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DOMESTIC IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS NORMS

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INCORPORATED INTERNATIONAL LAW

In Australia, to use the categories mentioned by Dame Rosalyn Higgins [1] in her most recent book, we have followed the dualist theory of the relationship between international and national law. Until now, there have been two essentially different legal systems, existing side by side, within different spheres of action - the international plane and the domestic plane [2] . In 1982 Justice Mason succinctly described the common law principle applicable in Australia thus [3] :

"It is a well-settled principle of the common law that a treaty not terminating a state of war has no legal effect upon the rights and duties of Australian citizens and is not incorporated into Australian law on its ratification by Australia. ... In this respect Australian law differs from that of the United States where treaties are self-executing and create rights and liabilities without he need of legislation by Congress. ... As Barwick CJ and Gibbs J observed in *Bradley v The Commonwealth* [4] , the approval by the Commonwealth Parliament of the Charter of the United Nations in the *Charter of the United Nations Act* 1945 (Cth) did not incorporate the provisions of the Charter into Australian law. To achieve this result the provisions have to be enacted as part of our domestic law, whether by Commonwealth or State statute. Section 51(xxix) [the external affairs power] arms the Commonwealth Parliament ... to legislate so as to incorporate into our law the provisions of [international conventions]."

I have divided this contribution, like Caesar's Gaul, into three parts. In the first, I will deal with the increasing number of cases coming before the High Court of Australia which involve international treaties having relevance to basic human rights and which have been incorporated into domestic law. In the past, that section would have been a comparatively brief one. However, even in the short time that I have served on the High Court, the number of cases directly or indirectly raising such points has been significant. There is every prospect that the number will continue to increase. This is the world we are living in. It is a world of increasing preoccupation with fundamental human rights, expanded expression of such rights in international instruments and a steadily rising willingness on the part of the Australian Parliament, to enact laws giving domestic effect to such international treaty obligations. It is also interesting to observe how, in default of a comprehensive charter of rights in the Australian Constitution, litigants and lawyers are turning to international law in the quest for a peg on which to hang arguments designed to persuade Australian courts that part of international jurisprudence has been, or should be, incorporated by judicial decision.

A measure of the recognition of the growing impact of international law on Australian law, and thus on its judiciary and legal profession, is this conference. It follows closely upon a conference of the University of Sydney in which the impact of international law on Australian law was explored. The opening address at that conference was delivered by my colleague, Justice Gummow [5] . It cannot be entirely coincidental that within a week, the two of us have been asked to speak on related themes.

During the period that Justice Gummow and I have sat together on the High Court, several cases have been presented for decision in which the Court has been required to examine international treaty law and the jurisprudence which has gathered around it. Most of the cases have involved Full Courts. However, in two cases, points were raised before me as a single judge.

This is not the occasion to analyse, at any length, the decisions to which I refer. It is sufficient simply to note them:

* In *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [6] , the Court was required to return to the meaning and operation of the Refugees Convention, being the *Convention Relating to the Status of Refugees* which was done at Geneva on 28 July 1951 as amended by the Protocol relating to the Status of Refugees which was done at New York on 31 January 1967. The *Convention*, so amended, is incorporated into Australian domestic law by the provisions of the *Migration Act* 1958 (Cth) [7] . In *Chan v Minister for Immigration and Ethnic Affairs* [8] , the Court had considered the test to be applied. *Wu's* case was concerned with how the chance of persecution was to be ascertained from the multiple facts presented to the administrative decision-maker and the courts, given the inherent difficulty of predicting the future, should the putative refugee to be returned to the country of origin or nationality.

* In *Applicant A v Minister for Immigration and Ethnic Affairs* [9] , the Court again considered the definition of "refugee" and specifically that part of the *Convention* definition which refers to "membership of a particular social group". The applicants were Chinese nationals. They had sought asylum in Australia on the basis that they were parents of a child born in China and, if returned to China, would face forcible sterilisation under that country's one child policy. The Minister did not dispute that forcible sterilisation would amount to persecution, the well-founded fear of which by members of a particular social group would give rise to "refugee" status. However, he contended that any such persecution would not be "owing to" the appellants' membership of any particular social group. On that question the Court divided. The majority (Dawson, McHugh and Gummow JJ) held that the appellants were not members of a "particular social group". Accordingly, they were not refugees. Chief Justice Brennan and I dissented. The Chief Justice pointed out that protection of fundamental rights and freedoms was an object of the *Convention*, reflected in the definition of "refugee" adopted in domestic law in terms of the *Convention* [10] . All of the opinions in the Court reviewed the international jurisprudence which has developed around the ambiguous language of the *Convention*.

* In *De L v Director-General, NSW Department of Community Services* [11] , the Court was required to construe the *Convention on the Civil Aspects of International Child Abduction* (1980) [12] . Subsequently, the Court returned to the language of that Convention in order to construe Regulation 7 of the Family Law (Child Abduction Convention) Regulations (Cth) made in exercise of the power conferred by the *Family Law Act* 1975 (Cth), s 111B(1) [13] . Once again, the Court was concerned to reflect, in the meaning given to national law, the language and purpose of an international treaty to which Australia is a party which had been incorporated into Australian domestic law.

* Two Full Court decisions, which stand for judgment, concern aspects of Australia's international obligations. The first, *Project Blue Sky Inc and Ors v Australian Broadcasting Authority* [14] has nothing much to do with human rights. It relates to the *Australia New Zealand Closer Economic Relations-Trade Agreement* and the Trade in Services Protocol to the Trade Agreement said to be referred to, and incorporated in Australian law, by the *Broadcasting Services Act* 1992 (Cth) [15] . Under that Act the Authority is required to perform its functions in a manner consistent with "Australia's obligations under any Convention to which Australia is a party". Several federal statutes and regulations have provisions similar to that referred to in the *Blue Sky* case [16] . Clearly, legislative injunctions of this kind will become more common. Somewhat more relevant to human rights are the issues in *Qantas Airways Ltd v Christie* [17] . That case involves alleged discrimination against a Qantas air pilot on the ground of his age, contrary to obligations accepted by Australia and laid down by the International Labor Organisation [18] .

* One case which peripherally concerned international human rights norms was *Croome v Tasmania* [19] . The case was to have involved the constitutional validity of the *Human Rights (Sexual Conduct) Act* 1994(Cth). That Act was the vehicle for incorporating into Australia's domestic law the requirement of sexual privacy held by the United Nations Human Rights Committee to be inherent in the *International Covenant on Civil and Political Rights* to which Australia is a party. A preliminary point was taken in the case. It concerned the standing of the applicants. When that point was determined against the State of Tasmania, the constitutional question seemed ready for hearing. However, the *Criminal Code (Amendment) Act* 1997 (Tas) was then enacted, obviating the necessity to consider the constitutional validity of the federal statute [20] . The law criminalising adult, consensual homosexual conduct was amended. The case of Mr Toonen and Mr Croome illustrates quite vividly the way in which international human rights law can sometimes stimulate, or require, change in Australia's domestic laws [21] .

* *Linden v Commonwealth of Australia [No 2]* [22] was a case which was heard by me, sitting alone. It involved an application by the Commonwealth to strike out a statement of claim. That document sought declarations in large part parallelling the questions submitted at the same time to the International Court of Justice. Those questions sought an Advisory Opinion concerning the illegality of the threat or use of nuclear weapons [23] . The proceeding was, in a sense, a continuation of earlier attempted challenges by Mr Linden, to the Joint Defence Space Research facility near Alice Springs (commonly known as "Pine Gap") [24] . The process was struck out. A similar fate befell a statement of claim filed by the plaintiff in *Thorpe v Commonwealth of Australia [No 3]* [25] . Again, I dealt with the matter in the Practice list of the High Court. Mr Thorpe, an Aboriginal Australian, had sought a declaration that the Commonwealth was obliged by fiduciary duty to "move in the United Nations General Assembly for an Advisory Opinion from ... the International Court of Justice as to the separate rights and legal status of the original peoples of this land" [26] . The Commonwealth argued that any such declaration would involve a wholly impermissible invasion of the constitutional prerogatives of the Executive Government [27] . I upheld the Commonwealth's submission, concluding [28] :

"The Court has no knowledge of the many considerations which would have to be taken into account in deciding whether Australia should seek such a resolution from the General Assembly. It has no means of knowing how any such application would affect Australia's international relations generally or its relations with particular countries or its other activities within the United Nations and its agencies. These are all matters which the Australian Constitution reserves to the executive government of the Commonwealth. They defy judicial application. They turn on a multitude of considerations unknown to this Court. They are matters upon which the Australian government speaks to the international community with a single voice. That voice is the voice of the executive government chosen from the Parliament elected by the people of Australia. It is not the voice of this Court."

Mr Thorpe's case is an illustration of developments which have been seen in other jurisdictions, notably the United States of America [29] , wherein parties, discontented with what they see as the conduct of domestic and foreign policy, resort to the courts in the hope of securing orders directed to the Executive. It will be obvious from my reasons in *Thorpe* that I consider that great care must be taken by courts against intruding impermissibly into the conduct of the external affairs of the nation.

The foregoing cases, together with others decided by the Court shortly before I joined it [30] , illustrate well enough the increasing number of matters coming before the Court in which some aspect of international law is raised for decision. Perhaps because of cut-backs in government funded legal assistance, the number of litigants in person appearing before the Court is increasing. This is also a phenomenon in the State and federal appellate courts. Obviously, without skilled legal representation, it is likely that ill-conceived or misunderstood principles of human rights, referred to in international law, will be invoked by such litigants in the hope that they can over-ride the domestic law which is the apparent impediment to relief [31] . An appreciation of the true relationship between international law and domestic law is not always enjoyed by trained lawyers. It should therefore not come as a surprise that it is not fully understood by laymen who commonly expect international law to over-ride domestic law and to be capable of doing more than ordinarily it can.

JUDICIAL UTILISATION OF UNINCORPORATED NORMS

The Bangalore Principles:

Even in cases where international law has not, by legislation or valid Executive action, been incorporated into national law, there are occasional circumstances where that law may be used by judges and other independent decision-makers in the national legal system to influence their decisions. This is particularly so in the case of international human rights principles as they have been expounded, and developed, by international and regional bodies.

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* [32] . The meeting was chaired by Justice P N. Bhagwati, a former Chief Justice of India. I was the sole participant from Australia. 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 Appeals Court in the United States, Ruth Bader Ginsburg (now a Justice of the Supreme Court of the United States of America).

Means of applying international law:

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

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

(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 or 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." [33]

"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." [34]

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* [35] which expounded the classical divide. They regarded with scepticism the amount of assistance which could be derived in their busy work as judges from an international treaty, other international law or the pronouncements of international or regional courts, tribunals and committees. They were observing, in effect, the ordinary 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 common law countries. In 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]* [36] . 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) could no longer be accepted as part of the law of Australia, Justice Brennan said [37] :

"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 remarks of the English Court of Appeal in *Derbyshire County Council v Times Newspapers Limitea* [38] , a decision later affirmed by the House of Lords [39] , giving expression to a similar application of universal human rights.

In New Zealand, a like trend has also emerged. In that country, the position is somewhat different from that of Australia and England, by reason of the enactment of the *New Zealand Bill of Rights Act* 1990 and the *Human Rights Act* 1993 (NZ) [40] . 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* [41] . 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 jurisprudence under the *European Convention* established by decisions of the European Court of Human Rights [42] . He then said that this was an area of the law which was "undergoing evolution":

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." [43]

In New Zealand, although the *New Zealand Bill of Rights Act*, is not constitutionally entrenched, it gives an established framework for reference to international jurisprudence. The same is also 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 an appropriate gap appears in the common law or a statute falls to be construed which is ambiguous. 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 judicial opinions 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 appropriate to the times we are living in.

Words of caution:

Critics of the developments which I have just outlined list a number of considerations which 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 [44] .

- In federal countries, such as Australia, Canada, Malaysia, 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 incompatible with the constitution's basic structure [45] .

- Judicial introduction of human rights norms may sometimes divert the community from the more open, principled and democratic adoption of such norms in constitutional or statutory amendments which have the legitimacy of popular endorsement.

- Some commentators have also expressed scepticism about the international courts, tribunals and committees which pronounce upon human rights. They argue that often they are composed of persons from legal regimes very 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. The judge must proceed in a judicial way. He or she must not undermine the primacy of democratic law-making by the organs of government, directly or indirectly accountable to the people [46] .

- Finally, some critics warn against undue, premature undermining of the sovereignty of a country by judicial *fiat* without the authority of the country's democratically accountable law-makers. The latter is, generally, the proper institution to develop human rights in the country's 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 of an ambiguity of a local 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 engaged in nothing but "window-dressing".

- The concept of democracy today is more sophisticated than was formerly the case. It involves not merely the reflection in law-making of the will of the majority, intermittently expressed at elections. The legitimacy of democratic governance is now seen as depending upon the respect by the majority for the fundamental rights of minorities [47] .

- So far as federal states are concerned, their constitutions do not stand still. They operate in a world of increasing international 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 by the Executive where there is no serious intention to accept, for the nation, the obligations contained in a treaty.

- The international development of local laws is already happening outside the judiciary. In this regard I have already referred to the way in which express legislation has been used to introduce human rights principles into domestic law. The *Human Rights (Sexual Conduct) Act* 1994 (Cth) is simply the most vivid illustration in Australia. There are many others.

In the way of these things I expect the *Bangalore Principles* to continue to influence the judicial method in Australia. The tradition of the common law 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 our legal system that the courts should find a way to take cognisance of international human rights jurisprudence in appropriate cases and do so by appropriate and familiar techniques of judicial reasoning.

AN INTERPRETATIVE CONSTITUTIONAL PRINCIPLE

I come to the third part of this paper. It concerns a possible development by which, in appropriate cases, international human rights norms may influence the interpretation of a national constitution in a provision which is relevant to fundamental human rights.

In several countries where written constitution incorporate a charter of fundamental rights and freedoms, it is not unusual to find constitutional courts construing the provision of the national constitution in the light of the jurisprudence that has developed around the same or similar words in international or regional human rights instruments. Many modern constitutions have adopted constitutional statements of rights which are identical, or very similar, to those contained in international treaties such as the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights.* In such cases, it is natural for municipal courts to have resort to the interpretation of such provisions by international bodies which have the primary responsibility of giving meaning to their language.

In one of the last cases decided by the Privy Council on appeal from the Court of Appeal of Hong Kong, their Lordships in *Fok Lai Ying v Governor in Council* [48] , had to consider an attack on a resumption of portion of the appellant's land. The challenge was based, inter alia, on the principles of the *Hong Kong Bill of Rights Ordinance* 1991 (HK). The purpose of that Ordinance was to provide for the incorporation into the law of Hong Kong of provisions of the *International Covenant on Civil and Political Rights.* The Privy Council accepted that, because of relevant differences between the provisions of the European Convention and the Covenant, it was more relevant, in the case of Hong Kong, to have regard to the comments and opinions of the Human Rights Committee of the United Nations than decisions of the European Court of Human Rights. Their Lordships observed [49] :

"Accepting that as far as reasonably possible a court in applying Article 14 of the Hong Kong Bill of Rights should confine itself to the concrete case before it ... [Their Lordships] are not willing to reject the conclusion that Section 3 of the Resumption Ordinance should now be construed, at least where the compulsory acquisition of a home or part of a home is at stake, to require a fair procedure including a reasonable opportunity of objection."

The appellant's case failed on the facts. The Privy Council could find nothing to suggest that, in that case, the procedures of resumption were unfair, arbitrary or unlawful. But it is to be noted that they used the relevant international jurisprudence to give meaning to the local provision which had already acquired something of a constitutional character.

In *Newcrest Mining v The Commonwealth* [50] the High Court of Australia was divided in the interpretation of a provision in the Australian Constitution. That constitution contains, in s 51(xxxi), a guarantee of a fundamental character that the "acquisition of property from any person for any purpose in respect of which the Parliament has power to make laws" shall only be on "just terms". The point of division in the High Court was whether, as previous authority had held [51] , such guarantee had no application to Commonwealth acquisitions in a territory, in that case the Northern Territory of Australia. It is unnecessary to analyse the differences within the Court. They appear in the report of the case.

In the course of giving my reasons, I referred to an interpretative principle which I now wish to mention. On a constitutional question which, in my opinion, was otherwise finely balanced, I expressed the view that it was appropriate for judges to favour the construction which would conform to the principles of universal and fundamental rights rather than an interpretation which would involve a departure from such rights [52] . Adopting that approach confirmed my view that the true construction of the Australian Constitution required the application of the just terms requirement to federal acquisitions wherever occurring, whether in a state or territory. I said this [53] :

"Australian law, including its constitutional law, may sometimes fall short of giving effect to fundamental rights. The duty of the Court is to interpret what the Constitution says and not what individual judges may think it should have said. If the Constitution is clear, the Court must (as in the interpretation of any legislation) give effect to its terms. Nor should the Court adopt an interpretative principle as a means of introducing, by the back door, provisions of international treaties or other international law concerning fundamental rights not yet incorporated into Australian domestic law. However, as has been recognised by this Court, and by other courts of high authority, the inter-relationship of national and international law including in relation to fundamental rights is 'undergoing evolution'. To adapt what Brennan J said in *Mabo v Queensland [No 2],* the common law, and constitutional law, do not necessarily conform with international law. However, international law is a legitimate and important influence on the development of the common law and constitutional law, especially when international law declares the existence of universal and fundamental rights. To the full extent that its text permits, Australia's Constitution, as the fundamental law of government in this country, accommodates itself to international law, including in so far as that law expresses basic rights. The reason for this is that the Constitution not only speaks to the people of Australia who made it and accept it for their governance. It also speaks to the international community as the basic law of the Australian nation which is a member of that community."

So far as I am aware, this is the first time, in Australia, that the *Bangalore Principles* have been extended to constitutional interpretation. Some may dispute this course. Originalists would doubtless point out that international law was undeveloped at the time that the Australian Constitution was made and thus could not have influenced its making [54] . Traditionalists might point out that this is a novel idea, not previously expressed in nearly a century of constitutional interpretation. Opponents could question the influence upon

Australian law of unincorporated international law, particularly in the context of a charter of government. However, originalism is not a governing principle for construing the Australian Constitution, however helpful it sometimes is to understand what the Founders thought they were getting at. As the Constitution's formal amendment is extremely difficult to achieve, it must be expected that it will be interpreted broadly to meet wholly unpredicted and unforeseen circumstances, such as aviation, radio and television. Amongst the unexpected circumstances to which the Australian Constitution must now adapt is the changing role of the Australian federal government within the international community, the growth of international law generally and of international human rights law in particular. The fact that a new interpretative principle is perceived, to meet new circumstances, should not come as a complete surprise. The fact that the Australian Constitution must now operate in a different international milieu is so obvious that it scarcely requires mention. Should not the construction of that document adapt to that milieu, as so much else has had to do?

It will remain to be seen whether this interpretative principle attracts judicial support. One of the lessons of judicial life is that today's heresies sometimes become tomorrow's orthodoxy. In my 23 years of judicial service I have seen this happen so often that I have ceased to be surprised by it.

A NEW WAY OF THINKING

The age of reconciliation of international and national law has dawned in Australia. It has come in advance of the new millennium. It is a development as natural to the age as jumbo jets, international informatics, pandemics, global warming and the international economy. In this little planet, we are all ultimately bound together. Diminution in the human rights of others endangers peace and security elsewhere and offends the sensibilities of people everywhere, who are increasingly well informed on such matters. The system of the common law is marvellously adaptable to change. Those who have reflected upon its past, in the millennium that is passing, will be in no doubt as to its capacity to adapt to the challenges of the millennium soon to start.

In the law, those challenges clearly involve the evolution of a new relationship between international and national law. The new relationship is coming, as the many cases which require the application of international law expressly incorporated by local legislation or valid Executive act demonstrate. It is coming by the use of international human rights jurisprudence filling the gaps of the common law and helping to construe ambiguous legislation to conform with that law. And, in my view, it is coming as an interpretative principle to assist in the ascertainment of the meaning of national constitutions where they provide guarantees of fundamental rights and freedoms. It is an exciting and constructive time of legal creativity. But the ultimate question is whether judges and other lawyers, trained until now to think strictly in jurisdictional terms, can adapt their minds to a new way of thinking that is harmonious to the realities of the world about them.

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

[1] R Higgins, *Problems and Process - International Law and How We Use It,* Clarendon, Oxford, 1994 at 204.

[2] D Anzilotti, cited Higgins above n 1 *loc cit.*

[3] *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168 at 224-225. See also per Gibbs CJ at 193.

[4] (1973) 128 CLR 557 at 582-583.

[5] W M C Gummow, "International Law and the Australian Judiciary", Conference, University of Sydney, 28 November 1997.

[6] (1996) 185 CLR 259.

[7] s 22AA read with the definition of "refugee" in s 4(1).

[8] (1989) 169 CLR 379.

[9] (1997) 71 ALJR 381 (HC).

[10] *Ibid,* at 383.

[11] (1996) 187 CLR 640.

[12] Incorporated by *Family Law Act* 1975 (Cth), s 111B.

[13] *De L v Director-General, New South Wales Department of Community services* (1996) 71 ALJR 588 (HC).

[14] [1997] 7 Leg Rep SL 2a.

[15] s 160(d).

[16] A number of Australian statutes and regulations have provisions similar to s 160(d). See *Air Services Act* 1995 (Cth), s 9(3); *Australian Postal Corporation Act* 1989 (Cth) s 28(c); *Chemical Weapons (Prohibition) Act* 1994, ss 22, 95; *Civil Aviation Act* 1988 (Cth), s 11; *Customs Act* 1901 (Cth), s 269SK; Customs (Prohibited Exports) Regulations (Cth), reg 13CA(2); *Endangered Species Protection Act* 1992 (Cth), s 171; Extradition (Ships and Fixed Platforms) Regulations 1993 (Cth), regs 6(2), 7(2); Hazardous Waste (Regulation of Exports and Imports) Regulations 1996 (Cth), reg 7(2); *Navigation Act* 1912 (Cth), s 422; *Nuclear Non-Proliferation (Safeguards) Act* 1987 (Cth), s 70(1); *Ozone Protection Act* 1989 (Cth), s 45(5); *Sea Installations Act* 1987 (Cth), s 13; *Telecommunications Act* 1997 (Cth), s 366.

[17] [1997] 2 Leg Rep SL 5a.

[18] International Labor Organisation, *The Termination of Employment Convention* and the Termination of Employment Recommendation 1982 (Rec No 166). These were incorporated in the *Industrial Relations Act* 1988 (Cth) by s 170CA(1). That Act has since been repealed and replaced by the *Workplace Relations Act* 1996 (Cth). The *Convention* remains incorporated by s 170CA(1)(e) but the Recommendation is not expressly mentioned. The *Convention Concerning Discrimination in Respect of Employment and Occupation* (No 111) of the ILO was given effect by s 170CA(2) of the previous Act. It is not mentioned in the *Workplace Relations Act* 1996. The Equal Remuneration Recommendation 1951 and the Discrimination (Employment and Occupation) Recommendation 1958 (Rec 111) are given effect by s 170BA of both the previous and the current Acts.

[19] (1997) 71 ALJR 430 (HC).

[20] See *Toonen and Australia,* Communication of the Human Rights Commission of the United Nations (Com 488/1992). See note (1994) 5 *Public Law Review* at 72.

[21] See M D Kirby, "The Seven Lessons of Hobart" (1997) 16 *Uni of Tas L Rev* at 1. See also *Toonen v Australia,* UN Doc CCPR/C?50/488/1992 (4 April 1994). For discussion see A Funder, "The Toonen case" (1994) *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.

[22] (1996) 70 ALJR 541 (HC).

[23] *Ibid* at 542.

[24] cf *Limbo v Little* (1989) 98 FLR 421; *Re Limbo* (1989) 64 ALJR 241 (HC); *Linden v The Commonwealth* (1995) 70 ALJR 145.

[25] (1997) 71 ALJR 767 (HC). The plaintiff invoked the Genocide Convention introduced into domestic jurisdiction by the *Genocide Convention Act* 1949. (Cth). See *ibid,* at

772-773. Cf Akhavan, "Énforcement of the Genocide Convention Through the Advisory Opinion Jurisdiction of the International Court of Justice" (1991) 12 *Human Rights Law Journal* 285 at 296.

[26] *Ibid,* at 769.

[27] cf *Re Ditford; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347 at 368-369 per Gummow J.

[28] (1997) 71 ALJR 767 at 779 (HC).

[29] *Chicago and Southern Airlines Inc v Waterman Steamship Corporation* 323 US 103 at 111 (1948); *Crockett v Reagan* 658 F Supp 893 (1982).

[30] See eg *Horta v The Commonwealth* (1994) 181 CLR 183 and *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273. Cf J W Perry, "At the Intersection of Australian and International Law" (1997) 71 ALJ 841.

[31] See eg *Young v Registrar, Court of Appeal [No 3]* (1993) 32 NSWLR 263 (CA).

[32] See (1988) 14 *Commonwealth Law Bulletin,* 1196.

[33] *Bangalore Principles* No 4.

[34] *Bangalore Principles* No 7.

[35] [1976] 1 QB 198 at 207.

[36] (1992) 175 CLR 1.

[37] *ibid* at 42.

[38] [1992] 1 QB 770.

[39] [1993] AC 534.

[40] See K Keith, "The Application of Human Rights Law in New Zealand" 32 *Texas Intl LJ* 401 at 411.

[41] [1994] 2 NZLR 257.

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

[43] [1994] 2 NZLR 257 at 260. cf *Minister for Immigration and Ethnic Affairs (Australia) v Teoh* (1995) 183 CLR 273 at 278.

[44] See Parliamentary Approval of Treaties Bill 1995 (Cth) and Administrative Decisions (Effect of International Instruments) Bill 1997 (Cth). cf Joint Statement by Minister for Foreign Affairs and Minister for Justice. *The Effect of Treaties in Administrative Decisions.*

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

[46] See *Dietrich v The Queen* (1992) 177 CLR 292 at 325 per Brennan J (diss). 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, at 376, 381; BF Fitzgerald "International Human Rights and the High Court of Australia" (1994) 1 JCULR 78.

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

[48] [1997] ..... WLR ....., (PC) Print of decision delivered 27 June 1997 by Lord Cooke of Thorndon.

[49] *Ibid.* Article 14 concerns protection of privacy, family and home from unlawful attacks. It follows the language of Article 17 of the *International Covenant on Civil and Political Rights.*

[50] (1997) 71 ALJR 1346 (HC).

[51] *Teori Tau v The Commonwealth* (1969) 119 CLR 564.

[52] *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 71 ALJR 1346 (HC) at 1423.

[53] *Ibid,* at 1423-1424. Citations omitted.

[54] But see *Victoria v The Commonwealth* (1996) 187 CLR 416 at 476-480 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.