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Readers of this Journal will recall the note on the judicial colloquium held in Bangalore, India in February 1988 concerning the domestic application of international human rights norms.[1] That colloquium was administered by the Commonwealth Secretariat on behalf of Justice P N Bhagwati, the former Chief Justice of India. Participants included a number of Chief Justices and Judges principally from the Asian Pacific region. Amongst the participants were Justice Michael Kirby, President of the Court of Appeal of the Supreme Court of New South Wales and Chief Justice Enoch Dumbutshena of Zimbabwe.

Between 19-22 April 1989 in Harare, Zimbabwe, Chief Justice Dumbutshena convened a follow-up meeting. Like the Bangalore meeting it was administered by the Commonwealth Secretariat in London. It was supported by funds from the Ford Foundation. Papers were presented by Chief Justice Dumbutshena and three of the paper-writers for Bangalore, including Justice Kirby. The colloquium gathered together most of the Chief Justices of the Commonwealth countries in Africa. The meeting was opened by the President of Zimbabwe

(The Hon R G Mugabe). It closed with the approval by the participants of the "Harare Declaration on Human Rights". This is an appendix to this note.

In his opening remarks, President Mugabe placed respect for internationally stated human rights in the context of the chief concerns of African countries. He said that "The denial of human rights and fundamental freedoms is not only an individual and person tragedy, but also creates conditions of social and political unrest, sowing seeds of violence and conflict within and between societies and nations". He recorded that since independence in 1980, Zimbabwe had enjoyed the benefits of a justiciable Bill of Rights, enforceable in the courts. It had adopted a policy of national reconciliation applicable to all citizens. The President said that his government was "firmly committed to the rule of law and to the maintenance of a justiciable Bill of Rights. It respects judicial decisions and avoids confrontation with the judiciary".

President Mugabe referred to a significant decision of the Supreme Court of Zimbabwe in 1987 in the case of Ncube Tshuma & Ndlovu v State. There, the Supreme Court of Zimbabwe held that corporal punishment by whipping (administered by six strokes of the cane) was an inhuman or degrading punishment in contravention of the constitution of Zimbabwe. In reaching that view, the Supreme Court drew upon jurisprudence which had developed around similar provisions in international statements of human rights and in the

constitutions of other countries. It was in this way, the President said, that the developing jurisprudence of human rights could be utilised in the domestic decision-making of judges. In closing, President Mugabe expressed doubts about the "cosmetic" reforms to apartheid in neighbouring South Africa. He declared that "any wishful thinking on this score is not only futile but positively harmful as it raises false hopes and deflects attention and energies away from the struggle against apartheid". The President's speech was a thoughtful contribution to the conference, reflecting Mr Mugabe's training both in law and economics. The Chief Justice of The Gambia (Ayoola CJ) expressed the participants' thanks to the President who then met the Judges privately.

The working sessions then opened with a paper presented by Lallah JA of Mauritius, recently elected Chairman of the Human Rights Committee of the United Nations. This Committee, established under the International Covenant on Civil and Political Rights (ICCPR) (to which Australia is a party) has a large jurisdiction in reviewing national reports on human rights issues and compliance with international obligations. In the case of countries which have accepted the Optional Protocol to the ICCPR, it also receives individual complaints. Justice Lallah outlined the developing framework of international and regional treaties dealing with human rights. He explained the development of customary international law which has accumulated around the United Nations Charter itself, the Universal Declaration of

Human Rights (1948), the International Covenants and Declarations and Resolutions of the General Assembly of the United Nations and other international and regional instruments.

This paper was followed by one presented by Dr Rose D'Sa, a Kenyan lawyer now living in England concerning the domestic application of the African Charter on Human and Peoples' Rights. This Charter was adopted by the Organisation of African Unity (OAU) in 1981. It entered into force in October 1986. Some two-thirds of the membership of the OAU has ratified or acceded to the Charter, bringing up to thirty-five the number of participating States. The African Charter is the African equivalent to the European Convention on Human Rights and Fundamental Freedom and the American Convention on Human Rights developed by the Organization of American States. But unlike the European and American Conventions, the African Charter does not establish an inter-jurisdictional court to receive and determine complaints about derogations from the treaty. Instead, an African Commission on Human and Peoples' Rights is established consisting of eleven members, serving in rotation. Some participants in the Harare colloquium questioned why the machinery which had been accepted in Europe and the Americas had not been adopted for the African Charter. Reference was made to this point in the concluding statement. The Commission appointed by the Charter has begun its work which includes the provision of educational material

concerning human rights and the provisions of the Charter. The other point of distinction from the European and American treaties is the reference in the African Charter to "peoples' rights" and to "duties", some of the latter expressed in wide language which also attracted the critical attention of the African jurists brought up in the tradition of the common law.

The third session considered a paper by Justice Kirby on "Implementing the Bangalore Principles on Human Rights Law". This paper referred to the Australian legal authority on the recognition given to international law in courts in Australia. See Chow Hung Ching v The King[2]; New South Wales v The Commonwealth[3] and Koowarta v Bjelke-Petersen.[4] It called attention to the choices which must frequently be made by judges in common law countries where the language of the constitution or legislation is ambiguous or where a gap is demonstrated in the common law which is to be filled by analogous reasoning from past precedents. In these circumstances, Kirby P proposed that reference could legitimately be made by judges to any relevant jurisprudence which had developed around international statements of universal human rights. He pointed out that this was now commonly done in the United Kingdom, under the stimulus of the decisions of the European Court of Human Rights. See eg Attorney General v Guardian Newspapers Limited & Ors [No 2][5] and In re K D (a minor) Ward: Termination of Access.[6] The growing attention in

English courts to international human rights norms has been noted in a number of recent articles. See eg T C Hartley, Federalism, Courts and Legal Systems: The Emerging Constitution of the European Community[7] and Nigel Foster, The European Court of Justice and the European Convention for the Protection of Human Rights.[8] Kirby P then illustrated by reference to a number of decisions of the High Court of Australia and of the Court of Appeal of New South Wales instances where useful reference had been made by members of the courts to international human rights law in the development of their reasoning. See eg Deane J in J v Lieschke;[9] Daemar v Industrial Commission of New South Wales and Ors;[10] Jago v The District Court of New South Wales & Ors;[11] Gadidge v Grace Bros Pty Limited[12] Cachia v Isaacs & Ors[13].

The session then proceeded to a discussion led by Mr Anthony Lester QC (England) on the way judges could respond, consistently with human rights law, to state challenges to personal liberty of subjects who appeal to the court for protection. The session concluded with a paper by Justice Bhagwati on Fundamental Rights in their Economic, Social and Cultural Context.

Although meetings of the Chief Justices of Commonwealth Africa are now a regular event,[14] it is rare, if not unprecedented, to have collected in the one place so many leading judges from most of the Commonwealth countries in Africa. Dinners in honour of the participants were offered

by the Minister of Justice, Legal and Parliamentary Affairs of Zimbabwe and the Zimbabwe Law Society. At the last mentioned, the guest of honour was Mr Arthur Chaskalson SC of South Africa. He is the national director of the Legal Resources Centre of South Africa. This is a body which helps to represent disadvantaged people before the courts of South Africa, particularly persons detained under the emergency laws. Mr Chaskalson also attended the meeting of the colloquium as an observer, as did representatives of the African Bar Association, the Zimbabwe Legal Resources Foundation and representatives of the University of Zimbabwe and of Interights. The latter publishes regular bulletins on developing international human rights law and makes particular mention of domestic references to such law in court decisions in many countries, including Australia.

The principal proposal of the colloquium was the preparation by the Commonwealth Secretariat in London of a handbook for judges and lawyers. This would include the principal international human rights instruments together with handy references to the leading cases on the various basic rights referred to in those instruments. The preparation of such a volume would, it is hoped, translate the growing body of international human rights law from fine sentiments in international treaties to an influential stimulus to the decision-making of judges and the work of lawyers. International human rights law is not thereby incorporated into domestic law, contrary to established

authority. It simply becomes one of the resources by which lawyers and judges perform their daily functions of interpreting ambiguous statutes and filling gaps in the common law where these are shown to exist. Support for this approach, which is now perfectly normal in England and in other countries, was expressed by all participants at the African colloquium. It is recorded in the concluding statement which follows:

APPENDIX

REPORT OF JUDICIAL COLLOQUIUM ON THE DOMESTIC APPLICATION OF INTERNATIONAL HUMAN RIGHTS NORMS

HARARE, ZIMBABWE

(Here set out)

FOOTNOTES

1. See (1988) 62 ALJ 531 noted also (1988) 14 CLB 1196.
2. (1948) 77 CLR 449.
3. (1975) 135 CLR 337, 445.
4. (1983) 153 CLR 168, 218, 224.
5. [1988] (CA) WLR 805.
6. [1988] 2 WLR 398 (HL).
7. (1986) 34 Am J Comp Law, 229-247.
8. [1987] ECJ and ECHR vol 8 245.
9. (1986-87) 162 CLR 447.
10. (1988) 12 NSWLR 45-53.
11. (1988) 12 NSWLR 558, 569, 580.
12. Court of Appeal, unreported, 4 December 1988; (1988) 5 NSWJB 219.
13. Court of Appeal, unreported, 23 March 1989; (1989) NSWJB .
14. See (1988) 14 CLB 1198.