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THE PARLIAMENTARIAN

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THE *BANGALORE PRINCIPLES*

The traditional view of most common law countries has been that international law is not part of domestic law. Save for the United States, where Blackstone had a profound influence, this traditional view came to be regarded as orthodoxy in most Commonwealth countries. It is known as the "dualist" view, as opposed to the "monist" approach which treated international law as part of the general law and hence applicable in domestic jurisdiction[1]. Lately, a new recognition has come about, amongst judges of Commonwealth countries, concerning the use that may be made of international human rights principles and

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* President of the International Commission of Jurists. Justice of the High Court of Australia.

1 R Higgins, *Problems and Process - International Law and How to Use it*, Clarendon, Oxford 1994 at 105.

their exposition by the courts, tribunals and other bodies established to give them content and effect. This development is a reflection of the growing body of international human rights law, of the adoption of instruments both regional and international which give effect to human rights law, of the adoption of independence constitutions which refer to universal human rights and of the growing recognition of the way in which all countries on this planet are linked together by common problems and common duties to safeguard fundamental human rights.

An expression of what I take to be this modern approach was given in February 1988 in Bangalore, India in the so-called *Bangalore Principles*[2]. These were agreed by a group of lawyers from a number of 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 these and other Commonwealth participants was a judge of the Federal Circuit

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2 See (1988) 14 *Commonwealth Law Bulletin* 1196.

Court in the United States, Ruth Bader Ginsburg (now a Justice of the Supreme Court of the United States of America).

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 (by a gap 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.

(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.

In terms, the *Bangalore Principles* declare:

> *"[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."*[3]

> *"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."*[4]

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 heretical. They preferred earlier English decisions such as *R v Secretary of State for the Home Department; Ex parte Bhajan Singh*[5]. They regarded with

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3 *Bangalore Principles* No 4.

4 *Bangalore Principles* No 7.

5 [1976] 1 QB 198 at 207.

scepticism the amount of assistance which could be derived from an international treaty, other international law or the pronouncements of international or regional courts, tribunals and committees in their busy work as judges. They were observing the classical response of the dualists.

JUDICIAL PRONOUNCEMENTS

In the ten years since Bangalore, something of a sea change has come over the approach of courts in several Commonwealth countries. The purpose of this paper is to illustrate and explain that change.

In my own country, Australia, the clearest indication of the change may be found in the remarks of Justice Brennan (with the concurrence of Chief Justice Mason and Justice McHugh) in *Mabo v Queensland [No. 2]*[6]. In the course of explaining why a discriminatory doctrine, such as that of *terra nullius* (which declined recognition to the rights and interests in land of the indigenous inhabitants of a settled colony such as Australia)

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6 (1992) 175 CLR 1.

could no longer be accepted as part of the law of Australia, Justice Brennan said[7]:

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

To similar effect were the remarks of the English Court of Appeal in *Derbyshire County Council v Times Newspapers*

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7 *ibid* at 42.

Limited[8], later affirmed by the House of Lords[9], giving expression to a similar application of universal human rights. 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. The extent of a possible obligation on the part of New Zealand Ministers to have regard to international human rights norms was considered by the New Zealand Court of Appeal in *Tavita v Minister of Immigration*[10]. Delivering the interim judgment of the New Zealand Court of Appeal, in that case concerning expulsion of an illegal immigrant, Justice Cooke, as Lord Cooke of Thorndon then was, stopped short of deciding that international obligations *must* be considered in the performance of the administrative decision-making process. Nevertheless, he reviewed the relevant jurisprudence under the *European Convention* established by decisions of the European Court of Human Rights[11]. He then said that this was an area of the law "undergoing evolution":

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8 [1992] 1 QB 770.

9 [1993] AC 534.

10 [1994] 2 NZLR 257.

11 eg *Berrehab v Netherlands* (1989) 11 EHRR 322; *Beljoudi v France* (1992) 14 EHRR 801.

> *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."*[12]

In New Zealand, the vehicle of the *New Zealand Bill of Rights Act*, although not constitutionally entrenched, gives an established framework for reference to jurisprudence developed around similarly expressed provisions in international law. The same is even more true in the countries of the newly independent Commonwealth which have written constitutions incorporating a Bill of Rights reflecting universal 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

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12 *Ibid* at 260. *Cf Minister for Immigration and Ethnic Affairs (Australia)* (1995) 183 CLR 273 at 278.

law or a statute falls to be construed which is ambiguous or uncertain of meaning. Increasingly, judges of the common law tradition, faced with such a problem, are turning not simply to the analogous reasoning which they can derive from the judgments written, 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 a desirable development of our marvellously flexible and adaptable common law legal system. 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 developing global institutions.

WORDS OF CAUTION

Critics of the developments which I have just outlined list a number of considerations which certainly need to be taken into account as judges venture upon this new source of principle for judicial law-making. The expressed concerns include:

- Treaties are typically negotiated by the Executive Government. They may or may not reflect the will of the

people, expressed in Parliament for sometimes the Executive does not control Parliament or both Houses of Parliament.

- The processes of ratification are often defective. There is 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[13].

- In federal countries, such as Australia, Canada, Malaysia, Nigeria etc, special concern may be expressed that the ratification of international treaties could be used as a means to undermine the constitutional distribution of powers between the Federal and State legislatures in a way never contemplated by the drafters[14]

- Then it is suggested that judicial introduction of human rights norms may divert the community from the more

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13 See Joint Statement by Minister for Foreign Affairs and Minister for Justice. *The Effect of Treaties in Administrative Decisions.*

14 See eg D Rose "Judicial Reasoning and Responsibility in Constitutional Cases" (1994) 20 Monash U L Rev 195.

open, principled and democratic adoption of such norms in constitutional or statutory amendments which have the legitimacy of popular endorsement.

- Some commentators have also expressed scepticism about the international courts, tribunals and committees which pronounce upon human rights. They argue that often they are of persons from legal regimes different from our own.

- To similar effect, critics have pointed to the broad generality of the expression of the provisions contained in international human rights instruments. Of necessity, these are expressed in language which lacks precision. This means that those who use them may be tempted to read into their broad language what they hope, expect or want to see. Whilst the judge of the common law tradition has a creative role, such creativity must be in the minor key. 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[15].

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15 See *Dietrich v The Queen* (1992) 177 CLR 292 at 325 per Brennan J. Cf G Triggs "Customary International Law and Australian Law" in A J Bradbrooke and A J Duggan (eds) *The Emergence of Australian Law*, Butterworths, Sydney 1989,

Footnote continues

- Finally, some critics caution against undue, premature undermining of the sovereignty of a country by judicial *fiat* and the authority of every country's democratically accountable law-makers to develop human rights in their own way.

SUPPORT FOR THE BANGALORE PRINCIPLES

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 I have referred:

- The *Bangalore Principles* do not undermine the sovereignty of national law-making institutions. They acknowledge 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 opportunity of a gap in the common law or an ambiguity of a local

at 376, 381; BF Fitzgerald "International Human Rights and the High Court of Australia" (1994) 1 JCULR 78.

statute. Far from being a negation of sovereignty, this is an application of it.

- The process which the *Bangalore Principles* endorse is an inevitable one. As countries submit themselves to the external scrutiny and criticism of their laws by the United Nations Human Rights Committee, the results 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 mere participant in human rights "window-dressing".

- Modern notions of democracy are more sophisticated than formerly. They involve not merely the reflection in law-making by the will of the majority, intermittently expressed at elections. Now the legitimacy of democratic governance is seen as depending upon the respect by the majority for the fundamental rights of minorities[16].

- So far as federal states are concerned, their constitutions do not stand still. They operate in a world of increasing

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16 H Charlesworth "Protecting Human Rights" (1994) 68 Law Inst J (Vic) 463-463.

interrelationships in matters of economics and of human rights. Judges, no more than legislatures and governments, can ignore this reality.

- 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.

- The international development of local laws is already happening outside the judiciary. For example, international human rights principles are being introduced into domestic law by express legislation[17]. Sometimes that legislation follows determinations of a relevant international body, as was the case of the recent Australian statute: *Human Rights (Sexual Conduct) Act* 1994 (Cth). That Act followed the decision of the United Nations Human Rights Committee in determining a complaint against Australia in respect of the Tasmanian laws on homosexual offences. Such offences had been repealed everywhere else in

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17 For example *Privacy Act* 1988 (Aust) introducing the OECD principles on Privacy or *Migration Act* 1958 (Aust), s 22AA introducing the Refugees Convention, 1951..

Australia except Tasmania.[18] 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.

- The developments just described should not be surprising or threatening, at least to judges and lawyers of the common law tradition. That tradition has always been open to outside and international influences. It is appropriate that a *rapprochement* between domestic and international law should be developed. As we enter a new millennium there will be increasing international law of every kind. It is part of the genius of the legal system operating in Commonwealth countries that our courts have found a way to take cognisance of international human

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18 *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 Rev* 156; G. Selvaner, "Gays in Private, The problems with the privacy analysis in furthering Human Rights" (1994) 16 *Adelaide L Rev* 331; W. Morgan, "Protecting rights or just passing the buck?" (1994) 1 *Aust J Human Rights* 409. In May 1997 the Tasmanian Parliament finally repealed the provisions of the *Criminal Code* (Tas) punishing consensual adult homosexual conduct. It set the age of consent at 17 years, the same as for heterosexual offences.

rights jurisprudence in appropriate cases and to do so by appropriate and familiar techniques of judicial reasoning.

CONCLUSIONS

When first enunciated by the judges meeting in the sunshine under the bougainvillea in Bangalore in 1988, the *Bangalore Principles* seemed to some to be rather radical. But even in the passage of so short a time, they have come to be increasingly accepted by judges throughout the Commonwealth of Nations[19]. Once again, the common law, the great legacy of Commonwealth judges of the past, is proving itself capable of adaptation to new times - times of increasing national and international concern about human rights. Fortunate are we to be the beneficiaries of this great legacy. But we must earn the privilege of being worthy inheritors of this tradition by the response we give to reconciling domestic and international law in a principled and modern manner.

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19 A P Mutharika, "The Role of International Law in the Twenty-first Century: An African perspective" (1995) 21 *Commonwealth Law Bulletin* 983.

HOW IT IS DONE

Example of the use of international human rights norms

Based on *Gradidge v Grace Bros* (1988) 93 *Federal Law Re*
414 (Australia). (Decision of the Court of Appeal of New S
Wales).

A mute was giving evidence in a compensation cou
Australia. An objection was taken to certain evidence on
grounds. The advocate for the mute's employer suggested
it was unnecessary for the interpreter to translate the obje
as it was purely legal and, in effect, between the judge an
lawyers. The judge agreed and directed that the interprete
not need to interpret the legal argument. The interp
continued to provide interpretation. The judge stopped
proceeding on the basis that the interpreter would not con
to his procedural direction given in the control of the runni
the court. The parties appealed. There was no constitut
provision or Act of Parliament which specifically covere
point. The common law governing court procedure acco
high measure of respect to the discretion and directions o
trial judge including in the use of interpreters. The appeal ju
drew by analogy upon the principle established for criminal
in the *International Covenant on Civil and Political Rights* Ar
14.1 and 14.3(a) and (f). They upheld the right of the
witness to have everything conducted in open court translat
that she could understand it.