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COMMONWEALTH SECRETARIAT

THE JUDGE IN THE NEW WORLD ORDER - A ROLE IN ADVANCING HUMAN RIGHTS?*

The Hon Justice Michael Kirby AC CMG**

HUMAN RIGHTS IN THE NEW WORLD ORDER

In the midst of our daily duties as judges, it is all too easy for us to overlook the contributions we make to building the foundations of the new world order. With our gaze steadily fixed on the cases before us, we may overlook the great mosaic to which each, in his or her humble way, makes a contribution. Each of us serves the people who come before us (and also those who do not) in accordance with law. Looking down from the bench at the lawyers who argue before us or at the litigants and witnesses paraded through our courts, it is easy to lose sight of the gigantic world context in which our daily activities must, upon one level, be viewed.

In his speech to the United States Congress on September 1990, President George Bush, justifying and explaining the course later taken by the United Nations in the Gulf Crisis, declared that there was:

> *"... [A] new world ... struggling to be born, a world quite different from the one we have known, a world where the rule of law supplants the rule of the jungle, a world in which nations recognise the shared responsibility for freedom and justice, a world where the strong respect the rights of the weak."*[1]

Earlier, General Secretary Gorbachev, in his 1988 address to the General Assembly of the United Nations, referred to:

> *"... a quest for universal consensus in the movement towards a new world order."*[2]

In fact, that quest began long before these speeches were made. It came to an important watershed in the establishment of the United Nations Organisation by the adoption of the United Nations *Charter* with its dedication to respect for universal human rights.[3] That *Charter* stimulated first the adoption of the *Universal Declaration of Human Rights* and then the process which led to the development and adoption of the *International Covenants* which make up the International Bill of Rights. Since 1945 there has been a quite revolutionary development in the international legal order. The ideas affirming the basic right to self-determination of peoples has led to the liberation first of colonised peoples, then of many in the trusteeship territories and lately of peoples in Central and Eastern Europe, Asia, Africa and elsewhere who had been denied the right to

self-determination. This process is continuing.

Clearly, the end of the Cold War and of the tensions which for four decades perilously divided the world, present an extraordinary opportunity to humanity. Indeed, it is an opportunity never before in prospect. Its potential is reinforced by the technological wonders of our time which link all the peoples of this planet to their common destiny. It is a moment when the fundamental right to political self-determination and to the protection of basic human rights stand a better chance to be realised than ever before.

Following the Gulf War, the leaders of the world's seven major industrialised countries declared in London in July 1991:

> *"[T]he conditions now exist for the United Nations to fulfil completely the promise and the vision of its founders. A revitalised United Nations will have a central role in strengthening the international order. We commit ourselves to making the UN stronger, more efficient and more effective in order to protect human rights, to maintain peace and security for all and to deter aggression."*[4]

Allowing for the hyperbole which typically accompanies the new world optimism about security, democracy and human rights,[5] and facing squarely the discouraging failures of the United Nations (as in the case of the Kurds and East Timor) as well as its prospects for success,[6] it is nonetheless true that the current events in which all of our countries play out their rôle on the international stage are propitious for democracy and self-determination and for fundamental human rights.

So much was recognised at the recent meeting of Commonwealth Heads of Government in Harare, Zimbabwe. The

dramatic changes which have occurred in South Africa allowed the Commonwealth, for the first time in twenty years, to give priority to new issues. Amongst the items given the highest ranking in the agenda was a renewed attention to global human rights. The Secretary General of the Commonwealth, Emeka Anyaoku of Nigeria, declared at the opening ceremony that there was an increased desire within the Commonwealth to promote values such as democracy, human rights and the rule of law. President Mugabe of Zimbabwe recognised that the "gales of change" unleashed by the end of the Cold War demonstrated not only the urgency of the quest for democracy "representative and responsive government" but also the:

> *"... insistent demand by millions for social justice and respect for the fundamental rights of peoples and nations."*

The inter-relationship between law and social justice in Africa was also the theme of the biennial conference of the African Bar Association held in Abuja in March 1991. According to the report of that meeting, participants urged the need for fearless lawyers and the defence of the rule of law and human rights throughout Africa whose history had been full of derogations from these precious values.[7] It seems likely that the self-same "gales" which have swept through Eastern Europe are now reaching Africa. Early signals of change include the abandonment of the single party state proposal in Zimbabwe, the peaceful change of government achieved by the election of a new President in Zambia and the steps taken in fulfilment of the promise of the restoration of civilian democracy in Nigeria.

These great changes may seem remote from the daily

activities of judges and lawyers. But they are not. Judges are part of the governmental machinery of their countries. They are, in the words of Alexander Hamilton, the least dangerous branch of government. But they are a branch of it nonetheless. Lawyers minister to justice and are officers of the courts. Inescapably, the law reflects the social and political environment in which it operates. Because the idea of individual rights and representative democracy are so deeply imbued in the thinking of the common law, to which we the judges are all heirs, it is inevitable that, in our daily work, we should reflect many of the universal values now expressed in the international instruments which state universal norms of human rights.

It is no accident that there is an abiding synchrony between the norms of international human rights and the principles of the common law. The linkages may derive, in part at least, from the very universality of human rights and the notion that basic rights inhere in individuals everywhere simply because they are human beings, each deserving of individual respect. But in an institutional sense, the Anglo-American global dominance at the end of the Second World War, during that time when the United Nations *Charter* was adopted, the *Universal Declaration of Human Rights* accepted and the *International Bill of Rights* drawn up, ensured that on the modern statements of international law affecting human rights was left the indelible stamp of the thinking of the great judges of the Common law.[8]

This is why, as judges, even when we are unfamiliar with the verbiage and jurisprudence of international human

rights norms, when we stumble upon them (or research and discover them for a particular purpose) we are very rarely surprised. On the contrary, the discoveries tend to confirm and reinforce our own thinking as common lawyers. And this is precisely because of the very great impact which common lawyers have had upon the preparation, expression and implementation of universal human rights, especially in the days of the true new world order since 1945.

FROM NOBLE THOUGHTS TO STRATEGIES FOR ACTION

I presume to commence my paper with these remarks because of the need, as I see it, for judges of our generation to confront honestly and boldly their place as servants of the law in a new world order concerned with "democracy, human rights and the rule of law", as the Secretary General of the Commonwealth described it.

One of the dangers of a life in the law is the ever present tendency to parochialism. In a sense, this is enforced on us every day by the jurisdictional borders which divide us into disparate legal régimes. In federations (such as Australia and Nigeria) there is a still further subdivision of legal régimes. Yet at least federalism opens the eye of the lawyer to the necessity to live every day with two legal régimes. In some unitary states, the lawyer may feel completely unconcerned with what happens across the frontier. But the new world order necessitates that the human rights of neighbours, and the provision to them of democratic means to achieve self-determination and self-government, are the legitimate concerns of those who live next door. Indeed, they are of concern globally because of the universality of these values and the danger to

international peace and security from derogations from them.

It is in this context that consideration of international human rights norms must be placed today. It must be seen as a building block of the new world order. That is not an order which abolishes the nation state or denies respect for the multitude of different peoples who make up the world. On the contrary. But it is a world of close interdependence and a shared concern about basic rights of fellow human beings. Out of recognition of this concern we can see many initiatives of government, academe and the legal profession.

One important illustration of the movement to which I refer is the establishment of the Advisory Group of the Commonwealth Human Rights Initiative. That Group prepared a report for the recent Harare meeting of Commonwealth leaders titled *Put our World to Rights*.[9] If the purpose of the report was to stimulate discussion and action in Harare on the themes of human rights, it would appear to have found willing ears amongst the Commonwealth leaders. Boldly, the report suggests that:

> *"Human rights have always underpinned the Commonwealth. The evolution of the empire into the Commonwealth was itself a testimony of the most basic of human rights, self-determination. The sense of family between peoples of diverse races within the Commonwealth was a powerful repudiation of one of the major threats to human rights, racism. Close and friendly relations between members of the Commonwealth have emphasised the common humanity of mankind, transcending differences of race, religion, language and culture. The Commonwealth has cooperated in pushing the frontiers of freedom internationally, particularly in its fight against colonialism and racism. Individual member states have played valuable roles in formulating international or regional instruments for the protection of human rights.*

The members of the Commonwealth share the legacy of the common law with its strong emphasis on the rule of law and procedural safeguards secured through an independent judiciary."[10]

Yet the authors of this report contend that, on the whole, the record of the member countries of the Commonwealth in the field of human rights has been "poor".[11] Signing and ratifying international instruments is not enough. Both at a Commonwealth level and in the individual countries of the Commonwealth there is a need for new attention so that the noble words of human rights will be translated into a strategy of action. Such a situation necessitates many initiatives at the international and national level. One of the chief of these is "strengthening [of] the legal system":[12]

> *"It is essential to the effectiveness of the legal system that judges and lawyers should be well qualified, courageous and independent ... Governments need to discard the notion that a human rights oriented judge or lawyer is ipso facto subversive. The courts must give a liberal and broad interpretation to human rights provisions, as many of them, including the Privy Council have now accepted. It is necessary that all individuals or groups should have easy access to courts for the protection of their rights. The procedures for bringing suits should be simplified, and the rules as to who may bring actions relaxed, as the Indian Supreme Court has done ...; relevant NGOs should be permitted to bring actions on behalf of individuals or in the public interest. Legal aid should be provided where an individual or group cannot afford legal costs. Human rights instruments and legislation and case law should be readily available."*[13]

Judges and other lawyers cannot (except as prominent and educated citizens) be specially concerned in the national and international initiatives within and beyond the Commonwealth for the protection and advancement of democracy, human rights

and the rule of law. As lawyers and citizens in their own countries they can and should take part in appropriate non-governmental organisations, such as Amnesty International and the International Commission of Jurists. And because their daily work involves actions which affect, inescapably, the basic rights of fellow human beings who come before the courts and tribunals of their country, they have an inescapable and personal responsibility to play a worthy and relevant part in the development and application of the norms and standards of human rights. They cannot wash their hands of this part, asserting that these are functions for international agencies, national governments, politicians or administrators. Because they are involved in decisions which require the making of choices, their legal functions inescapable involve their playing a rôle in the advancement of a civilized "new world order".

Of course, that role is distinctly in the minor key. Not for judges and lawyers, ordinarily, are the grand gestures reserved to political leaders. Nonetheless, in their daily lives, judges and lawyers make a multitude of decisions and take countless actions which, individually may be insignificant but collectively are of tremendous importance for the practical attainment of basic rights. It was in this way that the Royal Courts of England, over many centuries, gradually put together the coherent body of the common law. In a similar way, it falls to contemporary lawyers to play a constructive part in building, by their daily activities, a new world order in which domestic law reinforces and gives substance to the noble ideas of international human rights law.

It should not be expected that the harmonious relationship between domestic and international law will be created overnight. It will not be, any more than was the common law of England which we have inherited. By the same token, domestic respect for basic norms of international human rights will also not come about unless the judges and lawyers of today are aware of their terms and sensitive to the need to reflect international norms in their decisions. Their worthy part in the new world order of human rights will not be attained unless they are sympathetic to this global development and conscious of the sources to which they may turn for the intellectual guideposts for their individual contributions.

I have now sufficiently sketched the contemporary context in which the rôle of the judge in advancing basic human rights should be seen. Beyond doubt, it is a challenging moment in legal history to serve as a judge. I turn, next, to a reminder of the stage which has been reached in the debate about the precise legal relationship between international human rights law and national law as applied in municipal courts which follow the common law tradition.

FOURTH STEP, LONG JOURNEY

This meeting, convened by the Supreme Court of Nigeria, is the fourth in a series facilitated by Interights and 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*.[14] The thesis of those principles was not that international legal norms on human rights are incorporated, as such, 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 provincialism and blinkered jurisdictionalism. 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 or criteria. 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 Justice 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 on that occasion 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.[15] 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."[16]

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.

The third meeting was held in Banjul, The Gambia between 7 and 9 November 1990. This meeting was convened on the initiative of the Government of the Gambia and of Chief Justice Ayoola. It resulted in the *Banjul Affirmation*. By it, the participants in Banjul accepted "in their entirety" the *Bangalore Principles* and the *Harare Declaration*. They acknowledged that:

"... [F]undamental human rights and freedoms are inherent in mankind ... [A]ny truly enlightened social order must be based firmly on respect for individual human rights and freedoms, peoples' rights and economic and social equity."[17]

The participants in Banjul pledged their commitment and dedication to the goals and principles collected in the statements issued at Bangalore and Harare. They called attention to the need to ensure that judges, lawyers, litigants and others are made aware of applicable human rights norms as stated in international instruments and national constitutions and laws. They recalled the particular provisions of the *African Charter on Human and Peoples' Rights* and suggested that the African Commission on Human Rights should consider establishing local

associations in each member state to facilitate the process of education, training and dissemination of human rights information. They urged the sharing of experience within and beyond Commonwealth Africa so that the jurisprudence on human rights could be shared, reinforcing a dedication to their attainment.

After the Harare Colloquium and before the meeting in Banjul, one of the regular participants in this series, Mr Anthony Lester QC sought to persuade the English Court of Appeal to accept 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*[18] the question was whether a declaration by the United Kingdom Home 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:[19]

> *"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..."*

This foregoing decision in *Brind* was disappointing to many of the apostles of Bangalore.

Never daunted, Mr Lester took the decision to the House of Lords. Although their Lordships dismissed the appeal, some of the speeches nudged English law a little closer to the principle embraced in Bangalore, Harare and Banjul. Lord Bridge of Harwick, for example, declared that there was "considerable persuasive force"[20] in Mr Lester's argument. He asserted that the preference of a construction of a statute which avoids conflict between domestic legislation and international treaty obligations was a "canon of construction which involves no importation of international law into the domestic field".[21] But in the end, Lord Bridge's opinion did not embrace the Bangalore idea:

"When Parliament has been content for so long to leave those who complain that their Convention rights have been infringed to seek their remedy in Strasbourg, it would be surprising suddenly to find that the judiciary had, without Parliament's aid, the means to incorporate the Convention into such an important area of domestic law and I cannot escape the conclusion that this would be a judicial usurpation of the legislative function.

In a way, *Brind* was a difficult case to use as a vehicle for advancing the Bangalore principles in England. The legislation in question, involving as it did a response to the special problem of terrorism, presented difficulties which other legislation might not have done. Hard cases still make good law, we are told. So much appears to have been recognised by Lord Roskill.[22] And by Lord Templeman.[23] Lord Ackner, whilst accepting as well settled that a Convention:

"... may be deployed for the purpose of the resolution of an ambiguity in English primary or subordinate legislation"[24]

could find no ambiguity or uncertainty in the legislation to fetter the exercise of discretion provided in it. He rejected the view that the courts should:

"... police the operation of the Convention and ... ask themselves in each case, where there was a challenge, whether the restrictions were 'necessary in a democratic society ...' applying the principles enunciated in the decisions of the European Court of Human Rights. The treaty, not having been incorporated in English law, cannot be a source of rights and obligations ..."[25]

Lord Lowry agreed with Lord Ackner. At first blush, then, the decision in *Brind* seems very disappointing.

But we are on a long journey. Distinguished though the

English Court of Appeal and House of Lords are, their decisions are no longer binding on the courts of the independent countries of the Commonwealth. The principle in *Brind* may one day and in a better case be reviewed in the United Kingdom. Meanwhile, it is for other Commonwealth countries to fashion their own principles. Perhaps *Brind* is as important for the scope it acknowledges for the application of 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."*[26]

As against the somewhat discouraging messages 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". 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 to 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."*[27]

Still more recently, at a meeting of the Australian Academy of Forensic Sciences in Sydney in October 1991, the President of the Australian Human Rights and Equal Opportunity Commission (Sir Ronald Wilson) explored the domestic impact of international human rights law.[28] He traced the adoption of standards accepted by the world community as part of international law and expressed in a series of conventions. He also traced the developments in Australia - including adherence to international treaties and the creation of local bodies to receive and investigate complaints and to stimulate compliance with human rights norms. Sir Ronald, a past Justice of the High Court of Australia, went on to express the way in which:"

"Recourse to international principles of human rights may be just as relevant to the moulding of the common law as it is to statutory interpretation."

As an example, he made reference to the landmark decision of the House of Lords restating the law of rape in marriage first expressed in 1736 by Hale CJ, by reference to modern "social, economic and cultural developments". He pointed out that those developments lie at the heart of the *Convention on the Elimination of Discrimination Against Women.* By adopting and applying international human rights norms, courts of the common law tradition are playing their part in a peaceful process of change. This avoids social upheaval but pushes forward the cause of human freedom.

Against the background of the ancient legal system of which we are inheritors, we, the judges, 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 will to devote the rest of this essay to three questions which arise from the foregoing:

(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 binding on them, actually use international human rights norms in their daily work?

PART OF LOCAL LAW?

It is important to recognise the fact that urging 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 of the common law 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".[29]

In 1983 the present Chief Justice of Australia, then Mason J, put it this way:[30]

> *"It is a well settled 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 of the American republic were frequently 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 and, I suspect, Nigeria.

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.[31] Writing of the division of responsibilities in respect of lawmaking in one such state, Canada, in the context of treaties and legitimate matters of international concern, the Privy Council in 1937 said this:[32]

> *"... 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:[33]

"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".[34]

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.[35]

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.[36] It has been accepted in Australia by the High court of Australia.[37]. 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.[38]

Commenting on the advice of the Privy Council in the case just mentioned, the biographer of Lord Atkin (who, it is noted, 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.'"*[39]

Atkin's statement provoked a number of fears on the part of academic writers at the time.[40] However, I agree with Atkin's biographer that the commentators misunderstood what his Lordship 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:[41]

> *"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, the urgent necessity of arms control over weapons of every kind and now the end of the Cold War and dismantlement of the Soviet Empire. 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 basic 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*[42] 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*[43] 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).[44] 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*[45], 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[46] 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 the 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.[47] 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)*[48] both the trial judge (Scott J)[49] 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'."[50]

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:[51]

"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 references to the *European Convention* by Dillon LJ[52] and by Bingham LJ.[53]

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.[54] 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 Lords Bridge and Donaldson were at pains to stress in *Brind*, neither the *European Convention* nor the *International Covenant* are, as such, part of English domestic law. Each may be 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)*[55], 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:[56]

> *"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, by various techniques, to bring English law into harmony with international human rights norms.[57] 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.[58]

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*[59], 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.*"[60]

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*[61] 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."[62]

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*[63] a question arose as to whether a recently appointed 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.[64]

> *"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 si 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*[65] the question arose as to whether, under the common law of the State, a person accused of a criminal

arge had a legally enforceable right to a speedy trial. ere had been a delay of many years in bringing the accused trial and he sought a permanent stay of proceedings. A jority of the Court (Samuels JA and myself) held that ilst there was a right to a fair trial, there was no right, such, under statute or common law to a speedy trial. eed was however an attribute of fairness. McHugh JA (now a stice of the High Court of Australia) held that the common w did provide a right to speedy trial. Both Samuels JA and referred to provisions of the *International Covenant on Civil and Political Rights*.

A great deal of time in the Court in *Jago* was taken xploring ancient legal procedures in England back to the ign of King Henry II. In independent Australia, in 1988, his 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."[66]

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 Racia 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."[67]

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.[68]

Another case in which the *International Covenant* was considered was also one in which Samuels JA sat with me and with Clarke JA in *Gradidge v Grace Brothers Pty Limited.*[69] 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 still further recent example of the use of the *International Covenant* is *Cachia v Isaacs & Ors.*[70] 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 English decisions as *London, Scottish Benefit Society v Chorley*[71] and *Buckland v Watts*,[72] 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. Equal access to the courts should be a reality and not a shibboleth.

Many are the occasions when it is useful to refer to international human rights law in resolving a local dispute. Just before I left for Abuja a decision of my Court was published in which a majority upheld an application for a stay of proceedings in a disciplinary matter involving three medical practitioners. They had earlier secured a permanent stay of proceedings before the disciplinary tribunal on the basis of gross delays in the prosecution of complaints.[73] Five years later, following a Royal Commission, public and political pressure, an attempt was made to revive the prosecution upon reworded particulars. The majority of the Court maintained the order for a stay. It did so upon the basis that a revival of the case would be unfairly and unjustifiably oppressive. In the course of giving my reasons, I referred to the basic principle of the common law[74] that a person should not suffer double jeopardy. I went on:

"Protection against double jeopardy is not only a fundamental feature of our legal system, reflected in the many circumstances collected in my reasons in Cooke v Purcell (1988) 14 NSWLR 51, 56ff. It is also a feature of basic human rights found in the International Covenant on Civil and Political Rights which Australia has ratified. See eg Article 14.7. Although expressed in the Covenant in terms of criminal charges, the principle applies equally, I believe, to an inquiry into the right of a person to continue the practice of his or her profession, the denial of which would have grave consequences for that person's reputation and livelihood. ... The European Court of Human Rights has stressed, as this Court also has, the importance of promptness in dealing with allegations of professional misconduct. See Konig v Federal Republic of Germany (1978) 2 EHRR 170; cf The New South Wales Bar Association v Maddocks (1988) NSWJB 143."[75]

Familiarity with basic principles of human rights (and the jurisprudence which have collected around their elaboration) will arm the judge with means to respond, in a thoroughly professional way, to perceived injustice. It will provide the judge with a body of principle by which to explain the reasons in a particular case. Another recent decision of my Court provides my final illustration. On this occasion, I was in the minority. In *Arthur Stanley Smith v The Queen*[76] a prisoner had refused to take the oath in the trial of a co-accused. He had appealed against his earlier conviction and sentence of life imprisonment, imposed after a separate trial upon a charge of murder. He was told that he could object to particular questions but not to taking the oath. Upon his persistent refusal, for suggested fear of self-incrimination, he was charged with and convicted of contempt and fined $60,000. It was proved that he was a bankrupt, an invalid pensioner, had no assets and that his

only income was $12 per week as a gaol sweeper. The majority of the Court (Mahoney and Meagher JJA) upheld the sentence. But for me, it was an "excessive fine" forbidden by the *Bill of Rights* 1688 which still applies in Australian jurisdiction as part of the constitutional legislation inherited by Australia from England.[77]

In explaining my opinion, I was able to call upon the large body of jurisprudence which has gathered around the 8th Amendment to the Constitution of the United States of America prohibiting excessive fines and cruel and unusual punishments. Reference was made to the laws of other countries in which similar human rights prohibitions on excessive fines and punishments exist. It is, after all, basic that a person should not be punished with a fine that he or she has absolutely no chance of ever paying. The basal feeling that to fine a $12 a week sweeper $60,000 is absurd finds its legal exposition by reference to international human rights law. But I will not re-argue any dissenting opinion here. Leave it to the law books.

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 a universal context. It puts it in a context of 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* and the *Banjul Affirmation* assert.

CONCLUSIONS - CONTRIBUTING TO THE NEW WORLD ORDER

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 restated in Harare in 1989 and reaffirmed in Banjul in 1990. 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 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 by their country or 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 on the brink of new world order. 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* and the *Banjul Affirmation* 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.* In their daily lives they can find a framework of useful reference in the international human rights and other norms from which to derive guidance for the performance of their important duties. If we rise to this challenge we, the judges, will make our own proper contribution to the building of the new world order.

FOOTNOTES

* This is an updated and amended version of a paper presented by the author to the Judicial Colloquia on the Domestic Application of International Human Rights Norms held at Harare, Zimbabwe, April 1989 and Banjul, The Gambia, November 1990. Those papers are published by the Commonwealth Secretariat, vol 2, 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 and *ibid*, volume 3, *A Third Colloquium on the Domestic Application of International Human Rights Norms*, November 1990. See also M D Kirby, *Implementing the Bangalore Principles on Human Rights Law* (1989) 106 *South Africa LJ* 484.

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1. See G Bush quoted in G J Evans, "The New World Order and the United Nations" in M R Bustelo and P Alston, *Whose New World Order: What Role for the United Nations?*, Federation, Sydney, 1991, 1.
2. M Gorbachev quoted *ibid.*
3. United Nations *Charter*, article 1(2).
4. *Political Declaration: Strengthening the International Order*, issued on 16 July 1991. See Bustelo and Alston, Appendix C, above n 1, p 155.
5. See R Hill, "International Disputes and a New World Optimism", in Bustelo and Alston, above, 22.
6. P Alston, "Human Rights in The New World Order: Discouraging Conclusions from the Gulf Crisis" in Bustelo and Alston, above, 98.
7. *International Bar News*, 1991, 36. See also International Commission of Jurists, Adama Dieng (French text) *Report of the ICJ on the Participation of Non-Governmental Organisations in the African Commission of Human and Peoples' Rights*, Banjul, The Gambia, 5-7 October 1991; B K A Amoah, *Participation of Non-Governmental Organisations in the Work of the African Commission on Human and Peoples' Rights*, *loc cit.*
8. R B Lillich and H Hannum, "Linkages Between International Human Rights and US Constitutional Law", in 79 *American J of Int L*, 158 (1985); see also G A Christenson, "Using Human Rights Law to Inform Due

process and Equal Protection Analyses" 52 *Cincinnati L Rev* 3 (1983).

9. Advisory Group, Commonwealth Human Rights Initiative, *Put Our World to Rights*, 1991.

10. *Id*, 2ff.

11. *Id*, 6.

12. *Id*, 22.

13. *Id*, 22.

14. The *Bangalore Principles* are published in the Commonwealth Secretariat document, 73-74. They are also published in (1988) 14 *Commonwealth Law Bulletin*, 1196 and in (1988) 62 ALJ 531.

15. R G Mugabe, Inaugural Address to the Harare Judicial Colloquium in Commonwealth Secretariat, *Developing Human Rights Jurisprudence*, vol 2, 17.

16. *Harare Declaration of Human Rights*. This declaration is published in Commonwealth Secretariat, *ibid*, Vol 2, 9. See also (1989) 15 *Commonwealth Law Bulletin* 999.

17. *Banjul Affirmation* in Commonwealth Secretariat, Developing Human Rights Jurisprudence, Vol 3, "A Third Colloquium on the Domestic Application of International Human Rights Norms", London, 1991, 1 at 3.

18. [1991] 1 AC 696; [1990] 2 WLR 787 (CA).

19. *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.

20. [1991] 2 WLR 588 (HL) at 592.

21. *Ibid*, 592.

22. *Id*, 594.

23. *Id*, 595

24. *Id*, 603.

25. *Id*, 605.

26. Lord Donaldson of Lymington MR in *Brind*, above in 18, 797-8.

27. 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.

28. R D Wilson, "The Domestic Impact of International Human Rights Law", unpublished paper for the Australian Academy of Forensic Science, 29 October 1991.

29. *Chow Hung Chin v The King* (1948) 77 CLR 449, 477.

30. (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.

31. e.g. Australia, Canada, India, Malaysia, Nigeria, Tanzania etc.

32. *Attorney General (Canada) v Attorney General (Ontario)* [1937] AC 326, 348 (PC).

33. (1975) 135 CLR 337, 445.

34. *Koowarta v Bjelke-Petersen* (1985) 153 CLR 168, 200. (Gibbs CJ).

35. A C Hutchinson and A Petter, "Private Rights - Public Wrongs : The Liberal Lie of the Charter" (1988) 38 *Uni Toronto LJ* 298.

36. J L Brierly (1935) 51 *LQR* 31.

37. *Chow Hung Hing* at 477.

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

39. G G Lewis, *Lord Atkin*, Butterworths, London, 1983, 97f.

40. See eg H Lauterpacht *International Law: Collected Papers* (vol 2), *The Law of Peace*, 560.

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

42. (1978) 143 CLR 410.

43. (1979) 143 CLR 575.

44. *Ibid*, 588.

45. (1985) 153 CLR 168.

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

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

48. [1988] 2 WLR 805 (HC).

49. *Ibid* at 850, 51 (CA).

50. *Id*, 851.

51. *Id*, 869.

52. *Id*, 897.

53. *Id*, 907.

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

55. [1988] 2 WLR 398 (HL).

Ibid, 410, 412.

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).

58. See eg *Koowarta* (above).

59. (1986-7) 162 CLR, 447.

60. *Ibid*, 463.

61. (1988) 12 NSWLR 45; 79 ALR 591 (CA).

62. *Ibid*, 53, 599.

63. (1988) 12 NSWLR 358 (CA).

64. *Ibid*, 360-361.

(1988) 12 NSWLR 558 (CA).

Ibid, 569,70.

Ibid, 580-2.

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See *Green v United States* 355 US 184, 187 (1957) (USSC).

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