QUEENSLAND ELECTORAL AND ADMINISTRATIVE REVIEW COMMISSION

HUMAN RIGHTS SEMINAR

Brisbane 20 July 1992

THE INTERNATIONAL IMPORTANCE OF BILLS OF RIGHTS - CHANGE OF FOCUS FOR THE AUSTRALIAN JUDICIARY*

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The Hon Justice Michael Kirby AC CMG**

> *"The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights."*
>
> *Mabo v The State of Queensland, High Court of Australia, 3 June 1992, per Justice Brennan.*

AUSTRALIA AND HUMAN RIGHTS

In not so splendid isolation: The imagination of the founding fathers of the Australian constitution was blunted by their fascination with the constitution of the United States of America. Yet they resisted the idea to incorporate in their handiwork a

constitutional *Bill of Rights* akin to the *Bill of Rights* added to the United States constitution by the first Ten Amendments. A few scattered rights were included. To just terms on the acquisition of property (s 51(xxxi)); to trial by jury in certain cases (s 80); to freedom of trade, commerce and intercourse among the States (s 92); to a right to freedom of and from religion (s 116) and to non-discrimination among residents of the several States (s 117). Some of these rights were neutered by early decisions of the High Court in the hands of judges, generally unsympathetic to notions of fundamental rights. Section 92, alone, worked miracles: preserving banking in the private sector until the time would come for public banking to be privatised; preventing airline nationalisation in order to await the day when all public aviation would be privatised; but also protecting the Australian community from the worst excesses of McCarthyist anti-communism. It is only in recent years that the other rights have begun to be rediscovered and reinterpreted.[1] It is only now that the implications of basic rights, said to be inherent in the very nature of the Federal constitution establishing a democratic polity of limited powers, has begun to attract a respectable jurisprudence in Australian law.

Although Australia has no formal *Bill of Rights*, in the sense of a justiciable, entrenched, constitutional statement of fundamental rights, it has a generally better record in the protection of basic rights than many countries with constitutions which enshrine such basic principles. The courts have established techniques of the common law for the interpretation of statutes and the development of judge-made law, by which to protect basic rights. Moreover, many statutes, Federal and State, have now been enacted for the protection of basic rights and to afford justiciable claims in

courts for those who allege a breach.

The fact remains that Australia is one of the few countries to stand outside the mainstream of human rights jurisprudence which has been going on in the rest of the world since the end of the Second World War. That jurisprudence has developed around a *Bills of Rights*, typically annexed to the post-colonial constitutions of the many nations which have come to independence since 1945. It has also been developed in the international and regional courts and the commissions which have been set up by the United Nations organisation and by other multi-national agencies. Not only does Australia have no *Bill of Rights* of its own. There is no regional convention to stimulate local law into conformity with international thinking on fundamental human rights and freedoms.

It is possible, of course, that we do not need any association with these world-wide developments. Safe in our Antipodean remoteness, and enjoying huge self-satisfaction with our first century of Federal constitutionalism, we may consider the world-wide movements towards the statement, protection and enforcement of basic human rights irrelevant to our concerns. Doubtless many lawyers, and not a few judges, take that attitude. However, for those with an eye on the long haul, it will seem unlikely that Australia can hold out forever against developments which basically stem from the nature of the new world order, the opening provisions of the United Nations *Charter* and the position of the individual and the group in the world.[2] For such people, such isolation will appear thoroughly undesirable. What then is to be done?

No Bill of Rights: no Treaty: In my professional career, I have seen a change in global jurisprudence and the beginnings of its impact on the laws of Australia. In a very small way, I have participated in the change and continue to do so.

The major *stimuli* to the concretisation of international minimum standards available in other countries are missing from Australian domestic law. There is no regional charter of human rights equivalent to the *European Convention on Human Rights*, the *American Convention on Human Rights* or the *African Charter on Human and Peoples' Rights*. Accordingly, there is no regional court or commission, external to Australia by which, under a treaty or otherwise, our jurisprudence may be obliged, under court order, to conform to basic minimum standards of human rights.

One of the most interesting developments for a common law lawyer to observe at this time is the way in which law in the United Kingdom (from which so much of Australian law is derived) is now being criticised and altered following complaints which lead to the measurement of that law against regional and international standards. In important respects, English law has been found to fall short of acceptable minimum standards in matters such as freedom of expression; prisoners rights; discrimination against homosexuals etc.[3]

There is now talk in some quarters about a regional human rights convention for Asia and the Pacific and a court to go with it. The speed with which changes occur in international affairs today makes it impossible to deny absolutely the possibility of such a development in Australia's region. But the chances appear thin, not least because of the many abuses of human rights by the governments of newly independent countries in the Asia/Pacific region which would have to agree. At least in the North Asia, it is also relevant that Confucian attitudes inculcate in those communities notions favouring the community over the individual; duties over rights; and the rule of men of virtue over the just rule of law.[4]

Nor have we in Australia had the stimulus of a national bill of rights, to provide the vehicle for the importation of the developing jurisprudence of human rights emerging from international agencies: most especially the European Court of Human Rights and the United Nations Human Rights Committee. In 1989 Chief Justice Mason pointed out that Australia and New Zealand were virtually alone in standing outside the movement to provide for constitutional guarantees of human rights.[5] Since that time, the New Zealand Parliament has enacted the *Bill of Rights Act* 1990 (NZ). The courts of New Zealand are now busily engaged in applying that important charter. Although not constitutionally entrenched, its impact, already, is significant.[6] Victoria has followed the New Zealand approach. Queensland is now considering whether it should do so.

In Hong Kong, on the eve of an otherwise deplorable capitulation and withdrawal of the British Crown without adequate measures for the protection of the fundamental right of self-determination and self-government,[7] the departing colonial rulers have provided a *Bill of Rights* which effectively introduces into the domestic law of the colony key provisions of the *International Covenant on Civil and Political Rights* (ICCPR). Notably excluded are those provisions which relate to self-determination and self-government.[8] But most of the basic rights in the ICCPR have now been made part of the law of Hong Kong.

So here we are in Australia, a sleeping continent. Always the remote south land. The victim of the tyranny of intellectual distance. Doing it, as usual, our own way. But not quite. For, in legal terms, our own way is all too often living in the past. We continue to apply concepts of law developed in England earlier in the century and before, at times when our international position was quite different from what it is now and before the impact of the

movement towards the internationalisation of human rights which gained momentum after the lesson of Hiroshima began to sink in.

There are, of course, notable exceptions to this somewhat bleak landscape. I refer to the *Racial Discrimination Act* 1975 (Cth) which implemented, in Australia, the *International Convention on All Forms of Racial Discrimination*. I refer also to the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth). That Act replaced the Human Rights Commission earlier established under the *Human Rights Commission Act* 1981 (Cth). It established a new Commission with wider powers. These include the promotion of an understanding and acceptance and public discussion of human rights in Australia and the scrutiny of Australian laws to ascertain whether there are inconsistencies with various specified international instruments of human rights including those set out in the five schedules.[9] Also relevant now is the *Sex Discrimination Act (Cth) and the Affirmative Action (Equal Employment Opportunity for Women) Act* 1986 (Cth) designed to give effect to the *Convention on the Elimination of All Forms of Discrimination Against Women*. There are also important State laws and institutions relevant to the protection of basic rights and more are under contemplation.

But what we still lack in Australia are general normative rules to which our lawyers can appeal in the courts and use in their daily work. Our courts have rejected the notion that there are rights which run so deep that even Parliament cannot override them.[10] I support that rejection. The notion has no legitimacy in our democratic system. It elevates the judges, by their own say-so and without the authority of a constitutional or other law, to a pretention as to their functions which they should not assert without clear authority deriving (ultimately) from the people.[11] The recent attempt, at referendum, to secure the passage into the

Australian constitution of human rights provisions did not even come close to the majorities required by s 128 of that Constitution. The Bicentenary referendum in 1988 could muster only 30.4% of the population to support the proposal to extend the right of trial by jury; to extend protection for freedom of religion and to ensure fair terms for persons whose property was acquired by any government. In not a single jurisdiction of the nation was a majority secured. The result bore out, once again, Professor Sawer's striking comment that, constitutionally speaking, Australia is a frozen continent.

It may be said that the Government's strategy and support for the 1988 referendum was wholly inadequate. The ground for bipartisan support was not properly laid. The campaign was muted and unimaginative. There are still some who call for persistence with the path of formal constitutional reform. But the record is somewhat sobering. Too much store should not, in my view, be placed upon transient favourable opinion polls, short of the one that ultimately matters and which is usually in the negative.

On the grand scale, therefore, we appear to have reached something of a blockage in giving effect, in Australian law, to emerging international minimum standards in human rights. Of course it is possible that all problems will suddenly fall away. Perhaps by the century of federation in less than a decade, our people will radically reform the Australian constitution, abolish the Commonwealth, establish an Australian republic, abolish the States, enlarge the powers of local government, entrench a treaty of reconciliation with the Aboriginal people and set in place a modern charter of rights, justiciable in the courts. Perhaps the States, if they survive, will themselves gradually introduce their own *Bills of Rights* just as Victoria has done and Queensland is now

considering. Anything is possible. Whether all, or any, of these developments would be desirable may be debated. I suspect that most of our fellow citizens in Australia - and the politicians they elect - would not wish to absorb too many radical changes too quickly. Learned commentators may despair of this indelible conservatism of the Australian people. But Australians look about their country and compare it with other countries and prefer at least the broad features of what they presently see.

Attaining more modest objectives: If this is the conclusion which is reached, the way ahead for the application in Australia of emerging international human rights standards appears not to involve home grown *Bills of rights*, still less a radical constitutional charter included in the Australian constitution. It may, instead, involve a more subtle and piecemeal approach. More of the same. More international treaties ratified. More willing acceptance of the authority of international agencies established by such treaties to investigate complaints by individual Australians about suggested non-compliance of Australian laws and practises with such treaties. More jurisdiction to the Human Rights and Equal Opportunity Commission under such treaties to investigate and identify local disharmonies with international law and to educate lawyers and other citizens in this country. Obviously, these are desirable developments. Whether they go far enough is the question.

There is now a new development which every lawyer - and every citizen too - must notice. I refer to the accession of Australia in September 1991, to the *First Optional Protocol* to the ICCPR. It is this accession which will permit the United Nations Human Rights Committee to receive, and deliver non-binding (but highly authoritative) opinions on, individual complaints which allege violation of rights recognised under the *Covenant* where domestic

remedies have been exhausted and where no effective domestic remedy is available. The path to this important step was a long and tortuous one. Successive federal Ministers pursued their (ultimately fruitless) attempts to persuade all members of the Standing Committee of Attorneys General to agree to the step. Ultimately, only New South Wales and the Northern Territory held out. The Federal Government, as the international representative of Australia, went ahead and ratified anyway. Once that step was taken, it will be difficult to reverse. The full measure of its impact on Australian domestic law remains to be seen.

I wish to examine the way in which Australia's domestic law may be stimulated, and where necessary changed, not by use of a *Bill of rights* (constitutional or otherwise) but by reference to the developing standards of human rights, formulated in international agencies. This is an issue that has been generally neglected by Australian lawyers and citizens. Yet it is, I suggest, an important feature of the future of the law in our country and the observance of basic rights. It concerns the rôle of the judiciary (and hence of lawyers generally) - even without a formal *Bill of Rights*, federal or state, in interpreting ambiguous legislation or filling gaps in the common law by reference to international human rights principles.

DOMESTIC APPLICATION OF HUMAN RIGHTS NORMS BY JUDGES

The Bangalore Principles: During the past four years I have participated in a further series of meetings organised by the Commonwealth Secretariat concerned with the Domestic Application of International Human Rights Norms.

The first meeting was held in Bangalore, India in February 1988. It was convened by the former Chief Justice of India, P N Bhagwati. At that meeting were formulated the *Bangalore*

principles.[12]

The thesis of the *Bangalore Principles* is not that international legal norms on human rights are incorporated, as such, as part of domestic law. Still less is it that domestic judges are entitled to override clear domestic law by reliance upon such international norms. But it is that judges should not ignore such important rules, living in a blinkered comfortable world of judicial provincialism and jurisdictionalism. Instead, they should become familiar with the international norms on human rights. When appropriate occasions present (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 not mechanical. To exercise their choices, they must have points of reference or criteria. Choices should not depend upon the idiosyncratic whim of a particular judge. Where relevant they should be made, by reference, amongst other things, to fundamental principles of international human rights.

The second colloquium on the *Bangalore Principles* was held in Zimbabwe in April 1989. At the end of that meeting, the participants joined in the *Harare Declaration on Human Rights*.[13] It 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."*

The third meeting in the series was held in Banjul, The Gambia

in November 1990. It resulted in the *Banjul Affirmation*. By this, the judicial participants accepted the *Bangalore Principles* and pledged their commitment to implementing them.[14] In this way, leading judges of the majority of Commonwealth countries accepted a simple idea. In most of the jurisdictions represented at this series of meetings, the domestic constitution already provides a vehicle for introducing the developing international jurisprudence of human rights. Many of the rights, collected in the post-colonial constitutional guarantees of Commonwealth countries, already reflect concepts similar to those collected in the ICCPR and in the regional human rights conventions. But the *Bangalore Principles* go further. They are particularly relevant to countries, like Australia, which have no such constitutional provisions.

The fourth meeting in this series conducted by the Commonwealth Secretariat was held at Abuja, the new capital of Nigeria, in December 1991. Present was a very large contingent of judges from all parts of Nigeria, the third most populous common law jurisdiction of the world. Also present were judges from other Commonwealth countries of West Africa. For the first time there was a judge from the civil law tradition (Brazil) and from the European Court of Human Rights (Judge Rolv Ryssdal, President). Also attending were judges of the Sharia courts of Nigeria: presenting a first opportunity in the series to examine the jurisprudence of international human rights from the perspective of the Sharia law.

At the end of the meeting, the judges unanimously adopted the *Abuja Confirmation of the Domestic Application of International Human Rights Norms*.[15] By this, they reaffirmed the principles stated at Bangalore, reflecting:

> *"... the universality of human rights - inherent in human kind - and the vital duties of the independent judiciary in interpreting and applying national constitutions and*

laws in the light of those principles."

According to the *Abuja Confirmation* the process envisaged by the Bangalore idea involves nothing more than use of the:

> *"... well established principles of judicial interpretation. Where the common law is developing, or where a constitutional or statutory provision leaves scope for judicial interpretation, the courts traditionally have had regard to international human rights norms, as aids to interpretation and widely accepted sources of moral standards. ... Obviously the judiciary cannot make an illegitimate intrusion into purely legislative or executive functions; but the use of international human rights norms as an aid to construction and as a source of accepted moral standards involves no such intrusion."*

A fifth meeting in the series has now been summoned to take place in Oxford, England in September 1992 upon the initiative of the Lord Chancellor, Lord Mackay of Clashfern.

The controversy: The use of international human right standards in this way, at least in Australia, is still controversial. What is not in contest is that such norms, unless lawfully incorporated into domestic law, are not,by our legal theory,part of Australian law as such.[16] The supporters of the *Bangalore Principles* have never asserted to the contrary. But it remains a question as to whether it is legitimate for Australian judges to have regard to human rights standards, expressed in international conventions, either:

(a) where such conventions are ratified by Australia; or

(b) (even if not ratified) where the rules stated have come into force and have come to express international customary law.

Some Australian judges have taken the view that such statements of international principle are completely irrelevant to Australian law. They are mere exhortations or rallying cries. They are not

legal norms to which any regard whatsoever should be paid in expounding or developing the law of Australia. Various justifications are given to support this stance. They include the potential tension between the Executive Government (which ratifies treaties) and the legislature (which gives effect in domestic law to their provisions). Also relevant is the Federal nature of Australia's polity and the limited extent to which that basic feature of the Australian constitution may be undermined by the mere ratification of an international convention on human rights: still less where the rights in question have not been enacted as part of domestic law by a valid Federal statute and least of all where, for the default of federal law, no valid State law operates.

These controversies in Australia reflect similar judicial and scholarly debates in other major common law jurisdictions, such as the United States and England. In the United States, by conventional theory, treaties are self-executing. They create rights and liabilities without the need for legislation by Congress.[17] However, a subsidiary question has lately arisen in that country as to whether, for the construction of the United States constitution, it is appropriate and permissible to have regard to the views of the international community upon the meaning and purpose of words which appear both in that constitution and in international instruments of human rights. Specifically, the question has arisen as to whether the phrase "cruel and unusual punishment" in Amendment VIII to the United States Constitution imports to the jurisprudence of that country the learning which had developed around the same provision in international instruments and in other common law countries. In *Thompson v Oklahoma*[18] Stevens J endorsed the opinion (supported by Blackmun, Brennan, Marshall and O'Connor JJ) that:

We have previously recognised the relevance of the views of the international community in determining whether a punishment is cruel and unusual."[19]

Scalia J (with whom Rehnquist CJ and White J concurred) dissented:

"We must never forget that it is the Constitution of the United States of America that we are expounding ... Where there is not first a settled consensus among our own people, the views of other nations, however enlightened the justices of this court may think them to be, cannot be imposed upon Americans through the Constitution."[20]

A year later in *Stafford v Kentucky*[21], with a change in the composition of the Court, Scalia J's opinion prevailed. He was joined in it by Kennedy J and, on this occasion, O'Connor J. According to commentators this decision has "cast a dark shadow over the internationalist *dictum* previously accepted by the United States Supreme Court". Brennan J's dissent in the later case, called in aid the fact that the death penalty for juveniles was prohibited by the *International Covenant on Civil and Political Rights*, the *American Convention on Human Rights*, the *Geneva Convention Relative to Protection of Civilian Persons in Time of War* and by other resolutions of agencies of the international community. But for the moment, Scalia J's "classical" or "statist" view has prevailed in the United States.[22]

The position now reached by the United States Supreme Court accords entirely with the opinion of Professor Robert H Bork:[23]

"The major difficulty with international law is that it converts what are essentially problems of international morality, as defined by a particular political community, into arguments about law that are largely drained of morality. ... A moment's reflection makes it clear that, in the real world, arguments about the 'morality' of the United States invasion of Granada could not [have weight in international law]. In order to be international, rules about the use of force between nations must be acceptable to régimes that operate on different - often contradictory - moral premises. The

rules themselves must not express a preference for freedom over tyranny or for elections over domestic violence as the means of coming to power. This moral equivalence is embodied in international charters. The charters must be neutral and the easier neutral principle is: No force. The fact that the principle will not be observed by those who simply see international law as another foreign policy instrument does not affect the matter ... International law thus serves, both internationally and domestically, as a basis for a rhetoric of recrimination directed at the United States."[24]

Similar explanations for the resistance to the utilisation of international law have been ventured in other legal jurisdictions. In Ireland, for example, it has been put down to cynicism about, and hostility to, the laws of foreigners; confusion about the binding force of international rules; and lack of information and training of lawyers in the applicable international human rights law.[25]

In Britain, the conventional or statist view has long prevailed. By and large, courts in the United Kingdom have been uncomfortable in the world of human rights enforcement. Indeed, the record of the Judicial Committee of the Privy Council, as the ultimate appellate court for Commonwealth countries with entrenched human rights provisions, has been roundly criticised.[26] Approaching such rights by the "austerity of tabulated legalism" has produced sharp differences among the Law Lords themselves. Perhaps the most acute case recently illustrating this comment concerns the much delayed enforcement of capital sentences in Jamaica considered in *Riley v Attorney General of Jamaica*.[27] A commentator, contrasting the clash of opinions of Lords Hailsham, Diplock and Bridge (on the one hand) and Scarman and Brightman (on the other) observed:

"Since human lives depended on this split decision, Riley is a deeply troubling authority. The head-on clash in the Judicial Committee seems to have been as deeply rooted as the split in the Law Lords over the role of the press in the first Spycatcher decision. Riley will

surely have been reargued and reconsidered if the death row challenges that are now accumulating in Jamaica are to have a substantial chance of success in the future."[28]

In fact, these cases were duly taken to the United Nations Human Rights Committee which accepted them and has considered them in ways more attentive to developments in international human rights law than the Privy Council majority evinced.

Nevertheless, in Britain's own courts there has more lately been a significant shift. In part, this is no doubt affected by a series of decisions by which conclusions were reached in the European Court of Human Rights critical of the results accepted by the highest English courts as expounding the law of England. In *Regina v Secretary of State for the Home Department; ex parte Brind & Ors*[29] a number of hints were given by the Law Lords that a Convention to which the United Kingdom has subscribed (in this case the *European Convention on Human Rights*):

"... may be deployed for the purpose of the resolution of an ambiguity in English primary or subordinate legislation."[30]

In that case, no ambiguity could be found. But it was different in *Derbyshire County Council v Times Newspapers Limited.*[31] The question was whether a local government authority could sue for libel under the law of England. The English Court of Appeal held that it could not. Relevant to the reasoning of the judges was a consideration of United States authority. Also relevant were decisions in Commonwealth countries, including Australia,[32] about the importance of the basic right in a democratic society to criticise government action without unreasonable legal inhibition. Perhaps most critical of all were the perceived requirements of the provisions of the *European Convention*

on Human Rights. It was held that these might be resorted to in order to help resolve "*uncertainty or ambiguity in municipal law*".[33] Butler-Sloss LJ stated the principle thus:[34]

> *"Where the law is clear and unambiguous, either stated as the common law or enacted by Parliament, recourse to [the convention] is unnecessary and inappropriate. ... Where there is an ambiguity, or the law is otherwise unclear or so far undeclared by an appellate court, the English Court is not only entitled but, in my judgment, obliged to consider the implications of [the Convention]."*

Australian law: - It might be said that the position reached, somewhat belatedly, by the English courts is itself a product of the United Kingdom's earlier adherence to the *European Convention on Human Rights*. There being no exactly equivalent regional Convention in Australia, to which litigants disaffected by Australian court decisions can have access, it could be suggested that the position in Australia is distinguishable. But I think it is not.

Since December 1991 there is now an avenue of redress open to Australians when they contend that the application of Australian law results in a breach of fundamental human rights standards. Having exhausted domestic remedies, they may complain to the Human Rights Committee established under the *First Optional Protocol* to the ICCPR. Many in the future will doubtless do so. Still more belatedly therefore, I expect Australian law to come under the discipline of international human rights jurisprudence. Just as the English courts have had to consider the development of English law conformably with European Convention law, I believe that our courts will come to the same conclusion in relation to the jurisprudence of the Human Rights Committee and other bodies which consider language analogous to that appearing in the ICCPR.

Before Australia adhered to the ICCPR and the *Optional*

protocol, I expressed the opinion, in a series of decisions of the New South Wales Court of Appeal, that it was entirely legitimate for an Australian court to have regard to the statements of universal rights contained in international law. I embraced exactly the same principle as has now been accepted in the English Court of Appeal. I took the applicable provisions of the ICCPR as the starting point of my analysis where the common law offers no binding authority on the point or where a local statute was ambiguous. The cases have included cases where a bankrupt was deprived of civic rights[35]; a litigant complained of apparent bias of a judge who had previously, as a barrister, enjoyed a retainer from the opponent[36]; a claim to have a trial on criminal charges without undue delay[37]; a claim of a deaf mute to have an interpreter present, translating the proceedings of the court even during legal argument[38]; and the right of a litigant in person to suffer no discrimination for the lack of a lawyer.[39] There have been many other cases.

Generally the other judges of the Court have opted for a different approach. Sometimes, they have found more attractive the "classical" or "statist" view which would bar even consideration of, or reference to, international human rights law, even by way of analogy.[40] On the other hand, more recently, there have been signs of a greater willingness of Australian judges to follow the course urged in the *Bangalore Principles*.

In the High Court of Australia, Deane J did so in *J v Lieschke*.[41] Speaking extracurially, and since his retirement, Sir Ronald Wilson (formerly a Justice of the High Court of Australia) has expressed the following views:

> *"I suggest there is a more indirect, but nevertheless important, impact that must be taken into account ... [I]t is increasingly recognised that in appropriate cases*

> *international law may be of assistance notwithstanding that it has not been incorporated into municipal law. In cases involving statutory interpretation, where words to be interpreted are ambiguous or lacking in completeness, it will be right for the court to consider whether the case is one where the search for legislative purpose will be furthered by the assumption that Parliament would have intended its enactment to have been interpreted consistently with international law ..."*[42]

In one case in the Court of Appeal, Samuels JA felt it relevant to note that the ICCPR had now been annexed as Schedule 2 to the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth).[43] In dealing with the right of a mute to an interpreter, Samuels JA considered it useful to have regard to the standard, albeit established for criminal proceedings, contained in the ICCPR.

More recently still in the Family Court of Australia, Nicholson CJ (in a dissent, later upheld by the High Court) recanted an earlier adherence to the "classical" or statist" view.[44] In *Re Marion*[45] Nicholson CJ revised that opinion. He concluded that the passage of the Federal *Human Rights and Equal Opportunity Commission Act* and its schedules constituted:

> *"... a specific recognition by the Parliament of the existence of the human rights conferred by the various instruments within Australia and, that it is strongly arguable that they imply an application of the relevant instruments in Australia."*

Marion was appealed to the High Court of Australia. In a sense, Nicholson CJ's opinion went further than the *Bangalore Principles* require. The obligations of those principles are neatly expressed by Butler-Sloss LJ in a passage in the *Derbyshire Council Case* which I have cited. The High Court's decision in *Marion* casts no new light on the duty of Australian courts. But neither did that decision contradict the *Bangalore Principles*.

The *Mabo* decision: Then, in June 1992, in *Mabo*, came the decision of the High Court pointing to the future of

Australian law as part of the law of the emerging world community. The passage in Justice Brennan's judgment set out at the head of this paper, was expressed with the concurrence of Chief Justice Mason and Justice McHugh. It points the way to the future development of the Australian common law in harmony with the developing principles of international law. It is a bold step forward. The mechanical application of statist notions of law, developed by English and Australian courts in utterly different international circumstances, provides a very shaky foundation for the modern world in which Australian law must operate. In that world, Australia must find its part. In it, Australia's laws are now accountable to an international agency armed with a growing body of detailed jurisprudence and supported by the power of international opinion. The High Court of Australia has now shown a way by which the resolution of daily problems in our courts may take into account the growing world body of human rights jurisprudence. And they can do so even without the enactment of a formal *Bill of Rights*, Federal or State, entrenched or otherwise.

CONCLUSIONS: INCULCATING A CULTURE OF HUMAN RIGHTS

The recognition, expression and enforcement of human rights is a crucial element of the new world order which has followed the Second World War. In a small number of cases, international statements of human rights have been enacted as part of domestic Australian law, federal or state. But generally it is not so. Nor does Australia as a whole have a constitutional *Bill of Rights* to provide a ready means for importing the growing body of jurisprudence on human rights, as most common law countries may now do. The experiment by the States with their own *Bills of rights* is at an early, experimental phase.

Nevertheless, there are two important new vehicles which should

be kept in mind in considering what should be done to provide practical protection of basic rights.[46] The first depends upon the utilisation of the many international agencies with objectives relevant, directly or indirectly, to the protection of human rights in Australia. By reference to the work of the OECD, WHO the ILO and the Human Rights Committee, I have myself been involved in the indirect incorporation of internationally accepted principles into domestic law, including in Australia.

It is likely, given the global nature of many problems today, their complexities born of technological change, the incapacity of local laws adequately to deal with them and the need to avoid inefficiencies of incompatible laws, that there will be many instances of such legal developments in the future. They are not coercive as is a binding treaty. However, their influence derives from the high authority which is increasingly accorded to the opinion and advice of international agencies, supervising the elaboration and enforcement of human rights throughout the world.

The opportunities for most judges and lawyers to take part in such contributions to domestic law-making are necessarily limited. Much more promising, as a means of importing basic human rights principles into Australian domestic law by the activities of local judges and lawyers, is the acceptance of the simple idea contained in the *Bangalore Principles* and reaffirmed since at meetings of judges of Commonwealth countries in Harare, Banjul and Abuja.

Using principles of human rights, which have become part of international law to fill the gaps of the common law and to aid the interpretation of ambiguous legislation involves no heretical leap into the unknown. At the least it is the inevitable consequence of submitting our legal system to the scrutiny of the agencies of the international community, such as the Human Rights Committee

established under the *Optional Protocol* to the ICCPR.

We can, of course, simply persist in our own views whilst the United Nations Committee repeatedly tells us that our common law and statutory interpretation has departed from international norms of human rights jurisprudence. But it is much more likely - as Justice Brennan acknowledged candidly in *Mabo* - that in Australia, as in Britain, our courts will, over time, seek to harmonise Australian common law with universal notions of fundamental human rights, as expounded by distinguished regional courts and by agencies of the United Nations. Any other approach involves persistence with notions concerning the sources of law appropriate to the days of Empire, long after the sun has set on the imperium and when Australia is seeking to find its proper place as a good citizen of the world community. It is akin to persisting with the horse and cart for travel in the age of interplanetary flight, nuclear physics and the microchip. Only lawyers could so unreluctantly be guilty of such blind folly.

Courts may, of course, adhere to their fancies and refuse to have anything to do with international human rights law until it is expressly incorporated into domestic law by valid local legislation - federal or state. But I believe the time has come for the judges of Australia, supported by a legal profession knowledgeable about the international jurisprudence of human rights, to utilise that jurisprudence in helping to solve Australian legal problems. We should do so for reasons of principle, accepted by judges of the Commonwealth of Nations operating within the same intellectual tradition. If we remain so blinkered that we still wait for the leadership of the English courts, we can now take our green light from some of the speeches in the House of Lords in *Brind* and from the even stronger recent statement of the English Court of Appeal in *Derbyshire Council*. If we were waiting for the green light from

the High Court of Australia, I believe that it was given in *Mabo*. Certainly, the lights are changing.

Judges, distracted by their busy court lists are often unfamiliar in this country with the great body of international human rights jurisprudence. Many are even unaware of the provisions of the principal instruments, including those to which Australia has adhered. It must surely be the rôle of lawyers of the next decade to lead the Australian judiciary into the 21st century by submissions which call that jurisprudence to notice, where it is relevant. And where appropriate, to urge its adoption to guide the development of the law of Australia. We must all become more internationalist in our outlook. This applies to us as citizens. But it also applies to us as lawyers. The provincialism of lawyers generally, and of Australian lawyers in particular, is profoundly discouraging. So we must do better in the years ahead. The means of doing better are available to us. They are comfortably orthodox and, by now, legally sanctioned. Yet, in Australia, they still require a boldness of spirit and a determination to escape the bog of provincial jurisdictionalism. The lingering question is thus stated: Do Australia's judges and lawyers have the imagination and foresight to seize the opportunity which beckons them?

ENDNOTES

* This paper develops a theme expressed in a paper presented at the 14th Annual National Conference of the Australian Society of Labor Lawyers, Melbourne, 25 May 1992.

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OECD Expert Group on Transborder Data Barriers and the Protection of Privacy. Formerly Commissioner of the Global Commission on AIDS of the World Health Organisation. Australian Human Rights Medal, 1991.

1. See eg *Street v Queensland Bar Association* (1989) 168 CLR 461; cf *Leeth v The Commonwealth of Australia* (1992) 2 HCB 27 (HC).
2. United Nations *Charter*, Preamble 1; Article 2.
3. C Palley, *The United Kingdom and Human Rights*, 42nd Hamlyn Lectures, Stevens, London, 1991, 113ff.
4. R Little and W Reed, *The Confucian Renaissance*, Federation, Sydney, 1989, 54.
5. A F Mason, "A Bill of Rights for Australia?" (1989) 5 *Aust Bar Rev* 79, 80.
6. See eg *R v Kirifi* [1991] NZLR - forthcoming. See note [1991] *NZ Current Law* 870, para 2002.
7. International Commission of Jurists, *Countdown to 1997 - Report of a Mission to Hong Kong*, Geneva, Switzerland, 1992.
8. Bill of Rights Ordinance 1991 (HK). See Discussion in *Countdown* (above n 7) 96ff.
9. See s 11 and Schedules 1 to 5.
10. See *Union Steamship Co of Australia Pty Limited v King* (1988) 166 CLR 1; *Mabo v State of Queensland* (1988) 166 CLR 186, 202; *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1987) 7 NSWLR 372 (CA); *Adler v District Court of New South Wales* (1990) 19 NSWLR 317 (CA); *Eastgate v Rozzoli* (1990) 20 NSWLR 188, 201 (CA). Cf I D Killey, Peace, Order and Good Government: A Limitation on Legislative Competence (1989) 17 *MULR* 24; P A Joseph and G R Walker, "Theory of Constitutional Change" (1987) 7 *Oxford J*

L Studies 155.

11. See *BLF* case, above n 10, 402ff.

12. The *Bangalore Principles* are published in (1988) 14 *Commonwealth Law Bulletin* 1196 and (1988) 62 ALJ 531. See also Advisory Group, Commonwealth Human Rights Initiative, *Put Our World to Rights*, 1991, 73-4.

13. The *Harare Declaration* is published in Commonwealth Secretariat, vol 2, 9. See also (1989) 15 *Commonwealth Law Bulletin* 999.

14. The *Banjul Affirmation* is found 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.

15. The *Abuja Confirmation* appears in the Commonwealth Secretariat, *Developing Human Rights Jurisprudence* 1991, London 15ff.

16. (1983) 153 CLR 168, 224. See also Barwick CJ in *Bradley v The Commonwealth* (1973) 128 CLR 557 at 582f; and cf *Kioa & Ors v West & Ors* (1985) 159 CLR 550, 570, 604.

17. See *Foster v Neilson* 27 US 164, 202 (1829) (SC).

18. 108 S Ct 2687 (1988) (SC).

19. At 2696.

20. *Ibid*, 2717.

21. 109 S Ct 2969 (1989) (SC).

22. See note "Judicial Enforcement of International Law Against the Federal and State Governments", 104 *Harvard L Rev* 1269, 1285 (1990); K Norman "Practising What We Preach in Human Rights: A Challenge to Rethinking for Canadian Courts" (1991) 55 *Saskat L Rev* 289, 297; see also L Brilmayer, "International Law in American Courts: A Modest Proposal", 100

Yale L J 2277, 2291 ff (1991).

23. Robert H Bork, "The Limits of 'International Law'" in *The National Interest*, 3 (Winter 1989-1990).

24. *Ibid*, 9-10.

25. M O'Flaherty, "International Protection of Human Rights by the Irish Legal Practitioner", *Irish Legal Times*, December 1991, 285.

26. See eg A W Bradley, Comment, "The Constitutional Protection of Human Rights in the Commonwealth" [1991] *Public Law*, 477, 479.

27. [1983] 1 AC 719 (PC).

28. *Bradley*, above n 16, 479. See also "Optional Protocol to the International Covenant on Civil and Political Rights: Individual Complaints" (1991) 16 *Commonwealth Law Bulletin* 272; *Reid (Junior) v The Queen* [1990] 1 AC 363 (PC).

29. [1991] 1 AC 696, 747 (HL); [1990] 2 WLR 787 (CA).

30. *Ibid* AC, 760.

31. [1992] 3 WLR 28 (CA). See note (1992) 66 ALJ 382.

32. *Commonwealth of Australia v John Fairfax & Sons Limited* (1980) 147 CLR 39, 52.

33. [1992] 3 WLR 28 at 43.

34. *Ibid*, 60.

35. See eg *Daemar v The Industrial Commission of New South Wales & Ors* (1988) 12 NSWLR 45; 79 ALR 591 (CA).

36. *S & M Motor Repairs Pty Limited & Anor v Caltex Oil (Australia) Pty Limited & Anor* (1988) 12 NSWLR 358 (CA).

37. *Jago v District Court of New South Wales & Ors* (1988) 12 NSWLR 558 (CA); affirmed (1989) 168 CLR 23. The High Court there made no reference to the issue.

38. *Gradidge v Grace Bros Pty Limited* (1988) 93 FLR 414 (CA).

39. *Cachia v Haines & Anor* (1991) 23 NSWLR 304, 312 (CA).

40. See eg Samuels JA in *Jago* (above), 580-2.

41. (1987) 162 CLR 447.

42. R D Wilson, "The Domestic Impact of International Human Rights Law". Address to the Australian Academy of Forensic Sciences, 29 October, 1991 in *Australian Journal of Forensic Sciences*, 1992, forthcoming.

43. *Gradidge* (above), 426.

44. Expressed in *Re Jane* [1989] FLR #92-007 (F Fam C).

45. [1991] FLC #92-193 at 78, 301 (F Fam C).

46. I leave aside invocation of the Bill of Rights 1688. See *R v Arthur Stanley Smith* (1991) 56 A Crim R 148, 159 (NSWCA). I also leave aside State Bills of Rights and particular legislation conferring rights. See Queensland, Electoral and Administrative Review Commission, Issues paper No 20, *Review of the Preservation and Enhancement of Individuals' Rights and Freedoms*, June 1992.