

COMMONWEALTH SECRETARIAT

GOVERNMENT OF THE GAMBIA

JUDICIAL COLLOQUIUM ON THE DOMESTIC APPLICATION OF

INTERNATIONAL HUMAN RIGHTS NORMS

BANJUL, THE GAMBIA, 8 NOVEMBER 1990

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ROLE OF THE JUDGE IN ADVANCING HUMAN RIGHTS\*

The Hon Justice Michael Kirby CMG\*\*

THIRD STEP, LONG JOURNEY

The Government of The Gambia and Chief Justice Ayoola are to be congratulated for convening this colloquium. It is the third in a series. We are on a long journey. If, truly, there is to be a New World Order, as President Bush recently declared to the United States Congress, it will have no legitimacy unless it is based firmly on respect for individual human rights, peoples' rights and economic and social equity.

Judges in their daily work rarely deal with the large socio-political issues of the age. Instead, we are artisans concerned in the resolution, according to law, of a multitude of disputes and problems. Yet judges are often the intellectual leaders of their country. Generally, they outlast the winds of change which accompany politicians and other leaders on and off the stage of public affairs. Judges are there for the long haul. They perform their work, in the tradition of the common law, not by personal whim. But by

reference to an intellectual framework provided by written and unwritten law and much else besides.

The simple message of this colloquium can be stated in a sentence. When common law judges are faced (as so often we are) with ambiguities of legislation or uncertainty of the common law, it is appropriate and legitimate, in filling the gaps to have regard to international human rights norms. The international statements of principle concerning human rights are found in the Universal Declaration of Human Rights, the International Covenants, regional human rights instruments, specific treaties, the jurisprudence of international and regional courts, the determinations of international agencies of high authority, and the writings of scholars on international law. In the age of the jumbo jet and rapid developments of international telecommunications, it is necessary to adjust our legal perspective. We must lift our eyes from our own jurisdictions. We must escape the intellectual prisons to which we have been consigned by parochial attitudes, legal training and statements of the law fashioned for the quite different circumstances of earlier times. It falls to us, the common law judges of today, in the post-Hiroshima age, to make a practical contribution to the peaceful evolution of a new international legal order.

This order will not come overnight, but neither was the authority of the Royal Courts of England established without travail. But it will also not come about unless the judges of today are aware of the need for it, sympathetic to its development and aware of the sources to which they may turn

for the intellectual guidance of individual contributions.

### GOOD NEWS AND BAD NEWS

It is as well to start this essay with a reminder of the stage reached in the debate about the relationship between international human rights law and the national law as applied in municipal courts.

This colloquium is the third in a series facilitated by the Commonwealth Secretariat. The first was held in Bangalore, India in February 1988. It was convened by Justice P N Bhagwati, a former Chief Justice of India. It formulated the Bangalore Principles.<sup>1</sup> The thesis of those 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 reliance on such international norms. But it was that judges should not ignore such international rules in a comfortable world of judicial parochialism. Instead, they should become familiar with the international norms. When appropriate occasions present themselves, as in the construction of an ambiguous statute or the declaration and extension of the common law, they should ensure, so far as possible, that their statement of the local law conforms to the basic principles of human rights collected in international law. Judges of the common law have choices. Their task is by no means mechanical. To exercise their choices they must have points of reference. Choices should not be made upon the idiosyncratic whim of a particular judge. They should be made by reference, amongst

other things, to the fundamental principles of international human rights norms.

On the initiative of the Hon Enoch Dumbutshena, then Chief Justice of Zimbabwe, a second colloquium was convened in Harare in April 1989. It was opened by President Mugabe. He stressed the imperative duty of all countries to create an environment of peace (without which human rights can not flourish) and to assure the independence of the judiciary as a means of upholding such rights.<sup>2</sup> At the end of the Harare conference, the participants joined in the Harare Declaration on Human Rights. This contained the reminder that:

*"Fine statements in domestic laws or international and regional instruments are not enough. Rather it is essential to develop a culture of respect for internationally stated human rights norms which sees these norms applied in the domestic laws of all nations and given full effect. They must not be seen as alien to domestic law in national courts."*<sup>3</sup>

The participants noted many cases in courts of high authority where international human rights norms had been utilised to resolve ambiguity or uncertainty in written law or to fill gaps in the common law. They called for the preparation of a practical manual, containing basic instruments, as a practical means to further the process of implementation.

Now, we meet for the third time in Banjul, the Gambia. It may be hoped that new disciples for the cause will be won and further ideas accepted for the unembarrassed consideration by judges in their daily work of international norms and the jurisprudence which is collecting about them.

It should not be thought that the journey ahead will be an easy or straight-forward one.

Not long after the Harare colloquium Anthony Lester QC (who had been in Bangalore and Harare and is a leading force in this movement) sought, in effect, to persuade the English Court of Appeal to the principles of the Bangalore statement. That distinguished Court would go only part of the way. In Regina v Secretary of State for the Home Department: ex parte Brind and Ors<sup>4</sup> the question was whether a declaration by the Secretary of State requiring United Kingdom broadcasters to refrain from broadcasting words spoken by alleged Irish terrorists was ultra vires and unlawful. Amongst other arguments, it was claimed that the directive, made under the Broadcasting Act 1981 (UK), contravened article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Divisional Court dismissed the challenge. So did the Court of Appeal. It held that the European Convention was not incorporated by statute into English domestic law. Accordingly, its provisions were not applicable as a rule of statutory construction except to help resolve ambiguity in primary legislation of the United Kingdom, enacted subsequently. Such a limited utility was explained upon the presumption that Parliament would endeavour to legislate consistently with the United Kingdom's treaty obligations once entered. Otherwise, where powers were provided by Parliament to permit the Executive Government to make subordinate legislation, and expressed in language which was

unambiguous, the court would not presume that such powers were intended to be limited by the terms of the convention.

These remarks were, in one sense obiter dicta. The Court of Appeal held that the empowering language of the Broadcasting Act was clear and unambiguous. That alone might be said to justify its conclusion that the terms of the European Convention were not relevant to the Court's determination of the application. In 1967, Diplock LJ had said:<sup>5</sup>

*"If the terms of the legislation are clear and unambiguous, they must be given effect to, whether or not they carry out Her Majesty's treaty obligations."*

The decision in Brind will be considered disappointing to many of the apostles of Bangalore. But we are on a long journey. Distinguished though the English Court of Appeal is, its decisions are not binding throughout the Commonwealth. The principle in Brind may one day be reviewed in the United Kingdom. Meanwhile, it is for other Commonwealth countries to fashion their own principles. Furthermore, Brind is as important for the scope it acknowledges to international human rights law as for that which it denies. Lord Donaldson MR, for example, agreed with the:

*"... assertion, in which I would concur, that you have to look long and hard before you can detect any difference between the English common law and the principles set out in the Convention, at least if the Convention is viewed through English judicial eyes. ... [W]hen the*

terms of primary legislation are fairly capable of bearing two or more meanings and the Court, in pursuance of its duty to apply domestic law, is concerned to divine and define its true and only meaning. In that situation various *prima facie* rules of construction have to be applied such as that ... in appropriate cases, a presumption that Parliament has legislated in a manner consistent, rather than inconsistent, with the United Kingdom's treaty obligations."<sup>6</sup>

As against the discouraging message of Brind, it can be noted that in other countries of the Commonwealth, judges of the highest authority have publicly acknowledged the "growing familiarity with comparative law and a greater willingness to borrow from other legal systems". Thus, Chief Justice Mason, of the High Court of Australia, in an address in August 1990 to the 64th Conference of the International Law Association held in Queensland, Australia, catalogued the many instances in which the High Court of Australia had made reference to international law, including human rights norms:

*"[T]here is a prima facie presumption that the legislature does not intend to act in breach of international law. Accordingly, domestic statutes will be construed, where the language permits, so that the statute conforms to the State's obligations under international law. The favourable rule of statutory interpretation goes some distance towards ensuring that the rules of domestic law are consistent with those of international law. In construing a statute giving effect to a convention, the Court will resolve an ambiguity by reference to the Convention, even where the statute is enacted before ratification of the Convention, as I did in one case some years ago. And there are many instances here and elsewhere in national courts taking into account the provisions of the Universal Declaration on Human Rights in interpreting national statutes and shaping the rules of municipal law. ... [J]udges and lawyers in this country and in other jurisdictions are developing a growing familiarity with*



*comparative law and showing a greater willingness to borrow from other legal systems. Ultimately, the new spirit will facilitate the moulding of rules of international law suited to incorporation into national law and create a climate in which acceptance by national courts is more readily attainable."*<sup>7</sup>

At the same conference, Chief Justice Sabyasachi Mukharji of India, who sadly died soon afterwards, declared:

*"Human rights [are] neither a new morality nor a lay religion and [are] much more than a language common to all mankind. They [are] requirements which every civilized State is expected to ensure for its citizens."*<sup>8</sup>

He reminded his listeners of Oliver Wendell Holmes' aphorism that "rights without remedies were no rights at all". This truth provides the reason why it is legitimate for us, judges concerned with rights and remedies, to gather at Banjul. Against the background of the ancient legal system of which we are inheritors, we may consider the way in which, lawfully and legitimately, we can translate the brave words of international human rights law into our daily professional work.

I wish to devote the rest of this essay to three questions:

- (a) Is international law (including that of human rights) directly incorporated, by the common law, into local law so as to become part of it?
- (b) If not a part of local law, is international law (including on human rights) nonetheless a proper source for domestic law, and if so in what

circumstances? and

- (c) If so, how may a judges in municipal cases, in conformity with constitutions, statutes and common law, actually use international human rights norms in their daily work?

#### PART OF LOCAL LAW?

It is important to recognise clear-sightedly the fact that noting the 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. Dixon J said in 1948 that the theory of Blackstone in his Commentaries 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".<sup>9</sup>

In 1983 the present Chief Justice of Australia, then Mason J, put it this way:<sup>10</sup>

*"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 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 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 used 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, signing 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 treaty, 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.<sup>11</sup> 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:<sup>12</sup>

*"... 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 expressed 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:<sup>13</sup>

*"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 statute 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 law making. Such approach would allow "no effective safeguard against the destruction of the federal charter of the constitution".<sup>14</sup>

The majority of the High Court of Australia held otherwise. It upheld the validity of the Racial Discrimination Act. But the controversy posed by the minority opinion is important in the present context. In federal states at least it must be given weight. The

question it 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 this may import 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.<sup>15</sup>

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 Federal 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.<sup>16</sup> It has been accepted in Australia by the High court of Australia.<sup>17</sup> 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.<sup>18</sup>

Commenting on the advice of the Privy Council in the case just mentioned, the biographer of Lord Atkin (who delivered the judgment 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 needs nor could be proved in the same way as rule of foreign law. The range of inquiry is necessarily wider; and here there is the 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 of 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.'*"<sup>19</sup>

This statement provoked a number of fears on the part of academic writers at the time.<sup>20</sup> However, I agree with his Atkin's biographer that the commentators misunderstood what his Lordship 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:<sup>21</sup>

*"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 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 today 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<sup>22</sup> 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 McInnes v The Queen<sup>23</sup> 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).<sup>24</sup> 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<sup>25</sup>, 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<sup>27</sup> 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 on matters which 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.<sup>27</sup> Our decision was later confined 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 other 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)<sup>28</sup> both the trial judge (Scott J)<sup>29</sup> and the Judges of the English 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'.*"<sup>30</sup>

In the Court of Appeal in different circumstances and eighteen months before Brind, Sir John Donaldson MR (as Lord Donaldson then was) also acknowledged the importance of bringing English domestic law into line with the European Convention:<sup>31</sup>

*"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<sup>32</sup> and by Bingham LJ.<sup>33</sup>

It might be said that, from the perspective of Realpolitik, 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.<sup>34</sup> 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. As Lord Donaldson was at pains to stress in Brind, neither the European Convention nor the International Covenant are, as such, part of domestic law. Each is a source in certain circumstances for the court's approach to determining domestic law. The point being presently made is that despite Brind the English courts are increasingly looking to those sources and deriving guidance from them 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)<sup>37</sup>, 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 Law Lords with the assertion that the European Convention was not part of English law and that its requirements were therefore irrelevant to the determination of the 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:<sup>36</sup>

*"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.<sup>37</sup> The same should happen in other Commonwealth countries.

## RECENT AUSTRALIAN EXPERIENCE

In Australia, the steps towards a similar movement have also been taken cautiously. The caution 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.<sup>38</sup>

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<sup>39</sup>, Deane J had to consider the right of a parent to participate in proceedings which affected the custody of the 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 eg 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 eg 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."*<sup>40</sup>

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<sup>41</sup> 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:

*"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 this language, so as not to deprive a person of that entitlement."*<sup>42</sup>

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<sup>43</sup> 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.<sup>44</sup>

*"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 eg 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<sup>45</sup> 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 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 is uncertain, Australian Judges, after the Australia Act 1986 (Cth) at least do well to look for more relevant and modern sources for the statement and development of the 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 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."<sup>46</sup>

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 either 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."<sup>47</sup>

The decision of the Court of Appeal was confirmed by the High Court of Australia, affirming the common law right to a fair trial. In that Court no reference was made to the international human rights instruments.<sup>48</sup>

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.<sup>49</sup> 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 a certain earlier decision 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 acknowledge 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)."*

A further example of the use of the International Covenant is Cachia v Isaacs & Ors.<sup>50</sup> 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<sup>51</sup> and Buckland v Watts,<sup>52</sup> 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.

Still more recently, both in the High Court of Australia<sup>53</sup> and in the Full Court of the Supreme Court of South Australia<sup>54</sup> reference has been made to the status in Australian law of international human rights norms.

It will be observed that the cases in which reference has been made to the International Covenant for the purpose of stating a guiding principle may be seen, in one sense as stating the 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. On 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 and Harare Declaration 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 were declared in 1988 and reaffirmed in Harare in 1989. 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 them have been given. There are reasons for caution, in every country, and particularly Federal states, in and 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.

Today's judges 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 modern lawyers, 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 and the Harare Declaration show the way ahead. The opportunity exists for all judges and lawyers in every country of the common law to pick up the challenge presented by the Bangalore Principles and the Harare Declaration. 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. I hope that in Banjul we will reaffirm our dedication to these goals.

## FOOTNOTES

- \* This is an updated and amended version of a paper presented by the author to the Judicial Colloquium on the Domestic Application of International Human Rights Norms held at Harare, Zimbabwe, April 1989. That paper is published in Commonwealth Secretariat, Judicial Colloquium in Harare, Developing Human Rights Jurisprudence, volume 2: A Second Judicial Colloquium on the Domestic Application of International Human Rights Norms, November 1989, 49 ff.
- \*\* President of the Court of Appeal, Supreme Court of New South Wales; Commissioner and Member of the Executive Committee of the International Commission of Jurists, Geneva. Member of the World Health Organisation Global Commission on AIDS. Personal views.
1. The Bangalore Principles are published in the foregoing Commonwealth Secretariat document, 73-74. They are also published in (1988) 14 Commonwealth Law Bulletin, 1196 and in (1988) 62 ALJ 531.
  2. R G Mugabe, Inaugural Address to the Harare Judicial Colloquium in Commonwealth Secretariat, Developing Human Rights Jurisprudence, vol 2, 17.
  3. Harare Declaration of Human Rights. This declaration is published in Commonwealth Secretariat, ibid, Vol 2, 9. See also (1989) 15 Commonwealth Law Bulletin 999.
  4. [1990] 2 WLR 787 (CA).
  5. Salomon v Commissioners of Customs and Excise [1967] 2 QB 116, 143 (CA) followed in Garland v British Rail Engineering Limited [1983] 2 AC 751, 771 (HL). See also Chundawadra v Immigration Appeal Tribunal [1988]



Imm AR 161, 173.

6. Lord Donaldson of Lynton MR in Brind, above in 4, 797-8.
7. A F Mason, "The Relationship Between International Law and National Law and its Application in National Courts", address to the 64th Conference of the International Law Association, Broadbeach, Queensland, 24 August 1990, as yet unpublished.
8. Chief Justice S Mukharji, Chairman of a Working Session of the International Law Association Conference from transcript of proceedings, 21 August 1990, 1, 4.
9. Chow Hung Chin v The King (1948) 77 CLR 449, 477.
10. (1983) 153 CLR 168, 224. See also Gibbs CJ ibid at 193. Cf Kioa & Ors v West and Ors (1985) 159 CLR 550, 570; 604.
11. e.g. Australia, Canada, India, Malaysia, Nigeria, Tanzania etc.
12. Attorney General (Canada) v Attorney General (Ontario) [1937] AC 326, 348.
13. (1975) 135 CLR 337, 445.
14. Koowartav Bjelke-Petersen (1985) 153 CLR 168, 200. (Gibbs CJ).
15. A C Hutchinson and A Petter, "Private Rights - Public Wrongs : The Liberal Lie of the Charter" (1988) 38 Uni Toronto LJ 298.
16. J L Brierly (1935) 51 LOR 31.
17. Chow Hung Hing at 477.
18. See Chung Chi Cheung v The King [1939] AC 160, 168

(PC).

19. G G Lewis, Lord Atkin, Butterworths, London, 1983, 97f.
20. See eg H Lauterpach International Law: Collected Papers (vol 2), The Law of Peace, 560.
21. R v Burgess; ex parte Henry (1936) 55 CLR 608, 680-1.
22. Dowal v Murray & Anor (1978) 143 CLR 410.
23. McInnis v The Queen (1979) 143 CLR 575.
24. Ibid, 588.
25. Kootwarta v Bjelke-Petersen (1985) 153 CLR 168.
26. Tasmania v Commonwealth of Australia. (The Tasmanian Dams Case) (1984-5) 158 CLR 1.
27. Attorney General for the United Kingdom v Heinemann Publishers Australia Pty Ltd (1988) 10 NSWLR 86 (CA).
28. [1988] 2 WLR 805.
29. Ibid at 850, 51 (CA).
30. Id, 851.
31. Id, 869.
32. Id, 897.
33. Id, 907.
34. 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.
35. [1988] 2 WLR 398.
36. Ibid, 410, 412.
37. 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 Bhaian 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).

38. See eg Koowarta (above).
39. (1986-7) 162 CLR, 447.
40. Ibid, 463.
41. (1988) 12 NSWLR 45; 79 ALR 591.
42. Ibid, 53, 599.
43. (1988) 12 NSWLR 358
44. Ibid, 360-361.
45. (1988) 12 NSWLR 558.
46. Ibid, 569,70.

47. Ibid, 580-2.
48. Jago v District Court of New South Wales (1989) 63 ALJR 640 (HC).
49. (1988) 93 FLR 414.
50. Unreported, Court of Appeal (NSW), 23 March 1989; (1989) NSWJB 46.
51. (1884) 13 QBD 872.
52. [1970] 1 QB 27 (CA).
53. Re Limbo (1989) 64 ALJR 241 (HC - Brennan J).
54. Harradine v The University of Adelaide, unreported, Supreme Court of South Australia, 8 June 1989 applying Sezdirmezoglu & Anor v The Minister [No 2] (1983) 51 ALR 575, 585 (FCA).