Implementing the Bangalore Principles on Human Rights Law*

By The Hon Justice Michael Kirby CMG**

The Bangalore Principles
In February 1988, in Bangalore, India, a number of principles were adopted concerning the role of the judiciary in advancing human rights by reference to international human rights norms. The principles were stated at the end of a judicial colloquium brought together by Justice P.N. Bhagwati, the former Chief Justice of India. The participants in the colloquium included the Chief Justice of Zimbabwe (Dumbutshena, C.J.) who has now taken the initiative of organizing this colloquium of African judges. As in the case of the Bangalore meeting, the organizational skills of the Legal Division of the Commonwealth Secretariat have proved indispensable to bringing the meeting about. When the Bangalore Principles were formulated, the participants also included high judicial officers from India, Pakistan, Papua, New Guinea, Mauritius, Sri Lanka, Malaysia, the United Kingdom and the United States of America. I attended from Australia. The meeting was not an exclusively Commonwealth affair as the participation of judges from Pakistan and the United States shows. The link between us was the link of the common law.

The idea of the Bangalore meeting - and of this meeting in Harare - is to plant the seed of a very simple idea. In the world of jumbo jets, telecommunications and nuclear fission, it is vital that civilized leaders should contribute to, promote and stimulate an internationalist approach to common problems. International law must be seen not as a remote compilation of high sounding rules, political in character addressed to governments and not to people. It must be seen rather as the rules of humanity, defined by experts and deriving authority from international agencies and multi-national acceptance. In such a world, it becomes the duty of the judges in domestic courts, dealing with the practical problems of litigants before them, to endeavour, so far as possible, to bring their decisions into harmony with the developing body of international law. To do this, judges must become familiar with that body of law. Because many decisions in our busy courts depend upon the arguments which lawyers place before judges, it is also necessary in law schools, and in continuing education, that practitioners of the law should become familiar with the growing body of international law. Of course, judges owe their first duty to their local constitutions and to the statutes and common law applicable in their own jurisdictions. Save possibly for Crimes against Humanity, judges typically have a

* The Bangalore Principles are an Appendix to this paper. See (1988) 62 Aust LJ 531-2.
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judges typically have a wide leeway for choice in many decisions which they have to make. True, it is not always so. Sometimes the law is clear and the facts require but one outcome to a case. In such a circumstance, the judge's duty is plain, whatever may be the strictures of international law or of internationally accepted human rights norms. However, it is now increasingly recognized that the law is rarely so mechanical. Many are the choices which judges must make whether in developing the common law or in giving meaning to statutes which are ambiguous. The judge works with words. The English language, so rich in literature, is frequently ambiguous – a treasure-house of multiple meanings. In part, this is so because of the fact that, following the Norman Conquest, English became the marriage of two linguistic streams: the one Germanic and the other Romance. Ambiguity and uncertainty of meaning frequently give rise of the judge's opportunity. This is not an opportunity to indulge idiosyncratic opinions. Still less it is an occasion to fall prey to temptations of social engineering by reference to a pre-conceived strategy. But it is important for judges, especially, to recognize the opportunities for choice and the obligations and responsibilities which those opportunities place upon them.

Once it was faithfully taught that the judicial task was almost exclusively automatic and mechanical in nature. But now, judges, scholars and other academics throughout the common law world teach otherwise. They have done so with increasing conviction since Lord Reid in 1972 asserted that the declaratory theory of judicial decision-making was a "fairytale".

Upon some subjects which come before domestic courts international law has little, if anything, to say. But one topic upon which a growing body of international law has developed since the Second World War has been that of human rights. The process which has occurred is well described by Stephen, J., in the High Court of Australia, in these terms:

"The post-war history of this new concern is illuminating. The present international regime for the protection of human rights finds its origin in the Charter of the United Nations. Prominent in the opening recitals of the Charter is a reaffirmation of 'faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women'. One of the purposes of the United Nations expressed in its Charter is the achieving of international cooperation in promoting and encouraging 'respect for human rights and for fundamental freedoms for all without distinction as to race...'. Ch. 1, Art. 1:3; see too Ch. IX, Art. 55(c). By Ch. IX, Art. 56, all member nations pledge themselves to take action with the Organization to achieve its purposes. The emphasis which the Charter thus places upon international recognition of human rights and fundamental freedoms is in striking contrast to the terms of the Covenant of the League of Nations, which was silent on these subjects. The effect of these provisions has in international law been seen as restricting the right of member States of the United Nations to treat due observance of human rights as an exclusively domestic matter. Instead the human rights obligations of member States have become a 'legitimate subject of international concern': Judge de Aréchaga, Recueil des Cours, Vol. 178 (1978) at p. 177. Sir Humphrey Waldock, also a judge of the International Court of Justice, had earlier noted this development in Recueil des Cours, Vol. 106 (1962) p. 200. To the same effect are Lauterpacht's comments in International Law and Human Rights (1950), pp. 177-178 and those in Oppenheim's International Law 8th ed. (1958) Vol. 1, p. 740. The views of other distinguished publicists are summarized in Schwelb in 'The International Court of Jus-