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Relationship of international law and domestic law

One of the critical problems for international law concerns the relationship of that body of law with domestic or municipal law. With a growing momentum since the establishment of the United Nations Organisation in 1945, the international community has developed international law in many branches. International treaties govern a wide, and growing, sphere of activity hitherto reserved to national and subnational law-makers. Additionally, international customary law has developed in ways analogous to the growth of the common law itself. In a sense, these developments simply reflect the global nature of many issues in today's world, the global challenge of many problems (such as those arising from nuclear materials, global warming and AIDS), the rapid increase in transcontinental communications (whether by telecommunications, informatics or the jumbo jet) and the steady advance of the institutions of international government.

Despite these developments, the nation state still reigns sovereign as the principal collective entity for the purpose of international law. The United Nations *Charter* and the *International Bill of Rights* promise the right of self-determination to "peoples". Such "peoples", from the Tibetans

to the Kurds to the Bosnians, the Cri and the Australian Aboriginals, assert their right of self-determination with growing insistence. But for the most part, the nation state resists intrusion into its law-making affairs of international agencies and international law. It does so at least to the extent that international law is deemed excessive or incompatible with national sovereignty.

One of the principal movements of international law since 1945 has been the development and expression of basic human rights in the instruments prepared by many of the agencies of the United Nations and by other bodies within their particular spheres of competence. The issue, then, is how the momentum towards the establishment of international standards of basic human rights is to be utilized and, in a way compatible with national sovereignty as it is itself developing, the international principles on human rights applied, or reflected, in domestic lawmaking.

This problem has been considered by a series of judicial colloquia organised by the Commonwealth Secretariat based in London. The series began in February 1988 at Bangalore, India. It was initiated by Justice P N Bhagwati, the former Chief Justice of India.

The *Bangalore Principles*, expressed by the participants in that meeting, have been reproduced in this *Journal*.[1] In essence, they recognised that international law, including on human rights, is not (at least in most countries of the common law) part of domestic law, as such. But judges in their daily work have to make choices where there is a *lacuna* in the common law or where a statutory or constitutional provision is ambiguous. It is then that judges have a legitimate entitlement to have regard to basic international principles of human rights (and the jurisprudence developing around those principles) in filling the *lacuna* or resolving the ambiguity. The *Bangalore Principles* also called

upon the governments of countries within the Commonwealth of Nations to promote knowledge amongst judges and lawyers of the international jurisprudence of human rights.

The Bangalore meeting was followed by similar judicial colloquia held successively in Harare, Zimbabwe (1989); Banjul, The Gambia (1990); and Abuja, Nigeria (1991). The Commonwealth Secretariat, in conjunction with another sponsor of the series, Interights (the International Centre for the Protection of Human Rights) also in London, aided by funding from the Ford Foundation, recently published the conclusions of each of these meetings reinforcing the Bangalore themes.[2]

In many countries of the Commonwealth of Nations, post-colonial constitutions contain Bills of Rights expressed in fairly common terms of broad generality. These formulae have provided the means by which, where desired, much international jurisprudence on human rights can be imported into domestic law. In other "older" countries of the Commonwealth, Bills of Rights, although not originally included in constitutional arrangements, have lately been added. Thus the Canadian *Charter of Rights and Freedoms* came into force in April 1982. Still more recently, the New Zealand *Bill of Rights Act* 1990 has come into operation as an extra constitutional statement of basic rights.[3]

It is in countries such as Australia and the United Kingdom, with very few constitutional guarantees of basic rights, that the *Bangalore Principles* perhaps have their greatest significance. Such countries are not without fundamental and constitutional guarantees of rights. The *Magna Carta* and the *Bill of Rights* of 1688 still operate but within a relatively limited sphere.[4] In the United Kingdom, a stimulus towards attention to fundamental human rights, as stated in international and regional

instruments, has been provided by the submission of the decisions of the courts of that country to scrutiny in the European Court of Human Rights. That Court has frequently found that decisions of British courts expressing the law of the United Kingdom do not conform to the obligations accepted by that country under the *European Convention on Human Rights*.[5] Australia has not, until lately, been subject to any equivalent external stimulus. However, in December 1991, following Australia's accession, the first *Optional Protocol* to the *International Covenant on Civil and Political Rights* came into force in relation to Australia. Henceforth, persons disaffected by Australian legal decisions, having exhausted their domestic remedies, are entitled to lodge a complaint with the Human Rights Committee of the United Nations. The first such complaint has already been lodged. It relates to the operation of Tasmanian laws on homosexual offences. The European Court of Human Rights in Strasbourg and the United Nations Human Rights Committee in Geneva and New York represent two of the principal agencies of the international community which are developing reasoned and articulated decisions upon the meaning and requirements of international human rights norms.

Until lately, there has been a controversy in England as to whether the *European Convention*, the *International Covenant* or other international human rights norms have any relevance at all to domestic law, except where specifically incorporated into United Kingdom law by an Act of Parliament or other appropriate means. Doubt concerning the international standards, and their use in domestic law, was cast by some of the observations of the House of Lords in *R v Home Secretary; ex parte Brind*.[6] There were similar decisions in Australia in earlier times.[7] However, lately, the tide of judicial opinion in both countries appears to

have turned.

In England, the Court of Appeal unanimously accepted the legitimacy of resolving ambiguity in the common law by reference to fundamental human rights norms in *Derbyshire County Council v Times Newspaper Limited*.[8] This decision is subject to an appeal to the House of Lords which is expected to be decided early in 1993. In Australia, in *Mabo v Queensland*[9] Justice Brennan (with the concurrence of Chief Justice Mason and Justice McHugh) gave the green light to Australian courts in these terms:[10]

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

Judicial papers describe changing scene

It was against this background of international and domestic law that the participants in the fifth judicial colloquium of the Bangalore series collected at Balliol College, Oxford University in England in September 1992. The convenor of the conference was the Lord Chancellor (Lord Mackay of Clashfern). He chaired the first day of the session, the balance of the meeting being chaired by Lord Browne-Wilkinson. Lord Templeman also participated in the first day and other judges from all parts of the United Kingdom participated, including Lord Justice Balcombe of the English Court of Appeal.

Judges from sixteen Commonwealth countries took part in the meeting, including the Chief Justices of Jamaica, Nigeria, Pakistan and Zimbabwe. The President of the New Zealand Court of Appeal (Sir

Robin Cooke) also participated. There were four judges from outside the Commonwealth. They were the Hon Rolv Ryssdal (former Chief Justice of Norway and now President of the European Court of Human Rights); Dr Laszlo Solyom (President of the Constitutional Court of Hungary); Justice Niall McCarthy (Republic of Ireland) and Judge Louis Pollak (Judge of the United States District Court (Third Circuit)). The judicial participants were assisted by Professor Rosalyn Higgins QC, a member of the United Nations Human Rights Committee (United Kingdom). One of the judicial participants in each of the colloquia has been Justice Rajsoomer Lallah, Senior Puisne Judge of Mauritius. He has been a long-time member, and for a time Chairman, of the United Nations Human Rights Committee. He was recently re-elected to the Committee at the same time as Justice Elizabeth Evatt of Australia was elected for a four year term.

Before the meeting was a series of papers prepared by participants, with predictable judicial efficiency, in advance of the assembly. The first paper by Lord Mackay examined "The Rôle of the Judge in a Democracy".[11] The paper laid emphasis on the need for new judicial skills in case management and the legitimate rôle of judges, by public discussion, including in the media, in contributing to community understanding of their work and the complex legal issues which they face. Lord Mackay predicted the appointment of more women and members of ethnic minorities to the Bench in the United Kingdom. He suggested that this development was required because of the "heavy matters of social policy" which are left by Parliament to the common law.

This paper was followed by one by Justice P N Bhagwati on judicial balancing of the virtues of activism and restraint.[12] Justice Bhagwati emphasised the restraints which are in place to prevent judges going beyond their proper judicial function. But he

stressed the large area for choice which this still left to judges in respect of which they required guideposts of principle. It was here that the jurisprudence of human rights could sometimes be of help.

Professor Rosalyn Higgins presented her paper on the relationship of international and domestic law. She traced, mainly by reference to United Kingdom decisions, the changes in the law during the course of this century. She suggested that there had been a "certain lack of rigour" in judicial consideration of the subject. She claimed that the "general rules of international law", whether on human rights or on any other topic, were "part of the law of the land". And she asked the participants to answer the question of how, if international law was not itself part of local law, it could be used as a "source" for such law.[13]

Justice Lallah followed with his review of the *International Covenant* and the work of the Human Rights Committee of the United Nations in dealing with cases communicated under the *Covenant*.[14] Included in the papers of the conference were copies of the *Covenant* and various other international human rights instruments.

Justice Enoch Dumbutshena, former Chief Justice of Zimbabwe, presented a paper in which he described, in practical terms, the use made of international human rights norms during his period of service on the judiciary of Zimbabwe.[15]

There followed a paper by this writer concerned with Australian use of human rights norms.[16] A number of decisions of the New South Wales Court of Appeal were referred to[17] and described to the participants. The decision in *Mabo* in the High Court of Australia was described and an assessment made of its possible impact on the development of Australian jurisprudence in this area. The meeting was held before the decisions of the High Court in the

Australian Capital Television case concerning rights implied in the very nature of the Australian constitutional system of government.

The writer's paper was followed by one on administrative justice, given by the Chief Justice of Zimbabwe (Gubbay CJ).[18] He described the special problems for the protection of basic rights during civil unrest and states of emergency. The final substantive paper was given by Sir Robin Cooke.[19] It began, provocatively enough, with the assertion that the principles of administrative law could be stated in ten words:

> *"The administrator must act fairly, reasonably and according to law."*

Sir Robin described the ways in New Zealand and other countries of the Commonwealth by which the courts, using developments of administrative law, had afforded important protection for basic rights.

Two additional papers were read. One was presented by the Right Hon Justice Telford Georges, who uniquely held the positions of Chief Justice of Tanzania, Zimbabwe and The Bahamas. He described the protection of human rights in the Caribbean.[20] Finally, the Chief Justice of Pakistan (Chief Justice Zullah) tabled a paper on human rights in his country.[21] This addressed, in particular, the reconciliation of the fundamental principles of the religion of Islam and the norms established in international human rights law. The Chief Justice of Pakistan procured the addition to the final statement of the Balliol Conference of a reminder, by himself, that international human rights norms could not over-ride national constitutional standards. It seems plain that the harmonisation of universal human rights and the principles established by religious precepts (such as Islam) deserves further

attention at the international level.

Final statement reaffirms principles

The non-Commonwealth judges made notable contributions to the meeting, describing particular issues for human rights in their respective courts. Justice McCarthy (Republic of Ireland) drew attention to the fact that as the Balliol meeting was proceeding, representatives of the Republic of Ireland and Northern Ireland were meeting for the first time in Dublin in a session chaired by Sir Ninian Stephen of Australia. The Balliol participants expressed the hope that this meeting would find a source for resolution of current problems in the common adherence of Ireland and of the United Kingdom to international law and human rights. Tragically, a little more than a week after the Balliol meeting, Justice McCarthy and his wife were killed in a motor vehicle accident in Spain. The news of the loss of this fine lawyer and proponent of human rights shocked all those who took part in the colloquium at Balliol.

The final statement issued by the judges reaffirmed the principles accepted in the earlier judicial colloquia. They recognised that the means by which the principles became part of domestic law may differ from one country to another. But they asserted that the universal statements of human rights:

> *"Serve as vital points of reference for judges as they develop the common law and make the choices which it is their responsibility to make in a free and democratic society."*

At the end of their statement, the judges requested the Commonwealth Secretariat to provide the resources necessary to service the Commonwealth Judicial Human Rights Association established at the Abuja Meeting in Nigeria in 1991. Dissemination of knowledge about basic human rights throughout the Commonwealth was said to be an

urgent necessity and appropriate to the high ideals of the Commonwealth.

The closing dinner was addressed by the Secretary-General of the Commonwealth (Chief, the Hon Emeka C Anyaoku) (Nigeria). He emphasised the high importance attached by the Commonwealth of Nations to the principles of the rule of law and the protection of human rights. The Secretary-General's attention was drawn to the Balliol Statement of 1992 by Mr Anthony Lester QC, the President of Interights and one of the leading participants forces in the series of the Judicial Colloquia. The judges parted with expressions of friendship and a determination, in proper and lawful ways, to bring the basic principles of human rights down from the tablets of international treaties into the daily work of the courts of the common law operating throughout the Commonwealth of Nations and beyond.

FOOTNOTES

1. See (1988) 62 ALJ 531. See also (1988) 14 *Cwlth L Bulletin* 1196.
2. Commonwealth Secretariat and Interights, *Developing Human Rights Jurisprudence: Conclusions of Judicial Colloquia on the Domestic Application of International Human Rights Norms 1988-91*, London, 1991.
3. See eg *R v Toucher* [1992] 2 NZLR 257 (CA). Cf *R v Greer* Court of Criminal Appeal (NSW), unreported, 14 August 1992.
4. See eg *Jago v District Court of New South Wales* (1989) 168 CLR 23; (1988) 12 NSWLR 558 (CA); *Adler v District Court of New South Wales & Ors* (1990) 19 NSWLR 317 (CA); *Smith v*

The Queen (1991) 25 NSWLR 1 (CA) at 15.

5. See eg on matters such as freedom of expression, contempt law and homosexual offences. Cf T Opsahl, "The Co-Existence Between Geneva and Strasbourg - Inter-Relationship of the *International Covenant on Civil and Political Rights* and the *European Convention on Human Rights* and Their Respective Organs of Implementation" [1991] *Canadian Human Rights Year Book* 151, 153f; D Kinley, "Legislation, Discretionary Authority and the *European Convention on Human Rights*" in (1992) 13 *Statute Law Rev* 63, 70.

6. [1991] 1 AC 696 (HL) at 760.

7. See eg *Chow Hung Ching v The King* (1949) 77 CLR 449, 477; *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168, 200.

8. [1992] 3 WLR 28 (CA).

9. (1992) 66 ALJR 408 (HC).

10. *Ibid*, 422.

11. Lord Mackay of Clashfern "The Role of the Judge in a Democracy", in *Papers* of the Judicial Colloquium, Balliol College, Oxford, 21-23 September 1992, forthcoming publication of the Commonwealth Secretariat and Interights (hereafter *Papers*).

12. P N Bhagwati, "The Role of the Judiciary in a Democratic Society: Balancing Activism and Judicial Restraint" in *Papers*.

13. R Higgins, "The Relationship Between International and Regional Human Rights Norms and Domestic Law" in *Papers*.

14. R Lallah, "Notes on the *International Covenant on Civil and Political Rights* and some of its Case Law" in *Papers*.

15. E Dumbutshena, "Rôle of the Judge in Advancing Human Rights" in *Papers*.

16. M D Kirby, "The Australian Use of International Human Rights Norms - From Bangalore to Balliol: A View from the Antipodes" in *Papers*.

17. See eg *Jago* (above); *Smith* (above) and *Gradidge v Grace Brothers Pty Limited* (1988) 93 FLR 414 (NSW CA).

18. A R Gubbay, "Administrative Justice: Balancing Personal Freedoms and the Interests of the State - the Zimbabwean Position" in *Papers*.

19. R Cooke, "Empowerment and Accountability: The Question for Administrative Justice" in *Papers*.

20. T Georges, "The Protection of Human Rights Through Law in the Commonwealth Caribbean" in *Papers*.

21. M A Zulla, "Human Rights in Pakistan" in *Papers*.