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INTERNATIONAL BAR ASSOCIATION

HUMAN RIGHTS INSTITUTE

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The Hon. Michael Kirby AC CMG

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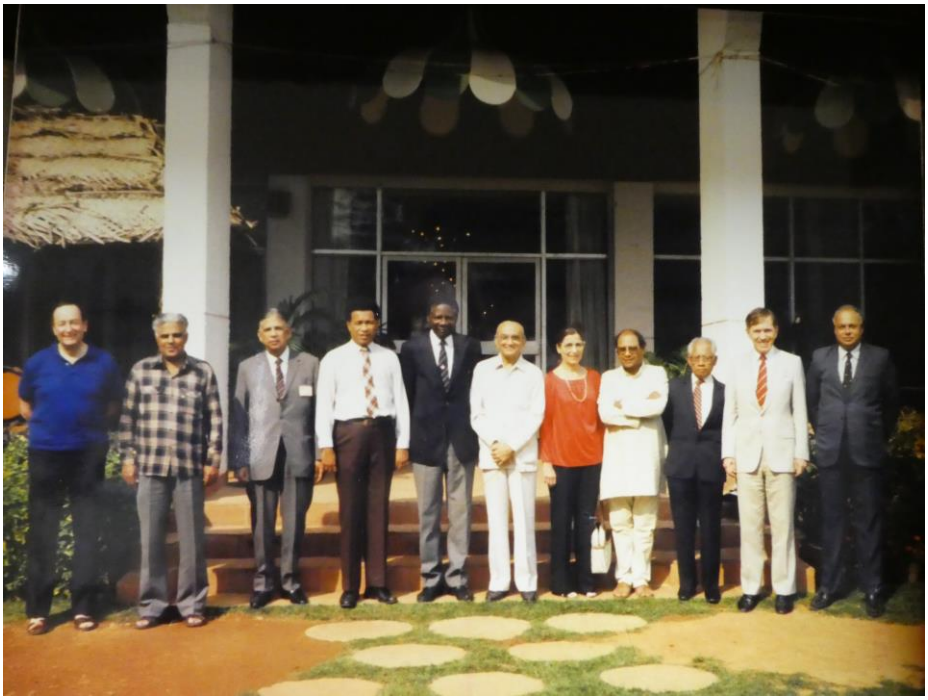

Judicial founders of the *Bangalore Principles*, February 1988, P.N. Bhagwati, (centre)

ABSTRACT

In this paper the author pays tribute to the great Indian judge and international office-holder, P.N. Bhagwati (1921-2017). Avowedly a "judicial activist", Justice Bhagwati recognised and embraced the judicial role in re-expressing the

[*] Some parts of this text have been developed from ideas expressed in a publication of the *Eightieth Birthday of the Hon. P.N. Bhagwati* published by the Society for Community Organisation Trusts (2001).

[**] Justice of the High Court of Australia (1996-2009); President of the Court of Appeal of New South Wales (1984-96); President of the International Commission of Jurists (1995-8), Co-chair of the International Bar Association Human Rights Institute (2018-).

law by reference to universal human rights. He brought to international attention ways in which this could be done by the *Bangalore Principles* o*n the Judicial Application of International Human Rights Norms* (1988). This article shows how judges could utilise international human rights law in resolving ambiguities and gaps in the law. The application of the *Bangalore Principles*, now in their 30th year, has had beneficial consequences in many countries, and the *Mabo Case* in Australia, upholding Aboriginal title to traditional land, is an example of the way in which the principles can operate.

LIFTING THE FLOODGATES

The common law tradition assigns a very important role to its judges in expressing, developing and reforming legal principles. Initially, there was a reluctance to acknowledge that role too candidly. In 1972, a great Scottish judge (Lord Reid) declared:[1]

> "There was a time when it was thought almost indecent to suggest that judges made law – they only declare it. Those with a taste for fairy tales seemed to have thought that in some Aladdin's cave there is hidden the Common Law in all its splendour and that on a judge's appointment there descends upon him knowledge of the magic words Open Sesame. Bad decisions are given when the judge has muddled the password and the wrong door opens. But we do not believe in fairy tales anymore."

The legitimacy for judicial creativity in the common law legal system derived from its history. But also from the tools with which judges worked. Those tools included the use of language, and the interpretation of the language of others. The language of the law might be formed in the opaque expressions of a national constitution. Or it

[1] Lord Reid, "The Judge as Lawmaker" (1972) 12 *Journal of Public Teachers of Law*, 22.

might exist in an enactment of the legislature. Or it might appear in earlier judicial decisions, where judges had endeavoured to express the content of the judge-made law.

In every legal system judges emerge who display a greater or lesser inclination to utilise their 'leeways for choice'.[2] Some judges are 'timorous souls'. Others are 'bold spirits'.[3] Justice P.N. Bhagwati of India was a bold spirit. His life's journey taught him the common tendency of the law, speaking from earlier times, to produce unjust outcomes for citizens. He saw this as a first class law student in Bombay. He witnessed it as an advocate, in the earliest days of Indian independence, appearing before the courts. He became more conscious of the opportunities and dangers during his service as a judge of the Gujarat High Court (1960), as chief justice of that court (1967), when he became a Justice of the Supreme Court of India (1973) and finally Chief Justice of India (1985).

Justice Bhagwati was to continue his passion for justice in the many tasks he undertook after his judicial retirement in 1986. His career was a stellar one. Being human, and faced with the daily necessity of making difficult and controversial decisions, he doubtless erred from time to time, as we all do. What was special about him was his unyielding curiosity about the law as it affected the human condition. He was a highly professional and accomplished judicial officer and presiding judge in India. However, his mastery of ideas and his skill with words brought his voice to countries far from India and to lawyers and citizens of many lands, including in my own country, Australia.

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[2] Julius Stone, *Social Dimensions of Law and Justice* (Maitland, Sydney, 1966) 676-695. See also M.D. Kirby, *Judicial Activism* (Thomson, London, 2004), Hamlyn Lectures 2003, 27.
[3] The dichotomy is suggested by Denning LJ in *Candler v Crane Christmas & Co* [1951] 2KB 164 at 178 (CA).

Justice Bhagwati was proud of the description often given to him that he was an “activist” judge. He knew that there were inevitable limitations upon the creativity that judges could exhibit, in the discharge of their judicial offices. The language of the national constitutions and earlier decisions upon that language would, for example, sometimes establish boundaries. Although there might be ambiguities, there would also be restrictions on the unfettered capacity of the judge to embrace creative solutions for society’s problems. Likewise, the language of legislation, national and sub-national, would sometimes mark off boundaries beyond which a judge could not go. So long as the enactment was constitutionally valid, the judge might push solutions in this direction or that. But the judge did not have a completely free hand to do whatever he or she thought to be desirable. Likewise, with the earlier decisions of the judge made law. Here, especially, a judge would have legitimate opportunities for significant creativity. Yet predictability in the law; the orderly arrangements of society; the investments of citizens on the faith of the established understandings of the law would all establish limits. He knew this. Where necessary, he would yield to the limitations. But he was not swift to find them.

Justice Bhagwati’s conception of judicial activism grew out of his acute understanding of the common tendency of the law to protect established social, economic and political interests. It was his appreciation of the inequalities of access to the law, especially, that made him sceptical about a purely formalistic approach to the expression and provision of legal rights. If the law remained rigid and unchanging, it would fail to serve the interests of all of the citizens. It would become part of the

problem, rather than part of the solution, of society's never ending needs.

Some judges, in every country, emphasise the limitations on the ability and propriety of judges in expressing the law so as to advance the interests of previously neglected segments of society. An inclination to this point of view is often strong amongst lawyers; and even more so amongst judges. However, in many of his judicial decisions, scholarly writings, engagements with civil society, and participation in international activities, Justice Bhagwati pushed the boundaries of judicial activism. He did so especially because of his deep human empathy for the poor, the vulnerable and disadvantaged minorities. He realised that, for them, the law's protections were commonly only theoretical not real. Its principles were often unattainable because the ordinary citizen, without effective legal aid, had no real chance of ascertaining, advancing and enforcing his or her legal rights.

In some societies, for a judge or chief justice to embrace the obligation of "activism" might be seen as inappropriate, unjudicial and even shocking. But in every society, despite discouragements, judicial leaders emerge who give voice, to varying degrees, in favour of activism where the needs for change are great. Justice Bhagwati was such a leader.

In Australia, which like India is often in need of life bringing waters to sustain human existence, it is often stated that the role of the judges is to man the floodgates so as to avoid changes to the law that are too frequent, too rapid, too unpredictable; or too disturbing to settled interests. However, the danger of adhering unthinkingly to the defence

of the "floodgates" was drawn to notice by leading Justice of the High Court of Australia, Justice William Deane.[4] He explained his thinking in a powerful passage in one of his decisions. Where the land below was parched and fallow, he said, there will often be need to raise the floodgates so as to let life-giving water have access and bring renewal and replenishment.

This also was Justice P.N. Bhagwati's view. It is a barren debate to focus only on old controversies about the judicial role. The real controversy concerns the *timing* and *occasions* of curative intervention, not the *power* of the higher judiciary to assume the responsibility of sometimes lifting the floodgates and bringing life and renewal to the law.

Justice Bhagwati's life illustrated his acute understanding of his functions as a judge and his duties as a moral human being. In these remarks, I will describe my initial encounter with him when he came to Australia in 1984. At the time, he was a judge of the Supreme Court of India, already with more than a decade of service. His elevation to be Chief Justice of India followed a year after our meeting. He had come to Australia for a judicial dialogue. In the course of his visit he was invited to a lunch with judges of the Court of Appeal of New South Wales. I had then recently assumed office as President that Court: the busiest full-time appellate court in Australia. I had already served for a decade as the inaugural chairman of the Australian Law Reform Commission.[5] During that service I had enjoyed the privilege of meeting two other great

[4] Tim Mellor, "Opinion, Guarding the Floodgates? Standing in Public Interest Litigation", Bulletin, Law Society S Aust, Vol. 33, Issue 9 (October 2011); G.L. Fricke, "Nervous Shock – The Opening of the Floodgates" (1981) 7 UniTas L.Rev 113, referring to *Jaensch v Coffey* (1984) 155 CLR 549.

[5] The author was appointed to chair the Australian Law Reform Commission 1975. He held that post until September 1984 when appointed to the NSW Court of Appeal.

judges of the Supreme Court of India, Justice H.R. Khanna[6] and Justice V.R. Krishna Iyer.[7]

Within a fortnight of assuming my new judicial function, I had participated in hearing an important appeal concerned with an issue of whether the common law in Australia recognised an entitlement, on the part of an individual affected by a decision of a governmental official exercising a power given by statute, to provide reasons for the decision if it was adverse to the individual concerned. I did what judges, meeting distinguished visiting colleagues from other jurisdictions frequently do. I began talking about the case I had then recently heard argued.[8] I asked our visitor whether, drawing on his own experience and Indian law, he could throw any legal light on my problem. Judges are like that, at least in the tradition of the common law. Where we speak the same language and share a similar legal tradition, we never hesitate to exchange experience and insights. This is part of the comparativist tradition of the common law. It was fostered by the links previously secured through the work of the Judicial Committee of the Privy Council. Now the links are neither imperial nor enforceable. But they continue to be the links of intellect, utility and mandatory. I knew I was on safe grounds in raising the question when I observed the visitor's sharp intelligence, incisive voice, boundless energy and vibrant intellectual curiosity deployed in providing his answer.

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[6] Justice H.R. Khanna, obituary by the author: (2008) 84 ALJ 351-352.

[7] Justice V.R. Krishna Iyer (1914-2014) was appointed a Judge of the Kerala High Court in 1968 and served on the Supreme Court of India (1973-1980). He and Justice Bhagwati pioneered public interest litigation in India. See B. Preston "A Précis of Justice Krishna Iyer's Contribution to the Environmental Jurisprudence of the Supreme Court of India" (2014).

[8] *Osmond v Public Service Board (NSW)* [1984] 3 NSWLR 477 (CA); [1983] 1NSWLR 691 (SC – Hunt J). In Australia, the term "judicial activist" is usually regarded as one of disparagement. See T. Josev, *The Campaign against the Court – a History of the Judicial Activism Debate* (Federation, Sydney, 2017). Reviewed A. Cheshire, [2017] *Bar News* (NSW) 74 where the author concludes: 'Judicial activism is a moveable term of abuse that is unhelpful and uninformative; it should be avoided in any legal or academic debate; and it should be left for use, if at all, in the media.

OSMOND'S CASE AND THE RIGHT TO REASONS

By 1984 the Australian courts had, for some time, held that a judicial officer was obliged to provide reasons for an adverse decision.[9] However, the obligations of administrators were much less certain. In England (from which Australia's common law derived) Lord Denning MR, like Justice Bhagwati a proponent of reform, had concluded that, sometimes, administrators were also so obliged.[10] However, the majority judicial opinion in that country suggested that there was no such obligation, unless Parliament specifically provided for it.[11] The position had been complicated in Australia by the passage of federal legislation, affording persons affected by adverse decisions of federal administrators, the right to obtain reasons for such decisions.[12] However, that legislation did not extend to the obligations of State administrators. In default of a statutory requirement, the duties of State officials were normally left to the demands of the common law.

As I outlined the problem in my case to Justice Bhagwati, I could see his eyes, with luminous intelligence, following my exposition of the problem. He put his delicate hands into a position of repose. He then began to explain to me the relevant developments of the law in the Supreme Court of India. In particular, he explained the outcome of two leading cases in which he had participated: *Siemens Engineering and*

[9] *Pettitt v Dunkley* [1971] 1 NSWLR 376 at 388.
[10] *Breen v Amalgamated Engineering Union* [1971] 2 QB 175 (CA) at 190-191.
[11] *Reg v Gaming Board; Ex parte Benaim* [1970 2 QB 417 at 430-431; *Payne v Lord Harris* [1971] 1 WLR 754 at 764-765.
[12] *Administrative Decisions (Judicial Review) Act* 1977 (Cth), s 13; cf *Administrative Law Act* 1978 (Vic), s 8; *Tribunals and Inquiries Act* 1971 (UK), s 12.

Manufacturing Co of India Ltd v Union of India[13] and *Maneka Gandhi v Union of India*.[14]

Newly inspired by this encounter, I went back to the task of writing my opinion in the case in hand.[15] I reviewed the facts, the submissions of the parties and the relevant court decisions in Australia and England, in the United States of America, Canada, New Zealand and Fiji. By reference to the briefing provided to me by a uniquely informed judicial colleague, I also turned to the jurisprudence of the Supreme Court of India:[16]

> "In *Siemens* Bhagwati J said that the rule requiring reasons to be given was "like the principle of audi alteram partem, a basic principle of natural justice. … The role of 'natural justice' in administrative law as an important principle intended to "invest law with fairness and to secure justice. It was stressed by Bhagwati J in *Maneka Gandhi* ... Calling on the language of Lord Morris of Borth-y-Gest in *Wiseman v Borneman* [1971] AC 297 at 309, Bhagwati J suggested that the 'soul of justice' is 'fair play in action' and that is why it has received the widest definition throughout the democratic world. In that case the Supreme Court of India held that the Passport Authority was obliged to supply reasons for impounding the passport of Mrs Maneka Gandhi. The case is complicated by the reference to the Indian Constitution and various statutory provisions. However, the basis for the obligation to provide

[13] AIR 1976 SC 1785.
[14] AIR 1978 SC 597.
[15] *Osmond v Public Service Board of NSW* [1984] 3 NSWLR 447 (CA) per Kirby P and Priestley JA; Glass JA dissenting. M.D. Kirby, "Accountability and the Right to Reasons", M. Taggart (ed.), *Judicial Review of Administrative Action in the 1980s - Problems and Prospects,* (OUP, Auckland, 1986), 36; M. Taggart, *Osmond in the High Court of Australia: Opportunity Lost*, *loc cit*, 53.
[16] *Ibid*, at 461.

> reasons would appear to have been expressed to lie in the duties of, or akin to, those imposed in this country by the rules of natural justice".

When the majority decision of the Court of Appeal, upholding the right to reasons from State administrators in serious decisions affecting the claimant was taken on appeal to the High Court of Australia, that Court unanimously reversed the Court of Appeal's orders.[17] Delivering the leading decision in the appeal, the then Chief Justice of Australia (Sir Harry Gibbs) said that there was no general rule of the common law or principle of natural justice that required reasons to be given for administrative decisions, even those made in the exercise of a statutory discretion and liable adversely to affect the interests, or defeat the legitimate or reasonable expectations, of others. As to the decisions of the Supreme Court of India to which I had referred in the Court of Appeal, Chief Justice Gibbs was unimpressed:[18]

> "Fourthly, Kirby P referred to a line of Indian decisions in which it has been held to be 'settled law' that where an authority makes an order in exercise of a quasi-judicial function, it must record its reasons in support of the order it makes": *Seimens Engineering and Manufacturing Co of India Ltd v Union of India*.[19] This, it was there said, is "a basic principle of natural justice". These decisions appear to state the common law of India, although without a detailed knowledge of the course of decisions in that country it would be hazardous to assume that they have not been influenced by the provisions of the Constitution of India or by Indian statutes".

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[17] Public *Service Board of NSW v Osmond* (1986) 159 CLR 656.
[18] M. Taggart (ed.), *Judicial Review of Administrative Action in the 1980 – Problems and Prospects* (OUP, Auckland, 1986). H.R.W. Wade, *Administrative Law* (5th ed. 1982), 486. *Ibid*, 662.
[19] (1976) 63 AIR (SC) 1785 at 1789.

The reversal of the majority opinion of the Court of Appeal of New South Wales happened when I was in New Zealand to participate in a conference on the then current developments in administrative law. It had been announced that the decision in the *Osmond case* would be announced in Canberra on the very day that I was scheduled to present my paper on the topic. The reversal was disappointing. But when the reasons of Australia's highest court became known soon afterwards, there was surprise on the part of many lawyers at the tone of it. Some suggested to me that an early opportunity had been grasped, to slap down the new, young, judicial adventurer. Describing this reaction, the organiser of the New Zealand conference, Professor Michael Taggart, said:[20]

> "Displaying a somewhat chauvinistic attitude Gibbs CJ dismissed Indian and American authorities, saying it would be 'hazardous' to assume that they had not been influenced by the Constitution or statutes according to the Chief Justice, it is only where Australian law is unclear or uncertain that assistance may be gained from overseas authority: 'when the rules are clear and settled (in Australia) they ought not be disturbed because the common law of countries may have developed differently in a different context."

There had been earlier similar observations by scholars and judges in Commonwealth countries. Thus, in *Administrative Law* (5th ed, 1982),[21] the doyen of administrative law in the United Kingdom, Professor HRW Wade, had noted: 'It is almost obligatory for Judges to stress the

[20] Taggart, above n. 18 at 62 (footnote omitted)
[21] HRW Wade, *Administrative Law* (5th ed, 1992) 486.

desirability of reason decisions while denying any obligation to do so'. In Canada a judge was critical of this double standard:[22] 'Unless the Court is prepared to compel the board to give written reasons I cannot see any useful purpose in repeatedly expressing a desire that the board furnish written reasons for its decision'.

In an article on "Lawmaking Judges",[23] Professor Max Atkinson remarked:[24]

> "Judges divide into two general camps, according to the balance they strike according to the desirability of reform, and their concern for the theory of precedent and the considerations on which it is based. Conservative judges of the first camp will stress their lack of mandate to make law as well as the injustice of its retrospective application. They may also acknowledge their lack of competence to assess social and economic policy and will remind us that the case for reform generally comes without notice, and that the new rule cannot be easily retrieved if unsatisfactory. 'Activist' judges from the opposed camp agree on these matters, but believe that the need to keep the law up to date is more often worth such cost. Each camp finds its view consistent with the common law... [But the majority of justices of the High Court of Australia are] presently in strongly conservative mood in their attitude to the common law."

These remarks were written only a decade before the High Court of Australia in the trail blazing decision in *Mabo v Queensland [No.2],*[25]

[22] Loc cit.
[23] Ibid at 34.
(1982) 7 UniTas L.Rev 33 at 34.
[24] (1976) 63 AIR (SC) 11785 at 1789.

embraced a principle, arguably extremely 'activist', affording qualified recognition for Aboriginal native title to land in Australia, which had earlier been denied by 150 years of Privy Council and Australian judicial decisions. I shall revert to this development below. But on the right to reasons from administrative officials, Australia's highest court in *Osmond* (1986) was unmoved by my references to the reasoning of Justice Bhagwati. It concluded that such arguments had to be addressed to the legislatures; not to the courts.

When in 1996 I was appointed to the High Court of Australia I reflected that an opportunity might arise during my service, for the reconsideration of the decision in *Osmond*. I waited patiently and politely (always keeping an open mind) in case a decision were ever presented, on an appeal or an application for special leave to appeal, to allow the High Court of Australia to revert to its earlier reasoning. Apart from my own views, one of the Justices in the High Court in *Osmond* (Justice Deane) had expressly recognised that developments in the common law and in the context of statutory law, might over time, be:[26]

> 'Conducive to an environment in which the courts should be less reluctant than they would have been in times past to discern in statutory provisions a legislative intent that the particular decision-maker should be under a duty to give reasons or to accept that special circumstances might arise in which contemporary standards of natural justice or procedural fair play demand that an administrative decision-maker provide reasons for a decision to a person whose property rights or legitimate expectations are adversely affected by it.'

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[25] (1992) 175 CLR 1.
[26] *Osmond* (1986) 159 CLR 656 per Deane J, quoted Taggart, ibid, 66-67.

Although I waited over the 13 years of my service on the High Court of Australia, no clear opportunity arose to revisit the reasoning arguably in *Osmond*. Accordingly, the conclusion sustained by that reasoning remains the law in Australia to this day. Neither as a principle of common law supplementing express statutory provisions nor as an implication from statute, based on the requirement that should be attributed to a modern parliament, is a right to reasons for administrative decisions obligatory in Australia, absent an express enactment.

Express provisions have proliferated under federal state and territory law in Australia. However, the general common law rule remains in place. Other remedies might sometimes be afforded to dissatisfied citizens (such as access to a legislator or to the Ombudsman). However, the rule of reason has not yet been substituted for the rule of unexplained exercise of power. The latter was not an approach attractive to Justice Bhagwati or to me. Ultimately, this was probably because of fundamental notions we each held concerning the deployment of public power and the duties assumed by those enjoying that privilege. Justice Bhagwati's powerful reasoning in *Siemens* and *Manuka Gandhi* remains in the Australian case books by way of my reasons in *Osmond*. It awaits the day when it will be embraced by the High Court of Australia, freed from the constraints of *Osmond.*

In several countries of the Commonwealth of Nations, the right to reasons for administrative decisions has been affirmed, just as Justice Bhagwati had taught.[27] I never forgot my first encounter with Justice

[27] See for example *Baker v Canada* [1992] 2 SCR 815 at 859; (1999) 174 DLR (4th) 193 at 229; cf *Mukherjee v Union of India* [1990] Supp 1 SCR 44; *Stefan v General Medical Council* [1999] 1 WLR 1293.

Bhagwati. In many subsequent meetings, I never lost my admiration and respect for his lively intelligence and deep commitment to justice. That is why, after I had first met him in 1984, I always called him "Chief".

THE BANGALORE PRINCIPLES AND HUMAN RIGHTS LAW

Following 1984, I encountered Justice Bhagwati on many occasions and worked closely with him in international meetings and colloquia. No enterprise of the many was so important as that which he convened at Bangalore, India (now Bengaluru) in 1988. That was where the *Bangalore Principles on the Domestic Application of International Human Rights Norms* were formulated. Presiding at that meeting was Justice Bhagwati, in brilliant symbiosis with his deputy Mr Anthony Lester QC of England (later Lord Lester of Herne Hill). The impact of that meeting in Bangalore in 1988 has been enormous. It is continuing.

Before the meeting in Bangalore, Justice Bhagwati was puzzling over the relationship between the growing body of international human rights law and the domestic law of each nation state. The orthodox view of the common law of England had been that the two systems of law, municipal and international, were separate. They worked on different planes.[28] But could this "dualist" theory be maintained as strictly as in the past in a world in which international rights law generally and international human rights law in particular was growing so rapidly? Should a reconciliation now be attempted between the two systems, out of a recognition of the necessity that each should work in harmony with the other?

[28] Explained R Higgins, *Problems and Process – International Law and How We Use It* (1994), Oxford, Ch. 12 "The Role of National Courts in the International Legal Process".

As the judges met in Bangalore, under the guidance of Justice Bhagwati, a consensus was reached which was to have much influence throughout the common law world. The *Bangalore Principles*[29] acknowledged that, international law was not part of domestic law unless it was duly incorporated into domestic law- usually by enactment by valid legislation. But the *Principles* went on to suggest a new and innovative rule which would promote harmonisation of the two legal systems.

Thus, if legislation were ambiguous, it would be consistent with the function of a judge, in a common law system, to resolve the ambiguity by reference to international human rights principles. If there were a gap in the common law, it would be consistent with the functions of such a judge to have regard to established rules of international law, particularly as to any relevant human rights, in filling the gap and providing for the development of the common law, relevant to the case in hand. This was not a revolution in the law. It was evolution. As befitted a distinguished and experienced judge, whose life had been dedicated to the rule of law, it did not turn established rules upside down. It simply provided a new and creative way by which the growing body of international human rights jurisprudence could be harmonised with the domestic law of the judge's own legal jurisdiction.

As these principles were contained in the concluding statement issued by Justice Bhagwati, and as they were to have a large significance in many countries, it is appropriate to set out the main paragraphs:[30]

[29] The *Bangalore Principles* are found in many places. See e.g. (1988) 14 *Commonwealth Law Bulletin* 1196 and (1988) 62 *Australian Law Journal* at 531.

[30] (1988) 62 ALJ 531.

BANGALORE PRINCIPLES

Between 24 and 26 February 1988 there was convened in Bangalore, India, a high-level judicial colloquium on the Domestic Application of International Human Rights Norms. The colloquium was administered by the Commonwealth Secretariat on behalf of the convenor, the Hon. Justice P N Bhagwati (former Chief Justice of India), with the approval of the Government of India, and with assistance from the Government of the State of Karnataka, India.

The participants were:

Justice P. N. Bhagwati (India) (Convenor)
Chief Justice E. Dumbutshena (Zimbabwe)
Judge Ruth Bader Ginsberg (USA)
Chief Justice Mohammed Haleem (Pakistan)
Deputy Chief Justice Mari Kapi (Papua New Guinea)
Justice Michael D. Kirby CMG (Australia)
Judge Rajsoomer Lallah (Mauritius)
Mr Anthony Lester QC (Britain)
Justice P. Ramanathan (Sri Lanka)
Tun Mohamad Salleh Bin Abas (Malaysia)
Justice M.P. Chandrakantaraj Urs (India)

There was a comprehensive exchange of views and full discussion of a number of expert papers. The Convenor summarised the discussion in the following paragraphs:

1. Fundamental human rights and freedoms are inherent in all human kind and find expression in constitutions and legal systems throughout the world and in international human rights instruments.

2. These international human rights instruments provide important guidance in cases concerning fundamental human rights and freedoms.

3. There is an impressive body of jurisprudence, both international and national, concerning the interpretation of particular human rights and freedoms and their application. This body of jurisprudence is of practical relevance and value to judges and lawyers generally.

4. In most countries whose legal systems are based on the common law, international conventions are not directly enforceable in national courts unless their provisions have been incorporated by legislation into domestic law. However, there 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.

5. This tendency is entirely welcome because it respects the universality of fundamental human rights and freedoms and the

vital role of an independent judiciary in reconciling the competing claims of individuals and groups of persons with the general interests of the community.

6. While it is desirable for the norms contained in the international human rights instruments to be still more widely recognised and applied by national courts, this process must take fully into account local laws, traditions, circumstances and needs.

7. 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.

8. However, where national law is clear and inconsistent with the national obligation of the State concerned, in common law countries the national court is obliged to give effect to national law. In such cases the court should draw such inconsistency to the attention of the appropriate authorities since the supremacy of national law in no way mitigates a breach of an international legal obligation which is undertaken by a country.

9. It is essential to redress a situation where, by reason of traditional legal training which has tended to ignore the international dimension, judges and practising lawyers are often unaware of the remarkable and comprehensive development of statements of international human rights norms…

10. These views are expressed in recognition of the fact that judges and lawyers have a special contribution to make in the administration of justice in fostering universal respect for fundamental human rights and freedoms.

26 February 1988

The adoption of the *Bangalore Principles* led to in a series of colloquia for judges from common law countries. These were held in diverse venues including Banjul, Johannesburg and Balliol College, Oxford.[31] Individual judges began to apply the *Bangalore Principles* in their municipal decision-making. An early case in which I did so involved an appeal to the *Principles* in order to elaborate and clarify the requirements of the common law in Australia concerning the right of a litigant to access to the interpretation of proceedings in an open court which would otherwise be unintelligible to that person.[32] The application of the *Bangalore Principles* to resolve ambiguities or to fill gaps in the law became increasingly well known within the judiciary in Australia. However, it awaited endorsement by the High Court of Australia which enjoyed the constitutional power of supervision over the judgments and reasons of courts lower in the judicial hierarchy. Observers did not have long to wait.

In the *Mabo* case, already referred to,[33] Justice F.G. Brennan (for the plurality) embraced a principle quite similar to the *Bangalore Principles*, when explaining his reasons for upholding the claim of an indigenous

[31] M.D. Kirby, "The Australian use of International Human Rights Norms: from Bangalore to Balliol" (1993) 16 UNSW LJ 363 at 377-383.
[32] *Gradidge v Grace Bros. Pty Ltd* (1988) 93 FLR 414 at 415-422. See also *Jago v District Court of NSW* (1988) 12 NSWLR 558; *Young v Registrar, Court of Appeal* (1993) 71 ACrimR 121.
[33] (1992) 175 CLR 1.

litigant to enjoy legal rights in traditional lands claimed as belonging to his family and community. Justice Brennan held that, because Australia had ratified the *International Covenant on Civil and Political Rights* (ICCPR) and had also acceded to the *First Optional Protocol* to that treaty affording a person in Australia a right to complain to the United Nations Human Rights Committee for alleged breaches, the ICCPR could be utilised in funding and expressing the contemporaneous principle of the common law. This was so although neither that treaty nor the *Optional Protocol* had been expressly incorporated into Australian law by a legislature, with the constitutional power to do so; and although the pre-existing expositions of the common law had denied recognition of the claimed legal interest and had done so consistently, over nearly a century and a half. Justice Brennan said of the ICCPR and the Optional Protocol:[34]

> "[It] 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."

No express mention was made in Justice Brennan's reasoning of the *Bangalore Principles* or of the article which I had published in the national law journal,[35] concerning the technique of using and

[34] (1992) 175 CLR 1 at 42.
[35] (1998) 62 ALJ at 531.

incorporating particular principles of international human rights law by way of judicial elaborations of the common law. However, it may be too coincidental to believe that the *Bangalore Principles* had not impacted the reasoning of the majority in *Mabo* in taking such a bold, principled step to remove a longstanding, serious, discriminatory injustice.

If, directly or indirectly, the exposition of the *Bangalore Principles* contributed to the reasoning of Justice Brennan and the majority in the *Mabo* decision, this would constitute a major beneficial impact of Justice Bhagwati's initiative in convening the Bangalore meeting and formulating the principles that were there endorsed.

In my own later service on the High Court of Australia, after 1996, I quite frequently invoked the techniques of the *Bangalore Principles* to utilise the universal norms of human rights expressed in international law. I did so in cases involving the interpretation of ambiguous provisions of the Australian Constitution[36] and cases involving the interpretation of unclear federal legislation.[37] This was sometimes strongly criticised by a number of judges of the court.[38] To this time it has not attracted the support of a majority in the High Court of Australia. However, in my view it is inevitable that the international context, against which all aspects of Australian law must now be understood, interpreted and enforced, is now influencing the understanding of law. International law (including on universal human rights) will inevitably influence municipal law as a powerful contextual element.

[36] *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 417-109 [166]-[167] (per Kirby J).
[37] E.g. *Al-Kateb v Godwin* (2004) 219 CLR 562.
[38] Ibid at 585 – 595 [47]-[73] per McHugh J; see also *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 221-223 [164]-[175] per Hayne J and at 224-226 [181]-[183] per Heydon J. (diss).

In the United States of America, Judge Ginsberg (who had participated in the Bangalore meeting) returned to that country and was soon elevated to the Supreme Court of the United States. She and some other Justices of that court, in a similar way, began to use international human rights law in concluding contested questions in that country.[39] The issue remains a highly controversial one in the United States.[40]

Because of the controversy, the influence of international human rights norms is commonly omitted from judicial reasoning, including in the United States, to avoid provoking the adamant opponents. Nevertheless, the interstitial impact is considerable. In my view it is inevitable and also beneficial. In India, express words in the national constitution impose upon the State obligations to promote international peace and security; to maintain just and honourable relations between nations; to foster respect for international law; and to encourage the settlement of international disputes by arbitration. [41] In such a context, and working with a constitutional instrument that followed, and did not precede, the *Charter* of the United Nations, it is natural that international law should have a large and growing impact on texts adopted in a world that had accepted the *Charter*.[42] In most countries of the world, the ideas propounded in the *Bangalore Principles* are largely uncontroversial, because their national constitutional instrument contains national principles of human rights that are compatible with universal human rights. In the United States of America and Australia, the

[39] See e.g. R.V. Ginsberg and D.J. Merritt, "Affirmative Action: An International Human Rights Dialogue" 21 *Cardoso L. Rev* 253 (1999).
[40] See e.g. M.D. Kirby, "International Law – The Impact on International Constitutions" (Grotius Lecture 2005) 21 *AmU. Int'l L. Rev* 327 (2006); Justice Antonin N. Scalia and Justice Stephen Breyer, "The Relevance of Foreign Legal Materials in US Constitutional Cases: A Conversation" 3 *Int'l J. Const. L.* 519 (2005).
[41] *Indian Constitution*, Art. 51(c).
[42] *The Bangalore Principles* were also controversial in Malaysia. The Lord President of the Federal Court, Tun Salleh Bin Abas, who signed the Principles, was removed from judicial office, allegedly for wrongful conduct.

national constitutions preceded these developments. To some extent, this explains the continuing resistance to according operative effect to universal human rights law as a source of the law applicable to particular cases. This fact makes the *Bangalore Principles* even more important in such countries, if intellectual isolationism is to be avoided.

Once again, I must express my personal gratitude to Justice Bhagwati for his leadership in helping to secure the adoption of the *Bangalore Principles* in national courts and in encouraging their implementation in many countries of the world.[43]

CONCLUSIONS

In addition to his important and creative work as a senior Judge in the Indian judicature, and eventually as Chief Justice of India, as well as his work in his post judicial years in fostering internationalism within the global judicial family, Justice Bhagwati served in many international roles that brought us together.

Thus, during the years in which I was a Commissioner, and ultimately President, of the International Commission of Jurists in Geneva, he served on the board of the Centre for the Independence of Judges and Lawyers (CIJL). This body was instrumental to the proposal that the

[43] C.f. James Crawford, "International Law in the House of Lords and the High Court of Australia (1996-2008): A Comparison" (Kirby Lecture 2008) published [2008] *Australian Year Book of International Law*. See also L. Thomas, "Can International Human Rights Law have a Legitimate Influence on the Interpretation of the Australian Constitution?" *Polemic*, Vol. 14 Issue 1, 24.

United Nations General Assembly should adopt *Basic Principles on the Independence of the Judiciary*. This proposal was endorsed by the General Assembly in 1985. It was elaborated in the 1990s when Justice Bhagwati served as the chairman of the CIJL Advisory Board. Because, at the same time, I was serving as the chairman of the Executive Committee of the International Commission of Jurists, I had many opportunities to meet and work with him. These were times of great creativity for universal human rights.[44]

We also served together in various tasks initiated by successive High Commissioners for Human Rights of the United Nations, once that office was established in 1993. Because he was deeply concerned about the legal implications of poverty and the profound disadvantages of the poor in India, he sought to promote awareness amongst the global judiciary about the *International Covenant on Economic Social and Cultural Rights* (ICESCR). Many judges were initially inclined to view the ICESCR as lacking in legal justiciability. I participated in meetings at OHCHR on this issue during time that the former Irish President, Mary Robinson, was serving has High Commissioner for Human Rights (1997-2002). He also participated with me in the Judicial Reference Group created by High Commissioner Louise Arbour of Canada (2003). He was always looking for new ways to promote awareness of international human rights in civil society and to encourage UN agencies to advance such knowledge amongst judges, advocates, law students, philosophers, sociologists, officials and the general public.

[44] See *EIJL Bulletin* No.25-26 Special Issue: *The Independence of Judges and Lawyers: A Compilation of International Standards*, October 1990.

Both Justice Bhagwati and I accepted mandates under the United Nations special procedures on human rights, addressed to particular issues and places in need of monitoring, legal advice and technical assistance. Thus, in 1993-6 I was appointed by Secretary-General Boutros Boutros-Ghali as his Special Representative for Human Rights in Cambodia. At the same time, from my seat in the High Court of Australia, I was expressing similar concern about human rights grounded in the same provisions of human rights law.[45] At the time I was serving in Cambodia, in September 1994, he was elected as the first Indian national to serve on the United Nations Human Rights Committee. He was later appointed Vice-Chairman of that Committee. My appointment for Cambodia fulfilled a provision in the Paris Peace Accords that followed the genocidal wrongs in Cambodia of the Khmer Rouge regime (1991). In May 2002, Justice Bhagwati accepted appointment as a human rights observer to visit detention centres for asylum seekers at Woomera in Australia. He pointed to the injustice of the circumstances in which the detainees were held.[46]

In the 1990s Justice Bhagwati was also appointed to chair an international committee to observe and monitor the peace process in Sri Lanka. In 2013 I was appointed to chair an international Commission of Inquiry on human rights violations in the Democratic People's Republic of Korea.

To a very large extent my life and P.N. Bhagwati's life ran a parallel course. However, I followed behind him and learned from his friendship,

[45] *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365 (indefinite detention of children); *Al-Kateb v Godwin* (2004) 219 CLR 562 (indefinite detention of stateless person); *Fardon v Attorney-General* (Qld) (2004) 223 CLR 575 at 645 [187]-[189] (phenomenological punishment).
[46] P.N. Bhagwati, *www.newsindia-times*.

writings and example. Huge and complex as its challenges were, India was not by itself sufficient for his commitment to humanity as a whole. He taught me and others the importance, in the current age, of our obligations to fellow human beings everywhere. Truly he was in the first generation of judges who could be described as global in outlook. Still, he was intensely practical and wise in his contributions.

All of the contributions of P.N. Bhagwati to the national and international scenes are significant and worthy of study. To me he was a teacher and an example. Few mortals came anywhere near his energy and fearless commitment to global human rights. I have sought, and still do, to follow in his footsteps. He was noble, wise and humble in equal degrees.

I am proud to contribute to this *Festschrift* that honours P.N. Bhagwati's contributions to our world. I pay a special tribute for his contributions to the building of a modern judiciary: international in outlook and committed to rendering universal human rights part of everyday professional endeavour. I pay particular tribute to his innovative work. In this chapter, I have tried to show the contribution he made, not only to India but also to Australia and other lands. His life has concluded. However, his spirit lives on. Above all, it teaches the duty of all people – but especially judges and practising lawyers – to advance and uphold universal human rights in the law – to the full extent that this is proper, as it usually is. If I close my eyes, I can still hear P.N. Bhagwati's urgent, restless voice, speaking of universal justice. He is urging me on. He is urging all of us to make the world safer and kinder because it is more just.