Treaties in Australian Law

Justice Kirby Collection

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NEW PERSPECTIVES

This conference is timely. It comes in a year in which there have been and will be many conferences reflecting upon the achievements of the United Nations in the past fifty years and the prospects and difficulties which lie ahead. Some repetition is inevitable. Inevitably, each contributor to a year-long reflection will draw upon his or her activities in furthering or studying the global mission of the United Nations. Over the past decade, I have had the privilege of working in a number of the agencies of the United Nations. Necessarily, this work has given me a perspective of the weaknesses and inefficiencies of the United Nations. But it has also made clear to me its utility in furthering the grand objectives conceived during the War and carried into effect by the *Charter* in 1945. My exposure to the United Nations has been as follows:

In 1984, I participated in the Australian delegation to the General Conference of UNESCO, led by Mr Whitlam. Thereafter, I have taken part, as chairman and rapporteur in several expert groups seeking to give content to that elusive and highly controversial promise of international law that "peoples" will enjoy a right to self-determination. More recently, I have been part of the International Jury for the UNESCO Prize for the Teaching of Human Rights. This jury's awards recognise the efforts, by education and example, to convert United Nations human rights principles into the thinking and actions of the citizens of tomorrow;

In the International Labour Organisation (ILO), I am a member of the Fact-Finding and Conciliation Commission on Freedom of Association. I served a member of that Commission's panel on South Africa. The Commission's report, adopted by the ILO, has greatly influenced the labour law of the new South Africa.[3] It has provided a means of converting the principles of the ILO into the domestic law of that hitherto isolated country;

In the World Health Organisation (WHO), I served on the Global Commission on AIDS. From that perspective, I was able to see, and to participate in, the activities of WHO in promoting effective legal responses to the HIV/AIDS epidemic: to help to slow its spread. At this time, without a vaccine or a cure, only behaviour modification will arrest effectively the spread of the virus. Laws and policies which promote such behaviour modification are the strategies which WHO advises;

For the United Nations Development Programme (UNDP), I have been involved in a number of activities, particularly in Africa. It was my privilege to participate in the United Nations assistance to Lesotho and Malawi as they moved to multi-party democracy. In Malawi, I was called upon to be co-chairman of the constitutional conference which immediately preceded the election leading to a change of government. That the United Nations was asked to provide this facility was a tribute to the confidence which UNDP enjoys in Malawi for is neutrality and work for the rule of law;

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Most recently, in Cambodia, as Special Representative of the Secretary-General for Human Rights, I have participated in the conversion of United Nations human rights treaty principles into laws and policies of the new Cambodian Government and legislature. For the first time, the United Nations Centre for Human Rights established a resident office in a country to assist with advice and technical help in the implementation of United Nations treaty law. I report to the Commission on Human Rights and the General Assembly about my findings on Cambodia. The reports must thus be given before the international community. This is itself a stimulus to compliance by Cambodia with international human rights principles; and

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The extra-conventional activities of the Special Rapporteurs and Special Representatives of the Secretary-General, reporting to the Commission on Human Rights, is an interesting development in the institutions of the United Nations. Under the stimulus of the *Vienna Declaration*, there is now a concerted effort to ensure increased efficiency in the activities of the Special Rapporteurs and Representatives. They meet annually[4] to consider common problems and to exchange information concerning country and thematic mandates. In many ways, the special procedures of the United Nations, invoked to deal with emergency problems and human rights crises, present mechanisms of great utility, and even greater potential, for the work of the United Nations in the next century. The task ahead is likely to be less that of formulating new substantive treaties and human rights obligations. Rather, it is likely to involve improvement of current institutions and development of new ones to ensure that the noble ideas of global respect for human and peoples' rights are translated into action.

I mention these activities in order to explain why it is natural that I, an Australian lawyer and judge, should have a perspective of international organisations and law-making which goes beyond that of most of my colleagues. This is not a boast. It is simply a fact. Without doubt it has influenced my approach to the role of international law generally - and particularly in Australian law. It has sharpened my perception both of the potential of international law to assist the development of Australian law and of the difficulty which that potential presents both for legal theory and for practical implementation.

In ways which I have described elsewhere, my eyes were opened to the methods by which international human rights treaties could be utilised in the daily work of the courts by my participation in a conference in Bangalore, India, seven years ago.[5] When I returned to Australia from Bangalore, and began cautiously to give effect to the principles adopted at that meeting, my efforts were at first seen by some to be eccentric, even heretical. The purpose of this paper is to describe the *Bangalore Principles*; to illustrate their growing

acceptance in Australian courts and in other countries of the common law; to demonstrate the many practical instances in which international human rights law can be of assistance in understanding and developing Australian common and statute law; and then to derive the practical lessons which these developments suggest, not least in respect of the procedures for Parliamentary consideration of treaties and ratification of them by the Executive Government.

THE *BANGALORE PRINCIPLES*

The traditional view of most common law countries has been that international law is not part of domestic law. Blackstone in his *Commentaries*, suggested that[6]:

"... the law of nations (whenever any question arises which is properly the object of its jurisdiction) is here [in England] adopted in its full extent by the common law, and is held to be part of the law of the land ..."

Save for the United States, where Blackstone had a profound influence, this view came to be regarded, virtually universally, as being "without foundation".[7] In Australia, Mason J explained the traditional position in 1982 in these terms[8]:

"It is a well settled principle of the common law that a treaty not terminating a state of war has no legal effect upon the rights and duties of Australian citizens and is not incorporated into Australian law on its ratification by Australia ... [T]he approval of the Commonwealth Parliament of the Charter of the United Nations in the Charter of the United Nations Act 1945 (Cth) did not incorporate the provisions of the Charter into Australian law. To achieve this result the provisions have to be enacted as part of our domestic law, whether by a Commonwealth or State statute. Section 51(x) [the external affairs power] arms the Commonwealth Parliament ... to legislate so as to incorporate into our law the provisions of [international conventions]."

More recently, however, a new recognition has come about of the use that may be made by judges of international human rights principles and their exposition by the courts, tribunals and other bodies established to give them content and effect. This has come about as a reflection of the growing body of international human rights law, of the instruments both regional and international which give effect to it and in recognition of the importance of its content An expression of what I take to be the modern approach was given in February 1988 in Bangalore, India in the so-called *Bangalore Principles*. These were agreed by a group of lawyers from a number of Commonwealth countries. The meeting was chaired by Justice P N. Bhagwati, the former Chief Justice of India. I was the sole participant from the Antipodes. Amongst the other participants were Mr Anthony Lester QC (now Lord Lester of Herne Hill), Justice Rajsoomer Lallah (now Chief Justice of Mauritius) and Justice Enoch Dumbutshena (then Chief Justice of Zimbabwe). Joining the Commonwealth participants was a judge of the Federal Circuit Court in the United States, Ruth Bader Ginsburg (now a Justice of the Supreme Court of that country). Relevantly, the *Bangalore Principles* stated, in effect:[9]

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

(2) Such law does not become part of domestic law until Parliament so enacts or the judges (as another source of law-making) declare the norms thereby established to be part of domestic law;

(3) The judges will not do so automatically, simply because the norm is part of international law or is mentioned in a treaty - even one ratified by their own country;

(4) But if an issue of uncertainty arises (as by a *lacuna* in the common law, obscurity in its meaning or ambiguity in a relevant statute), a judge may seek guidance in the general principles of international law, as accepted by the community of nations; and

(5) From this source material, the judge may ascertain and declare what the relevant rule of domestic law is. It is the action of the judge, incorporating the rule into domestic law, which makes it part of domestic law.

In terms, the *Bangalore Principles* declared:

"[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.[10]"

"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."[11]

Some lawyers (and not a few judges), brought up in the tradition of the strict divide between international and municipal law, were inclined at first to regard the *Bangalore Principles* as erroneous.[12] They referred to such cases as *R v Secretary of State for the Home Department; Ex parte Bhajan Singh*[13] and regarded with scepticism the amount of assistance which could be derived from an international treaty, other international law or the pronouncements of international or regional courts, tribunals and committees.

HIGH JUDICIAL PRONOUNCEMENTS

But in the seven years since Bangalore, something of a sea change has come over the approach of courts in England, Australia, New Zealand and other countries of the common law.

The clearest indication of the change in Australia can be found in the remarks of Brennan J (with the concurrence of Mason CJ and McHugh J) in *Mabo v Queensland [No. 2]*.[14] In the course of explaining why a discriminatory doctrine, such as that of *terra nullius* (which refused to recognise 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, Brennan J said:[15]

"The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of the international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organisation of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands."

To similar effect were the remarks of the English Court of Appeal in *Derbyshire County Council v Times Newspapers Limited*,[16] later affirmed by the House of Lords,[17] gave expression to a similar principle. In a sense, it paved the way for the reasoning of Brennan J in *Mabo* and was referred to by him. The question in *Derbyshire* was whether a local government authority was entitled, by the law of England, to sue for libel to protect its corporate reputation (as distinct from that of its members). The trial judge (Morland J) had held that it was.[18] But this decision was reversed by the Court of Appeal. In the course of his reasoning, Balcombe LJ[19] referred to article 10 of the *European Convention on Human Rights* to which the United Kingdom is a party. That article relates to freedom of expression. His Lordship observed:

"Article 10 has not been incorporated into English domestic law. Nevertheless it may be resorted to in order to help resolve some uncertainty or ambiguity in municipal law: per Lord Ackner in Reg v Secretary of State for the Home Department; Ex parte Brind [1991] 1 AC 696, 761. Thus (1) Article 10 may be used for the purpose of the resolution of an ambiguity in English primary or subordinate legislation ... (2) Article 10 may be used when considering the principles upon which the Court should act in exercising a discretion, e.g. whether or not to grant an interlocutory injunction ... (3) Article 10 may be used when the common law (by which I include the doctrines of equity) is uncertain. In Attorney-General v Guardian Newspapers Limited [No. 2] [1990] 1 AC 109 the courts at all levels had regard to the provisions of Article 10 in considering the extent of the duty of confidence. They did not limit the application of Article 10 to the discretion of the court to grant or withhold an injunction to restrain a breach of confidence. Even if the common law is certain the courts will still, when appropriate, consider whether the United Kingdom is in breach of Article 10 ... This approach of English law to Article 10 is wholly consistent with the jurisprudence of the European Court of Human Rights. That court has, on more than one occasion, held that a doctrine of the English courts has violated a litigant's rights under Article 10 and this on occasion has led to Parliament having to change the substantive law ... In my judgment, therefore, where the law is uncertain, it must be right for the Court to approach the issue

before it with a predilection to ensure that our law should not involve a breach of Article 10. That was the approach of Lord Oliver of Aylmerton in In re K D (a Minor) (Ward: Termination of Access) [1988] AC 806 where, in relation to an argument based on Articles 6 and 8 of the same Convention and a previous decision of the European Court of Human Rights, ... he cited with approval the argument of counsel in the following passage at p 823:

"Although this is not binding upon your Lordships, the United Kingdom is, of course, a party to the convention for the protection of human rights and fundamental freedoms and it is urged that it is at least desirable that the domestic law of the United Kingdom should accord with the decisions of the European Court of Human Rights under the Convention." "

To the same effect were the remarks of Butler-Sloss LJ[20] in *Derbyshire*:

"Adopting as I respectfully do, that approach to the Convention, the principles governing the duty of the English court to take account of article 10 appear to be as follows: where the law is clear and unambiguous, either stated as the common law or enacted by Parliament, recourse to article 10 is unnecessary and inappropriate. Consequently, the law of libel in respect of individuals does not require the court to consider the Convention. But where there is an ambiguity, or the law is otherwise unclear or so far undeclared by an appellate court, the English court is not only entitled but, in my judgment, obliged to consider the implications of article 10."

Since these words were written, a like question was presented to the New South Wales Court of Appeal in *Ballina Shire Council v Ringland*.[21] A majority (Gleeson CJ and myself; Mahoney JA dissenting) followed *Derbyshire* and the earlier judgment of the Appellate Division of the Supreme Court of South Africa in *De Spoorbond v South African Railways*.[22] In coming to our respective conclusions, both Mahoney JA[23] and I[24] referred to the provisions of article 19.2 of the *International Covenant on Civil and Political Rights* which Australia has ratified. Following as it did *Mabo*, nobody questioned in *Ringland* the relevance of a consideration by the Court of applicable international human rights principles in assisting it to come to its conclusions about the content of local common law.

In New Zealand, the same trend has emerged. There, the position is somewhat different from that in Australia and England, by reason of the enactment of the *New Zealand Bill of Rights Act* 1990.[25]

In *Minister of Transport v Noort*; *Police v Curran*,[26] the Court of Appeal was required to consider whether the provisions of the *Transport Act* 1962 (NZ), ss 56B, 56C and 56D, relating to breath and blood testing were inconsistent with the right to legal advice under the *New Zealand Bill of Rights Act*. The Court, by majority (Cooke P, Richardson, Hardie-Boys and McKay JJ; Gault J dissenting) dismissed the appeal, holding that there was no relevant inconsistency. The reasoning of the judges differed. Cooke P referred to the "cardinal importance", in giving meaning to the *New Zealand Bill of Rights Act* to "bear in mind the antecedents":[27]

"The International Covenant on Civil and Political Rights speaks of inalienable rights derived from the inherent dignity of the human person. Internationally there is now general recognition that some human rights are fundamental and anterior to any municipal law, although municipal law may fall short of giving effect to them: see Mabo v Queensland (1988) 166 CLR 186, 217-218. The right to legal advice on arrest or detention under an enactment may not be quite in that class, but in any event it has become a widely-recognised right ... Subject to contrary requirements in any legislation, the New Zealand courts must now, in my opinion, give it practical effect irrespective of the state of our law before the Bill of Rights Act."

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 Court of Appeal in *Tavita v Minister of Immigration*.[28] This involves the consideration of the relevance of international norms to administrative decision-making, as distinct from the interpretation and application of the Bill of Rights Act. Mr Tavita had overstayed his permit to be in New Zealand. The main question concerning the Court, dealing with Mr Tavita's application to set aside a removal order, was whether the Minister, and the Immigration Service had failed, although obliged, to have regard to the international obligations relating to a child born to the applicant and his family in New Zealand and entitled to stay there. The Crown argued that the Minister and the Department were entitled to ignore the provisions whether of the *International Covenant on Civil and Political Rights*, its first *Optional Protocol* signed also by New Zealand or the *Convention on the Rights of the Child* 1989, all ratified by New Zealand. Delivering the interim judgment of the New Zealand Court of Appeal, Cooke P stopped short of deciding that international obligations *must* be considered in the performance of the administrative decision-making process.[29] Nevertheless, the Court reviewed the relevant jurisprudence under the *European Convention* established by decisions of the European Court of Human Rights.30 His Honour went on to describe the Minister's submission as:[31]

"... an unattractive argument, apparently implying that New Zealand's adherence to the international instruments has been at least partly window-dressing. Although for the reasons to be mentioned shortly, a final decision on the argument is neither necessary nor desirable, there may at least be hesitation about accepting it. The law as to the bearing on domestic law of international human rights and instruments declaring them is undergoing evolution. For the appellant [counsel] drew our attention to the Balliol Statement of 1992, the full text of which appears in 67 ALJ 67, with its reference to the duty of the judiciary to interpret and apply national constitutions, ordinary legislation and the common law in the light of the universality of human rights. It has since been reaffirmed in the Bloemfontein Statement of 1993."

If and when the matter does fall for decision, an aspect to be borne in mind may be one urged by counsel for the appellant: that since New Zealand's accession to the Optional Protocol the United Nations Human Rights Committee is in a sense part of the country's judicial structure, in that individuals subject to New Zealand jurisdiction have direct rights of recourse to it. A failure to give practical effect to international instruments to which New Zealand is a party may attract criticism. Legitimate criticism could extend to the New Zealand Courts, if they were to accept the argument that, because a domestic statute

giving discretionary powers in general terms does not mention international human rights norms or obligations, the Executive is necessarily free to ignore them."

The *Balliol Statement* and the *Bloemfontein Statement* were made at meetings of judges from throughout the Commonwealth of Nations which were attended by Cooke P and myself. Like the earlier similar statements, issued after meetings in Harare, Zimbabwe and Abuja, Nigeria, they accept and endorse the *Bangalore Principles*.[32]

CASES APPLYING THE *BANGALORE PRINCIPLES*

The foregoing collection of judicial pronouncements confirms Cooke P's statement to the effect that the impact of international human rights law upon domestic law is "undergoing evolution".

In an earlier essay,[33] I collected a number of decisions of the High Court of Australia and of the New South Wales Court of Appeal to that time in which reference had been made to international human rights principles in the development of the understanding of local law. In my own Court, the cases have included:

* A case involving a suggested ambiguity of the *Bankruptcy Act* 1966 (Cth) staying civil proceedings and whether it should be interpreted to exclude public law proceedings for the vindication of a public right.[34]

* A case concerning imputed bias by reason of a judge's earlier retainer, whilst a barrister, for a party to litigation in suggested breach of the requirement in article 14.1 of the *ICCPR* that a person have a "fair and public hearing by a competent *independent* and *impartial* tribunal established by law".[35]

* A case concerning whether the common law provides an enforceable right to speedy trial[36] having regard to the terms of article 14.3 of the *ICCPR*.

* A case concerning a right of a mute person to have an interpreter assist in the understanding of evidence and argument given in open court in proceedings concerning her, having regard to the terms of articles 14.1, 14.3(a) and (f) of the *ICCPR*.[37]

* A case involving the right of a litigant in person to have, as costs, expenses necessary for attending court by reason of the promise of "equality" before the courts and tribunals under Article 14.1 of the *ICCPR*,[38] notwithstanding earlier court decisions to the contrary in England.

* A case involving the imposition of a fine of $60,000.00 upon a bankrupt, invalid pensioner prisoner as punishment for contempt of court, having regard to the prohibition on "excessive fines" in the still applicable *Bill of Rights* 1688 (GB).[39]

* A case by a convicted contemnor involving an asserted denial of his right to have his conviction and sentence reviewed by a higher tribunal according to law as article 14.5 of the

ICCPR requires, when all that was provided was an entitlement to seek special leave to appeal against conviction to the High Court of Australia.40

There are many other Australian cases which could be mentioned, including cases in the Federal Court of Australia,[41] the Family Court of Australia[42] and in the Court of Criminal Appeal of New South Wales.[43] In many of the foregoing decisions, a feature of the reasoning is the reference by the judges, not only to the text of a relevant international instrument, but also to the development of the jurisprudence by courts, tribunals and committees - particularly by the European Court of Human Rights.

In New Zealand, the vehicle of the *New Zealand Bill of Rights Act*, although not constitutionally entrenched, gives an established framework for the reference to analogous jurisprudence developed around similarly expressed provisions in international law. In Australia and England there is no similar domestic statute. This has not stopped the courts, in the manner suggested in the *Bangalore Principles*, from utilising international law where a relevant gap appears in the common law or a statute falls to be construed which is ambiguous or uncertain of meaning. Increasingly, judges of our tradition, faced with such a problem, are turning not simply to the analogous reasoning which they can derive from the judgments written, often in a different world for different social conditions, far away. Now, increasingly, they are looking, where relevant and applicable, to international human rights jurisprudence. In my view, this is both a natural and desirable development of our marvellously flexible and adaptable legal system. It is one which is in general harmony with the development of the international law of human rights. It is one apt for a time of global technology (such as telecommunications, international transportation, satellites etc), global problems (such as the HIV/AIDS epidemic, atmospheric warming, overpopulation etc) and global institutions.

CAUTIONARY TALES

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

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

(2) The processes of ratification are often defective. In Australia, for example, the Federal Government deposited the instrument of accession to the first *Optional Protocol* to the *ICCPR* before tabling the instrument in Parliament. This was described by one observer as "extraordinary ... without any public debate or even public awareness of its existence, let alone its scope and significance".[44] 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]

(3) In federal countries, such as Australia, the ratification of international treaties might be used as a means to undermine the distribution of powers between the Federal and State legislatures in a way never contemplated by the drafters of the *Constitution*.[45] One reason advanced for awaiting legislation to introduce an aspect of international law into domestic law in a federation, and to refrain from introducing such principles by judicial decision, is that this course will permit the constitutional validity of the statutory introduction to be tested in the courts;

(4) Judicial introduction of human rights norms may divert the community from the more open, principled and democratic adoption of such norms in constitutional or statutory amendments which have the legitimacy of popular endorsement. It is upon this ground that some criticism has been voiced of the recent discovery by the High Court of Australia of fundamental rights to be implied from the nature and purposes of the Australian *Constitution* although not expressed there.[46] Those who hold to this view urge that it would be preferable to engage in a national debate and openly to embrace an enacted Bill of Rights than to accept such a development from a well-meaning judiciary, introducing it "by stealth";

(5) Some commentators have also expressed scepticism about the international courts, tribunals and committees which pronounce upon human rights. They are typically made up of persons from legal regimes sometimes quite different from our own. In *R v Jeffries*[47] Richardson J observed that, whilst the jurisprudence of Canada in the area of human rights and that of the European Court of Human Rights have offered undoubted assistance in the interpretation and application of the *New Zealand Bill of Rights Act*, New Zealand should nonetheless be wary. It should not forget its own legal and social history which has distained federation and, so far, has declined to accept an entrenched statement of rights with overriding constitutional force;

(6) To similar effect, critics have pointed to the generality of the expression of the provisions contained in international human rights instruments. Of necessity, the charters are expressed in language which lacks precision. This means that those who use them may be tempted to read into the broad language what they hope, expect or want to see. Whilst the judge of the common law tradition has an indisputably creative role, such creativity must be in the minor key. It must proceed in a judicial way. It must not undermine the primacy of democratic law-making by the organs of government, directly or indirectly accountable to the people;[48] and

(7) Finally, some critics caution against undue, premature undermining of the sovereignty of a country by judicial *fiat* and the authority of every country's law-makers to develop human rights in their own way, at least when they are democratically elected and accountable. The world, in the matter of rights protection, is by no means monochrome. We are now at pains to protect the bio-diversity of human culture, and of fauna and flora. The principle of self-determination of peoples is a reflection of the fundamental right of every people to be governed in a way acceptable to a majority of the population. It would be ironic if the advance of international human rights principles were to undermine the variety of human

legal systems and democratic accountability which is itself an important right which courts should loyally respect.

SUPPORT FOR THE *BANGALORE PRINCIPLES*

Against the foregoing considerations, the supporters of the *Bangalore Principles* rely on a number of factors which must be kept in mind in the evolving jurisprudence to which Cooke P referred in the New Zealand Court of Appeal in *Tavita*:49

(1) The *Bangalore Principles* do not undermine the sovereignty of national law-making institutions. They acknowledge that if those institutions have made (by constitutional, statutory or common law decision) a rule which is unambiguous and binding, no international human rights principle can undermine or overrule the applicable domestic law. To introduce such a principle requires the opportunity of a gap in the common law or an ambiguity of a local statute. Then, by direct legislation or indirect introduction by the judicial branch of government, the principle can be imported into the law of the sovereign country. Far from being a negation of sovereignty, this is an application of it;

(2) The process which the *Bangalore Principles* endorse is, in a sense, as Brennan J described it in *Mabo*, an inevitable one. As countries, such as New Zealand and Australia, by subscription to the First *Optional Protocol*, submit themselves to the external scrutiny and criticism of their laws by the United Nations Human Rights Committee, the result must be addressed. If a domestic law is measured and found wanting, a country is then obliged to bring its law into conformity, to withdraw from the treaty if it may or be revealed as nothing more than a practitioner of human rights "window-dressing";

(3) Modern notions of democracy are more sophisticated than they formerly were. They involve not only the reflection in law-making by the will of the majority, intermittently expressed upon a broad range of issues. Now, it is increasingly accepted that the legitimacy of democratic governance depends upon the respect by the majority for the fundamental rights of minorities.[50] Therefore, insofar as courts give effect at least to fundamental rights, they are assisting in the discharge of their governmental functions to advance the complex notion of democracy as it is understood today;

(4) So far as federal states are concerned, their constitutions do not stand still. The view has been expressed that a federal parliament and government is a trustee in a federal country for the international standards of the world community in which it is the responsibility of the federal polity to be the nation's voice.[51] The power of a federal Supreme Court to strike down excessive laws and to measure of all laws against the standards of the *Constitution* as understood from time to time, ensure that such laws meet the requirements of constitutionality. Federal constitutions must themselves adapt to the world in which the federal state finds itself. This, indisputably, is a world of increasing interrelationships in matters of economics and of human rights. Judges, no more than legislatures and governments, can ignore this reality;

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

(6) The international development of local law are already happening outside the judiciary. For example, international human rights principles are being introduced into domestic law by express legislation.[52] Sometimes that legislation follows determinations of a relevant international body, as was the case of the recent Australian statute: *Human Rights (Sexual Conduct) Act* 1994 (Cth). That Act followed the decision of the United Nations Human Rights Committee in determining the communication by Mr Nicholas Toonen concerning Tasmanian laws on homosexual offences, repealed everywhere else in Australia.[53] Given that other branches of government are giving effect to international human rights law, it is scarcely surprising that the courts, as a branch of government, are also taking such law into account in appropriate cases and in permissible circumstances; and

(7) The developments just described are hardly surprising or threatening, at least they should not be so to judges and lawyers of our tradition. The international human rights instruments were, for the most part, drawn up by Anglo-American lawyers. In countries such as Australia, their concepts are often already enshrined in constitutional, statutory or common law principles. It is the jurisprudence which is now collecting around these broad concepts that is often helpful in facing the kinds of problems which societies must address today. That is why it is appropriate and useful for the common law now to modify its earlier principle of strict separation of international and domestic law. It is timely that a *rapprochement* between these systems of law should be developed. As we enter a new millennium where there will be increasing international law of very kind, it is part of the genius of our legal system that our courts have found a way to take cognisance of international human rights jurisprudence in appropriate circumstances and by appropriate and familiar techniques of reasoning.

AN AMBER LIGHT?

In a paper delivered just before his retirement as Chief Justice of Australia, Sir Anthony Mason referred[54] to the idea behind the *Bangalore Principles*. He recalled that it had "been suggested that Australian courts should fill any gap in the common law by adapting rules or principles of law embodied in international conventions to which Australia had acceded".[55] This suggestion was attributed to a paper which I had presented to the Senate Department in February 1995 on the topic of "Human Rights - The International Dimension".[56] A footnote to Sir Anthony Mason's paper states:

"This view was not endorsed by the High Court in its very recent decision in Minister of State for Immigration and Ethnic Affairs v Teoh, unreported, 7 April 1995."

Clearly in my earlier lecture, I did not make sufficiently plain the subtlety of the *Bangalore Principles*. I do not agree that Australian courts should fill *any* gap in the common law by adapting international conventions. I hope that, in this paper, I have indicated that the

principles are more discerning and less ham-fisted than they must have appeared from my February contribution to this debate.

Lest, then, it should be thought that the High Court in *Teoh* has rejected the *Bangalore* idea, it is important to reflect upon what the judges actually stated. Their comments on the point are peripheral to the main subject matter of the case. It concerned a challenge to a finding of a delegate of the Minister for Immigration and Ethnic Affairs. In the Full Federal Court, a majority held that Australia's ratification of the *Convention on the Rights Of The Child* created a "legitimate expectation" in parents and children that any action or decision by the Commonwealth would be conducted, or made, in accordance with the principles of the *Convention*.[57] There were other holdings which were challenged. But it was this one which led the High Court into a consideration of the relevance of the *Convention* to Australian law, given that, as such, it had not been incorporated into Australian law by federal legislation.

In the course of their judgment dismissing the appeal, Mason CJ and Deane J said this:[58]

"It is well established that the provisions of an international treaty to which Australia is a party does not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute ... So a treaty which has not been incorporated into our municipal law cannot operate as a distinct source of individual rights and obligations under that law ...

But the fact that the convention has not been incorporated into Australian law does not mean that its ratification holds no significance for Australian law. Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party, at least in those cases in which the legislation is enacted after, or in contemplation of, entry into or ratification of, the relevant international instrument. That is because Parliament, prima facie, intends to give effect to Australia's obligations under international law.

It is accepted that a statute is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law. ... In this context there are strong reasons for rejecting a narrow conception of ambiguity. If the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail. So expressed, the principle is no more than a canon of construction and does not import the terms of the treaty or convention into our municipal law as a source of individual rights and obligations.

Apart from influencing the construction of a statute or subordinate legislation, an international convention may play a part in the development by the courts of the common law. The provisions of an international convention to which Australia is a party, especially one which declares universal fundamental rights, may be used by the courts as a legitimate guide in developing the common law. But the courts should act in this fashion with due

circumspection when the Parliament itself has not seen fit to incorporate the provisions of a convention into our domestic law. Judicial development of the common law must not be seen as a back-door means of importing an unincorporated convention into Australian law. A cautious approach to the development of the common law by reference to international conventions would be consistent with the approach which the courts have hitherto adopted to the development of the common law by reference to statutory policy and statutory material. Much will depend on the nature of the relevant provision, the extent to which it has been accepted by the international community, the purpose which it is intended to serve and its relationship to the existing principles of our domestic law."

Mason CJ and Deane J pointed out that, in *Teoh*, they were not concerned with the resolution of an ambiguity of a statute. Nor were they concerned with the development of an existing principle of the common law. To that extent, their remarks on the *Bangalore* idea were *obiter dicta*. They were, as will be seen, cautious. But as I read them those remarks were entirely consistent with the *Bangalore Principles*, although with a cautionary warning against excessive enthusiasm.

To the same effect were the remarks of Toohey J in *Teoh*:[59]

"In the appellant's submission the Convention had no bearing on and was irrelevant to the rights of the respondent and the obligations of the appellant. Ratification did not amount to adoption or incorporation of the Convention in the municipal law of Australia. Declarations for the purposes of the HREOC Act did no more than identify an international instrument as a guide to the Human Rights and Equal Opportunity Commission in fulfilling its functions of inquiring into and reporting on any act or practice that may be inconsistent with or contrary to human rights declared in the instrument."

His Honour noted the remarks of Nicholson CJ in *Re Marion*:[60]

"It [is] strongly arguable that the existence of the human rights set out in the relevant instrument ... have been recognised by the parliament as a source of Australian domestic law by reason of this legislation."

He reserved whether that was the case. But he went on:[61]

"It follows that while Australia's ratification of [a] Convention does not go so far as to incorporate it into domestic law, it does have consequences for agencies of the executive government of the Commonwealth. It results in an expectation that those making administrative decisions in actions concerning children will take into account as a primary consideration the best interests of the children and that, if they intend not to do so, they will give the persons affected an opportunity to argue against such a course. ... The point is not that the delegate was obliged by the Convention to do so but that, had she done so, she might have been in a better position to meet the legitimate expectation to which the Convention gave rise."

Gaudron J agreed with what Mason CJ and Deane J had said about the status of the *Convention* in Australian law. She added:[62]

"The significance of the Convention, in my view, is that it gives expression to a fundamental human right which is taken for granted by Australian society, in the sense that it is valued and respected here as in other civilised countries. And if there were any doubt whether that that were so, ratification would tend to confirm the significance of the right within our society. Given that the Convention gives expression to an important right valued by the Australian community, it is reasonable to speak of an expectation that the Convention would be given effect. However, that may not be so in the case of a treaty or convention that is not in harmony with community values and expectations."

McHugh J, who dissented in the result, and rejected the idea that the terms of the *Convention* gave rise to a legitimate expectation in the particular case, nonetheless offered a similar analysis of the relevance of the *Convention* to Australian law:[63]

"Conventions entered into by the federal government do not form part of Australia's domestic law unless they have been incorporated by way of statute. They may, of course, affect the interpretation or development of the law of Australia. ... In that respect, conventions are in the same position as the rules of customary international law. International conventions may also play a part in the development of the common law."

For the last statement, his Honour referred to the crucial passage in the judgment of Brennan J in *Mabo* (above) and to *Dietrich*[64] as well as to two opinions of my own in *Jago*[65] and in *Ringland*.[66]

Therefore, far from rejecting the *Bangalore* idea, the decision in *Teoh* endorses the basic concept. It cautions against a rude invention of the common law by judges, using unincorporated conventions as a "back-door" means of introducing treaty law where Parliament has held back. With that caution I am in entire, respectful agreement. I believe that such caution is expressed, in terms, in the *Bangalore Principles* themselves.

THE RATIFICATION ISSUE

In a number of countries, including Australia, the increasing influence of international treaty law upon domestic law has focussed unprecedented attention upon the ratification procedure. As treaties come to have an increasing influence upon the shape of local law, it is inevitable, and natural, that legislatures will assert the right to influence, superintend, and even veto ratification of treaties by the Executive Government.

Under the *Australian Constitution*, the Executive has exclusive authority to negotiate, sign and ratify treaties. Until now, it has been assumed that it may lawfully do so without informing, still less obtaining the approval of, the Federal Parliament. In this regard Australian treaty-making practice has followed that of the United Kingdom. This is, in turn, no more than the succession to the practice of treaty-making by the Sovereign.

During the debates on the *Australian Constitution* there was little discussion of the scope of the legislative power conferred by s 51(xxix) with respect to external affairs. Sir Anthony Mason explains why this was so:[67]

"The delegates appear to have thought that the Imperial Government would make treaties binding Australia, though some delegates considered that Australia itself might make commercial or trade agreements with other countries. The outlook of the delegates reflected their understanding that Great Britain, not Australia, was the relevant member of the community of nations with power to bind Australia to an international treaty. The possibility that the external affairs power would enable to the Parliament to carry into effect an international convention which seeks to regulate conduct as between citizens within national boundaries may not have been foreseen by the framers of the Constitution. That, of course, is not an adequate reason for holding that implementation of such a convention stands outside the legislative power. But it does indicate that the expansion in the scope of international affairs has had a very significant impact on the exercise of legislative power by the Commonwealth Parliament."

In 1961, in keeping with this expansion, Prime Minister R G Menzies announced that, in general, the Australian Government would henceforth not proceed to ratify or accede to a treaty until it had lain on the table of both Houses of Federal Parliament for twelve sitting days.[68] This unilateral adoption of a Parliamentary procedure may have been prompted by persistent Opposition questions addressed to Mr Menzies when he was both Foreign Minister and Prime Minister. The practice so instituted was followed until the 1970s when it fell into disuse. The position has now been reached that it is no longer followed. The present practice is for treaties to be tabled in bulk every six months.[69]

In 1983, Senator Haradine (Tasmania) tabled a motion for the establishment of a Standing Committee on Treaties. That motion has been reintroduced in each session of the Senate since 1983 but not adopted. In 1994, the Australian Democrats introduced a Parliamentary Approval of Treaties Bill 1994. That Bill would provide a system of Parliamentary disallowance of accession to treaties which are disapproved by Parliament. The Bill has not been passed.

Much attention was given to the treaty-making power following the Government's action of depositing in New York the instrument of accession to the First *Optional Protocol* to the *International Covenant on Civil and Political Rights* before notification to the Federal; Parliament or the Australian people. This action was described as "extraordinary", involving as it did no "public debate or even public awareness of its existence, let alone its scope and significance".[70] There followed a number of sharp exchanges in the Senate. To the proposal of Senator Rod Kemp (Victoria) that Australia's ratification of international treaties should henceforth be submitted for Parliamentary approval, the Minister for Foreign Affairs and Trade, Senator Gareth Evans, responded, with characteristic directness: "No way José". To Senator Kemp's rhetoric "We could not have the people at all involved in this", Senator Evans told an Estimates Committee bluntly: "Dead right". Later, before the Estimates Committee, Senator Evans agreed that treaties should be tabled in Parliament before action was taken to adhere to them. This he described as a "sort of half-way José".[71]

A number of reasons have been advanced to support the present practice as to ratification of treaties. They include:

Negotiation of major multi-lateral treaties is usually a drawn-out and often quite public process permitting Parliamentary discussion on key issues;[72]

Before actual incorporation of a treaty into domestic law, Parliament would have an ample opportunity to debate the treaty;

The introduction of a requirement of Parliamentary approval by the United States *Constitution* has had the effect of stultifying the ratification of international treaties by that country. Thus, whereas the United Kingdom has ratified 67 of the *ILO Conventions*, the United States has ratified but 9. At a time when international involvement is expanding in harmony with international travel, communication, institutions and problems, the risk must be faced that introduction of a legislative voice in Australia into the treaty ratification process could distinctly retard Australia's participation in the development of international law.

On 21 October 1994, in a joint statement, the Minister for Foreign Affairs and Trade and the Attorney-General said:

"The Government will supplement [the present] information flow by now tabling, wherever possible, all treaties, other than sensitive bilateral ones, before action is taken to adhere to them. We will also take steps to increase the possibility of participation by Members of Parliament on various treaty negotiating delegations and we will be happy to offer full briefings on treaties under consideration or negotiation to any Member or Senator who asks for them."

The foregoing arrangement, involving the members of Federal Parliament, supplements procedures already put in place for consultation with the States and with industry bodies.[73]

In 1995, the Senate Legal and Constitutional References Committee was asked to inquire into the Commonwealth's treaty-making powers. The Committee is to report by 24 August 1995. It is conducting widespread consultations. It has issued a Discussion Paper. One option raised is the establishment of a Parliamentary Committee or an inter-governmental body to monitor the implementation of treaties and to scrutinise their effects on Australian law.[74] It is clear that the expansion of treaty-based law has affected the "balance" between Federal and State powers within Australia. The Discussion Paper also raises issues concerning the relationship of the Federal Executive and the Parliaments, Federal and State, of Australia. Increasingly, as I hope my paper illustrates, treaty-based law affects the development of Australia's common law and the construction of ambiguous statutes.[75]

The foregoing developments make it particularly timely that the Australian Federal Parliament and Government should be reconsidering the procedure of ratification (and associated issues of implementation of, and withdrawal from) treaties. As treaty law comes to affect more profoundly the content of Australian domestic law, it is proper that the Australian Parliament should be more closely involved in monitoring treaty negotiations and aware of treaty ratification and implementation. Parliamentary consideration may also have a beneficial consequence of enlivening public debate about treaty law and public

understanding of the inevitability of, and general benefit secured from, the growth of treaty law, both for Australia as a nation and for its people as co-inhabitants of an increasingly inter-dependent world.

CONCLUSIONS

The influence of treaty law upon Australian law is growing. The powerful influence of international standards will have an increasing impact on the development of the common law and statute law in Australia. The full evolution of the technique described in the *Bangalore Principles* has not yet been achieved. But the idea is now amongst us. It is a powerful idea. It is one appropriate to the times in which we live. It is one which promises a gradual harmonisation between internationally accepted principles and the municipal law of a country such as Australia.

From a subject of esoteric interest to a few lawyers advising States and international agencies, international law is increasingly becoming of relevance to Australian law. If then we look to the United Nations and lawmaking for the 21st century, we can scarcely overlook the way in which treaty law, adopted under the United Nations, is coming to influence Australian law, directly and indirectly. It is the privilege of lawyers of this generation to contribute to this inevitable and natural historical development. But first they must realise that it is happening, and why.

FOOTNOTES

* Adapted, in part, from a paper presented by the author to the New Zealand Judges' Conference, March 1995 *sub nom* "The Impact of International Human Rights Norms - Law Undergoing Evolution".

** President of the New South Wales Court of Appeal. Chairman of the Executive Committee of the International Commission of Jurists.

1. See eg Conference *Great Expectations - the United Nations at Fifty*, Melbourne, April 1995.

2. See eg Conference *The United Nations - Between Sovereignty and Global Governance*, Melbourne, July 1995.

3. See Labour Relations Bill 1995 (S Af).

4. See "Special Rapporteurs and Representatives Meet in Geneva, May-June 1994" (1994) 68 ALJ 829.

5. M D Kirby, "The Australian Use of International Human Rights Norms: From Bangalore to Balliol - a View from the Antipodes" (1993) 16 UNSWLJ 363.

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

7. *Loc cit*.

8. **Koowarta v Bjelke-Petersen and Ors (1982) 153 CLR 168**, 224f. See comment [1994] NZLJ 433, 434.

9. See M.D. Kirby, UNSWLJ (above n 5), 373f.

10. *Bangalore Principles*, Principle 4. See (1988) 14 Cth L Bull 1196; (1988) 62 ALJ 531.

11. *ibid*, Principle 7.

12. See e.g. Samuels JA in *Jago v District Court of New South Wales and Ors* (1988) 12 NSWLR 558 (CA), 580f. See also Powell JA in *Young*, below n 40.

13. [1976] QB 198 (CA), 207.

14. (1992) **175 CLR 1**.

15. *ibid*, 42. See also **Dietrich v The Queen (1992) 177 CLR 292**, 330, 337, 361, 365. 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, 376, 381; B F Fitzgerald, "International Human Rights and the High Court of Australia" (1994) 1 *JCULR* 78.

16. [1992] QB 770 (CA).

17. [1993] AC 534 (HL).

18. [1991] 1 QB 775; 4 All ER 795 (DC).

19. *ibid*, 812.

20. *ibid*, 830.

21. (1994) 32 NSWLR 68 (CA).

22. 1946 AD 999.

23. *ibid*, 721.

24. *ibid*, 699.

25. Cf M. Mulgan, "Implementing international human rights norms in the domestic context: The rôle of a national institution" (1993) 5 *Canterbury L Rev* 235; J. Craig, "The 'Bill of Rights' debates in Australia and New Zealand - a comparative analysis" (1994) 8 *Leg Stud* 67. See also

R v Goodwin [1993] 2 NZLR 153 (CA), 168.

26. [1992] 3 NZLR 260 (CA).

27. *ibid*, 270.

28. [1994] 2 NZLR 257 (CA).

29. *loc cit*. See B. O'Callaghan, Case Note: *Tavita v Minister for Immigration* (1994) 7 *Auckland Uni L Rev* 762, 764.

30 See e.g. *Berrehab v Netherlands* (1988) 11 EHRR 322; *Beldjoudi v France* (1992) 14 EHRR 801; *Lamgiundaz v United Kingdom* (1993) TLR 483.

31. *Tavotai, ibid,* 266.

32. See Commonwealth Secretariat, *Developing Human Rights Jurisprudence*, London, 1991, where these instruments are collected.

33. See M.D. Kirby, UNSWLJ n 5(above).

34. See *Daemar v Industrial Commission of New South Wales and Ors* (1988) 12 NSWLR 45; 79 ALR 591 (CA).

35. See *S&M Motor Repairs Pty Limited and Ors v Caltex Oil (Australia) Pty Limited and Anor* (1988) 12 NSWLR 358 (CA).

36. See *Jago v District Court of New South Wales* (1988) 12 NSWLR 558 (CA), 569; see now (1989) 168 CLR 23.

37. See *Gradidge v Grace Bros Pty Limited* (1988) 93 FLR 414 (NSWCA).

38. See *Cachia v Hanes and Anor* (1991) 23 NSWLR 304 (CA). See now *ibid*, (1994) 68 ALJR 394 (HC).

39. See *Smith v The Queen* (1991) 25 NSWLR 1 (CA), 15.

40. See *Young v Registrar, Court of Appeal [No. 3]* (1993) 32 NSWLR 262 (CA).

41. See e.g. *Minister for Foreign Affairs v Magno* (1992) 37 FCR 298 (FFC); 112 ALR 529, 534f; *v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 41 FCR 117 (FC); *Teoh v Minister for Immigration and Ethnic Affairs* (1994) 121 ALR 436 (FFC) 443 (Black CJ).

42. See e.g. *Re Marion* (1990) 14 Fam LR 427, 449; contrast *Re Jane* (1988) 12 Fam LR 662.

43 See e.g. *Regina v Greer* (1992) 62 A Crim R 442 (NSWCCA); *Reg v Astill* (1992) 63 A Crim R 148 (NSWCCA); *R v Sandford* (1994) 33 NSWLR 172 (CCA), 177f, 185f. See also *Director of Public Prosecutions for the Commonwealth v Saxon* (1992) 28 NSWLR 263 (CA). *Canellis v Slattery* (1993) 33 NSWLR 104 (CA) (reversed HC).

44. A Twomey, Parliamentary Research Bkgrd Paper No 27 (1995) *Procedure and Practice of Implementing International Treaties*, 9 February 1995, 9.

45 See eg M D Kirby, "Human rights - the International Dimension", address, Parliament House, Canberra, 17 February 1995 in Australian Parliament, Senate, *Occasional Papers* (forthcoming).

46. See e.g. D. Rose, "Judicial Reasonings and Responsibilities in Constitutional Cases" (1994) 20 *Monash Uni L Rev* 195; A. Fraser, "False hopes: implied rights and popular sovereignty in the Australian Constitution" (1994) 16 *Syd L Rev* 213; L. Zines, "A Judicially Created Bill of Rights?" (1994) 16 *Syd L Rev* 166.

47. [1994] 1 NZLR 290 (CA), 299.

48. See e.g. Brennan J in *Dietrich v The Queen* (1992) 177 CLR 292, 323.

49. [1994] 2 NZLR at 266.

50. See H. Charlesworth, "Protecting Human Rights" (1994) 68 *Law Inst J* (Vic) 462, 463; C Caleo, "Implications of Australia's Accession to the First Optional Protocol to the International Covenant on Civil and Political Rights (1993) 4 *Public L Rev* 175.

51. See H. Charlesworth, "The Australian Reluctance about Rights" in P. Alston (ed), *Towards an Australian Bill of Rights*, HREOC, Canberra, 1994, 53.

52. See e.g. **Privacy Act 1988** (Cth).

53. *Toonen v Australia*, UN Doc CCPR/C/50/D/488/1992 (4 April 1994). For discussion see A. Funder "The Toonen Case" (1994) 5 *Public Law Rev* 156; G. Selvaner, "Gays in Private, The problems with the privacy analysis in furthering Human Rights" (1994) 16 *Adelaide L Rev* 331; W. Morgan, "Protecting rights or just passing the buck?" (1994) 1 *Aust J Human Rights* 409.

54. A Mason, "Towards 2001 - Minimalism, Monarchism or Metamorphism?" The Third Lucinda Lecture, Monash University, 11 April 1995 in *Monash Uni L Rev* (forthcoming).

55. *Ibid,* 20.

56. M D Kirby above n 45.

57. *Teoh v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 121 ALR 436

(FFC).

58. *Minister for State for Immigration and Ethnic Affairs v Teoh*, High Court of Australia, unreported, 7 April 1995, 10.

59. *Ibid*, 24.

60. (1990) 14 *Fam L R* 427 (F Fam C), 451. See also *Minister for Foreign Affairs and Trade v Magno* (1992) 112 ALR 529 (FFC), 535 (Gummow J).

61. Above n 58, 28f.

62. *Ibid*, 31.

63. *Ibid,* 45.

64. **Dietrich v The Queen (1992) 177 CLR** at 321, 360.

65. *Jago v District Court of New South Wales* (1988) 12 NSWLR 558 (CA), 569.

66. *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680 (CA), 709f.

67. Mason, above n 54, 18.

68. See *Commonwealth Parliamentary Debates (House of Representatives)*, 10 May 1961, 1693.

69. Australian Parliament, Senate Legal and Constitutional References Committee, Discussion Paper, *Treaties and the External Affairs Power*, March 1995, 4.

70. See A Twomey, above n 44, 9. See also Australian Parliament, Joint Committee on Foreign Affairs, Defence and Trade, *A Review of Australia's Efforts to Promote and Protect Human Rights*, AGPS, Canberra, 1994, 47ff. Australia, Department of Foreign Affairs and Trade, *Human Rights Manual*, AGPS, Canberra, 1993, 25.

71. Australian Parliament, Senate Estimates Committee, *Hansard*, 29 November 1994, 157.

72. Australia, Department of Foreign Affairs and Trade, *Common Concerns About Australia's Participation in Treaty Regimes - Questions and Answers* noted *Discussion Paper* above n 69, 5.

73. *Ibid*, 6.

74. *Ibid*, 10.

75. Mason, above n 54, 21.