*LAW IN CONTEXT*

# INTERNATIONALISING LAW - A NEW FRONTIER FOR LAW AND JUSTICE[*]

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## ADJUSTING TO A NEW AGE

One has to feel sorry for judges and lawyers. Not too much; but a little. It was once enough for them to learn the local law. They did so in notes that they collected in their law school days. If, during that time, they undertook the study of international law, they were lucky. In my day at the University of Sydney, the study of international law was compulsory. I was blessed with great teachers who enjoyed global reputations in the field - most especially Professor Julius Stone.

Many Australian lawyers, however, secured their professional qualifications without the slightest study of international law. This would have been remarkable back in the 1950s at Sydney University when I began my legal studies. It is astonishing, and even reprehensible, today

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[*] Based on an address at the conference on Globalism, Law and Justice at the University of Western Australia, Perth on 27 October 2006.

[**] Justice of the High Court of Australia. This essay draws on, adapts and updates previous writings of the author.

given the impact that international law (including the international law of human rights) increasingly has on the way law is practised in legal offices, government departments and courtrooms throughout a nation such as Australia. Yet it happens.

The purpose of this contribution is to sketch the process by which the internationalisation of law came to be realised in my mind. It was not fully appreciated when I embarked on my legal studies. Indeed, at that time the new world legal order, that had commenced with the *Charter* of the United Nations, was but a decade old. Moreover, at that time, the municipal legal mind was still locked in the perception that international law basically existed for the control of nation states and international organisations. According to this view, it had comparatively little to do with municipal law. At least, it had little impact on municipal law unless, exceptionally, the provisions of an international treaty were expressly incorporated into domestic law by a local statute - an act that engaged the legislature and government. According to this approach, the legislature, typically, brought treaty provisions into municipal law. The government, typically, negotiated and ratified the treaty and, once enacted as part of domestic law, took steps to carry it into effect. The courts then interpreted and applied the domestic law, including any incorporated treaties.

Into this relatively settled and placid understanding of the place of international law, reflecting the dualist school to which countries such as Australia subscribed, several events intruded. First, there was the

devastation of two world wars that shattered much of the old world order and demonstrated the need for a fresh approach. As the United Nations *Charter* itself signified, that new approach would be built upon new arrangements for international peace and security; a new acceptance of the need for universal economic opportunity that required the termination of the global political empires; and a new commitment to respect for the universal principles of human rights.

To these global dynamics was added the advent of the technologies of air travel, telecommunications, informatics, nuclear technology, and now nanotechnology and biotechnology that render global approaches to social problems absolutely imperative for the sake of humanity and the survival of the human species. In addition, global issues came to be recognised that could not be solved except on a global basis, reflected in a global outlook with local manifestations. I refer to such issues as global warming, transnational hunger, homelessness and poverty, international security, counter-terrorism and such urgent issues confronting our species as HIV/AIDS, Avian flu, malaria, tuberculosis and the challenges of the internet.

On top of all of these forces, the growth of the global economy, with its regional and national manifestations, and the advent of huge economic developments in countries such as China and India, present *stimuli* that have lifted the human mind in less than half a century from an outlook locked in local jurisdiction to an outlook that perceives issues in regional, global and even extra-terrestrial perspectives. Talk about

Law in Context. This is a changing context that at once produces, and obliges, changes in law.

A question resulting from these phenomena is whether lawyers, who hitherto have been so hidebound to their local jurisdictions, confined to the laws and regulations of their own territorial sovereigns, can adapt quickly enough to a world in which such narrow perspectives are unacceptable and whether they will realise that a new, international outlook is imperative. Lawyers and judges, as professional groups, tend to be quite conservative by instinct. They are often resistant to radical change - certainly to fundamentally changed ways of thinking about problems and devising legal solutions for them. Nevertheless, a new outlook is essential if the law, and the rule of law, are to survive. Gradually, I trust, this message is sinking in.

In this contribution, I will give a personal story of the way in which my own thinking came to expand - and to realise the need for a fresh outlook: one that seeks to adapt local law so that it fits comfortably into the ever-expanding context of international law, in turn being developed by international and regional agencies and institutions. Many who have not taken this journey are still resistant to the idea that municipal law must adapt to the advances of international law. Some, who are not so resistant, are still sceptical and doubtful about the impact of international law in practice. By explaining how the new perspective came into my life as a lawyer, I may help others to understand the new realities.

## THE AGENCIES OF THE UNITED NATIONS

For me, it all began when I was appointed chairman of the Australian Law Reform Commission (ALRC) thirty years ago. Soon afterwards, the Commission was required by the Federal Attorney-General to prepare a report on privacy protection. This task coincided with the establishment by the Organisation for Economic Cooperation and Development (OECD) of an expert group, set up to draw up guidelines on privacy protection in the context of transborder data flows. That was an unusual task for the OECD. But looking back, we can see it as an early portent of the increasing moves in recent times of those hard-nosed institutions, the OECD, the World Bank, the International Money Fund (IMF) and the World Trade Organisation into issues of good governance. Without stronger governance, vigilant against corruption, economic advancement will be a hollow achievement, if was is attainable at all[1].

I was elected chairman of the OECD group. We prepared our guidelines[2]. They were adopted by the Council of the OECD and recommended to member states. They were as much designed to prevent economic inefficiency and disparate municipal regulation of the

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1 J Kelsey, "Global Economic Policy-making: A New Constitutionalism?" (1999) *Otago Law Review* 535 at 539.

2 OECD, *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*, Paris, 1980. cf "Privacy in Cyberspace" in M D Kirby, *Through the World's Eye* (2000), Ch 5, 52.

new information technology as to defend fundamental human rights. Eventually, most OECD countries, including Australia, accepted the guidelines. In Australia (as in New Zealand) they provided the basis for privacy principles incorporated in privacy protection legislation[3]. Through the ALRC I was able to see the highly practical way in which a legal project at an international level could assist and influence municipal law-making. After that, I could never accept the view that international law - even soft law - was a matter for scholars and theorists alone. In countries as far apart as Japan, the Netherlands and Australia, the deliberations of our expert group in Paris had a real, practical and beneficial effect on international cooperation and local law.

In the manner of these things, one engagement leads to another. Soon after the OECD work was completed I took part in the general conference of UNESCO, also in Paris. That organisation was in the throes of what became the temporary withdrawal from UNESCO of the United States and the United Kingdom. Strangely enough, one of the reasons for the United States' withdrawal was the insistence by Director-General M'bow that UNESCO should continue the exploration of the meaning in the common first articles to the *International Covenant on Civil and Political Rights* the *International Covenant on Economic, Social and Cultural Rights* which promise the self-determination of peoples. Who were a "people" for this purpose?

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[3] *Privacy Act,* 1988 (Cth), Schedule 3, "National Privacy Principles", reflecting the OECD Guidelines.

It always seemed odd to me that the United States should have opposed the exploration of this idea, given the famous opening words of the *Declaration of Independence.* But the United States quit UNESCO and, to its great credit, that organisation went on with the exploration of the issue of self-determination. I was elected to the expert group and ultimately as rapporteur and chairman. Our task was to examine who were a "people" entitled to this promised right.

The issue was, and is, a highly controversial one. It is uncongenial to many nation states containing national minorities. It is even unwelcome to some people in Australia. But, looking at the real causes of conflict in the world today, who can doubt that this is one of the great issues of international law - from East Timor to Ache; from Burma to Tibet; from Palestine to Kosovo; from Corsica to Ulster; from the Falklands to Nunavut; and most recently from Fiji, Bougainville and Solomon Islands to Aboriginal Australia. It is an issue that goes to the heart of the current dangers to international peace and security. It concerns the rights of peoples but also the human rights of the individuals who make up peoples.

The UNESCO expert group completed its task. It identified four elements necessary to constitute a "people" for international law

purposes[4]. It is a misfortune that many who are unaware of the body of international law and scholarship on this subject mistake 'self-determination' for total national 'independence'. That is a possible but not a necessary attribute of self-determination. This is a message from international law that needs to be learned in many countries.

By the time the work of the UNESCO group was completed the HIV/AIDS pandemic was upon the world. I then met one of the truly noble participants in the building of international law and policy - a United States epidemiologist - not a lawyer - who called me to serve on the World Health Organisation (WHO) Global Commission on AIDS. This was Dr Jonathan Mann who tragically lost his life in 1998 *en route* to Geneva for a meeting on HIV vaccines.

The Global Commission on AIDS established principles for the management of the HIV epidemic, now being pursued by that unique successor inter-agency body, UNAIDS. Implementing the guidelines has been by no means easy, given the cultural impediments that exist in various countries. It has fallen to some of the participating agencies, such as the United Nations Development Programme (UNDP), to attempt to persuade governments and bureaucracies in affected

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[4] UNESCO, International Meeting of Experts for the Elucidation of the Concepts of Rights of Peoples (1985-91) (Final Report SHS-85/Conf.613/10). See also UNESCO, Report of the International Conference of Experts, Barcelona 21-27 November 1998, "The Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention" (1999).

countries to adopt the bold strategies that will help reduce the spread of the HIV virus. Significantly, those countries which have done so (including Australia) have seen the graph of sero-conversions to HIV fall and largely plateau. Those countries which have not (particularly in sub-Saharan Africa and parts of Asia) have witnessed rapid escalation in the spread of the virus that continues.

UNAIDS guidelines[5] worked out in 1997, at meetings which I chaired, held in concert with the United Nations Centre for Human Rights, reflections of a consensus amongst the most informed public health and epidemiological experts in the world. The guidelines present a stimulus to the recalcitrant or the ignorant leaders and officials of do-nothing nation states. This is not international law in the traditional sense. But the influence of such guidelines, carried into municipal bureaucracies by WHO and UNAIDS experts, fired with a determination to prevent the ravages of AIDS, can sometimes have a direct local impact far greater than high-sounding treaties. This is international cooperation and principle turned to vital practical initiatives to save human lives. Without international law and international agencies it would be just a dream, mere talk.

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[5] UNAIDS/Centre for Human Rights *Guidelines on Implementation of HIV/AIDS Strategies* (Geneva, 1997). These Guidelines have later been updated and elaborated in respect of the right to access to healthcare, following the development of anti-retroviral therapies.

In more recent times, I have been serving on a Global Reference Panel of UNAIDS. This Panel is concerned specifically with the human rights aspects of the HIV pandemic. It has been asked to address the issue of how the international principles of human rights that sustain rights to informed consent for medical treatment should be adapted to help promote the availability of anti-retroviral drugs. These therapies have become available in the last decade. They arrest rapid decline in the health of most recipients. They restore life and well being. They are expensive. But they are now available. A major effort to provide them to people living with HIV in poorer countries has been undertaken by UNAIDS. To be administered, it is necessary to identify those who are already infected with HIV. Yet to do so runs the risk, in many countries, of exposing those people to stigma and even violence. How can the tests be conducted, and patients encouraged to consent to such a course, when they may not be assured of access to the treatment yet run the instant risk of calumny, isolation and rejection? Such problems are not theoretical. They are not confined to talk in international meetings in Geneva. They arise in the field in many countries of the world. They demand legal and social changes that protect the infected and, by protecting and helping them, they defend society as a whole.

In two other specialised agencies of the United Nations I have witnessed the practical helping hand that can sometimes be offered to domestic law-making. In 1991-92, I participated with two other Commonwealth judges in the International Labour Organisation (ILO) Fact-Finding and Conciliation Commission on Freedom of Association.

Our particular task, just before the achievement of constitutional change in South Africa, was to examine the labour laws of that country and to advise on the standards which they had to attain in order to conform to ILO Conventions.

Having walked out of the ILO rather than be expelled during the apartheid years, the existing South African laws had fallen into serious disrepair. South Africa was keen to renew its relationship with international legal norms[6]. The ILO mission examined closely the letter and practice of the South African laws. Its report, delivered to the de Klerk government was subsequently acted upon by the Mandela government. A new *Labour Relations Act* was adopted, complying with ILO standards[7].

In 1994 the United Nations Development Programme (UNDP) arranged my participation in a number of meetings leading up to an important constitutional conference in Malawi. It was that conference which agreed on the text of constitutional changes designed to usher in a multi-party democracy in the place of the one-party rule of President Hastings Banda. After a referendum and elections, a peaceful change of government was accomplished in Malawi. I pay tribute to the officers

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6 A Stemmett, "The Influence of Recent Constitutional Developments in South Africa on the Relationship Between International Law and Municipal Law" (1999) *The International Lawyer* at 47.

7 International Labour Organisation, *Report on the Mission to South Africa* (1992).

of UNDP and other United Nations agencies who facilitated this remarkable and largely peaceful change in Malawi and in other lands. This was truly a translation of the universal principles of human rights concerning democracy and human dignity into action in a particular country. I do not believe that it could have happened without the skills of United Nations agencies that I saw in operation at first hand.

In more recent years I have taken part in the innovative work of the International Bioethics Committee of UNESCO (IBC). This body has been grappling with some of the most difficult legal and ethical questions confronting humanity. I refer to the quandaries presented by genomic science, the development of the Human Genome Project and the advent of embryonic stem cell experiments and human cloning. The UNESCO Committee in 1998 adopted the *Universal Declaration of Human Rights and the Human Genome.* This contains a number of basic norms aimed to provide a framework for a global response to legal and ethical questions relevant to the entire human species[8].

Between 2003 and 2005, I chaired a drafting group of the IBC that developed the *Universal Declaration on Bioethics and Human Rights*. This group proposed a form of declaration that was endorsed by the IBC. After some modifications by member states, the *Declaration* it was

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[8] *Universal Declaration on Human Rights and the Human Genome* (1997). cf "The Human Genome" in M D Kirby, *Through the World's Eye* (2000), Ch 4, 41.

adopted, unanimously, by the General Conference of UNESCO in October 2005. The new *Declaration* attempts, for the first time, to combine the ancient principles of bioethics (largely developed for the healthcare professions) and the more recent expression of universal human rights (largely developed by lawyers, politicians and political scientists).

In due course it is possible that this Universal Declaration will lead on to a treaty, as others in the past have done. The point to be made is that an international agency, calling on diverse expertise and viewpoints from different religions, economic needs and cultures, is seeking to design an effective universal response for humanity. The difficulties of securing such a response in a world of so many different starting points and where large investments and differing national intellectual property regimes apply, are not to be under-estimated.

Most recently I have been participating in an initiative of the United Nations Office for Drug Control and Crime Prevention (UNODC). Under the aegis of that agency, a Global Programme Against Corruption has been established. Several international agencies, including the OECD, the World Bank and the IMF, have increasingly concerned themselves with the problem of corruption and its insidious effect on municipal laws and governmental institutions. A Judicial Group on Strengthening Judicial Integrity has now been established in Vienna, working directly to the United Nations office there. I am its rapporteur.

This Group mainly comprises chief justices and senior judges from Asia and from Africa. At present, most of them are from countries of the common law tradition. The intention, in due course, is to establish a broader group with members from Latin America, Central and Eastern Europe and the former Soviet Union and perhaps elsewhere. The task is to draw up strategies, including a universal minimum code of judicial conduct. Wisely, the Vienna agency is leaving the task to the judges themselves, supported by research and other staff, as well as by informed non-governmental organisations.

The UNODC Group has drawn up, and endorsed, the *Bangalore Principles on Judicial Integrity*[9]. These Principles have been accepted by the governing body of UNODC and endorsed by ECOSOC. They too, may in time, give rise to treaty obligations, for example, as a conditional requirement for financial assistance imposed by the OECD, the World Bank, the IMF or the World Trade Organisation. Effective rules of international law cannot be ruled out. Pursuant to an OECD Convention, long-arm legislation has been enacted by Australia and other nation states to render it a crime for their nationals to engage in corruption of overseas foreign officials. This is the way in which

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[9] UNODC, Bangalore Principles of Judicial Conduct were noted by the (former) United Nations Commission on Human Rights in its resolution 2003/43. They were endorsed by the 15th session of the UN Commission on Crime Prevention and Criminal Justice in April 2006. In July 2006, the UN Economic and Social Council (ECOSOC) by resolution without a vote, adopted the UNODC resolution (ECOSOC 2006/23).

international principles of 'soft law' may come in time to affect local domestic law and national practice.

I tell these stories not to enlarge my own role in any of these multifarious activities. My role has been relatively minor. Instead, they are told to illustrate by reference to some activities with which I am familiar, the rapid multi-pronged advance of international initiatives, many of them relevant to the design of national law. What, only forty years ago, was basically the concern and responsibility of the nation states themselves, domestically, has increasingly become an issue for international cooperation, the development of universal guidelines, the involvement of people and their organisations and, sometimes, international law. These developments continue to gather pace. We are only witnessing an early phase of them. But the present generation of judges and lawyers has been privileged, in effect, to be there at the creation.

## MONITORING HUMAN RIGHTS: SPECIAL PROCEDURES

One of the most remarkable developments of international law in recent decades has been the growing impact of international human rights treaties on municipal law and practice. I have observed this at three levels. I want to mention each.

First, between 1993 and 1996 I served as Special Representative of the Secretary-General of the United Nations for Human Rights in

Cambodia. That function arose in the aftermath of the successful completion of the UNTAC phase in Cambodia, as a requirement agreed between that country and the international community and given effect in the Paris Peace Accords[10].

Twice a year, in Geneva in April and in New York in November, it was my duty to report on the state of human rights in Cambodia to the then Commission on Human Rights and to a Committee of the General Assembly. I was one of about 30 United Nations Special Representatives and Special Rapporteurs. I saw at first-hand the operations of the United Nations Centre for Human Rights. When the new office was established, I worked closely with the High Commissioner for Human Rights when that office was established. The criteria for my visits and reports were not merely intuitive beliefs of my own about civilised standards that should be observed by Cambodia. The criteria were the principles laid down in the international treaties which together establish the basic framework of international human rights law applicable everywhere.

I have no doubt that my work and that of the United Nations Office of Human Rights in Cambodia, stimulated, cajoled and encouraged domestic law and practice in that country so that it would conform with

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**10** The 1991 Paris Peace Agreements are referred to and the work of the author as Special Representative explained in "Cambodia: The Struggle for Human Rights" in M D Kirby, *Through the World's Eye* (2000), Ch 3, 24.

the international treaty provisions that Cambodia increasingly ratified. In a land that had been racked by revolution, war, genocide and invasion, there was a deep thirst for help and technical support. I came to know noble servants of the United Nations with whom I worked. "Shorty" Coleman, an Australian soldier, supervising landmine clearance. Christophe Peschoux, human rights officer, who investigated dangerous cases of abuse of power. Basil Fernando, who instituted programmes for training prison officers and police. Ms Kek Galabru who helped establish non-governmental organisations in Cambodia to assert and uphold the rights of women.

Let no one say that the United Nations is only made up of time servers. I have known dedicated and idealistic servants of international human rights law, often working in most trying and even dangerous situations. Their work goes on. Many of the Special Rapporteurs of the United Nations have suffered retaliation for their actions, including the former Special Rapporteur on the Independence of the Judiciary (Dato' Param Cumaraswamy). His claim for diplomatic immunity had to be taken to the World Court[11] before it was finally recognised by the then government of his own country, Malaysia.

The bureaucracy of the United Nations is sometimes inefficient. The frustrations and rejections are sometimes dispiriting. More recently,

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[11] International Court of Justice, Advisory Opinion Concerning a Special Rapporteur (1999).

since the establishment of the new Human Rights Council to take the place of the Human Rights Commission of the United Nations, concerns have been expressed about the very survival of the beneficial system of Special Rapporteurs and Special Representatives. The bold hopes that this system would be continued and strengthened and that the new Council would be an improvement are now coming under anxious re-assessment. Some nation states that are members of the Human Rights Council themselves have poor human rights records. The Council has not always acted with complete apparent impartiality. As in the past, decisions sometimes appear to have been made on political, rather than objective and principled, human rights grounds.

Perhaps defects of this kind are inevitable, to some in degree, in the real world. At least in the case of Cambodia, action was quite often taken in the early days in response to my recommendations as Special Representative and also the recommendations of my three successors since 1996. Even for the most oppressive nation states, it is a salutary requirement of international institutions and practice today that autocrats and their representatives are sometimes obliged to appear before the bar of the United Nations and to answer in public to charges of infractions of international human rights law. There is progress in that very fact. The process of transparent international accountability to international human rights law has begun.

## THE ICCPR FIRST OPTIONAL PROTOCOL

My second illustration began soon after it was announced that Australia would sign the First Optional Protocol to the *International Covenant on Civil and Political Rights* (ICCPR). This act rendered Australia accountable to the United Nations Human Rights Committee on the communication of any person with an interest. I was asked whether the gay and lesbian reform group in Tasmania should mount a complaint to the United Nations concerning the Tasmanian criminal laws then in force against adult homosexual conduct between males[12]. I advised against such a communication.

The intended complainant, Nicholas Toonen, had not been prosecuted under the Tasmanian laws. On one view, he had not exhausted domestic remedies, because no domestic process had been taken against him. I told him that his complaint was doomed to fail. In fact, the Human Rights Committee upheld Mr Toonen's complaint against Australia[13]. In the ultimate outcome, the Federal Parliament enacted a statute effectively over-riding the Tasmanian laws[14]. Those

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[12] Criminal Code (Tas), ss 122 and 123 (as previously applicable).

[13] *Toonen v Australia* (1994) 1 *Int Hum Rts Reports* 97 (No 3) reproduced in H J Steiner and P Alston, *International Human Rights in Context* (1996), 545. See also "Same-Sex Relationships", Ch 6 in M D Kirby, *Through the World's Eye,* (2000), Ch 6, 64 at 67.

[14] *Human Rights (Sexual Conduct) Act* 1994 (Cth). See also *Croome v Tasmania* (1997) 191 CLR 119.

laws were themselves eventually repealed and replaced by the non-discriminatory provisions now in force. Now, nowhere in Australia is there any law imposing criminal sanctions on people for adult, private sexual conduct, although there are still serious inconsistencies in the treatment of sexual minorities that fall outside the scope of this essay.

The lessons of the *Toonen Case* are many[15]. It shows once again the practical operation of international human rights law, at least in a country such as Australia, which has signed the First Optional Protocol to the ICCPR and has generally taken its international obligations seriously. As we do not have a general constitutional Bill of Rights in Australia and as there is no regional human rights court or commission for Asia or the Pacific, the importance of the ICCPR could not be over-stated.

The significance of the *Toonen* decision also runs far from Tasmania and Australia which, ultimately, would probably have corrected their anachronistic criminal laws on homosexual offences. It brings hope to people in countries where individuals are still seriously oppressed by reason of their sexuality. Because I am homosexual myself, I understand that oppression; indeed it helps me to understand all oppressions based on irrational and irrelevant grounds.

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[15] E Evatt, "National Implementation - The Cutting Edge of International Human Rights Law", ANU Centre for International and Public Law, *Law and Policy Paper* No 12, 24.

I do not pretend that the *Toonen* decision, and its reasoning, have passed without criticism in Australia as elsewhere. For example, some have seen it as an unwarranted and premature intrusion into Australia's domestic democratic concerns and federal arrangements. Some of the opposite view have suggested that it did not go far enough. Thus, it has been argued that it is fundamentally erroneous to rest a human rights response to discrimination on the ground of sexuality on notions of *privacy* rather than on notions of full *equality*. The adopted approach has been seen, by some observers, as little more than the "freedom" of a closeted human identity and one that tolerates the very public violence and discrimination suffered by homosexual people when they move out of the privacy which the ICCPR protects[16].

If one were to look beyond these topics to the growth areas for the application of fresh thinking about international human rights norms in the decades immediately ahead, they would, I suggest, include two. One would be other features of sexuality. Already essays are appearing on whether an entitlement to same-sex marriages, for example, can be

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**16** W Morgan, "Sexuality and Human Rights: The First Communication by an Australian to the Human Rights Committee Under the Optional Protocol to the International Covenant on Civil and Political Rights" (1993) 14 *Aust Yearbook of International Law* 277; W Morgan, "Identifying Evil for What it is: Tasmania, Sexual Perversity and the United Nations" (1994) 19 *Melbourne University Law Rev* 740; P Mathew, "International Law and the Protection of Human Rights in Australia: Recent Trends" (1995) 17 *Sydney Law Rev* 177 at 185.

derived from international law[17]. One judge of the High Court of Australia (Justice Michael McHugh) suggested, in one of his decisions, that the "marriage power" appearing in the Australian Constitution[18], although originally denoting only marriage between a man and a woman for life might, in today's society, be read more broadly to include a federal legislative power to enact laws with respect to same-sex unions[19]. Of course, having the constitutional power is one thing. Having the political will is quite another.

A second growth area of likely future attention is in the field of drug use and drug dependence. I suspect that in future decades we will look back on the current municipal and international legal responses to the problems presented by illicit drugs with something like the shame that now attends the way those laws once dealt with gender, ethnicity, aboriginality, disability and human sexuality.

## MUNICIPAL APPLICATION OF INTERNATIONAL LAW

My third illustration begins in Bangalore, India, in 1988. The Commonwealth Secretariat in London had collected a group of judges

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**17** E H Sadtler, "A Right to Same-Sex Marriage Under International Law: Can it be Vindicated in the United States?" 40 *Virginia J of International Law* 405 (1999).

**18** Australian Constitution, s 51(xxxi).

**19** *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at [45].

from many countries of the Commonwealth of Nations. I was there as President of the Court of Appeal of New South Wales, in Australia—the busiest appellate court in the country. Also there from an intermediate court was a non-Commonwealth judge, Judge Ruth Bader Ginsburg, then of the District of Columbia Circuit of the United States Court of Appeals. Bangalore was thus an example of the invisible global judicial college in action[20].

The 1988 conference in Bangalore considered the extent to which it was legitimate, in discharging domestic judicial duties, for judges of national courts to pay regard to international law, particularly the international law of human rights. Where a gap appeared in the common law or an ambiguity in a local statute or national constitution, might a judge turn to this new source of basic legal principles in order to fill the gap or resolve the ambiguity?

Led by Justice P.N. Bhagwati, then recently retired as Chief Justice of India, the judicial group endorsed the *Bangalore Principles on the Judicial Application of International Human Rights Law*.[21] These principles embraced the idea that access to foreign legal sources is

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[20] See M D. Kirby, International Law - The Impact on National Constitutions (7th Grotius Lecture), 21 *Am. U. Int'l L. Rev*. 327, 335 (2006).

[21] Report of Judicial Colloquium on the Domestic Application of International Human Rights Norms, Bangalore, India, reprinted in 14 *Commonwealth Law Bulletin* 1196 (1988).

legitimate and can be helpful. They do not provide binding rules but offer to judges a source of principles, a context for reasoning, and a stimulus to conceptual thinking when universal values may be at stake.

Since their adoption, these *Bangalore Principles* have achieved increasing recognition and influence throughout the common law world. However, in some countries, including the United States of America[22] and Australia,[23] they have proved controversial and even sensitive.[24]

Fresh from my epiphany in Bangalore, I returned to my busy life as a judge, presiding in an appellate court composed of judges of great ability and experience. It did not take long before I was presented with cases in which the *Bangalore Principles* seemed to speak directly to the way in which the issues at hand might be resolved[25].

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[22] *See, e.g.*, *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002); *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003); *Lawrence v. Texas*, 539 U.S. 558, 576–577 (2003); *Roper v. Simmons*, 125 S. Ct. 1183, 1200 (2005).

[23] *See Al-Kateb v. Godwin* (2004) 219 C.L.R. 562. *See also Newcrest Mining (WA) Ltd. v. Commonwealth* (1997) 190 C.L.R. 513, 657–658, 661; *Kartinyeri v. Commonwealth* (1998) 195 C.L.R. 337, 417-418.

[24] *See The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 *Int'l J Const L* 519 (2005); *cf.* Justice Sandra Day O'Connor, *Keynote Address, Proceedings of the Ninety-Sixth Annual Meeting of the American Society of International Law*, 96 Am Soc'y Int'l L Proc 348, 351 (2002).

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

At first, my repeated references to the utility of international human rights principles, to afford a context for elucidating problems of Australian law, was regarded in some circles as heretical.[26] Some Australian judges still consider it to be so.[27] Yet I persisted and do so to this day. The reconciliation of international and domestic law is one of the greatest challenges affecting contemporary judges and the future of municipal legal systems everywhere.

In 1992, in *Mabo v Queensland [No 2]* the High Court of Australia, in effect, adopted in part reasoning similar to that recommended in the *Bangalore Principles*[28]. Justice F G Brennan in that case explained how the international law of human rights forbidding racial discrimination could afford a key to unlock the door presented by the pre-existing Australian common law adverse to the recognition of native title rights of Australian Aboriginals:

> "Whatever 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

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[26] M D. Kirby, *The Australian Use of International Human Rights Norms: From Bangalore to Balliol - A View from the Antipodes* (1993) 16 *U New South Wales LJ* 363, 377–83; M D. Kirby, *The Impact of International Human Rights Norms - A Law Undergoing Evolution*, 22 Commonwealth L Bull 1183, 1183–84, 1189–91 (1996).

[27] *Al-Kateb v. Godwin* (2004) 219 C.L.R. 562, 580–591 [62]–67] per McHugh J; cf. *Al-Kateb* (2004) 219 C.L.R. at 626-630 [184]-[193] of my own reasons.

[28] *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

> discriminatory doctrine 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* bring 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. The 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 [29]".

Judges cannot solve all the problems of the world or of their own societies. They cannot cure all of the injustices. They should not try. If the law is clear, the rule of law requires that a judge give effect to the law, whatever his or her view may be of the wisdom and justice of the law in question.[30] This much is plain and undisputed.

Yet often the law is ambiguous. The Constitution will often be uncertain, simply because it is written in brief and general language designed to endure indefinitely. The laws made by the legislature will often be unclear because they represent compromises or hasty drafting

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[29] *Mabo*, (1992) 175 C.L.R. 1 at 42.

[30] *Minister for Immigration and Multicultural and Indigenous Affairs v. B* (2004) 219 C.L.R. 365, 424–26 [169]–[173].

or ill-thought-out proposals. In common law countries, that body of law will often be silent on new questions, simply because those questions did not occur to our judicial predecessors, learned though they were. In such circumstances, the judge's role is by no means mechanical. It is not confined to the mouthing of formularies. Anyone can do that. It involves choices. Making choices involves values. Often relevant values may be gleaned from the principle and jurisprudence of international human rights law.

To be a judge is to be concerned with something deeper, broader, and more universal than words —the attainment of justice and the respect for values common to all civilised people. International law can help contemporary judges in their search for such deeper objectives.

## THE FUTURE

Lawyers can and will adapt to the growing internationalisation of law, just as people generally are adapting to the forces of globalism and regionalism that are so powerful in today's world. Lawyers too will increasingly find and apply international law when it is relevant. However, the first step in the process is to adjust the legal mind. It is to re-focus perceptions of what law is, the way of thinking about law and the realisation of its many contemporary sources and *stimuli*. A negative attitude will delay the new dawn. But the new dawn is coming. Judges and lawyers, like other citizens, must eventually adapt.

This purpose of this essay has been to tell one lawyer's story - and to illustrate the many ways in which the adaptation is happening. It is exciting. It is often useful. And it is an inevitable process to which national law must adapt and which it must ultimately embrace. If we look at *Law in Context*, this is a context that is of the greatest importance for the law today. Internationalisation. We cannot afford to ignore it. We should not be afraid to embrace it.

*LAW IN CONTEXT*

# INTERNATIONALISING LAW - A NEW FRONTIER FOR LAW AND JUSTICE

**The Hon Justice Michael Kirby AC CMG**