on Civil and Political Rights, I expressed the opinion that, were the statute not unambiguous, the importance of a right of access to the courts would have suggested a construction that limited the effect of the statutory stay:[42]

> "The importance of an action for relief prerogative in nature for the vindication of duties imposed by law, the observance of which the Court supervises, needs no elaboration. It is obviously a serious matter to deprive any person of the important civil right of access to the courts, especially one might say where the public law is invoked where the allegation is made that public officials have not performed their legal duties or have gone beyond their legal powers. This starting point in the approach by a court to the construction of the Act derives reinforcement from the International Covenant on Civil and Political Rights: see articles 14.1 and 17. Australia has ratified that covenant without relevant reservations. The entitlement of persons with a relevant interest to invoke the protection of the courts to ensure compliance with the law is so fundamental that the Act would be interpreted, whenever it would be consonant with its language, so as not to deprive a person of that entitlement."[43]

The other judges of the Court did not refer to the International Covenant. But I took it as a touchstone for indicating the basic matters of approach which should be taken by the Court in tackling the construction of the statute. Had there been any ambiguity, the Covenant

provisions would have encouraged me (as would the equivalent rules of construction in the common law) to adopt an interpretation of the Bankruptcy Act which did not deprive the individual of the right to challenge in the Court, the compliance of the Act complained of with the law.

In S and M Motor Repairs Pty Limited & Anor v Caltex Oil (Australia) Pty Limited & Anor[44] a question arose as to whether a judge should have disqualified himself for reasonable apprehension of bias. It was discovered after the case was underway that the judge had, whilst a barrister two years earlier, been for many years on a retainer for the companies closely associated with the plaintiff. That company was seeking various remedies, including punishment for contempt against a subcontractor who was alleged to have breached a contract and a court order based on it. The judge was asked to stand aside. He declined to do so. The subcontractor was convicted of contempt. He appealed. The case raised important questions concerning judicial disqualification for the appearance of bias.

In the course of giving my minority opinion, to the effect that the judge ought to have disqualified himself in the circumstances, I referred to the importance of having a court manifestly independent and impartial.[45]

> "It would be tedious to elaborate the antiquity and universality of the principle of manifest independence of the judiciary. It is axiomatic. It goes with the very name of a judge. It appears in the oldest books of the Bible: see e.g. Exodus 18 : 13-26. It is discussed by Plato in his Apology. It is elaborated by Aristotle in The Rhetoric, Book 1,

Chapter 1. It is examined by Thomas Aquinas in part 2 of the Second Part (Q 104 AA2) of Summa Theologica. It is the topic of Lambent Prose in the Federalist Papers ... In modern times it has been recognised in numerous national and international statements of human rights. For example, it is accepted in Article 14.1 of the International Covenant on Civil and Political Rights to which Australia is a party. That article says, relevantly:

> '14.1 All persons shall be equal before the courts and tribunals. In determinations of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent independent and impartial tribunal established by law.'"

Again, the International Covenant became for me a starting point in the statement of principles which placed in context the dispute between the parties. It provided an international setting for the issues involved in the dispute.

In Jago v District Court of New South Wales & Ors[46] the question arose as to whether, under the common law of the State, a person accused of a criminal charge had a legally enforceable right to a speedy trial. There had been a delay of many years in bringing the accused to trial and he sought a permanent stay of proceedings. A majority of the Court (Samuels JA and myself) held that whilst there was a right to a fair trial, there was no right, as such, under statute or common law to a speedy trial. Speed was however an attribute of fairness. McHugh JA (now a Justice of the High Court of Australia) held that the common law did provide a right to speedy trial. Both Samuels JA and I referred to the

provisions of the International Covenant on Civil and Political Rights.

A great deal of time in the Court was taken exploring ancient legal procedures in England back to the reign of King Henry II. In independent Australia in 1988, this seemed to me a somewhat unrewarding search. I wrote:

> "I regard it to be at least as relevant to search for the common law of Australia applicable in this State with the guidance of a relevant instrument of international law to which this country has recently subscribed, as by reference to disputable antiquarian research concerning the procedures that may or may not have been adopted by the itinerant justices in Eyre in parts of England in the reign of King Henry II. Our laws and our liberties have been inherited in large part from England. If an English or Imperial statute still operates in this State we must give effect to it to the extent provided by the Imperial Acts Application Act 1969 ... but where the inherited common law. One such reference point may be an international treaty which Australia has ratified and which now states international law.
>
> The International Covenant on Civil and Political Rights contains in Art 14.3 the following provisions:
>
> '14.3 In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees in full equality:
>
> (a) To be informed promptly ... of the charge against him;
>
> (b) To be tried without undue delay.'
>
> If the right to be tried without undue delay is appropriately safeguarded, a denial of an asserted "right" to a "speedy trial" would not bring a court's decision into conflict with the standard accepted by Australia upon the ratification of the covenant. ... Australia appended a 'Federal Statement' to the

law is uncertain, Australian Judges, after the Australia Act (1986)(Cth) at least do well to look for more reliable and modern sources for the statement and development of the common ...

ratification of the Covenant. This may affect the direct applicability of Article 14 to a criminal trial in this State. But it does not lessen the authority of the covenant as a relevant statement of internationally accepted principles which Australia has also accepted, by ratification."[47]

Samuels JA, on the other hand, conducted a careful analysis of the history of English law and procedures from which Australian law are derived. So far as the Covenant was concerned, he was more cautious:

"I appreciate that the right to speedy trial, or to a trial within a reasonable time, has now been entrenched by statute in many jurisdictions in both the common law and Romanesque systems. Moreover there are international Covenants and Conventions which prescribe such rights. For example, the International Covenant on Civil and Political Rights (to which Australia with certain reservations and declarations is a party) provides in Art 14(3)(c) that in the determination of any criminal charge against him everyone shall be entitled 'to be tried without undue delay'. The Covenant is not part of the law of Australia. Accession to a treaty or international covenant or declaration does not adopt the instrument into municipal law in the absence of express stipulation such as that which may be derived from the Racial Discrimination Act 1975 (Cth) ... See the remarks of Lord Denning MR in R v Secretary of State for the Home Department; ex parte Bhajan Singh [1976] QB 198 at 207 ... It was suggested nonetheless that International Covenants of this kind might provide better guidance in a search for the principles of the common law than eight hundred years of legal history; and reliance was placed upon what Scarman LJ as he then was said in R v Secretary of State for the Home Department; ex parte Phansopkar [1976] QB 606 at 626. However, the statement does not seem to me to support the proposition and has, in any event, been roundly criticised ... Certainly, if the problem offers a solution of choice, there being no clear rule of common law or of statutory ambiguity, I appreciate that considerations of an international convention may be of assistance. It would be more apt in

> the case of ambiguity although in neither case it would be necessary to bear in mind not only the difficulties mentioned by Lord Denning but the effect of discrepancies in legal culture. In most cases I would regard the normative traditions of the common law as a surer foundation for development. but granted that a Convention may suggest a form of rational and adequate solution it cannot explain whether a particular right was or was not an incident of the common law. That was the question in the present case."[48]

Another case in which the International Covenant was considered was also one in which Samuels JA sat with me and with Clarke JA. I refer to Gradidge v Grace Brothers Pty Limited.[49] That was a case where a judge had ordered an interpreter of a deaf mute to cease interpretation of exchanges between the judge and counsel. The mute remained in court and was the applicant in workers' compensation proceedings. The judge refused to proceed when the interpreter declined to cease interpretation. The Court of Appeal unanimously answered a stated case to the effect that the judge had erred. In doing so both Samuels JA and I referred to the International Covenant on Civil and Political Rights. I mentioned in particular, in criticising certain earlier decisions in Australia about the entitlement to an interpreter, the provisions of Articles 14.1, 14.3(a) and (f). I stated that those provisions are now part of customary international law and that it was desirable that "the [Australian] common law should, so far as possible, be in harmony with such provisions".

Samuels JA said this:

"For the present purposes it is essential to balance what procedural fairness requires in circumstances such as this against the necessity to permit a trial judge to retain the ultimate command of order and decorum in his or her court. It seems to me that the principle which applies is clear enough; it must be that any party who is unable (for want of some physical capacity or the lack of knowledge of the language of the court) to understand what is happening. That party must, by the use of an interpreter, be placed in the position which he or she would be if those defects did not exist. the task of the interpreter, in short, is to remove any barriers which prevent understanding or communication ... The principle to which I have referred so far as criminal proceedings are concerned is acknowledged by the International Covenant on Civil and Political Rights, Article 14, which is now found as part of Schedule 2 to the Human Rights and Equal Opportunity Commission Act 1986 (Cth)."

The final example of the use of the International Covenant to which I would refer is Cachia v Isaacs & Ors.[50] A litigant in person had successfully appeared for himself to defend, in a number of levels of the court hierarchy, proceedings brought against him by his former solicitors. Various orders for "costs" were made in his favour. Invoking such decisions as London, Scottish Benefit Society v Chorley[51] and Buckland v Watts,[52] the solicitors urged that the litigant in person should only recover expenses which were strictly out of pocket. He should be denied the loss of income in attending court because this was something a lawyer could charge for and only lawyers had the privilege to so charge in our courts. The argument succeeded with a majority of the Court (Samuels and Clarke JJA). But I rejected it. I preferred the view that a litigant in person could recover all costs and expenses, necessarily and properly incurred to represent himself in the

court. I derived support for my view from (amongst other things) the International Covenant on Civil and Political Rights, Art 14.1. That article provides that all persons "shall be equal before the courts and tribunals". I suggested that from this fundamental principle should be derived the principle that litigants should not suffer discrimination because they are not represented by lawyers. Access to the courts should be a reality and not a shibboleth.

It will be observed that this is yet another case which reference has been made to the International Covenant for the purpose of stating what may be self-evident: a universal truth and part of the common law. But the reference to the Covenant is an intellectual starting point to the consideration by the court of the law to be applied in a particular case. It puts the judge's decision in context. It puts it in a context of universal, international principles. In uncertain and busy litigious seas, it is often helpful to have the guiding star of international human rights norms. That, in essence, is what the Bangalore Principles assert.

CONCLUSIONS

The purpose of this essay has been to bring up to date some of the developments in my own and other jurisdictions since the Bangalore Principles on the Domestic Application of International Human Rights Norms were declared a year ago. Since that time, in a number of practical instances, the

court of which I am a member has had the occasion to consider international human rights norms, as stated in international conventions. Illustrations of the use made of the, have been given. There are reasons for caution, in every country, and particularly federal states, in the use made of international principles stated in treaties negotiated by the Executive Government and not translated into domestic law by the legislature. But judges also make law. In doing so they frequently have choices. Those choices arise in the construction of statutes and in the development, clarification and restatement of the common law. In performing such functions, judges of today do well to look to international instruments. Particularly is this so where the international instrument has been accepted and has itself become part of the customary law of nations.

Judges of today are amongst the intellectual leaders of their communities. Those communities find themselves in a world of growing interdependence and intercommunication. Law has, until now, traditionally been a parochial jurisdiction-bound profession. But judges of today, accompanied by the lawyers of today, must begin the journey that will take them into an international community in which internationally stated norms are given active, practical work to do. For the sake of humanity and the respect of human rights in all countries, the Bangalore Principles show the way ahead. The opportunity exists for all judges an lawyers in every country of the common law to pick up the challenge

presented by the Bangalore Principles. In their daily lives they can find a framework of principle in the international human rights and other norms from which to derive guidance for the performance of their important duties.

APPENDIX

THE BANGALORE PRINCIPLES

(See (1988) 62 ALJ, 531.

Between 24 and 26 February 1988 there was convened in Bangalore, India, a high-level judicial colloquium on the Domestic Application of International Human Rights Norms. The Colloquium was administered by the Commonwealth Secretariat on behalf of the Convenor, the Hon Justice P N Bhagwati (former Chief Justice of India), with the approval of the Government of India, and with assistance from the Government of the State of Karnataka, India.

The participants were:

Justice P N Bhagwati (India) (Convenor)
Chief Justice E Dumbutshena (Zimbabwe)
Judge Ruth Bader Ginsburg (USA)
Chief Justice Mohammed Haleem (Pakistan)
Deputy Chief Justice Mari Kapi (Papua New Guinea)
Justice Michael D Kirby CMG (Australia)
Justice Rajsoomer Lallah (Mauritius)
Mr Anthony Lester QC (Britain)
Justice P Ramanathan (Sri Lanka)
Tun Mohamed Salleh Bin Abas (Malaysia)
Justice M P Chandrakantaraj Urs (India)

There was a comprehensive exchange of views and full discussion of expert papers. The Convenor summarises the discussions in the following paragraphs:

1. Fundamental human rights and freedoms are inherent in all humankind and find expression in constitutions and legal systems throughout the world and in the international human rights instruments.

2. These international human rights instruments provide important guidance in cases concerning fundamental human rights and freedoms.

3. There is an impressive body of jurisprudence, both international and national, concerning the interpretation of particular human rights and freedoms and their application. This body of jurisprudence is of practical relevance and value to judges and lawyers generally.

4. In most countries whose legal systems are based upon the common law, international conventions are not directly enforceable in national courts unless their provisions have been incorporated by legislation into domestic law. However, there is 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.

5. This tendency is entirely welcome because it respects the niversality of fundamental human rights and freedoms and the vital role of an independent judiciary in reconciling the competing claims of individuals and groups of persons with the general interests of the community.

6. While it is desirable for the norms contained in the international human rights instruments to be still more widely recognised and applied by national courts, this process must take fully into account local laws, traditions, circumstances and needs.

7. 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 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.

8. However, where national law is clear and consistent 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 inconsistency 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.

9. 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 an law enforcement officials; provision in libraries of relevant materials; promotion of expert advisory bodies knowledgeable about developments in this field; better dissemination of information to judges, lawyers and law enforcement officials; and meetings for exchanges of relevant information and experience.

10. These views are expressed in recognition of the fact that judges and lawyers have a special contribution to make in the administration of justice in fostering universal respect for fundamental human rights and freedoms.

Bangalore
Karnataka State
India
26 February 1988

FOOTNOTES

* The Bangalore Principles are an Appendix to this paper. See (1988) 62 Aust LJ 531-2.

** President of the Court of Appeal of New South Wales, Australia. Commissioner of the International Commission of Jurists. Member of the World Health Organisation Global Commission on AIDS. Personal views.

1. Simon Lee, Judging Judges, Faber & Faber, London, 1988, 38. Lee points out, with illustrations, the way in which leading decisions are, in part, fashioned by the arguments of counsel.

2. See e.g. Oceanic Sun Line Special Shipping Co Inc v Fay (1988) 62 Aust. Law J. Reports 389, 413 (High Court of Australia); Halabi v Westpac Banking Corporation, unreported, Court of Appeal (NSW) 8 February 1989. (S.L.R., HCA, 17 March 1988).

3. See M D Kirby, "Statutory Interpretation and the Rule of Law - Whose Rule, What Law?" in D St L Kelly Essays on Legislative Drafting, Adelaide Law Rev Assn, Adelaide, 1988, 84.

4. See e.g. R Clinton, "Judges Must Make Law : A Realistic Appraisal of the Judicial Function in a Democratic Society", 67 Iowa L Rev 711 (1981-2); M Cappetti, "The Lawmaking Power of the Judge and its Limits", (1981) 8 Monash Uni L Rev 15; B Dickson, "The Judiciary - Law Interpreters or Lawmakers" (1982) 12 Manitoba LJ 1; H Lücke, "The Common Law as Arbitral Law : A Defence of Judicial Lawmaking" (1983) 8 Adel L Rev 280; S D Smith, "Courts, Creativity and the Duty to Decide a

Case", Uni Illinois L Rev 573 (1985); M H McHugh, "The Lawmaking Function of the Judicial Process" (1988) 62 Aust LJ 15; and M D Kirby "The Role of Judge in Advancing Human Rights by Reference to International Human Rights Norms" (1988) 62 Aust. LJ 514.

5. Lord Reid, "The Judge as Lawmaker" (1972) 12 Journal of the society of Public Teachers of Law 22.
6. Koowarta v Bjelke-Petersen (1983) 153 CLR 168, 218-9.
7. African Charter on Human and Peoples' Rights, Division of Press and Information, Organisation of African Unity, General Secretariat, June 1982.
8. Chow Hung Ching v The King (1948) 77 CLR 449.
9. 1809, vol 4, 67.
10. (1948) 77 CLR 449, 477.
11. (1983) 153 CLR 168, 224. See also Gibbs CJ ibid at 193.
12. e.g Australia, Canada, India, Malaysia, Nigeria Tanzania etc.
13. Attorney General (Canada) v Attorney General (Ontario) [1937] AC 326, 348.
14. (1975) 135 CLR 337, 445.
15. Koowarta (above) at 200. (Gibbs CJ).
16. A C Hutchinson and A Petter, "Private Rights - Public Wrongs : The Liberal Lie of the Charter" (1988) 38 Uni Toronto LJ 298.
17. J L Brierly (1935) 51 LQR 31.
18. Chow Hung Hing at 477.

19. See Chung Chi Cheung v The King [1939] AC 160, 168 (PC).

20. G G Lewis, Lord Atkin, Butterworths, London, 1983, 97f.

21. See e.g. H Lauterpacht International Law : Collected Papers (vol 2), The Law of Peace, 560.

22. R v Burgess; ex parte Henry (1936) 55 CLR 608, 680-1.

23. Dowal v Murray & Anor (1978) 143 CLR 410.

24. McInnis v The Queen (1979) 143 CLR 575.

25. Ibid, 588.

26. Kootwarta v Bjelke-Petersen (19835) 153 CLR 168.

27. Tasmania v Commonwealth of Australia. (The Tasmanian Dams Case) (1984-5) 158 CLR 1.

28. Attorney General for the United Kingdom v Heinemann Publishers Australia Pty Ltd (1988) 10 NSWLR 86 (CA).

29. [1988] 2 WLR 805.

30. Ibid at 850-51. (CA)

31. Id, 851.

32. Id, 869.

33. Id, 897.

34. Id, 907.

35. T C Hartley, "Federalism, Courts and Legal Systems : The Emerging Constitution of the European Community" (1986) 34 Am J Comp Law 229, 247; Nigel Foster, "The European Court of Justice and the European Convention for the Protection of Human Rights" [1987] ECJ and ECHR Vol 8 245.

36. [1988] 2 WLR 398.

37. Ibid, 410, 412.

38. See, eg, X v Sweden (1981) 4 EHRR 398 at 410; X v United Kingdom (1981) 4 EHRR 1988; East African Asians v United Kingdom (1973) 3 EHRR 76 at 91; Her Majesty's Attorney-General v The Observer Ltd and Guardian Newspapers Ltd and Ors (Eng CA 10 February 1988; Waddington v Miah [1974] 1 WLR 683, (HL); Blathwayt v Baron Cawley [1976] AC 397, (HL); R v Lemon [1979] AC 617, (HL); Science Research Council v Nasse [1980] AC 1028, (HL); Attorney-General v British Broadcasting Corporation [1981] AC 303, (HL); United Kingdom Association of Professional Engineers v Advisory Conciliation and Arbitration Service [1981] AC 424, (HL); Gold Star Publications Ltd v DPP [1981] 1 WLR 732; Raymond v Honey [1983] AC 1 (HL); Home Office v Harman [1983] AC 280, (HL); Cheall v Apex [1983] 2 WLR 679 (HL); and cf R v Barnet LBD [1983] 2 AC 309, (HL); R v Secretary of State for the Home Department; Ex parte Bhajan Singh [1976] QB 198 at 207 (CA); R v Secretary of State for the Home Department; Ex parte Phansopkar [1976] QB 606 at 626, (CA).

39. See e.g. Koowarta (above).

40. (1986-7) 162 CLR, 447.

41. Ibid, 463.

42. Daemar v Industrial Commission of New South Wales & Ors (1988) 12 NSWLR 45.

43. Ibid, 53.

44. (1988) 12 NSWLR 358.

45. Ibid, 360-361.

46. (1988) 12 NSWLR 558.

47. Ibid, 569-70.

48. Ibid, 580-2.

49. Unreported, Court of Appeal (NSW) 4 December 1988; (1988) 5 NSWJB 219.

50. Unreported, Court of Appeal (NSW), 23 March 1989.

51. (1884) 13 QBD 872.

52. [1970] 1 QB 27 (CA).