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THE AUSTRALIAN NATIONAL UNIVERSITY

CENTRE FOR INTERNATIONAL AND PUBLIC LAW

IMPLICATIONS FOR AUSTRALIA OF THE CONTINUING INTERNATIONALISATION OF HUMAN RIGHTS*

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Justice Michael Kirby**

A SLEEPING CONTINENT

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 imaginative 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 undermined by early decisions of the High Court of Australia, 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 also 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 national, 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.

Australia is now 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 *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 since 1945 by the United Nations Organisation and by other multi-national agencies. Not only does Australia have no national *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 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 Australian lawyers, and not a few judges, take that attitude. However, for those with an eye to the long haul, it will seem unlikely that Australia can hold out forever against developments which basically stem from the opening provisions of the United Nations *Charter*, and the position of the individual and the group in the world and the growing political importance of human rights.[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. This contribution is about those changes.

One of the most interesting developments for an Australian 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 **Ill 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 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 considering whether it should do so.

In Hong Kong, on the eve of an otherwise deplorable 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 often continue to apply concepts of law developed in England in earlier 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 Hiroshima.

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* as examples. 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. Such powers 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.* As well, there are important State

laws and institutions relevant to the protection of basic rights. 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, in terms of formal constitutional amendment, 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 importing to favour radical change, short of the one which ultimately matters. It 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 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 when they elect - would not wish to absorb so many radical changes so 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 in responding to the continuing internationalisation of 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. Indeed, 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 practices. 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 about that law. 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 States and Territories represented in 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 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 two ways in which Australia's domestic law may be stimulated, and where necessary changed, by reference to the developing standards of human rights, formulated in international agencies. The first of these ways is relatively uncontroversial. The other is, however, the subject of some controversy in legal circles in Australia and elsewhere. For each of them, I wish to draw

upon my own experience. I do so not for the usual reasons of vanity but because my opportunities have provided me with an insight which I wish to share. I believe they have relevance for the development of our legal culture for the century to come.

The first involves the development, in international agencies, of principles which then influence highly specific areas of domestic law in ways which bring that law into harmony with internationally accepted principles. The second concerns the rôle of the judiciary (and hence of lawyers generally) in interpreting ambiguous legislation or in filling gaps in the common law by reference to international human rights principles.

APPLICATION OF SPECIFIC INTERNATIONAL PRINCIPLES

Privacy: In 1975 I was appointed first Chairman (as the office was then styled) of the Australian Law Reform Commission (ALRC). The *Law Reform Commission Act* 1973 (Cth) contained a provision unusual for Australian legislation, Federal or State:[12]

> *"In the performance of its functions, the Commission shall review laws to which this Act applies, and consider proposals, with a view to ensuring:*
>
> *(a) that such laws and proposals do not trespass unduly on personal rights and liberties and do not unduly make the rights and liberties of citizens dependent upon administrative rather than judicial decisions; and*
>
> *(b) that, as far as practicable, such laws and proposals are consistent with the articles of the International Covenant on Civil and Political Rights."*

At the time this provision was enacted, Australia was not a party to the ICCPR. Still less had it accepted the jurisdiction of the Human Rights Committee established under the *First Protocol* to that Covenant. Nevertheless, the criteria of the Covenant were accepted

by Federal Parliament as a standard against which the work of the Commission should constantly be measured.

In the first task received from the Whitlam government (concerning complaints against police and criminal investigation) the preamble to the reference affirmed:

> *"(b) The commitment of the Australian government to bring Australian law and practice into conformity with the standards laid down in the International Covenant on Civil and Political Rights."*

The Law Reform Commission never took the commitment to those principles lightly. In discharging its first reference, regard was paid to the requirements of the Covenant.[13] However, in the light of my later knowledge of human rights jurisprudence, honesty requires me to say that less attention was paid to the principles of the Covenant than might have been. Like other Australian lawyers, the Commissioners and the consultants were, to a large extent, cut off from international human rights jurisprudence. In any case, in the 1970s such jurisprudence (at least in international *fora*) had not reached anything like the development which was later to come and is now such a feature of the international scene. For many Australian lawyers the 1970s (indeed many today) international principles, as stated in the ICCPR and elsewhere, were expressions of aspiration rather than actual principles of law. This thought has been expressed by Tom Campbell in these words:

> *"The language of human rights carries great rhetorical force of uncertain practical significance. This is both its persuasive strength and its legislative weakness."*[14]

In more sober terms, the same idea was expressed by Dawson J in the High Court of Australia in *Gerhardy v Brown*.[15] Writing of the *International Convention on the Elimination of All Forms of*

Racial Discrimination, Dawson J explained:[16]

> *"It is the obligation imposed by the Convention which gives rise to the legislative power on the part of the Commonwealth to enact special measures ... [T]he limitations are entirely understandable in the context of the Convention, which envisages that the issues raised may be adjudicated by the Committee or the Conciliation Commissions for which the Convention provides ... The subject-matter of the legislative power which the Commonwealth derives from the obligation imposed by the Convention upon it to take special measures is ... something different from the manner in which, or the purpose for which, the Convention requires the Commonwealth to exercise that power. This is of significance for it must be borne in mind that, except to the extent that the Commonwealth has exercised its legislative power with respect to that subject-matter, the exercise by the States of their legislative powers with respect to the same subject-matter has no relevant limits and is not subject to any of the requirements of the Convention.*

The change of Government in 1975 did not lead to deletion of this novel provision from the *Law Reform Commission Act*. To the contrary, the electoral platform of the Fraser Government included a promise to refer to the Law Reform Commission an investigation into the Australian laws on privacy. When the reference to the Commission came from Attorney General R J Ellicott, it included a preambular reference to s 7 of the Commission's statute and specifically a reference to article 17 of the ICCPR providing that:[17]

> *"No one shall be subjected to arbitrary or unlawful interference with his privacy."*

The Commission's privacy reference was a major one. It ultimately resulted in a report on the brink of 1984. Meanwhile, a very interesting development took place which was to have consequences for the Commission's report and for my perception of the issue under examination.

Within Europe, the Scandinavian countries, collected in the Nordic Council, evinced an early concern about the potential impact

of the new information technology upon the protection of the privacy of the individual. This concern was expressed against the background of a number of international and regional instruments which had expressed the human desire for a zone of privacy as a basic human right. For instance, the preamble to the *Charter* of the United Nations had asserted the determination of the peoples of the United Nations:

> *"To reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small."*

Article 1 of that *Charter* had defined one of the main purposes of the Organisation to be:

> *"... to achieve international cooperation ... in promoting and encouraging respect for human rights and for fundamental freedoms for all."*

Article 56 of the *Charter* required all members of the United Nations to pledge to take action to achieve certain purposes, which included promoting:

> *"... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."*

It was pursuant to the mandate, expressed in Article 55 of the *Charter*, that the General Assembly initiated the steps which led in due course to the *Universal Declaration of Human Rights* (1948) and to the ICCPR (1966). Both of these referred to the right to privacy.

At the same time, and stimulated by the vivid recollections of the assaults on human rights before and during the Second World War and the peril to an interconnected world made plain by Hiroshima, many European countries subscribed to the *European Convention on*

Human Rights (1950). The creation of the machinery of the *European Convention* proceeded more rapidly than did that of the ICCPR. This was doubtless because of largely common ideals, fewer nations involved and the recent, shared recollection of the assaults on human rights in Europe.

It was against this background that the Nordic Council took its initiatives to develop principles on the special and new problems presented for privacy by the advent of computers and other information technology. Without delay, that initiative triggered action in the Council of Europe. It led to the adoption by the Council of a draft *Convention for the Protection of Individuals with regard to Automated Processing of Personal Data*[18]

The Organisation for Economic Cooperation and Development (OECD) has its headquarters in Paris. It is the successor to the institution established after the Second World War to re-invigorate the shattered economies of Europe (known as 'the Marshall Plan'). Its membership is no longer regional. It is now intercontinental. The core membership is constituted by the countries of Western Europe and North America (the United States of America and Canada). Subsequently Australia, New Zealand and Japan were admitted. The qualification for membership is that of an advanced economy and a shared commitment to democratic government and the rule of law. In such an environment, it was inevitable that human rights should, indirectly at least, become relevant to the objects of the OECD. And in the field of privacy there was a special problem, with economic implications.

The *Convention* of the Council of Europe had begun to bear fruit in the enactment of national laws for the protection of privacy of automated data particularly in the Scandinavian countries. But fear was soon expressed (particularly in the United States) that

disharmonious laws on privacy protection would produce serious diseconomies arising from the attempt of individuals and corporations to conform to them. On the other hand, some European countries thought that common law jurisdictions, such as the United States, were remarkably insensitive to the perils to individual privacy arising from the new information technology. Out of these conflicting concerns arose the establishment, within the OECD, of an Expert Group on Transborder Data Barriers and the Protection of Privacy.

Because the Australian Law Reform Commission was in the midst of its project on privacy protection, a decision was taken in Canberra that I should be the Australian Government "expert" on this international privacy group. At its first meeting, I was elected chairman of the Group. Between 1978 and 1980, in a series of six meetings, the Group laboured over the preparation of basic Guidelines. It was hoped that these would strike the right balance between the protection of individual privacy (on the one hand) and the assurance of the legitimate free-flow of data so important to advanced economies (on the other).

The Guidelines, as adopted by the Group, were eventually commended to the Council of the OECD in September 1980. They were adopted with a recommendation addressed to member countries that they should take them into account in their domestic legislation; endeavour to remove or avoid creating, in the name of privacy protection, unjustified obstacles to transborder data flows; and cooperate in the implementation of the Guidelines.[19]

During the passage of the Guidelines through the Council of the OECD, Australia, in company with certain other countries abstained. Meanwhile, the work of the Australian Law Reform Commission on privacy protection in this country continued. The work was highly

influenced by the OECD Guidelines. That fact is unsurprising, given my part in their preparation. When, eventually, the report of the Commission was produced, it contained recommendations and draft legislation which were, in turn, profoundly affected by the Guidelines of the OECD. In fact, as slightly modified, the OECD Guidelines were annexed in a schedule to the Commission's draft legislation.[20] The same basic concepts were preserved, namely that there should be restrictions on the collection, storage, access to, use and disclosure of personal information as well as a right to secure correction of such information where it was shown to be misleading, out-of-date, incomplete or irrelevant.

With the election of the Hawke Government in 1983, Australia withdrew its reservations to the Guidelines as adopted by the OECD. It indicated that it subscribed to the Guidelines. Moreover, when, eventually, the *Privacy Act* 1988 (Cth) was enacted, the OECD Guidelines re-emerged, in transmogrified form, as the "Information Privacy Principles" in s 14 of that Act. It is true that there are modifications and variations. It is also true that, to some extent, advances in technology have made some of the original wording of the OECD Guidelines outdated or at least incomplete. The lesson of technological change is that there is a constant need to monitor and update legislation applicable to technology. The ambit of the *Privacy Act* is still limited. The need for the expansion of the application of the OECD Guidelines into other areas of information management, beyond those provided for in that Act, is obvious. But for present purposes it is enough to note the way in which an interactive technology, whose very nature presented new problems to the international community, stimulated one organ of that community to an initiative which led on to domestic law making in Australia and beyond.

We could, of course, have done it our own way, alone. But the mechanism chosen ensured that the Australian law enacted took advantage of the legal developments which had already taken place (principally in Europe). It also ensured that the disharmonies of legislation, which could cause economic inefficiencies and reduce the effectiveness of remedies applicable to international data flows, were minimised.

The Law Reform Commission closed its report on privacy with a note on "Human Rights and International Developments":[21]

> *"The international nature of the information technology, and its economic as well as human rights implications, are likely to direct the attention of the Australian Government in the future to possible acceptance by Australia of international obligations that impinge upon the domestic legal protection of privacy. General Commonwealth human rights legislation is proposed which will preserve for 'detailed piece-meal legislation' subject to areas such as privacy. There is no doubt that privacy is high among the concerns about human rights in Europe and North America. It is also a proper matter of concern in Australia."*

The forecast of further activities at an international level was prescient. In one of these I have also been involved. In 1991 the OECD established a new Expert Group on the Security of Information Systems. The fifth, and probably final, meeting of that Group took place in Paris in June 1992. It approved certain Guidelines dealing with data security. The motivation for the preparation of these new guidelines, with obvious implications for human rights, in a body with the economic mission of the OECD, is the same as that which initiated the highly successful Privacy Guidelines. Assaults on data security can be international. The need for effective legislation to deter, detect and redress illegitimate intrusions into data security requires the adoption of legislation reflecting principles held throughout the OECD community. Both in Australia and in the other member countries of the OECD, the work of this new Group will

probably have a like impact.

It is interesting to observe the way in which experts, coming from different legal and (to some extent) political and bureaucratic cultures, can reach consensus on fundamental principles which can then guide domestic lawmakers in the enactment of legislation which takes advantage of such principles. Nor should it be thought that the work of the OECD Expert Groups only had an impact in countries with a legal tradition similar to Australia's. In Japan, for example, the OECD Guidelines are reflected in the *Personal Data Protection Act* 1988, which came into force in October 1989. Japan is a country which has been most concerned about the problems presented by the lack of effective international laws and policies on data security. It has shown a keen interest in, and support for, the work of the OECD Group working on the principles of data security.[23] Where technology is international, and especially where it is interactive, it seems likely to me that there will be more efforts of this kind to secure harmonisation. Because technology has such an important impact on human life today (and hence on human rights) it is vital that international initiatives should reflect concerns to secure and protect basic rights so that these are, in turn, provided for in domestic legislation and not lost by a resigned acceptance of whatever social consequences technology may bring.

Public health: AIDS: Between 1989 and 1991 I served as one of the foundation members of the Global Commission on AIDS (GCA) of the World Health Organisation (WHO).

The responsibility of the GCA is to advise the Director General of WHO on the overall strategy of that Organisation in dealing with a completely unexpected challenge to global health arising from the advent of the Acquire Immuno-Deficiency Syndrome (AIDS). The

syndrome, which has already caused the death of hundreds of thousands (and probably millions) of people in all continents, was first described in an authoritative medical journal a little more than a decade ago. It is generally believed that AIDS is caused by a virus, now known as the Human Immuno-Deficiency Virus (HIV). HIV suppresses the body's immune system. In the worst cases, it goes on to destroy that system, leaving the patient vulnerable to opportunistic infections which otherwise would be readily repelled.

The pattern and rate of spread of HIV and AIDS varies in different parts of the world. The effect of infection in an individual also varies; although in most cases it is believed that infection ultimately causes death or, at least, extremely serious consequences for health. There is, at the moment, no simple cure for HIV and AIDS. Some observers doubt that one will be found in the foreseeable future. Nor is there a vaccine to prevent infection; although, many scientists are more optimistic about the development of such a vaccine. Drugs are available which, in some patients, have the effect of slowing the rate of infection or helping them to respond to opportunistic illnesses. However, by any account, AIDS is an extremely serious threat to global health. Particularly in Africa, it threatens to undermine many of the medical, economic and social advances achieved by WHO and other agencies. There is now virtually no corner of the earth which is untouched by AIDS and the virus believed to cause it. Ease of international travel has made the rapid spread of the virus inevitable. In this sense, it is truly a public health condition of the late 20th century world.

The main modes of transmission of HIV/AIDS are through sexual intercourse; blood transfusion; intravenous drug use; and perinatally or neonatally (breast feeding) in the case of infants. The connection of HIV/AIDS with sex, drug-use, blood and death has

inescapably produced attitudes of fear from which are born attitudes, laws and policies of discrimination. The particular connection of HIV/AIDS, in some parts of the world, with groups already discriminated against (homosexuals, bisexuals, intravenous drug users and sex workers) has, in turn, produced demands for laws and policies designed to isolate still further such groups. Nevertheless, only in Cuba has a system of quarantine or isolation of persons with HIV been adopted. Only in that country and in pre-revolutionary Romania and parts of Russia have policies of universal mandatory screening of the population for HIV been put into force.

The rôle of the GCA, during the time I served on it, involved the protection of human rights of persons with HIV/AIDS, their families and friends. There is, of course, no human right to spread a virus of lethal potential. But the special dangers to human rights, in the wake of the AIDS pandemic, required special initiatives on the part of WHO which were in many ways novel even for that remarkably successful agency of the United Nations. The danger, especially in some developing countries (but not confined to them), was that laws would be adopted with little overall benefit to the containment of the epidemic but with serious consequences for the human rights of those affected.[24] Fortunately, in the first Director of its Global Programme on AIDS (GPA), Dr Jonathan Mann, WHO found an epidemiologist who understood the relevant norms of human rights and their significance for HIV/AIDS.

For default of an instant cure or vaccine, WHO was thrown back upon the urgent necessities of behaviour modification. All lawyers know the difficulties of persuading people to modify behaviour - especially in matters such as sexual conduct and drug-taking. But no other strategy was likely to be successful at this stage. Except in the most remote regions of the world, strategies of quarantine and

expulsion were likely to have little ultimate impact on the spread of HIV whilst at the same proving extremely burdensome to human rights.

These were the messages which GCA, in harmony with GPA, spread through the network of WHO.[25] By the effects of their decisions and recommendations, these organs of WHO influenced, in turn, the policies and health laws of member countries throughout the world. The message of WHO was clear and simple. It was that laws and strategies for the containment of HIV/AIDS should be based not on prejudice and discrimination but upon empirical data concerning the nature and spread of the epidemic. Responses should rest on a clear understanding of the modes of infection. Approached in that way, WHO asserted that there was no disharmony between halting the spread of the epidemic and respecting basic human rights. Indeed, the only real hope of securing the cooperation of individuals in their own protection and that of others was by the assurance of their fundamental rights. Only in this way could the important messages about HIV/AIDS be transmitted effectively to those most at risk. In that sense, respect for human rights sustained the public health strategies which WHO advocated.

In Australia, Federal laws and policies were adopted which, generally speaking, conformed to the WHO standards. Some States proved more reluctant, notably Tasmania which has adhered to the laws criminalising homosexual conduct. Such laws are wholly intolerable on human rights grounds. But they are also inimical to a successful strategy against the spread of HIV/AIDS. The Tasmanian obduracy has now produced an international initiative to which I shall return.

The WHO programme on HIV/AIDS has included Expert Groups quite similar to the OECD Expert Groups on privacy and data security on which I have served. One of these, for example, concerned the special problem of AIDS in prisons. In 1987, GPA summoned a meeting

of specialists from twenty-six countries to Geneva to draw up guidelines to influence the policies of prison officials throughout the world. At the end of the consultation, a statement, reached by consensus, was approved.[26] This is a common procedure adopted by WHO to provide guidance to member countries from the international pool of expertise available for dealing with major world health problems, such as HIV/AIDS.

The Prison Guidelines drew attention to the special risks of intravenous drug use, prostitution and "situational homosexual behaviour" in the prison environment. They laid down a number of rules including in relation to the education of the prison population about HIV/AIDS and its modes of transmission. The expert report noted:

> *"Homosexual acts, intravenous drug abuse and violence may exist in prisons in some countries in varying degrees. Prison authorities have the responsibility to ensure the safety or prisoners and staff and to ensure that the risk of HIV spread within prison is minimised. In this regard, prison authorities are urged to implement appropriate staff and inmate education and drug user rehabilitation programmes. Careful consideration should be given to making condoms available in the interests of disease prevention. It should also be recognised that, within some lower-security correctional facilities, the practicability of making sterile needles available is worthy of further study."*

Perhaps more boldly the experts concluded:

> *"Governments may wish to review their penal policies particularly where drug abusers are concerned in the light of the AIDS epidemic and its impact on prisons."*[27]

Advocates of reform of correctional services practices in Australia have latched onto these WHO recommendations to stimulate changes in Australian prison policy. Such principles, coming from an international agency of the highest repute and professionalism, have assisted advocates who have urged the provision of condoms and the

availability, at least, of cleaning bleach for such needles as exist within the prison community. That such instruments for drug injection exist is clear. Unless prison authorities can guarantee a total removal of such instruments from the prison environment, they have a clear responsibility to afford protection to prisoners and those in intimate contact with them.[28]

Amongst the other activities of WHO, by which the influence of its opinions is exerted, are regional workshops. One such workshop was held in Seoul, Republic of Korea, in July 1990. In my capacity as a member of GCA, I took part in the workshop. So did another Australian lawyer, Mr Philip Bates, a Sydney barrister specializing in health law. To the workshop were invited public health and legal officials from Asian and Pacific countries: many of them on the brink of developing for the first time laws and policies to deal with HIV/AIDS. The features of the epidemic in the region were explored. But so were the strategies adopted by WHO. In the result, by consensus, a series of guidelines were developed which laid out a checklist to be considered in the preparation of any legislation. That checklist, in turn, drew on the experience of countries further down the track, such as Australia. In this way, some of the more extreme (and, as it is considered, inefficient) legal responses to the epidemic may be avoided. Furthermore, by this procedure of regional consultation, the commitment of WHO itself to the protection of basic human rights in the midst of this epidemic, potentially so damaging to basic human rights standards, may be translated into positive action worldwide.[29]

I would not, by these remarks, wish to imply that Australia's record in respecting human rights in the face of the epidemic of HIV/AIDS has been perfect. On the contrary, numerous reports demonstrate the gaps in our own strategies.[30] Nevertheless, we

have done better than we did in most earlier epidemics and than many comparable countries have done in relation to this epidemic. The consistent instruction of WHO, as the international agency with a global responsibility for combating the AIDS epidemic, has helped to steady our legislative course. It has provided an important source of support to politicians and administrators, sometimes faced with noisy calls to adopt popular legal responses which are, at once, oppressive and ineffective.[31]

Labour laws: My most recent experience with the impact of international norms relevant to human rights has occurred in relation to the labour laws of the Republic of South Africa.

It arose out of my election to The Fact-Finding and Conciliation Commission on Freedom of Association of the International Labour Organisation (ILO). The ILO, one of the oldest agencies of the United Nations, was actually established under the League of Nations by the Treaty of Versailles in 1919. The Commission of the ILO was established in 1950.[32] Its function is to examine such cases of alleged infringements of trade union rights as are referred to it, to ascertain the relevant facts, to discuss with the government concerned any perceived departure from ILO standards and thereafter to report to the Governing Body of the ILO. Where a Member country is a party to a Convention adopted by the ILO, a complaint may sometimes be investigated without consent. However, where a Member country is not a party to the Convention concerned, where the state complained of is not a Member country and in certain other cases, consent of the Government concerned is required before an investigation can take place.

In 1988, the Congress of South African Trade Unions (COSATU) lodged with the ILO a complaint against the Republic of South Africa. Because that country had ceased to be a member of the ILO in

1966, it was necessary for the matter to be referred to the Economic and Social Council (ECOSOC) of the United Nations. South Africa has remained a member of that Organisation. ECOSOC requested South Africa to give its consent to the COSATU complaint being referred to the Commission of the ILO. Ultimately, that consent was forthcoming. But not before the Government of South Africa had secured the enactment by Parliament of reforms to its labour laws which, it claimed, removed the source of COSATU's complaint.

Essentially, COSATU's complaint was that amendments to the *Labour Relations Act* 1956, effected in 1988, had favoured and protected unions open only to white members. A number of complaints were also made relating to the alleged impingement by the Act upon the freedom to withdraw labour (or strike) guaranteed implicitly by ILO Conventions and, as it was put, by customary international law supported by such Conventions.

By the amending Act of 1991, the offending provisions of the *Labour Relations Act* were removed. The suggested source of racial discrimination in registering unions was repealed. The prohibition on sympathy strikes was also repealed. The presumption of union liability for an illegal strike of its members was removed. Other specific complaints listed by COSATU in its original invocation of the jurisdiction of the ILO Commission were attended to.

Nevertheless, as an aspect of the dramatic changes now proceeding in South Africa, the Government of that country ultimately agreed to a COSATU request for an expansion of the terms of reference of the panel of the Commission which the ILO Governing Body established. That panel comprised Sir William Douglas (past Chief Justice of Barbados and a member of the Privy Council); Justice Rajsoomer Lallah (Senior Puisne Judge of the Mauritius Court of

Appeal) and myself. As expanded, the panel was mandated to:

> *"... deliberate on and consider the present situation in South Africa insofar as it relates to labour matters with particular emphasis on freedom of association."*[33]

The result was a most interesting examination during three weeks in South Africa of a vast amount of evidence relating to the law and practice of that country on industrial relations. Its purpose was to scrutinise South African law and practice against the established ILO standards. The principal relevant instruments on freedom of association to which the evidence and submissions of the parties were addressed included the *Declaration of Philadelphia* adopted at the General Conference of the ILO in 1944; the *Convention Concerning Freedom of Association and Protection of the Right to Organise* (No 87),1984 and the *Right to Organise and Collective Bargaining Convention* (No 98), 1949.

The findings of the panel of the Commission are contained in the report to the Governing Body of the ILO, just tabled. The Commission found that, in important respects, South African labour law (even as amended in 1991) fell short of compliance with the standards of the ILO which the government of South Africa agreed to "associate itself with". Particular attention was called to the need to provide, by law, for protection of the rights of farm workers and domestic workers, presently excluded from the operation of the *Labour Relations Act*. The strict limitations upon members of the public service joining unions of their choice were also found to conflict with ILO standards. Many of the rules governing the constitutions of trade unions (such as those prohibiting political affiliation) were held to be in breach of the ILO Conventions. The cumbersome procedure for the registration of unions was found to be a potential inhibition upon freedom of association. The legal

restrictions on trade union activities which date from the apartheid days, when the African National Congress was "banned", were found to be incompatible with ILO norms. So were some of the provisions regulating the right to strike and permitting Executive Government interference in the collective bargaining process.

The documented evidence of interference by South African state organs in the internal union affairs of unions in that country was cited as totally incompatible with respect for freedom of association as guaranteed by international law. Covert funding of pseudo-union bodies inimicable to COSATU was condemned as incompatible with the independence and freedom of trade unions provided for by ILO principles. The lack of protection to unionists in the so-called "Homelands", to which South Africa has purportedly provided varying measures of "independence" during the time of apartheid, was called to attention. South Africa remains responsible in international law for those Homelands and for compliance, within them, with international law found in ILO standards.

The Commission emphasised that its conclusions were not based merely upon the personal opinions of its members. In every case, they were derived from the application to proved South African law and practice of the ILO Conventions mentioned above and certain other Conventions applicable to particular problems.[34] Also called in aid was the jurisprudence which has developed around these international conventions by the Governing Body decisions and the Recommendations and Findings of the Committee of Experts of the ILO on the Application of Conventions and Recommendations.[35] In this sense, the project was a normative one. The presentation of the report followed, therefore, a conventional pattern. The mandate of the Commission was explained. The evidence, as presented, was recounted. The findings on the evidence were recorded. Those

findings were tested against the applicable ILO norms. Conclusions were then stated, by reference to those norms. There followed a series of recommendations for action designed to bring the law of South Africa into conformity with ILO standards.

To some extent, the parties in South Africa, doubtless lulled by four decades of apartheid, were content to allow the division of trade unions upon racial lines to wither away over time. But the Commission had a greater sense of urgency on this issue. Its recommendation was imperative:

> *"No trade union or employer's organisation should be entitled by law to limit its membership by reference to race. There should be a transitional period during which a special officer should be appointed with a statutory duty to facilitate, within a given time, the removal of all provisions whereby membership of such organisations, or the holding of office in them, is confined to persons of a particular race."*[36]

Such racially based unions were found to be completely incompatible with the implications of free association contained in the ILO Conventions.

I do not pretend that the report of the ILO Mission will be a major factor in the current changes occurring in South Africa. But it does seem likely to me that it will influence the shape of future reforms of the *Labour Relations Act* of that country. It is interesting to observe the way in which the moral force of internationally accepted principles was accepted by all parties: as much by the Government of South Africa as by COSATU and employers' organisations. Whilst asserting some peculiarities of the local scene, the representatives of the Government, the unions and the employers acted upon the basis that it was highly desirable, if not imperative, to ensure that South African law and practice was brought into conformity with international principle. Within the changes which are occurring in that country, I would therefore expect the ILO

Commission report to be highly influential. It provides a good example of the way in which international principles relating to basic human rights (such as the right of free association and to withdraw labour) can be translated into action by international machinery which had no ultimate effective sanction other than the force of world opinion.

In closing this section it is perhaps worth noting the scrutiny of Australia's own industrial relations laws by organs of the ILO. Pending before the Committee on Freedom of Association is a complaint brought by the Confederation of Australian Industry. It alleges that the requirements of the Australian Federal statute, providing for a threshold number of members to secure registration,is a denial of the ILO guarantee of freedom of association and a breach of the convention. The complaint was lodged in December 1990. It received its first examination by the Committee in February 1992. This resulted in an interim decision under which both the complainant and the Australian government were asked to provide further information. Such information was provided in May 1992. It is anticipated that there will be a further investigation of the Australian law later this year. This is the only formal complaint concerning Australia's legislation before the ILO at this time.

Meanwhile, in 1989, the ILO Committee of Experts directed an inquiry to Australia about the state of Australian law concerning various issues relating to trade unions. These involve the protection of unions and their members against common law liability for legitimate union activities; the scope of s 45D of the *Trade Practices Act* (1974) (Cth) in its impact on unions; and the effective protection, in that regard, of the right to strike guaranteed, in effect, by the ILO Convention Number 97. The concerns foreshadowed by the Committee of Experts in 1989 were repeated in

1991. They led to another direct request for a response by the Australian Government in respect of the applicable Australian law. A response was prepared by the Australian Government. It was sent for comment to the ACTU and employers' organisations. Comments were provided by each of these for the ILO Committee of Experts. Included in the ACTU response were a number of criticisms about the recently enacted *Industrial Relations Act* 1991 (NSW).

At a meeting in March 1992, the Committee of Experts decided not to examine the Australian laws, and their conformity with ILO norms, until its next meeting in March 1993. So far, therefore, no action has been taken by the ILO organs against Australia in respect of its industrial relations laws. However, the present point is that, by participating in this way in international agencies, and by subscribing to the international treaties which they produce, Australia assumes obligations before the international community which bind it and which it has generally felt obliged to comply with. Especially if fundamental changes were to be introduced into Australia's industrial relations law in the future (as is sometimes predicted) the obligations of the ILO Conventions will certainly become an important factor in the local political and economic equation.[37]

Juvenile justice: In another field, in 1992, the suggested disconformity of an Australian statute with international standards became an important consideration in public and political debate.

I refer to the *Crimes (Serious and Repeat Offenders) Sentencing Act* 1992 (WA) enacted on the proposal of the Government of Western Australia. The Government's Advisory Committee on Young Offenders immediately made it plain that provisions in the proposed legislation allowing the imprisonment of juveniles of the Governor's pleasure, were "in clear breach of article 44 of the *International*

Covenant on Civil and Political Rights". The fact that the legislation was aimed at juvenile offenders as a discrete category was also said to raise a possible breach of article 56 of the *United Nations Guidelines for the Prevention of Juvenile Delinquency* 1990. Reference was further made to the United Nations *Convention on the Rights of the Child*, article 41, which dictates that any penalty must be consistent with the age of the child.

What it is important to note is that the need to ensure conformity to United Nations standards was not contested by the Government of Western Australia. The Premier (Dr C Lawrence) justified the legislation upon the basis of the "deficiency in the UN Guidelines".[38] Within Australia, the most serious agitation against the legislation arose from the conviction of many that, in operation, the legislation was aimed expressly at the Aboriginal community.[39] In a letter written to me following representations made by me for the Australian Section of the International Commission of Jurists, the Premier acknowledged the need to have the legislation comply with the "various international obligations". She expressed the view that the Act was consistent with those obligations. Nevertheless, she indicated that the Act would be the subject of further report by a Committee of the Legislative Council of Western Australia.

The influence of the ICCPR and the newly ratified *Convention on the Rights of the Child* upon the shape of the ongoing controversy in Western Australia, is to be welcomed. In the event that disconformity continues, procedures are now available, in the first instance through the Australian Human Rights and Equal Opportunity Commission and subsequently through the Human Rights Committee established under the *Optional Protocol* to the ICCPR, by which individuals in Australia can complain about such suggested

breaches of Australia's international obligations. Assuring such conformity has become a new factor in the political equation in Australia, wherever local legislation is deemed to depart from internationally accepted human rights standards. The sanction of access, ultimately, to the United Nations Committee, ensures that governments, and those advising them, will usually seek to conform to those standards. Where they do not, the advocates of human rights have an important new weapon in their armoury which they will not hesitate to use. In these direct and indirect ways, Australia is finally joining the international human rights movement. It is doing so without a formal national *Bill of Rights* of its own or of its region.

Homosexual offences: The last illustration I will mention in this list also arises specifically from Australia's ratification of the ICCPR and the *First Optional Protocol*. That ratification was the Government's Christmas gift to the people of Australia: coming into operation on Christmas Day 1991. The next day, Mr Nicholas Toonan of Hobart, Tasmania lodged with the United Nations Human Rights Committee the first Australian complaint invoking the *Optional Protocol* procedure.[40]

As background, it is relevant to state that Tasmania is now the only Australian jurisdiction which criminalises homosexual acts between consenting adults in private. Although formerly the criminal laws of the other Australian jurisdictions so provided, one by one (and in different terms) such laws have been repealed and reformed. An attempt by the last Tasmanian Government to amend the relevant provisions of the Tasmanian *Criminal Code* foundered in the Legislative Council. The Bill proposing the reforms was part of a "package" of measures which represented the Government's response to the HIV/AIDS epidemic. The Upper House balked at the clauses

relating to changes in the criminal law. Mr Toonan, although involved in the Tasmanian response to HIV/AIDS, did not initiate his complaint upon the basis of the adverse impact which criminal stigmatization of homosexual and bisexual persons would cause for the attempts to limit the spread of HIV. Specifically, he asserted that the Tasmanian laws represented an affront to basic human rights. He invoked articles 2.1, 17 and 26 of the ICCPR.

The Federal Attorney General has established within his Department in Canberra a Unit for processing matters relevant to Australia's accession to the *First Optional Protocol*. Towards the end of May 1992 the Attorney General received from the Centre for Human Rights of the United Nations Office at Geneva copy of Mr Toonan's communication under the Protocol. Under rule 91 of the Human Rights Committee's Rules of Procedure, the Australian Government has been requested to provide information relevant to the admissibility of Mr Toonan's communication. That response was required by 14 July 1992. Rule 91 requires consideration, relevantly, of whether the complainant is a victim of the violation alleged and whether the individual has exhausted "all available domestic remedies".

Mr Toonan has not himself been prosecuted under the criminal laws of Tasmania. One of the sources of complaint about those laws is the unpredictable use of prosecutions and the "chilling effect" which susceptibility to prosecution causes for the exercise of the rights guaranteed by the ICCPR. In the context of the European Convention, these considerations have been held sufficient to support complaints of a similar kind against the then laws of the Province of Northern Ireland in the United Kingdom and of the Republic of Ireland. Most observers believe that the decisions of the European Court of Human Rights in the *Dudgeon* and *Norris* cases

represented an insistence upon the acceptance throughout Ireland of the common European standard for observance of the human right to privacy in respect of sexual orientation and adult, consensual sexual expression.

The United Nations Human Rights Committee must, of course, operate in a global context. This is much wider than that governed by the *European Convention on Human Rights*. In 1982, the Human Rights Committee examined a communication which it had received under Article 5 para 4 of the ICCPR containing allegations concerning discrimination on the ground of homosexuality relevant to broadcasting and free speech. The particular complaint concerned the imposition of legal sanctions against participating in radio or television programmes dealing with homosexuality. The Committee reported[41] that public morals differed widely in member countries. There was no universally accepted common standard on this topic. Accordingly, it found that the Committee could not question the decision of the authorities of the State party that radio and television were not the appropriate fora in which to discuss issues relating to homosexuality. Accordingly the Committee was of the view that there had been no violation of the rights of the authors of the communication. Three minority, but not dissenting, opinions were appended to this report.

There are a number of reasons why the 1982 report provides little guidance to the prospect of Mr Toonan's communication. It concerned Article 19, not Article 17. It preceded relevant decisions of the European Court of Human Rights. It contained hopeful minority views. It did not concern a country like Australia where there is now (as in Europe) a continent-wide standard which only the laws of Tasmania now breach. Mr Toonan is subject to those laws.

It may be hoped that Australia, through its Federal Government

which has invited this most beneficial procedure, will not suggest the inadmissibility of Mr Toonan's complaint. Specifically it is to be hoped that no narrow view will be taken of the exhaustion of domestic remedies. In all truth, the advocates of reform of Tasmania's criminal laws on homosexual conduct have exhausted their remedies in Tasmania. Successive Federal Governments, of both political persuasions, have a good record on reform of the law in this area. Reflective of the Australia-wide standard, our country's international representative should not seek to protect the unacceptable departure from basic human rights norms still reflected in Tasmania's laws. They should neither do so upon the admissibility of Mr Toonan's complaint nor upon the fact that the laws in question are those of a State in the Australian Federation. An important blow for basic rights would be achieved if the Australian Government actually supported Mr Toonan's complaint. This it could easily do by reference to the authority of the European Court of Human Rights. Its decisions are relevantly applicable in a society such as Australia. Such a response by Australia would then expose the Tasmanian laws for what they are: a serious departure from basic human rights, a source of stigmatization, criminalisation and alienation of good citizens and (incidentally) an impediment to the national struggle against HIV/AIDS.

DOMESTIC APPLICATION OF HUMAN RIGHTS 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.[42]

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*.[43] 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.[44] In this way, leading judges many of the Commonwealth countries accepted a simple idea. In most of the jurisdictions represented, 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, including 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 (the Hon 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*.[45] 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 above series is now summoned by the Lord Chancellor of the United Kingdom to take place at Oxford University, England in September 1992. I have been invited to attend. Many leading English judges will be there. It is hoped that, for the first time, a participant from the former Eastern Bloc will take part.

The controversy: The use of international human right standards in this way, at least in Australia, is still somewhat 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 municipal law as such.[46] 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, until now, 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 and lawmaking process 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 generally self-executing. They create legal rights and liabilities without the need for legislation by Congress.[47] 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*[48] Justice Stevens endorsed the opinion (supported by Justices Blackmun, Brennan, Marshall and O'Connor) that:

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

Justice Scalia (with whom Chief Justice Rehnquist and Justice White 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."[49]

A year later in *Stafford v Kentucky*[50], with a change in the composition of the Court, Justice Scalia opinion prevailed. He was joined on that occasion by Justice Kennedy and, on this occasion, Justice O'Connor. According to commentators, this has "cast a dark shadow over the internationalist *dictum* previously accepted by the United States Supreme Court". Justice Brennan'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, Justice Scalia's "classical" or "statist" view has prevailed in the United States.[51]

The position now reached accords entirely with the opinion of

Professor Robert H Bork:[52]

> *"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."*[53]

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.[54]

In Britain, the conventional or statist view has reigned until very recent times. By and large, its courts 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.[55] Approaching such rights by the "austerity of tabulated legalism" has produced sharp differences of opinion even 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*.[56] A commentator, contrasting the clash of opinions of Lords Hailsham, Diplock and Bridge (on the one hand) and Lords 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."*[57]

In fact, these cases were later 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 very 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*[58] 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."*[59]

In that case, no ambiguity could be found. But it was different in *Derbyshire County Council v Times Newspapers Limited*.[60] The question there 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[61] 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"*.[62] Lord Justice Butler-Sloss stated the principle thus:[63]

> *"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: - There being no 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 not so.

There is now, indeed, 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, like Mr Toonan, 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, in this way, 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 offered no binding authority on the point or where a local statute was ambiguous. The cases in which I expressed these views have included matters where a bankrupt was deprived of civic rights[64]; a litigant complained of apparent bias of a judge who had previously, as a barrister, enjoyed a retainer from the opponent[65]; an accused claimed to have a trial on criminal charges without undue delay[66]; a deaf mute claimed to have an interpreter present, translating the proceedings of the court even during legal argument[67]; and a litigant in person asserted that he should suffer no discrimination for the lack of a lawyer.[68] There have been many other cases.

Generally the other judges of the Court have opted for a different approach. Often they ignored the point sometimes, they have found more attractive the "classical" or "statist" view which would bar even consideration of or reference to international human rights law by way of analogy.[69] On the other hand, more recently, there have been distinct signs of a greater willingness of Australian judges to follow the course urged in the *Bangalore Principles* and followed by me.

In the High Court of Australia, I believe that Justice Deane

did so in *J v Lieschke*.[70] 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 ..."*[71]

In one case in the New South Wales Court of Appeal, Justice Samuels 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).[72] In dealing with the right of a mute to an interpreter, Justice Samuels 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, Chief Justice Nicholson (in a dissent later upheld by the High Court) recanted an earlier adherence to the "classical" or "statist" view.[73] In *Re Marion*[74] his Honour 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."*

Re Marion was appealed to the High Court of Australia. In a sense, Chief Justice Nicholson's opinion went further than the *Bangalore Principles* require. The obligations of those

principles are neatly expressed by Lord Justice Butler-Sloss in a passage in the *Derbyshire Council Case* which I have cited. The High Court's decision in *Marion*[75] casts no new light on the duty of Australian courts. But neither did it contradict the *Bangalore Principles*.

The *Mabo* decision:[76] 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.

Reversing the long-held understanding of Australian common law, the High Court decided that the form of native title of the Australian Aboriginals was recognised by the law which, in the cases where it had not been extinguished, protected the entitlements of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands. Accordingly, the Court held (with Justice Dawson alone dissenting) that, excepting for the operation of Crown leases, the land entitlement of the inhabitants of the Murray Islands in the Torres Strait north of Queensland was preserved, as native title, under the law of Queensland. The doctrine of *terra nullius* was exploded.

But for the moment, it is important to notice a remarkable passage in the judgment of Justice Brennan. Writing with the concurrence of Chief Justice Mason and Justice McHugh, his Honour said this:[77]

> *"Whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. 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 (see Communication 78/1980 in Selected Decisions of the Human Rights Committee under the Optional Protocol, vol 2, p 23) brings to bear in 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. The common law doctrine foundered on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organisations of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands." (emphasis added)

This passage, and indeed the holding of the High Court in *Mabo*, points the way to the future development of the Australian common law in harmony with the developing principles of international law. It is an extremely 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. 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 proper account the growing world body of human rights jurisprudence. Our courts 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 in Australia, international statements of human rights have been enacted as part of

domestic law, Federal or State. But generally it is not so. Nor does Australia as a whole have a constitutional national *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.

There are, nonetheless, two important new vehicles which should be kept in mind in considering what should be done to provide practical protection of basic rights.[78] The first depends upon the utilisation of the many international agencies with specialised objectives relevant, directly or indirectly, for the protection of human rights in Australia. By reference to the work of the OECD, WHO the ILO with which I have been associated and the future rôle Australia of the Human Rights Committee, I have suggested practical ways by which international human rights norms have been (and will be) incorporated 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 generally 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 international agencies to secure the importation of international norms into 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. 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 could, of course, 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 and elsewhere, 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 entirely 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 new 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 folly.

Courts may adhere to their fancies and refuse to have anything to do with international human rights norms until they are expressly incorporated into domestic law by valid local legislation - Federal

or State. But I believe that 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 great 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.

Australian judges, distracted by their busy court lists, are often unfamiliar 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 and argument which call that jurisprudence to notice, where it is relevant. And where appropriate, by urging 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 and judges. The provincialism of lawyers generally, and of Australian lawyers in particular, is profoundly discouraging. We must do better in the years ahead. The means of doing better are now 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?

FOOTNOTES

* 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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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. See s 7.

13. See eg The Australian Law Reform Commission, *Criminal Investigation* (ALRC 2), 1975, 59 para 135.

14. See T Campbell, "Introduction: Realising Human Rights" in T Campbell, D Goldberg, S McLean and T Mullen (eds) *Human Rights: From Rhetoric to Reality*, 1986, 1. Cited P Bain, "Human Rights and a Ministry of Law" (1990) 64 ALJ 203.

15. (1985) 159 CLR 70.

16. *ibid*, 160f.

17. The Australian Law Reform Commission, *Privacy* (ALRC 22), 1983, vol 1, xxxvii.

18. *Council of Europe Convention*, cited ALRC 22, vol 1, 270.

19. See ALRC 22, vol 2, 269f.

20. *Ibid*, vol 2, 265.

21. *Id*, vol 2, 207.

22. M D Kirby, "Information Security - OECD Initiatives" (1992) *Computer Law & Security Rep* 102. Address to Japan

Information Processing Development Center Conference, October, 1991. To be published in *Australian Journal of Law and Information Science*, forthcoming.

23. See P C Sieghart, *AIDS and Human Rights: A UK Perspective*, BMA Foundation for AIDS, 1989, London. See also L J Moran "HIV, AIDS and Human Rights" (1990) 12 *Liverpool Law Rev* 3 and UN Centre for Human Rights, *Report of an International Consultation on AIDS and Human Rights*, Geneva, 1989. For applications of the *European Convention* to the benefit of persons with AIDS, see *X v France*, unreported judgment of the European Court of Human Rights noted *Times Law Reports* 20 April 1992.

25. World Health Organisation, Global Commission on AIDS, *Annual Reports* 1989 *et seq*.

26. World Health Organisation, *Consultation on Prevention and Control of AIDS in Prison*, 26-28 November 1987, WHO, Geneva. See also M D Kirby *AIDS Strategies and Australian Prisons* 1990 South Australian Justice Foundation Administration Foundation Oration, Adelaide, 1990.

27. *Ibid*, cited in Oration, *loc cit*, 9-10.

28. H Heilpern and S Egger, *AIDS in Australian Prisons: Issues and Policy Options*, report commissioned by the Federal Department of Community Services and Health, Canberra, 1989. Cf R M Douglas *et al*, "Risk of Transmission of the Human Immunodeficiency Virus in the Prison Setting" (1989) 150 *Medical Journal of Australia* 722.

29. World Health Organisation, Asia and Pacific Region, *Workshop on Guidelines on legislation on HIV/AIDS*, Seoul, Korea, 1991.

30. See eg United Nations, Economic & Social Council, report by Special Rapporteur (L V Quirós) *Discrimination against*

HIV-infected people or people with AIDS, New York, DOC E/CN.4 sub 2/1991/10. See also New South Wales Anti-Discrimination Board, *Discrimination - The Other Epidemic*, Report of the Inquiry into HIV and AIDS Related Discrimination, 1992. Cf Victorian Law Institute, Young Lawyers Community Issues Committee, *Aids and Discrimination*, Record of a Seminar held in Melbourne on 19 July 1991.

32. See International Labour Organisation, Minutes of the Governing Body, 110th Session, 62-90. The establishment and procedures of the ILO Commission are explained in Chapter I of its report *Prelude to Change: Industrial Relations Reform in South Africa*, ILO, Geneva, 1992.

33. ILO Report, above, n 32, para 43.

34. See eg *Workers' Representatives Convention* 1975 (No 135).

35. See ILO, *Freedom of Association and Collective Bargaining - General Survey of the Committee of Experts on the Application of Conventions and Recommendations*, ILO, Geneva, 1992; *ibid*, *Freedom of Association - Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, 3rd ed, Geneva, 1985.

36. ILO Report on South Africa, Chapter 14, Recommendations.

37. See International Labour Organisation *Constitution*, Articles 26-29; see also C W Jenks, The International Protection of Trade Union Freedom, 1957, Stevens & Sons Ltd, London, 181ff (ILO "Allegations Procedure"). The relevant registration provisions of the Australian Federal statute referred to are found in *Industrial Relations Act* 1988 (Cth), ss 189(1)(b) and (j).

38. As reported in the *West Australian*, 6 February 1992, 1.

39. See "Juvenile Injustice in Western Australia" in Australian

Council of Social Service, *Impact*, May 1992, 5.

40. United Nations, Human Rights Committee, *Rules of Procedure of the Human Rights Committee* (Doc CCPR/C/3/Rev.2), December 1989.

41. See United Nations, Human Rights Committee, *Report*, UN Doc A/37/40, annex xiv, para 18-24, 1982. The report is extracted in E Lawson, *Encyclopaedia of Human Rights*, Taylor and Francis Inc, New York, 1991, 732f. For the decisions of the European Court of Human Rights see *Dudgeon v United Kingdom* (1982) 4 EHRR 149 (ECHR) and *Norris v Ireland* (1991) 13 EHRR 186 (ECHR).

42. 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.

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

44. 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.

45. The *Abuja Confirmation* is found in Commonwealth Secretariat, *Developing Human Rights Jurisprudence*, London, 1992, 15f.

46. See eg *Koowarta v Bjelke-Petersen & Others* (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.

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

48. 109 S Ct 2687 (1988) (SC).

49. *Ibid*, 2717.

50. 109 S Ct 2969 (1989) (SC).

51. 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).

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

53. *Ibid*, 9-10.

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

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

56. [1983] 1 AC 719 (PC).

57. *Bradley, op cit* n 46, 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).

58. [1991] 1 AC 696 (HL).

59. [1991] 1 AC 696, 747 (HL); [1990] 2 WLR 787 (CA).

60. [1992] 3 WLR 28 (CA).

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

62. [1993] 3 WLR 28 at 43.

63. *Ibid*, 60.

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

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

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

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

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

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

70. (1987) 162 CLR 447.

71. R 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.

72. *Gradidge* (above), 426.

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

74. [1991] FLC #92-193 at 78, 301 (F Fam C).

75. *Secretary, Department of Health and Community Services (NT) v J W B & S M B* (1992) 66 ALJR 300 (HC).

76. *Mabo v Queensland* (1992) 66 ALJR 408 (HC).

77. *Ibid*, at 422. Emphasis added.

78. I leave aside invocation of the *Bill of Rights* 1688. See *R v Arthur Stanley Smith* (1991) 56 A Crim R 148, 159 (NSWCA).