INTERNATIONAL COMMISSION OF JURISTS

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A NEW MOVEMENT IN THE COMMON LAW - THE RECONCILIATION OF DOMESTIC LAW & INTERNATIONAL LAW, INCLUDING ON HUMAN RIGHTS

The Hon Justice Michael Kirby AC CMG

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The Hon Justice Michael Kirby AC CMG**

I regret it that I cannot participate in this important Colloquium. By this paper, I want to illustrate the growing impact of international law - including in the field of human rights - upon the legal systems which are based on the common law. This is a development which should be known to lawyers

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* Parts of this contribution appeared in an earlier form in the paper by the author "The Impact of International Human Rights Norms: 'A Law Undergoing Evolution'" (1995) 25 *Western Australian L Rev* 1.

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throughout the Commonwealth of Nations. It should be known to lawyers in Hong Kong.

In a chapter on "The Role of National Courts in the International Legal Process" in her recent book *Problems and Process - International Law and How We Use It*[1] Professor (now Judge) Rosalyn Higgins explains the need for a good grounding in both municipal and international law if there is to be a real understanding of the relationship between the two.

Competing theories about the relationship vie for acceptance. Monists assert that there is but one system of law, with international law as an element "alongside all the various branches of domestic law"[2]. For the monist, international law is simply part of the law of the land, together with the more familiar areas of national law. Dualists, on the other hand, assert that there are two essentially different legal systems. They exist "side by side within different spheres of action - the international plane and the domestic plane". Judge Higgins, looking at the question from the point of view of an international lawyer, goes on:

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1 Clarendon, Oxford, 1994 at 205.

2 *Loc cit.*

"Whichever view you take, there is still the problem of which system prevails when there is a clash between the two. One can give answers to that question at the level of legal philosophy; but in the real world the answer often depends upon the tribunal answering it (whether it is a tribunal of international or domestic law) and upon the question asked. The International Court of Justice has indicated that for it domestic law is a fact[3]. On some matters even an international court will need to apply this law ... But when the issue is whether an international obligation can be avoided, or excused, because of a deficiency or contradiction in domestic, then for an international tribunal the answer is clear - it cannot, and the obligation in international law remains. The domestic court may be faced with a difficult question, when the domestic law which is its day-to-day task to apply entails a violation of an international obligation. Domestic courts *do* address that problem differently. Leaving the theoretical aspects aside for a moment, it is as a practical matter difficult to persuade a nation court to apply international law, rather than the domestic, if there appears to be a clash between the two. But it is more possible in some quarters than in others. And, although I have sympathy with the view of those[4] who think the monist-dualist debate is passe, I also think it right[5] that the difference in response to a clash of international law and domestic law in various domestic courts is substantially conditioned by whether the country concerned is monist or dualist in its approach".

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[3] *Serbian and Brazilin Loans Case* (1929) PCIJ, Ser A Nos 20-1 pp 18-20; *Nottebohm Case*, [1959] ICJ Reps 4 at 20-1.

[4] J Frowein, 'Treaty-Making Power in the Federal Republic of Germany' in F Jacobs and S Roberts (eds) *The Effect of Treaties on Domestic Law* (1987) at 63.

[5] P Pescatore, 'Treaty-Making by the European Communities', in Jacobs and Roberts (eds) *The Effect of Treaties in Domestic Law* (1987) 171 at 191.

Judge Higgins writes, very frankly, about the attitudes and approaches of judges and lawyers in jurisdictions (such as most of those which derive their legal systems from England) who adhere resolutely to the dualist approach. They tend to lack a detailed knowledge of international law and a sympathy for its culture. They are "rather contemptuous of everything to do with international law, which they doggedly regard as 'unreal'"[6]. Others, who may be more sympathetic to international law, and impressed with its potential, invariably endeavour to locate the basis of their judgments in the more familiar domestic law. Still others "find international law potentially relevant and important and immerse themselves in it utterly prepared to pronounce upon it"[7].

A culture of monism or dualism is one which we tend to inherit from our place of birth or adoption. Hong Kong lawyers, like Judge Higgins and myself, have been brought up in the dualist school. Whilst international law was a subject taught at Law School, and was regarded as true law, it was on a different plane. It addressed itself to States and international organisations and their concerns. Rarely did it impinge upon

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[6] R Higgins, above n 1, at 206-7.

[7] R Higgins, above n 1, at 207.

domestic law, doubtless because of the discouraging attitude of the legal profession - a negative response born in the soil of dualism.

The old culture of resistance, or indifference to international law is now gradually changing. If one asks for a vision of the legal order in the twenty-first century which can already be perceived, one of great relevance to Hong Kong is the growing rapprochement which can be detected between international and domestic law. This is happening as a natural and inevitable result of the growing body and influence of international law. That body of law is responding to lessons drawn from the approaches of the principal legal systems of the world, reflecting the varied forms of civilisation which make the world up[8].

The High Court of Australia, like most ultimate national courts, pays the greatest of respect to established international law where it is relevant to cases before it. In opening a colloquium in the High Court building in Canberra in May 1996, called to honour the fiftieth anniversary of the International Court

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[8] C G Weeramantry, "The International Court of Justice in the Age of Multiculturalism", Inaugural Memorial Lecture in honour of Judge Nagendra Singh, Manuscript, 22 January 1996 at 27.

of Justice, the Chief Justice of Australia, Sir Gerard Brennan, collected some of the cases and referred to their use[9]:

> "In cases in this Court relating to Commonwealth power in respect of fisheries and territory below the low water mark *(Bonser v La Macchia*[10]*; New South Wales v The Commonwealth (Seas and Submerged Lands Case*[11] and *Raptis (A) & Son v South Australia*[12]) the reasons for judgment of Justices of this Court drew on the opinions of the Judges of the International Court in the *North Sea Continental Shelf Cases*[13] and the *Fisheries Case, United Kingdom v Norway*[14]. In cases relating to racial discrimination and Aboriginal land rights *(Koowarta v Bjelke-Petersen*[15]*; Mabo v Queensland [No 2] ("Mabo [No 2]"*[16] and *Gerhardy v Brown*[17]) reference was made to the judgments in *South West Africa Cases*[18]; the *Advisory Opinion on Minority Schools in Albania*[19]*; Namibia (SW Africa) Advisory*

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[9] F G Brennan, Fiftieth Anniversary of the International Court of Justice, Opening of Colloquium in *Papers of the Colloquium* published by the Australian Branch of the International Law Association pp 7-17.

[10] (1969) 122 CLR 177 at 186, 190, 201, 214; and see 215-216.

[11] (1975) 135 CLR 337 at 451-452, 454, 466, 475, 500-501.

[12] (1977) 138 CLR 346 at 387.

[13] [1969] ICJ Reports 3.

[14] [1951] ICJ Reports 116; [1952] 1 TLR 181.

[15] (1982) 153 CLR 168 at 205, 219.

[16] (1992) 175 CLR 1 at 40-41, 181-182.

[17] (1985) 159 CLR 70 at 128, 129, 135-136.

[18] [1966] ICJ Reports 3.

[19] (1935) Ser A/B No 64.

> *Opinion*[20]; *Advisory Opinion on Western Sahara*[21] and *Barcelona Traction, Light and Power Company Limited*[22]. In dealing with the sources and nature of international law, judgments in this Court in *The Commonwealth v Tasmania. The Tasmania Dams Case*[23] and *Polyukhovich v The Commonwealth*[24] drew on *Barcelona Traction,* the *North Sea Continental Shelf Cases* and *Nicaragua v United States of America*[25]. Nationality - a question that fell for consideration in *Sykes v Cleary*[26] - evoked references to the *Nottebohm Case, Liechtenstein v Guatemala*[27].
>
> A growing familiarity on the part of municipal courts and the practitioners who appear there with the judgments of the International Court of Justice will add to the increasing influence of international law on the municipal law of this country".

Chief Justice Brennan cited, with apparent approval, the remark of his predecessor, Sir Anthony Mason, describing the gradual erosion, in Australia, of the strict theory of dualism. Sir Anthony Mason had suggested that it was as "an overhang of the old culture in which international affairs and national affairs were

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[20] [1971] ICJ Reports 16.

[21] [1975] ICJ Reports 12.

[22] [1970] ICJ Reports 3.

[23] (1983) 158 CLR 1 at 222.

[24] (1991) 172 CLR 501 at 559-560.

[25] [1986] ICJ Reports 14. [1986] ICJ Reports 14.

[26] [1986] ICJ Reports 14.

[27] [1955] ICJ Reports 4.

regarded as disparate and separate elements". He foresaw that culture giving way to "the realisation that there is an ongoing interaction between international and national affairs, including law"[28].

Writing judicially in *Mabo v State of Queensland [No 2]*[29], as a step in his reasoning towards the conclusion that the "native title" of Australia's indigenous peoples had survived the acquisition of the Australian continent by the British Crown and its settlement by European colonists, Sir Gerard Brennan said of the influence of international human rights law:

> "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 indiscriminatory document 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*[30]

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[28] A F Mason, "The Influence of International and Transnational Law on Australian Municipal Law" (1996) 7 *Public Law Review* 20 at 23. Cf J Crawford and W R Edeson, "International Law and Australian Law" in K W Ryan (ed) *International Law in Australia,* 2nd ed, 1984, Sydney, 71 at 80-82.

[29] (1992) 175 CLR 1 at 42.

[30] See Convention 78/1980 in Selected Decisions of the Human Rights Committee Under the Optional Protocol, Vol 2, 23.

> 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. A common law doctrine founded 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 organisation of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional land".

In Australia, New Zealand, Britain and other countries of the common law which, until now, have adhered scrupulously to dualism, a change is gradually coming about. Hong Kong is bound to be influenced by this development unless it is to become a time capsule of law, frozen in its 1997 state[31]. Emphasis has also lately been placed on the need to rescue international law from a monochrome reflection of the great legal traditions of Europe. It should draw, in the future, upon the richness of the legal systems of other civilisations, including those in the Asian region[32]. A commitment to the universalistic ideals which underlie the concept, if not always the practice, of

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[31] Cf generally C J Weeramantry, *Nauru: Environmental Damage Under International Trusteeship*, OUP, Melbourne, 1992 noted (1992) 66 ALJ 762.

[32] C G Weeramantry in Nagendra Singh Lecture, above n 8, 6-7.

international law finds voice in the words of Mahatma Gandhi whom Judge Weeramantry of the International Court cites in his inaugural Memorial Lecture in honour of Judge Nagendra Singh[33]:

> "Indian culture is neither Hindu, Islamic nor any other, wholly. It is a fusion of all. ... I want the culture of all lands to be blown about my house as freely as possible. But I refuse to be blown off my feet by any. I refuse to live in other people's houses as an interloper, a beggar or a slave".

But it is the impact of these universal notions upon the reverse journey - international law affecting the development of municipal law - that I wish to explore in the balance of this paper. This is one of the most interesting developments that is occurring in domestic law at this time. It is doubly interesting because it is happening in countries such as Sri Lanka[34] as well as in the legal systems of Australia and the United Kingdom. Clearly, Hong Kong will not be exempt from this development The development has its critics as well as its supporters. I wish to describe the development in some of the jurisdictions which I

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[33] *Ibid,* 8, citing Gandhi.

[34] See eg *Velmurugu v Attorney General* (1981) 1 Sri Lanka LR 406; *Thadchanamoorthi v Attorney-General* FRC (1) 129 noted H Hannum, "The Status of the Universal Declaration of Human Rights in National and International Law" 25 *Georgia J Int'l and Comp L* 287 at 300 (1996).

know best. I will then attempt to draw some general conclusions.

THE BANGALORE PRINCIPLES

The traditional view of most common law countries has been the dualist one described by Rosalyn Higgins: that international law is not part of domestic law. Blackstone in his *Commentaries*, suggested that:

> "... the law of nations (whenever any question arises which is properly the object of its jurisdiction) is here [in England] adopted in its full extent by the common law, and is held to be part of the law of the land ..."[35]

Save for the United States, where Blackstone had a profound influence, his view came to be regarded, in English-speaking legal systems, virtually universally as being "without foundation"[36]. In Australia, in 1982, Justice Mason of the High Court of Australia explained the traditional position in these terms:

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[35] Quoted in *Chow Hung Ching v The King* (1948) 77 CLR 449 at 477.

[36] *Ibid.*

> "It is a well settled principle of the common law that a treaty not terminating a state of war has no legal effect upon the rights and duties of Australian citizens and is not incorporated into Australian law on its ratification by Australia ... [T]he approval of the Commonwealth Parliament of the Charter of the United Nations in the *Charter of the United Nations Act* 1945 (Cth) did not incorporate the provisions of the Charter into Australian law. To achieve this result the provisions have to be enacted as part of our domestic law, whether by a Commonwealth or State statute. Section 51(x) [the external affairs power] arms the Commonwealth Parliament ... to legislate so as to incorporate into our law the provisions of [international conventions]"[37].

More recently a new recognition has come about concerning the use which may be made by judges of international human rights principles and of their exposition by the international courts, tribunals and other bodies established to give them content and effect. This has happened as a reflection of the growing body of international human rights law, of the instruments both regional and international which give effect to it, and in recognition of the importance of its content.

An expression of what I take to be the modern approach in common law jurisdictions was given in February 1988 in Bangalore, India in the so-called *Bangalore Principles*. These

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[37] *Koowarta v Bjelke-Petersen* (1983) 153 CLR 168, 224-225: see comment by P J Downey "Law and the International Year of the Family" [1994] *NZ Law Journal* 433-434.

principles were agreed by a group of lawyers, mainly from Commonwealth countries. The meeting was chaired by Justice P N. Bhagwati, the former Chief Justice of India. I was the sole participant from Australasia. Amongst the other participants were Mr Anthony Lester QC (now Lord Lester of Herne Hill), Justice Rajsoomer Lallah (later Chief Justice of Mauritius) and Justice Enoch Dumbutshena (then Chief Justice of Zimbabwe). Joining the Commonwealth participants was a judge of the Federal Circuit Court in the United States, Ruth Bader Ginsburg (now a Justice of the Supreme Court of the United States).

Relevantly, the *Bangalore Principles* state, in effect:

(1) International law (whether human rights norms or otherwise) is not, as such, part of domestic law in most common law countries;

(2) Such law does not become part of domestic law until Parliament so enacts or the judges (as another source of law-making) declare the norms thereby established to be part of domestic law;

(3) The judges will not do so automatically, simply because the norm is part of international law or is mentioned in a treaty – even one ratified by their own country;

(4) But if an issue of uncertainty arises (as by a *lacuna* in the common law, obscurity in its meaning or ambiguity in a relevant statute), a judge may seek guidance in the general principles of international law, as accepted by the community of nations; and

(5) From this source material, the judge may ascertain and declare what the relevant rule of domestic law is. It is the action of the judge, incorporating the rule into domestic law, which makes it part of domestic law[38].

In terms, the *Bangalore Principles* declared[39]:

> "[T]here is a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law – whether constitutional, statute or common law – is uncertain or incomplete. It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes – whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law"[40].

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[38] M D Kirby, "The Australian Use of International Human rights Norms: From Bangalore to Balliol - A View from the Antipodes" (1993) 16 *UNSW L Journal*, 363.

[39] *Bangalore Principles*, Principle 4: see (1988) 14 *Cth Law Bulletin* 1196. Cf (1988) 62 *Aust L Journal* 531.

[40] *Ibid,* Principle 7.

Some Australian lawyers (and not a few judges), brought up in the tradition of the strict dualism, were inclined, at first, to regard the *Bangalore Principles* as entirely heretical[41]. They relied on such cases as *R v Secretary of State for the Home Department; Ex parte Bhajan Singh*[42]. They regarded with scepticism the amount of assistance which would be derived from an international treaty, other international law or the pronouncements of international or regional courts, tribunals and committees. In responding in this way they were reflecting the classical responses of the dualists described by Rosalyn Higgins in the passage quoted at the outset of this paper. Their views have not prevailed.

HIGH JUDICIAL PRONOUNCEMENTS

In the ten years since the *Bangalore Principles* were formulated, something of a sea change has come over the approaches of courts in England, Australia, New Zealand and other countries of the common law.

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[41] Eg *Jago v District Court of NSW* (1988) 12 NSWLR 558; Samuels JA, 580. Cf *Young v Registrar [No 3],* (1993) 32 NSWLR 62 per Powell JA, 291-293.

[42] [1976] 1 QB 198, 207.

The clearest indication of the change in Australia can be found in the remarks of Justice Brennan (with the concurrence of Chief Justice Mason and Justice McHugh) in *Mabo v Queensland [No. 2]*[43] already cited[44].

To similar effect were the remarks of the English Court of Appeal in *Derbyshire County Council v Times Newspapers Limited*[45], later affirmed by the House of Lords[46], giving expression to a like principle. In a sense, their Lordship's decision paved the way for the reasoning of Justice Brennan in *Mabo.* It was referred to by him. The question in *Derbyshire* was whether a local government authority was entitled, by the law of England, to sue for libel to protect its corporate reputation (as distinct from that of its members). The trial judge (Justice Morland) had held that it was[47]. His decision was reversed by

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[43] (1992) 175 CLR 1.

[44] *Ibid,* 42. Cf *R v Dietrich* (1992) 177 CLR 292, 330, 337, 365. See G Triggs, "Customary International Law and Australian Law" in A J Bradbrooke & A J Duggan (eds) *The Emergence of Australian Law* (Sydney: Butterworths, 1989) 376, 381; B F Fitzgerald, "International Human Rights and the High Court of Australia" (1994) 1 *JCU L Rev* 78.

[45] [1992] 1 QB 770.

[46] [1993] AC 534.

[47] [1992] 1 QB 775.

the Court of Appeal. In the course of his reasoning, Lord Justice Balcombe[48] referred to article 10 of the *European Convention on Human Rights* to which the United Kingdom is a party. That article relates to freedom of expression. His Lordship observed:

> "Article 10 has not been incorporated into English domestic law. Nevertheless it may be resorted to in order to help resolve some uncertainty or ambiguity in municipal law: per Lord Ackner in *Reg v Secretary of State for the Home Department; Ex parte Brind* [1991] 1 AC 696, 761. Thus (1) Article 10 may be used for the purpose of the resolution of an ambiguity in English primary or subordinate legislation ... (2) Article 10 may be used when considering the principles upon which the Court should act in exercising a discretion, eg. whether or not to grant an interlocutory injunction ... (3) Article 10 may be used when the common law (by which I include the doctrines of equity) is uncertain. In *Attorney-General v Guardian Newspapers Limited [No. 2]* [1990] 1 AC 109 the courts at all levels had regard to the provisions of Article 10 in considering the extent of the duty of confidence. They did not limit the application of Article 10 to the discretion of the court to grant or withhold an injunction to restrain a breach of confidence. Even if the common law is certain the courts will still, when appropriate, consider whether the United Kingdom is in breach of Article 10 ... This approach of English law to Article 10 is wholly consistent with the jurisprudence of the European Court of Human Rights. That court has, on more than one occasion, held that a doctrine of the English courts has violated a litigant's rights under Article 10 and this on occasion has led to Parliament having to change the substantive law ... In my judgment, therefore, where the law is uncertain, it must be right for the Court to approach the issue before it with a predilection to ensure that our law should not involve a breach of Article 10. That was the approach of Lord Oliver of Aylmerton

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[48] *Id,* at 812.

> in *In re K D (a Minor) (Ward: Termination of Access)* [1988] AC 806 where, in relation to an argument based on Articles 6 and 8 of the same Convention and a previous decision of the European Court of Human Rights, ... he cited with approval the argument of counsel in the following passage at p 823: 'Although this is not binding upon your Lordships, the United Kingdom is, of course, a party to the convention for the protection of human rights and fundamental freedoms and it is urged that it is at least desirable that the domestic law of the United Kingdom should accord with the decisions of the European Court of Human Rights under the Convention'".

To the same effect were the remarks of Lord Justice Butler-Sloss in *Derbyshire*:

> "Adopting as I respectfully do, that approach to the Convention, the principles governing the duty of the English court to take account of article 10 appear to be as follows: where the law is clear and unambiguous, either stated as the common law or enacted by Parliament, recourse to article 10 is unnecessary and inappropriate. Consequently, the law of libel in respect of individuals does not require the court to consider the Convention. But 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 article 10"[49].

Since these words were written, a similar question arose in the New South Wales Court of Appeal in *Ballina Shire Council v*

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[49] *Id,* at 830.

Ringland[50] when I was a member of that Court. A majority (Chief Justice Gleeson and myself; with Justice Mahoney dissenting) followed *Derbyshire* and the earlier judgment to like effect of the Appellate Division of the Supreme Court of South Africa in *De Spoorbond v South African Railways*[51]. In coming to our respective conclusions, both Justice Mahoney[52] and I[53] referred to the provisions of article 19.2 of the *International Covenant on Civil and Political Rights* which Australia had ratified. Following as it did the decision of the High Court of Australia in *Mabo*, nobody questioned the relevance of a consideration by the Court of applicable or relevant international human rights principles in assisting it to come to its conclusions about the content of Australian common law.

In New Zealand, the same trend in judicial thinking has also emerged. In that country, the position is somewhat different from that of Australia and England, by reason of the enactment of the *New Zealand Bill of Rights Act* 1990[54].

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[50] (1994) 33 NSWLR 680.

[51] [1946] AD 999.

[52] (1994) 33 NSWLR at 721.

[53] *Id,* at 699.

[54] Cf M Mulgan, "Implementing International Human Rights Norms in the Domestic Context: The Role of a National Institution" (1993) 5 *Canterbury L Rev* 235; J Craig, "The

Footnote continues

In *Minister of Transport v Noort; Police v Curran*[55], the New Zealand Court of Appeal was required to consider whether the provisions of the *Transport Act* 1962 (NZ), ss 56B, 56C and 56D, relating to breath and blood testing were inconsistent with the right to legal advice under the *New Zealand Bill of Rights Act*. The Court, by majority (Justice Cooke, President; Justices Richardson, Hardie-Boys and McKay; Justice Gault dissenting) dismissed the appeal, holding that there was no relevant inconsistency. The reasoning of the judges differed. Justice Cooke (as Lord Cooke of Thorndon then was) referred to the "cardinal importance", in giving meaning to the *New Zealand Bill of Rights Act* to "bear in mind the antecedents":

> "The International Covenant on Civil and Political Rights speaks of inalienable rights derived from the inherent dignity of the human person. Internationally there is now general recognition that some human rights are fundamental and anterior to any municipal law, although municipal law may fall short of giving effect to them: see *Mabo v Queensland* (1988) 166 CLR 186, 217-218. The right to legal advice on arrest or detention under an enactment may not be quite in that class, but in any event it has become a widely-recognised right ... Subject to contrary requirements in any legislation, the New Zealand courts must now, in my opinion, give it practical

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'Bill of Rights' Debates in Australia and New Zealand - A Comparative Analysis" (1994) 8 *Legal Studies* 67. Cf *R v Goodwin* [1993] 2 NZLR 153 at 168.

[55] [1992] 3 NZLR 260.

> effect irrespective of the state of our law before the Bill of Rights Act"[56]

The extent of a possible obligation on the part of New Zealand Ministers to have regard to international human rights norms was again considered by the New Zealand Court of Appeal in *Tavita v Minister of Immigration*[57]. That case involved the consideration of the relevance of international norms to administrative decision-making, as distinct from the interpretation and application of the Bill of Rights Act. Mr Tavita had overstayed his permit to be in New Zealand. He applied to the Court to set aside a removal order. He argued that the Minister, and the Immigration Service had failed, although obliged by law, to have regard to the international obligations relating to a child born to the applicant and his family in New Zealand. He was thus entitled to stay in New Zealand. The Crown argued that the Minister and the Department were entitled to ignore international obligations whether of the *International Covenant on Civil and Political Rights*, the first *Optional Protocol* or the *Convention on the Rights of the Child* 1989, all ratified by New Zealand.

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[56] *Id,* 270.

[57] [1994] 2 NZLR 257.

Delivering the interim judgment of the New Zealand Court of Appeal, Justice Cooke stopped short of deciding that international obligations *must* be considered in the performance of the administrative decision-making process[58]. Nevertheless, he reviewed the relevant jurisprudence under the *European Convention* established by decisions of the European Court of Human Rights[59]. He went on to describe the Minister's submission as:

> "... an unattractive argument, apparently implying that New Zealand's adherence to the international instruments has been at least partly window-dressing. Although for the reasons to be mentioned shortly, a final decision on the argument is neither necessary nor desirable, there may at least be hesitation about accepting it. The law as to the bearing on domestic law of international human rights and instruments declaring them is undergoing evolution. For the appellant [counsel] drew our attention to the Balliol Statement of 1992, the full text of which appears in 67 ALJ 67, with its reference to the duty of the judiciary to interpret and apply national constitutions, ordinary legislation and the common law in the light of the universality of

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[58] *Ibid.* See B O'Callaghan 'Note: *Tavita v Minister for Immigration'* (1994) 7 *Auckland Uni L Rev* 762, 764. See now, in Australia, *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273. The High Court of Australia warned against "judicial development ... as a backdoor means of incorporating an unincorporated convention into Australian law" *ibid* 288, per Mason CJ and Deane J.

[59] Eg *Berrehab v Netherlands* (1989) 11 EHRR 322; *Beldjoudi v France* (1992) 14 EHRR 801; *Lamgiundaz v UK* [1993] TLR 483.

> human rights. It has since been reaffirmed in the Bloemfontein Statement of 1993."
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> . . .
>
> If and when the matter does fall for decision, an aspect to be borne in mind may be one urged by counsel for the appellant: that since New Zealand's accession to the Optional Protocol the United Nations Human Rights Committee is in a sense part of the country's judicial structure, in that individuals subject to New Zealand jurisdiction have direct rights of recourse to it. A failure to give practical effect to international instruments to which New Zealand is a party may attract criticism. Legitimate criticism could extend to the New Zealand Courts, if they were to accept the argument that, because a domestic statute giving discretionary powers in general terms does not mention international human rights norms or obligations, the Executive is necessarily free to ignore them[60].

The *Balliol Statement* and the *Bloemfontein Statement,* referred to in the foregoing passage, were agreed at meetings of judges from throughout the Commonwealth of Nations. Like the earlier similar statements, issued after meetings in Harare, Zimbabwe and Abuja, Nigeria, they accept and endorse the *Bangalore Principles*[61]. Since then, a meeting in 1996 in Georgetown, Guyana, has endorsed the same principles.

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[60] Cf *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 288.

[61] See Cth Secretariat *Developing Human Rights Jurisprudence* (London, 1991) where these instruments are collected.

SOME CASES APPLYING THE *BANGALORE PRINCIPLES*

The foregoing collection of judicial pronouncements tends to confirm Justice Cooke's statement to the effect that the impact of international human rights law upon domestic law is "undergoing evolution".

In an earlier essay[62], I have collected a number of decisions of the High Court of Australia and of the New South Wales Court of Appeal, of which I was then President, in which reference had been made to international human rights principles in the development of the understanding of the local common law. In the Court of Appeal, the cases included:

* A case involving a suggested ambiguity of the *Bankruptcy Act* 1966 (Cth) whereby civil proceedings were stayed on bankruptcy and whether the Act should be interpreted so as to exclude any applications to public law proceedings brought for the vindication of a public (as distinct from private) right[63].

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[62] Kirby, above n 38.

[63] *Daemar v Industrial Commission of NSW* (1988) 12 NSWLR 358.

* A case concerning imputed bias by reason of a judge's earlier retainer, whilst a barrister, for a party to litigation in suggested breach of the requirement in article 14.1 of the *ICCPR* that a person have a "fair and public hearing by a competent *independent* and *impartial* tribunal established by law"[64].

* A case concerning whether the common law provides an enforceable right to speedy trial[65] having regard to the terms of article 14.3 of the *ICCPR*.

* A case concerning a right of a mute person to have an interpreter assist her understanding of evidence and argument given in open court in proceedings concerning her, having regard to the terms of articles 14.1, 14.3(a) and (f) of the *ICCPR*[66].

* A case involving the right of a litigant in person to have, as costs, expenses necessary for attending court by reason of

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[64] *S & M Motor Repairs Pty Ltd v Caltex Oil (Aust) Pty Ltd* (1988) 12 NSWLR 358.

[65] *Jago v District Court of New South Wales* (1989) 168 CLR 23 affirming (1988) 12 NSWLR 558.

[66] *Gradidge v Grace Bros Pty Ltd* (1988) 93 FLR 414.

the promise of "equality" before the courts and tribunals under Article 14.1 of the *ICCPR*[67], notwithstanding earlier court decisions to the contrary in England.

* A case involving the imposition of a fine upon a bankrupt, invalid pensioner prisoner of $60,000.00 as punishment for contempt of court, having regard to the prohibition on "excessive fines" in the still applicable *Bill of Rights* 1688 (GB)[68].

* An appeal by a convicted contemnor involving an asserted denial of his right to have his conviction and sentence reviewed by a higher tribunal according to law as article 14.5 of the *ICCPR* requires, when all that was provided was an entitlement to seek special leave from the High Court of Australia to appeal against conviction[69].

There ar many other Australian cases which could be mentioned, including cases in the Federal Court of Australia[70],

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[67] *Cachia v Hanes* (1991) 23 NSWLR 304.

[68] *Smith v The Queen* (1991) 25 NSWLR 1 at 15.

[69] *Young v Registrar, Court of Appeal [No 3]* (1993) 32 NSWLR 262.

[70] Eg *Minister for Foreign Affairs v Mango* (1993) 112 ALR 529, 534; *Premadal v Minister for Immigration* (1993) 41

Footnote continues

the Family Court of Australia[71] and in the Court of Criminal Appeal of New South Wales[72]. In many of the foregoing decisions, a feature of the reasoning is the reference by the judges, not only to the text of a relevant international instrument, but also to the development of the jurisprudence by courts, tribunals and committees – particularly the European Court of Human Rights.

In New Zealand, the *New Zealand Bill of Rights Act*, although not constitutionally entrenched, gives an established framework for the reference to analogous jurisprudence developed around similarly expressed provisions in international law. The same is even more true of Sri Lanka, India and countries of the "new Commonwealth" which have written constitutions which incorporate a detailed Bill of Rights. In Australia and England there is no similar charter of enforceable rights. However, this has not stopped the courts, in the manner suggested in the *Bangalore Principles*, from utilising international

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FCR 117; *Teoh v Minister for Immigration* (1994) 121 LR 436; Black CJ at 443.

[71] Eg *Re Marion* (1990) 14 Fam LR 427, 449; *Re Jane* (1988) 12 Fam LR 662.

[72] Eg *R v Greer* (1992) 62 A Crim R 442; *R v Astill* (1992) 63 A Crim R 148; *R v Sandford* (1994) 33 NSWLR 172, 177, 185. Cf *DPP (Cth) v Saxon* (1992) 28 NSWLR 263; *Cannellis v Slattery* (1993) 33 UNSWLR 104 (reversed (1994) 181 CLR 309).

law where a relevant gap appears in the common law or a statute falls to be construed which is ambiguous or uncertain of meaning. I see no reason why Hong Kong should be exempt from this development, occurring at the same time in so many common law jurisdictions.

Judges of the common law tradition, for all their dualist training, faced with such a problem, are turning not simply to the analogous reasoning which they can derive from the judgments written in England, often in a different world for different social conditions, far away. Now, increasingly, judges are looking, where relevant and applicable, to international human rights jurisprudence. In my view, this is both a natural and desirable development in our marvellously flexible and adaptable system of the common law. It is one which is in general harmony with the development of the international law of human rights. It is one apt for a time of global technology (such as telecommunications, international transportation, satellites etc), global problems (such as the HIV/AIDS epidemic, atmospheric warming, overpopulation etc) and of global institutions in which people of every land participate to address the common concerns of humanity.

TOWARD THE NEW MILLENNIUM

As international law grows in quantity, subject matter and importance, it is both inevitable and proper that national legislatures will seek (where their Constitution does not already

so provide) that they have a more effective say in the consideration and ratification[73] of treaties having an impact on domestic law. The task of reconciling the growing body of international law with the domestic legal system remains an important and acute one. In the process of such reconciliation, the three branches of government in any jurisdiction have their respective functions to perform. The judicial branch can scarcely ignore the developments of international law relevant to the cases before them. In the matter of fundamental human rights of universal application, it is inevitable, as Justice Brennan said in *Mabo*[74] that the influence of international law will grow and the *rapprochment* between the two systems will continue.

Once it was said that the law followed the flag. Now, international law is everywhere. Its influence increases. In part, that process is the result of the fine and scholarly work of the International Court of Justice. But it cannot be left to the International Court alone. Or even to the other international tribunals and personnel. The judges of national courts, and the lawyers who assist them, must make their own contributions. Doing so is natural and appropriate to the world we live in. It

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[73] Cf eg Treaties (Parliamentary Approval) Bill (1996) (GB) [Bill No 27 HL].

[74] (1992) 175 CLR 1 at 42.

calls forth the same vision evidenced by the jurists of the common law in the past.

This great development in the legal thinking of common law jurisdictions is specially relevant to Hong Kong as an international trading and financial centre. The development which I have described and illustrated points us in the direction of the new millennium. It will be a time when the reconciliation of the two systems of law - national and international - will be accomplished and the dream of effective global law and international institutions achieved. In the meantime there will be many small steps which judges and lawyers of our legal tradition can properly take. It is happening elsewhere in the common law world. International Hong Kong seems scarcely likely to avoid this legal development. The development, properly harnessed, will ensure that judges and lawyers in Hong Kong keep contact with their colleagues in other common law countries. It has been to this end that the International Commission of Jurists has summoned this Colloquium at this critical time of change for the law and people of Hong Kong.