THE UNIVERSITY OF SYDNEY

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OCCASIONAL LECTURE

WEDNESDAY 23 APRIL 1997

THE GROWING *RAPPROCHMENT* BETWEEN INTERNATIONAL LAW AND NATIONAL LAW

The Hon Justice Michael Kirby AC CMG

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MONISM AND DUALISM

In a chapter on "The Role of National Courts in the International Legal Process" in her book *Problems and Process - International Law and How We Use It*[1] Professor (now Judge)

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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.

** Justice of the High Court of Australia. President of the International Commission of Jurists. Formerly Special Representative of the Secretary-General of the United Nations for Human Rights in Cambodia.

1 Clarendon, Oxford, 1994 at 205.

Rosalyn Higgins explained 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:

> "Which ever 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

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2 *Loc cit.*

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.

> 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".

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) which 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].

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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.

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

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].

This culture of resistance, or indifference to international law is gradually changing. If one asks for the vision of the legal order in the twenty-first century which can already be perceived, the one of greatest relevance to the present offices of Judges Weeramantry and Higgins in the International Court of Justice (on the one hand) and myself in the High Court of Australia (on the other) 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. But it is also happening because of the contribution to international law of judges and writers such as Judges Weeramantry and Higgins. Both of them have a sound practical grounding in the municipal law of the common law tradition. Both enjoy the perception of the growing importance of international law and the need for it to respond to lessons

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7 R Higgins, above n 1, at 207.

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 has long paid the greatest of respect to the opinions of the judgments of the International Court of Justice as expositions of the principles of international law where those principles have arisen for consideration in Australian cases. In opening a colloquium in the High Court building in Canberra in May 1996, called to honour the fiftieth anniversary of the International Court 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*

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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.

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.

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 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

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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.

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.

> 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 had suggested that it was as "an overhang of the old culture in which international affairs and national affairs were 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, Sir Gerard Brennan, in *Mabo v State of Queensland [No 2]*[29], as a step in his reasoning towards the

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26 [1986] ICJ Reports 14.

27 [1955] ICJ Reports 4.

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.

conclusion that the "native title" of Australia's indigenous peoples had survived the acquisition of the continent by the British Crown and its settlement by the European colonists, 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] 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".

Thus, in Australia, New Zealand, Britain and other countries of the common law which, until now, have adhered

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

scrupulously to dualism, a change is gradually coming about. By Article 38 of the Statute of the International Court of Justice, that Court refers to judicial decisions of national courts as a source of international law. The need to be imaginative and eclectic in the use of national law has been a constant theme of the judicial work and scholarly writings of Judge Weeramantry. It appeared long before his appointment to the International Court. It was demonstrated in a creative way in his use of the English law of trusts in formulating the possible bases in international law for the claims of Nauru, including against Australia[31]. Since his appointment to the Court, it has been seen in many of his decisions where his insights as a legal practitioner, judge, law teacher and philosopher have combined in a rare mix of the greatest potency.

Judge Weeramantry has also repeatedly emphasised the need to rescue international law from a monochrome reflection of the great legal traditions of Europe so that it draws, in the future, upon the richness of the legal systems of other civilisations, including those in the Asian region where his homeland, Sri Lanka, is found[32]. Judge Weermantry's commitment to the

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31 See 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.

universalistic ideals which underlie the concept, if not always the practice, of the discipline of international law finds voice in the words of Mahatma Gandhi whom he 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".

Judge Weeramantry perceived the need for the cultures of all lands "to be blown about the house" of international law. The search for universal notions is one which motivates international law. Not least does it do so in the efforts to find, declare and enforce universal notions of human rights.

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 essay. In my view, 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 apace in countries

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33 *Ibid,* 8 citing Gandhi.

such as Sri Lanka[34] as well as in the legal systems of Australia and the United Kingdom. The development has its critics as well as its supporters. I wish to describe the developments in some of the jurisdictions which I 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 Rossalyn 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, virtually

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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).

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

universally, in English-speaking legal systems, as being "without foundation"[36]. In Australia, in 1982, Justice Mason explained the traditional position in these terms:

> "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, however, 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

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36 *Ibid.*

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.

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 such countries was given in February 1988 in Bangalore, India in the so-called *Bangalore Principles*. These 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 the Antipodes. 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

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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.

> 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].

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

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40 *Ibid,* Principle 7.

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.

HIGH JUDICIAL PRONOUNCEMENTS

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

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 decision paved the way for the reasoning of Justice Brennan in *Mabo* and was

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43 (1992) 175 CLR 1 at 42.

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.

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 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

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47 [1992] 1 QB 775.

48 *Id,* at 812.

> 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 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 was presented to the New South Wales Court of Appeal in *Ballina Shire Council v Ringland*[50] when I was a member of that Court. A majority (Chief Justice Gleeson and myself; Justice Mahoney dissenting) followed *Derbyshire* and the earlier judgment 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.

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49 *Id,* at 830.

50 (1994) 33 NSWLR 680.

51 [1946] AD 999.

52 (1994) 33 NSWLR at 721.

53 *Id,* at 699.

In New Zealand, the same trend has 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].

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":

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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 '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.

> "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 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

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56 *Id*, 270.

57 [1994] 2 NZLR 257.

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.

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

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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.

> 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 human rights. It has since been reaffirmed in the Bloemfontein Statement of 1993."
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> . . .
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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

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

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.

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

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

62 Kirby, above n 38.

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].

* 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

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

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.

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 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

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

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

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

provided was an entitlement to seek special leave from the High Court of Australia to appeal against conviction[69].

There are many other Australian cases which could be mentioned, including cases in the Federal Court of Australia[70], 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 vehicle of the *New Zealand Bill of Rights Act*, although not constitutionally entrenched, gives an

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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 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).

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 law where a relevant gap appears in the common law or a statute falls to be construed which is ambiguous or uncertain of meaning.

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, they 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 global institutions, about all of which Judge Weeramantry has written with insight and concern.

CAUTIONARY WORDS

Critics of the developments which I have outlined would list a number of considerations which need to be taken into account as the judges of national legal systems venture upon this new source of law-making. The expressed concerns usually include:

(1) Treaties are typically negotiated by the Executive Government, as the modern manifestation of the Crown. They may or may not reflect the will of the people, expressed by their representatives in Parliament;

(2) The processes of ratification are often imperfect. In Australia, for example, the Federal Government deposited the instrument of accession to the first *Optional Protocol* to the *ICCPR* before tabling the instrument in Parliament. This was described by one observer as "extraordinary ... without any public debate or even public awareness of its existence, let alone its scope and significance"[73]. There is

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73 A Twoomey, *The Procedure and Practice of Granting and Implementing International Treaties,* Parliamentary Research Service Background paper No 27 (1995) 9. Cf Aust Parl Joint Committee on Foreign Affairs, Defence and Trade, *A*

Footnote continues

now, in Australia, a lively discussion of the need to improve the procedures for the ratification of international treaties and to provide for pre-ratification scrutiny by the Federal Parliament[74];

(3) In federal countries special concern has been expressed that the ratification of international treaties may be used as a means to undermine the distribution of powers between the Federal and State legislatures in a way never contemplated by the drafters of the *Constitution*[75]. One reason advanced for awaiting legislation to introduce an aspect of international law into domestic law in a federation, is that such a course will permit the constitutional validity of the statutory introduction of the norm to be tested in the courts;

Review of Australia's Efforts to Promote and Protect Human Rights (Canberra: AGPS, 1993) 25.

74 For the earlier Australian practice: see *Hansard* (HR) 10 May 1961, 1693 (R G Menzies). For the proposals of the present Australian Government see *Treaty Making Reforms,* Discussion Paper, May 1996 and Joint Statement by the Australian Minister for Foreign Affairs and Minister for Justice, *The Effect of Treaties in Administrative Decision-Making* 25 February 1997.

75 See eg M D Kirby "Human Rights: the International Dimension", Aust Parl (Canberra, 17 February 1995).

(4) Then it is suggested that judicial introduction of human rights norms may divert the community from the more open, principled and democratic adoption of such norms in constitutional or statutory amendments which have the legitimacy of popular endorsement. The recent exposition by the High Court of Australia of fundamental rights to be implied from the nature and purposes of the Australian *Constitution* has sometimes been criticised on this ground[76]. Those who hold to this view urge that it would be preferable to engage in a candid national debate and to accept openly an enacted Bill of Rights rather than to accept such a development from the judiciary;

(5) Some commentators have also expressed scepticism about the international courts, tribunals and committees which pronounce upon human rights. They assert that they are typically made up of persons from legal regimes quite different from our own. In *R v Jeffries*[77] Justice Richardson, in New Zealand, observed that, whilst the

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76 Eg D Rose "Judicial Reasonings and Responsibilities in Constitutional Cases (1994) 20 *Monash L Rev* 195; A Fraser "False Hopes: Implied Rights and Popular Sovereignty in the Australian Constitution" (1994) 16 *Syd L Rev* 213; L Zines "A Judicially Created Bill of Rights?" (1994) 16 *Syd L Rev* 166.

77 [1994] 1 NZLR 290, 299.

jurisprudence of Canada in the area of human rights and that of the European Court of Human Rights have offered undoubted assistance in the interpretation and application of the *New Zealand Bill of Rights Act*, New Zealand should nonetheless be wary. It should not forget its own legal and social history which has disdained federation and, so far, has declined to accept an entrenched statement of rights with overriding constitutional force;

(6) To similar effect, critics have pointed to the generality of the expression of the provisions contained in international human rights instruments. Of necessity, these are expressed in language lacking in precision. This means that those who use them may be tempted to read into the broad language what they hope, expect or want to see. Whilst the judge of the common law tradition has an indisputable creative role, such creativity must be restrained. It must proceed in a judicial way. It must not undermine the primacy of democratic law-making by the organs of government, directly or indirectly accountable to the people[78]; and

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78 Eg *R v Dietrich,* supra n 44 per Brennan J at 323.

(7) Finally, the world, in the matter of rights protection, is by no means monochrome. We are now at pains to protect the bio-diversity of fauna and flora. The principle of self-determination of peoples is a reflection of the fundamental right of every people to be governed in a way acceptable to a majority of the population. It would be ironic if the advance of international human rights principles were to undermine the variety of human legal systems and democratic accountability which is itself an important right which courts should loyally respect[79].

SUPPORT FOR THE BANGALORE PRINCIPLES

As against the foregoing considerations, the supporters of the *Bangalore Principles* point to a number of factors which must be kept in mind in the evolving jurisprudence to which Justice Cooke referred in *Tavita*[80]:

(1) The *Bangalore Principles* do not undermine the sovereignty of national law-making institutions. They acknowledge

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79 See eg *Building Construction Employees & Builders' Labourers Federation (NSW) v Minister for Industrial Relations* (1986) 7 NSWLR 372.

80 Supra n 57.

that if those institutions have made (by constitutional, statutory or common law decision) a rule which is unambiguous and binding, no international human rights principle can undermine or overrule the applicable domestic law. To introduce such a principle requires the existence of a gap in the common law or ambiguity in a local statute. Then, by direct legislation or indirect introduction by the judicial branch of government, the principle can be imported into the law of the sovereign country. Far from being a negation of sovereignty, this is an application of it;

(2) The process which the *Bangalore Principles* endorse is, in a sense, as Justice Brennan described it in *Mabo*, an inevitable one. As countries, such as New Zealand and Australia, by subscription to the *First Optional Protocol*, submit themselves to the external scrutiny and criticism of their laws by the United Nations Human Rights Committee, the result must be addressed. If a domestic law is measured and found wanting, a country must bring its law into conformity or be revealed as a participant in human rights "window-dressing";

(3) Modern notions of democracy are more sophisticated than formerly. They involve more than the reflection in law-making by the will of the majority, intermittently expressed upon a broad range of issues at elections. Now, it is increasingly appreciated that the legitimacy of democratic

governance depends upon the respect by the majority for the fundamental rights of minorities[81]. Therefore, insofar as courts give effect at least to fundamental rights, they are assisting in the discharge of their governmental functions to advance the complex notion of democracy as it is now understood;

(4) So far as federal states are concerned, their constitutions do not stand still. The view has been expressed that a federal parliament and government is a trustee for the international standards of the world community in which it is the responsibility of the federal polity to be the nation's voice[82]. The power of a constitutional court to strike down excessive laws and to measure all laws against the standards of the *Constitution* as understood from time to time, ensure that such laws meet the requirements of constitutionality. But federal constitutions must themselves adapt to the world in which the federal state

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81 H Charlesworth, "Protecting Human Rights" (1994) 68 *Law Inst Journal (Vic)* 462-463; C Caleo, "Implications of Australia's Access to the First Optional Protocol to the International Covenant on Civil and Political Rights" (1993) 4 *Public Law Review* 175.

82 H Charlesworth, "The Australian Reluctance About Rights" In P Alston (ed) *Towards an Australian Bill of Rights* (Sydney: HREOC, 1994) at 53.

now finds itself. This, indisputably, is a world of increasing interrelationships in matters of security, economics and of human rights. Judges, no more than legislatures and governments, can ignore this international reality within which their courts and law operate;

(5) Giving effect to international law where a country has formally ratified a relevant treaty, does no more than give substance to the act which the executive government has taken. The knowledge that the judicial use of international law in this way is now becoming more frequent may have the beneficial consequence of discouraging ratification where there is no serious intention to accept, for the nation, the principles contained in the treaty;

(6) The international impact upon local law is already occurring happening outside the judiciary. For example, international human rights principles are being introduced into domestic law by express legislation[83]. Sometimes that legislation follows determinations of a relevant international body, as was the case of the recent Australian statute: *Human Rights (Sexual Conduct) Act*

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83 Eg *Privacy Act* 1988(Cth).

1994 (Cth). That Act followed the decision of the United Nations Human Rights Committee in determining a complaint by Mr Nicholas Toonen against Australia in respect of the Tasmanian laws on homosexual offences. Similar laws had been repealed everywhere else in Australia[84]. Given that other branches of government are giving effect to international human rights law, it is scarcely surprising that the courts, as a branch of government, are also taking such law into account in appropriate cases and in permissible circumstances; and

(7) The developments just described are hardly surprising or threatening, at least to judges and lawyers of the common law tradition. The basic international human rights instruments were, for the most part, drawn up by lawyers of that tradition. In countries such as Australia, Britain, Canada, India, New Zealand and Sri Lanka, their concepts are enshrined, to varying extents, in constitutional, statutory or common law principles. It is the jurisprudence

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84 *Toonen v Australia* UN Doc CCPR/C/50/D/488/1992 (4 April 1994). For discussion, see A Funder, "The Toonen Case" (1994) 5 *Public Law Review* 156; G Selvanera "Gays in Private: The Problems with the Privacy Analysis in Furthering Human Rights" (1994) 16 *Adel L Rev* 331-340; W Morgan, "Protecting Rights or Just Passing the Buck?" (1994) 1 *Aust J Human Rights* 409.

which is now collecting around these broad concepts that is often helpful in facing the kinds of problems which societies must solve today. That is why it is appropriate and useful for the common law now to modify its earlier monistic principle of strict separation of international and domestic law. It is timely that a *rapprochement* between these systems of law should be gradually developed. As we enter a new millennium where there will be increasing international law of very kind, it is part of the genius of the national legal systems that the courts should have found a way to take cognisance of international jurisprudence in appropriate circumstances and by orthodox and familiar techniques of reasoning.

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 of ratification[85] and in their impact on domestic law. The task of reconciling the growing body of international

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

law with the domestic legal system remains an important and acute one. In the process of reconciliation, the three branches of government 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*[86] that the influence of international law will grow and the *rapprochment* between the two systems will continue.

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86 (1992) 175 CLR 1 at 42.