HUMAN RIGHTS
A GLOBAL REVOLUTION

Dr Keith Suter*

INTRODUCTION

Some argue that the Commonwealth of Australia was created in January 1901 on the gross violation of human rights,[1] basing it on the attempted extermination of the continent's original inhabitants and on racist criteria for immigration. Australian journalist Paul Kelly noted the importance of racism as an underlying principle for federation:[2]

> It was the unique basis for the nation and the indispensable condition for all other policies. It was established in the first substantive law passed by the federal Parliament – the mark of individuality in an Empire of coloured races. White Australia was not just a policy; it was a creed, which became the essence of Australian nationalism and, more importantly, the basis of national unity. The Labor and Conservative parties, employers and unions, workers and housewives endorsed it.

But apart from fringe neo-Nazi groups, there is now no public support for the White Australia policy. Instead, all the political parties in public emphasise how much they disapprove of racism and, by contrast, how much they support an alternative national credo: multiculturalism.[3] Of the 10 most common names in the Sydney telephone directory, the name "Nguyen" is ranked number eight (after such names as "Smith" and "Jones") and is the fastest growing category.[4]

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* BA, MA, PhD.

[1] See Reynolds H, Frontier: Aborigines, Settlers and the Land (1987, Allen and Unwin, Sydney).

[2] Kelly P, The End of Certainty: the Story of the 1980s (1992, Allen and Unwin, Sydney) 2-3.

[3] In 1988 John Howard suggested that the rate of Asian immigration be slowed "in the interests of social cohesion". In the January 1995 campaign to regain the leadership of the Liberal Party, he apologised for those remarks and sought instead to emphasise just how much the Liberals had done for multiculturalism: "Howard's victory", The Australian, 28 January 1995 at 1.

[4] "Nguyens are up with the Joneses", The Sydney Morning Herald, 23 July 1994 at 10.

Australia had to drop the White Australia policy. As Gareth Evans and Bruce Grant pointed out:[5]

> The great turn-around in contemporary Australian history is that the region from which we sought in the past to protect ourselves - whether by esoteric dictation tests for would-be immigrants, or tariffs, or alliances with the distant great and powerful – is now the region which offers Australia the most. Our future lies, inevitably, in the Asia Pacific region.

Australia could not improve relations with the Asia Pacific region without first ending the White Australia policy. When the policy began, virtually all the countries in the region were colonies and so they had racism imposed on them by their own colonial masters. They are now independent and have strong views on racism. The demise of the White Australia policy is part of the global human rights revolution. Colonies around the world have become independent and have sought an end to institutionalised racism. Also, the temper of the times has changed in the "white" countries and many people now have different views from those of the older generation.

This article examines the growth of the international protection of human rights as an example of the process of globalisation. In this context, globalisation means the erosion of the significance of national boundaries, the reduction of the power of national governments to control national affairs and the rise of non-state actors, particularly inter-governmental organisations, non-governmental organisations (NGOs) and transnational corporations.

PROTECTION OF HUMAN RIGHTS

The 20th century saw some of history's worst violations of human rights and some of the most spectacular advances in their protection. There is a long way to go still. But at least in terms of international law it is recognised that human rights are now a global and not merely a national issue. However, human rights are still being violated but since people are

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[5] Evans and anor, Australia's Foreign Relations (1991, Melbourne University Press, Melbourne) 326. An example of an inter-governmental organisation is the United Nations while examples of NGOs are Amnesty International and the Geneva-based International Commission of Jurists.

more aware of their rights there is less resigned acceptance that such violations are an inevitable part of life.[6]

NATURE OF HUMAN RIGHTS

Human rights are fundamental privileges or immunities to which all people have a claim. They are not "given" by governments because they are derived automatically as a result of someone being a member of humankind. Since governments cannot "give" human rights, they should not try to take them away. Human rights thinking, especially since 1945, is based on the assumption that in essence all human beings have a common core although they may be divided on gender lines, speak different languages, and have different skin colours. Fundamentally, there are great similarities that are manifested partly in the rights that all humans enjoy.

The United Nations Charter's Preamble reaffirms "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small". Article 55(c) states that one of the purposes of the organisation is to achieve "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion". Article 56 provides that "[a]ll Members pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55".

The basic United Nations human rights document is the 1948 Universal Declaration of Human Rights. It has 30 Articles that include the right to life, liberty and security of person; equality before the law; freedom of movement and residence; freedom from torture or cruel, inhuman or degrading treatment or punishment; the right to seek in other countries

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[6] See Akermark SS (editor), Human Rights Education: Achievements and Education (1998, UNESCO, Paris); Bailey P, Human Rights: Australia in an International Context (1990, Butterworths, Sydney); Cranston M, What Are Human Rights? (1973, Bodley Head, London); Domingues J and ors, Enhancing Global Human Rights (1979, McGraw Hill, New York); Falk R, Human Rights and State Sovereignty (1981, Holmes and Meier, New York); Henkin A (editor), Honouring Human Rights: from Peace to Justice (1998, Aspen Institute, Washington DC); Henkin L and anor (editors), Human Rights: an Agenda for the Next Century (1994, American Society of International Law, Washington DC); Joyce JA, The New Politics of Human Rights (1978, St Martin's Press, New York); Nelson J and anor (editors), International Human Rights: Contemporary Issues (1980, Human Rights Publishing Group, Stanfordville, New York).

asylum from persecution; freedom of thought, religion and conscience; the rights to vote and to participate in government; the right to education; the right to work; the right to form and join trades unions; the right to an adequate standard of living; the right to health protection; and the right to participate fully in cultural life.

Human rights are divided into two general categories. One of them, the category on individual human rights may be further divided into three sub-categories. Almost all human rights apply to individuals. There is, however, one collective human right: the right to self-determination, namely, for a "people" to run their own affairs.[7] The collective right to self-determination – although the term itself is modern – has had a long history. For example, Moses in leading the Hebrews out of Egypt may be considered the leader of a "national liberation movement" when the Hebrews were seeking self-determination. George Washington, Ho Chi Minh and Nelson Mandela are further examples of leaders of peoples wishing to exercise their right of self-determination.

In relation to the three sub-categories, the first is the oldest. It refers to civil and political rights and examples are the right to a fair trial and to participate in politics. Just over a century ago as European countries started to create "welfare states" recognition was given to a second group on economic and social rights. Examples are the right to work and equal pay for equal work. Thirdly, there are the new "rights of solidarity" that can be attained only through the united efforts of all the global actors, not just governments. An example is Principle 1 of the Stockholm Declaration on the right to a healthy environment that began at the 1972 United Nations Conference on the Human Rights.[8] The Stockholm Declaration has become a rallying point for environmental NGOs and received further attention in inter-governmental instruments such as the Rio Declaration on Environment and Development at the 1992 United Nations Conference.[9] It is only when one looks back over past decades that it becomes clear just how much progress has been made.

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[7] See van Walt M and ors (editors), The Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention (1999, UNESCO, Paris).

[8] Stone P, Did We Save the Earth at Stockholm? The People and Politics in the Conference on the Human Environment (1973, Earth Island, London) 148.

[9] The Rio Declaration on Environment and Development, Agenda 21: the United Nations Programme of Action from Rio (1992, United Nations, New York) 9.

EARLY HUMAN RIGHTS CAMPAIGNS

The roots of the 1948 Universal Declaration of Human Rights go back a long way. Former United States President, Jimmy Carter, traced the origins back to the Old Testament Law and the prophets:[10]

> I have been steeped in the Bible since childhood, and I believe that anyone who reads the ancient words of the Old Testament with both sensitivity and care, will find there the idea of government as something based on a voluntary covenant rather than force - the idea of equality before the law and the supremacy of law over the whims of any ruler; the idea of dignity of the individual human being and also of the individual conscience; the idea of service to the poor and oppressed.

Formal human rights declarations have appeared throughout history, such as the Magna Carta in 1215, the 1789 French Bill of Rights and the Bill of Rights attached to the United States Constitution in 1791. These instruments obliged national governments to respect the political rights of their own citizens. However, if they did not, it was a matter for domestic jurisdiction traditionally speaking. As JL Brierly pointed out:[11]

> Under customary law no rule was clearer than that a state's treatment of its own nationals is a matter exclusively within the domestic jurisdiction of that state, that is, is not controlled or regulated by international law.

Although the idea of foreign intervention in the protection of human rights is contrary to the principle of state sovereignty, it did not stop countries from commenting on the practices of other countries. For example, the 19th century ill treatment of Christians in the Ottoman Empire attracted foreign criticism. In 1876, during the first "modern" British political campaign, sometimes known as the "Midlothian campaign", William Gladstone spoke at public meetings against the Turkish atrocities that occurred and the lack of action by British Prime Minister Benjamin Disraeli. However, there was little international intervention in Ottoman affairs and Gladstone, when he

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[10] Quoted in Pippert, "Does President Carter's Christianity count?" Australian Church Record, 30 July 1979 at 8.

[11] Brierly JL, The Law of Nations (1963, Clarendon Press, Oxford) 291.

was Prime Minister, was no more effective on this matter than Disraeli had been earlier. On the other hand, the 20th century's record of the protection of human rights is an account of this principle being eroded.

LEAGUE OF NATIONS

During World War I, there was an extensive debate on why the war started. Most Allied leaders took the view that it was Germany's fault and so Germany had to be punished after it was defeated. The United States President at the time and leader of the Associated Powers, Woodrow Wilson, argued that the basic system of competing nation-States was the cause and if the war had not started in 1914 it would have started at some other time. He argued that the system itself must be changed and States ought to learn to co-operate far more.

The League of Nations was formed to facilitate international cooperation. By United Nations standards it was a tentative beginning. The League Covenant, unlike the United Nations Charter, did not refer to human rights. Indeed, at the 1919 Paris Conference the idea that the Covenant should contain an explicit reference to human rights was quickly dropped. States with restrictive immigration policies such as the United States and Australia feared that Japan would use the Covenant as another attempt to force them to liberalise their immigration policies. Instead, the League was concerned to get States to cooperate with each other across national boundaries rather than get involved in the domestic affairs of other States.

However, President Wilson was anxious that the League should have a role in the protection of minority populations. He argued that World War I began partly as a result of minority populations in the Austro-Hungarian Empire being badly treated and that unstable regions like the Balkans could destabilise affairs between other States. He said that all peoples should be given the right to self-determination and able to govern themselves. Thus, the League had the task of protecting minorities in the territories of the defeated Axis Powers.

The inter-war minority treaties were major breakthroughs in the protection of human rights. They were the 1920 Danzig Convention, 1920 Finland (Aaland Islands) Convention, 1922 Geneva Convention on Upper Silesia, and the 1924 Memel Convention. Each treaty gave individuals the right to petition the League about alleged human rights violations. A League High

Commissioner examined the complaints and raised them with the government concerned. The system applied only to the defeated countries and some complaints fell into abeyance when Adolf Hitler came to power in 1933 and withdrew Germany from the League.

By contrast, the system never applied to the Allied and Associated Powers. As historian Elisabeth Wiskemann pointed out, this was a major distinction:[12]

> Italy as a Great Power was not bound by a Minorities Treaty; in any case her Yugoslav and her smaller German-speaking minorities (rather over five hundred thousand and two hundred thousand respectively) were condemned to ruthless Italianisation under the Fascists.

UNITED NATIONS

During World War II, consideration was given to a replacement for the League. There was no question that the League had to be replaced rather than abolished because the Allied Powers recognised that some form of machinery to co-ordinate affairs between States was required. British Prime Minister Winston Churchill had called World War II the "Unnecessary War" in that it "could easily have been prevented if the League of Nations had been used with courage and loyalty by the associated nations".[13]

Human rights received considerable attention when the United Nations Charter was drafted. Hitler had shown that a State that violated human rights at home would eventually violate human rights overseas. As United States Secretary of State George Marshall said during the General Assembly session that adopted the Universal Declaration of Human Rights:[14]

> Governments which systematically disregarded the rights of their own people were not likely to respect the rights of other nations and other people, and were likely to seek their objectives by coercion and force

[12] Wiskemann E, Europe of the Dictators 1919-1945 (1971, Fontana, London) 66-67.

[13] Noel-Baker P, The First World Disarmament Conference 1932-3 and Why it Failed (1979, Pergamon, Oxford) 6.

[14] Stein, "International law in internal law: toward internationalisation of Central-Eastern European Constitutions", (1994) 88 American Journal of International Law 427.

in the international field. Thus, it was necessary to try to nip such potential violations in the bud.

Additionally, the Allied Powers were embarrassed that none of them had complained officially about the treatment of Jews between 1933 (when Hitler came to power) and 1939 (the onset of World War II). They claimed at the time that States were not allowed to interfere in the domestic affairs of other States and that this ban prohibited criticisms of their domestic policies as well.

It was proposed that the Charter should have an International Bill of Rights attached to it similar to the model in the United States Constitution. There was not enough time for this to be written and so it was agreed that priority should be given to this task as soon as the United Nations came into being on 24 October 1945. Mrs Eleanor Roosevelt, widow of the United States President, oversaw this project but a single instrument did not eventuate. Instead, the United Nations General Assembly adopted the Universal Declaration on 10 December 1948 without negative votes. However, Honduras and Yemen were absent and there were some abstentions. USSR and its satellite countries[15] abstained because the Universal Declaration included the right to own property. South Africa and Saudi Arabia abstained because the former opposed the principle that blacks were equal to whites and the latter disagreed with the principle that women were equal to men.

However, General Assembly declarations are expressions of government opinion only. They are not binding in nature and do not even bind the governments that vote for them. Thus, to make the declarations binding, they have to be converted into a treaty that is ratified by States. Thus, the next stage was to convert the Universal Declaration into a treaty that was binding on all governments following ratification. The Universal Declaration was therefore used as the basis for two treaties, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Both were completed in 1966. It was felt that two treaties were needed because there were two different types of rights whose implementation presented different problems.

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[15] Byelorussia, Czechoslovakia, Poland, Ukraine and Yugoslavia.

Civil and political rights are rights that the individual has against his or her own government but the government is both the protector of the rights as well as the potential violator. On the other hand, economic, social and cultural rights require the active involvement of the government in the life of the nation so as to ensure, for example, that the economy is growing in such a way as to provide opportunities for employment. However, although a government may claim that it is in favour of full employment, at the same time it may claim that the economic conditions do not permit it.

The ICCPR and the ICESCR have a common system of periodic reporting. A government ratifying either or both of them agrees to provide the United Nations with a regular report on what it has been doing to respect the human rights listed in the treaties. The ICCPR encourages respect for civil and political rights and provides a system of state-to-state complaints. Governments that agree to be bound by this system agree that the United Nations may receive complaints from other governments in the system and to investigate the complaints. The First Optional Protocol to the ICCPR goes a step further, namely, governments that agree to be bound by the Protocol agree that the United Nations may receive complaints from their own citizens and investigate them.

All the implementation measures seem very mild. Even if a United Nations investigation finds that a government has behaved badly, the organisation has no power to do anything other than make the findings public. For example, there is no world police force to arrest a guilty government and no world prison for guilty governments. Additionally, the human rights budget of the United Nations is minute and, by comparison, it is much less than the total funds spent each year by human rights NGOs in the United States.

PROGRESS IN PROTECTING HUMAN RIGHTS

However, when viewed in the context of human rights violations and history, the progress and development of human rights in the post-1945 era have been spectacular. First, political claims are expressed in terms of "human rights" now and becoming part of the political vocabulary. Even where people are unfamiliar with the details of the United Nations' declarations and treaties, there is widespread interest in the topic. Further, it is likely that there will be more opposition to abuses of governmental power if it violates human rights. When people are treated badly today,

they are now aware that their rights are being violated and if they are persecuted they know that they are suffering or dying for a cause.

Secondly, the growth of a global middle class has aided the human rights revolution and as societies become richer more popular attention is paid to human rights matters. South Korea and Indonesia are two examples where modernisation and wealth-creation have resulted in the overthrow of their dictators and resulting in accountability. As the United States economist John Kenneth Galbraith pointed out:[16]

> A poor peasantry, scattered over the landscape, working from dawn to dusk in order to live, can, with little effort, be controlled and politically disenfranchised. For accomplishing this, there is the amply available assistance of the landlords. The vast and functionally inevitable contingent of scientists, journalists, professors, artists, poets, self-anointed saviours of the public soul and students - especially students - all of them seeking and then demanding participation in the modern industrial society, cannot be similarly manipulated.

Thirdly, the United Nations has produced a diverse range of declarations and treaties flowing from the Universal Declaration and this large collection was written in the last 50 years. In fact, this level of inter-governmental action on human rights is quite unprecedented and the following are some of the more notable treaties:

1. The 1951 Convention on the Prevention and Punishment of the Crime of Genocide provides for the prosecution of anyone charged with commissioning acts intended to destroy, in whole or in part, a national, ethnic, racial or religious group.
2. The 1969 International Convention on the Elimination of All Forms of Racial Discrimination prohibits discrimination and the dissemination of ideas based on racial superiority or hatred.
3. The 1981 Convention on the Elimination of All Forms of Discrimination against Women addresses discrimination in public life, education, employment, health, marriage and the family.
4. The 1987 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment holds governments

[16] Galbraith JK, The Culture of Contentment (1992, Houghton Mifflin, Boston) 8.

responsible for preventing torture and punishing torturers, even those acting under orders.

5. The 1990 Convention on the Rights of the Child defines primary health care and education, among others, as rights of all children.

Fourthly, the United Nations is creating a network of techniques to assist governments protect human rights. For example, United Nations officials have helped the new governments in Eastern Europe devise electoral reforms and they have advised on the creation of national human rights institutions.[17] The United Nations also has advisory services and technical assistance in the field of human rights, including training programs.

Finally, the United Nations' work is being copied at the regional level.[18] The best example is the Council of Europe whose record on civil and political rights has been notably good. It has shown that its human rights machinery has the power to coerce member States to change their policies or risk expulsion from the Council. In 1967 a number of army Colonels began torturing their opponents after seizing power at a time when Greece wanted to join the then European Economic Community. Greece was therefore denied membership as long as an undemocratic government ruled the country. Other examples are the Organisation of American States, which is developing a system for the regional protection of human rights, and the Organisation for African Unity, which encouraged the creation of the African Commission on Human and Peoples' Rights in 1981.[19]

ROLE OF NON-GOVERNMENTAL ORGANISATIONS

The protection of human rights has been enhanced by the work of NGOs notably when they lobby governments to improve their human rights records. United States political scientist, Louise Shelley, examined the work of the NGOs and stated:[20]

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[17] National Institutions for the Promotion and Protection of Human Rights (1993, United Nations Centre for Human Rights, Geneva).

[18] See Weston and ors, "Regional human rights regimes: a comparison and appraisal" (1987) 20:4 Vanderbilt Journal of Transnational Law 585-637.

[19] "African Commission on Human and Peoples' Rights" [December 1991] Review of the International Commission of Jurists 51-60.

[20] Shelley "Human rights as an international issue" [November 1989] Annals of the American Academy of Political and Social Science 9, 45-46.

> [T]he approximately 1,000 human rights organisations have acquired a large, socially and geographically diverse following. Amnesty International, with the largest constituency and the most broad-based agenda, and the other, more narrowly focused groups have raised the consciousness of large numbers of individuals worldwide and have become important pressure groups. This has been done by forming locally based citizens' groups and also through mass publicity efforts such as the recent live rock concerts sponsored by Amnesty International throughout the world...
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> The research and fact-finding missions conducted by independent human rights organisations bring credibility to human rights concerns that is not possible when the issues are researched by governmental bodies. Rarely tied to a particular party or movement, the independent organisations are able to serve as a credible voice with different political administrations. Human rights for these groups are a primary concern that does not have to be balanced with the general political strategy of an individual nation.

EROSION OF STATE SOVEREIGNTY

The human rights revolution has eroded the principle of state sovereignty, namely, that each country governs itself and cannot be forced into accepting international obligations regarding its own treatment of its citizens. The League of Nations recognised this principle and Article 15(8) of its Covenant ruled out any involvement in matters that were "solely within the domestic jurisdiction" of a State. Thus, the League's most innovative area of work, the minority treaties, was the result of the system being imposed on the defeated States, although the victors did not accept similar obligations for themselves.

The principle of state sovereignty has been eroded or undermined in two ways. First of all, Article 2(7) of the United Nations Charter limits the organisation's involvement in a State's domestic affairs. Secondly, there has been a change in Australian legal reasoning that helped to pave the way for the High Court decision in *Mabo v Queensland.*[21] In this case, the High Court recognised that Australian judges need to take note of advances in

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[21] (1992) 175 Commonwealth Law Reports 1.

the global protection of human rights when confronted with gaps in Australian human rights law.

THE UNITED NATIONS CHARTER ARTICLE 2(7)

Although Article 2(7) of the Charter is the equivalent of Article 15(8) of the League Covenant, the former is more flexible. Article 2(7) rules out any involvement in matters "which are essentially within the domestic jurisdiction" of any country. The use of "essentially" rather than "solely" was derived from the need that this provision had to be reconciled with provisions that noted the importance of international co-operation on protecting human rights, *inter alia.* By implication, these provisions foreshadowed at least some United Nations involvement in domestic human rights issues.

Fifty-five years after it was written, Article 2(7) has been subjected to considerable erosion. To the diplomatists and international lawyers at the time the erosion was incremental without any apparent dramatic changes. It is only by reflection that it is possible now to see how much change has occurred. In 1963 Rosalyn Higgins, now a member of the International Court of Justice, traced the first 18 years of the erosion and observed:[22]

> What is truly domestic today will not necessarily be so in five year's time. Problems of prostitution and narcotics were once the sole concern of sovereign states; they are now acknowledged to be matters of international concern. Until very recently, it has been assumed that the regard for human rights that a state shows in the treatment of its own citizens was a question of domestic jurisdiction; today this assumption is open to serious doubts.

One of the first cases on the erosion of Article 2(7) concerned South Africa's apartheid policy. At the United Nations General Assembly in the late 1940s India raised the issue of the racist policies of South Africa. Although South Africa claimed that this could not be discussed because it was a domestic matter under Article 2(7), over the decades General Assembly resolutions adopted increasingly a strident tone against such racist practices. At the time, Australia was one of South Africa's main

[22] Higgins R, The Development of International Law Through the Political Organs of the United Nations (1963, Oxford University Press, Oxford) 61.

supporters. Australia did so partly because it had a racist policy too, the White Australia policy including a record of ill-treating Aboriginal and Torres Strait Islanders. Australia feared that if Article 2(7) were eroded it would eventually lead to Australia itself receiving negative international attention. In fact, Australia was one of the last countries to desert South Africa at the United Nations. The change in policy came with the election of Whitlam's Labor Government in 1972.[23] Australia not only changed its policy on apartheid then but it also became reconciled with its own human rights policies, notably on indigenous affairs. Today, Australia no longer claims that human rights matters are purely domestic matters.

THE BANGALORE PRINCIPLES

Generally speaking, international treaties do not become part of Australian domestic law unless they are specifically incorporated by an Act of the federal Parliament. This process occurs by virtue of the "external affairs" power of the Australian Constitution under section 51(xxix). In 1988 Justice Michael Kirby, then President of the Court of Appeal of New South Wales and Chairperson of the International Commission of Jurists, raised the issue of human rights norms becoming part of Australian law by another route. During a conference of senior judges from Commonwealth countries in Bangalore, India convened by the Commonwealth Secretariat, they discussed the role of international treaties in domestic courts. Kirby J stated:[24]

> [I]n a number of common law countries, the process has begun by which domestic courts refer to international treaties ratified by their country as a source of guidance in constitutional and statutory construction in the development of the principles of the common law.

Further, Kirby J had predicted that this process would continue:[25]

> [T]he growth in the number of international treaties ratified by Australia, the development of an increasingly large jurisprudence

[23] See Suter K, Australia's Changing Policies Towards Apartheid (1985, United Nations Centre Against Apartheid, New York).

[24] Kirby, "Domestic application of international human rights standards" [May 1988] Australian Foreign Affairs Record 186-187.

[25] Ibid 188. See also Kirby, "The role of the judge in advancing human rights by reference to international human rights norms", (1988) 62 Australian Law Journal 514-532.

> around such treaties and the growing pace of internationalisation which has accompanied technological developments of travel and telecommunications all make it likely that the judges and lawyers in every land will pay increasing attention in the future to the backdrop of international legal norms, including those dealing with human rights.

The following are three of the ten Bangalore Principles:[26]

> 1. Fundamental human rights and freedoms are inherent in all humankind and find expression in constitutions and legal systems throughout the world and in the international human rights instruments.
> 2. These international human rights instruments provide important guidance in cases concerning fundamental human rights and freedoms.
> 7. It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes – whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.

Four years later, Kirby J noted that changes had begun in Australia. He said that the Bangalore Principles:[27]

> provided a timely corrective to the insularity to which any legal system is prone; but to which the Australian legal system, in particular, seems always susceptible... Judges do make law. They make law just as surely as the executive and the legislature make law.

Therefore, it is important to examine what goes into that law-making process. Unfortunately little attention was being paid in judgments to the growing body of international human rights norms and Kirby J felt that for a time he was somewhat lonely in the prosecution of the Bangalore cause in the Australian courts.[28] However, by about 1991 the tide of judicial opinion took a turn in Australia when a number of key appointments were

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[26] For the text of the ten Bangalore Principles see Appendix, ibid.

[27] Kirby, "The Australian use of international human rights norms from Bangalore to Balliol – a view from the Antipodes" [1992] Australian International Law News 37-40.

[28] Ibid.

made.[29] June 1992 was even more important because a crucial and instructive decision was handed down by Australia's highest court. In *Mabo v Queensland*[30] the High Court reversed the long-held understanding of the Australian common law and decided that the form of native title of the Australian Aboriginals was recognised by the common law. In cases where it had not been lawfully extinguished, such title was protected to the benefit of these indigenous inhabitants. Some of the judgments that followed were based on international human rights norms. Kirby J concluded:[31]

> In Australia, both in the High Court and in the Court of Appeal of New South Wales, the busiest appellate courts in the country, it is not too much to say that the "classic" or "statist" notions of the divorce of domestic and international law are breaking down. A need to develop Australia's law in harmony with international developments is increasingly recognised by judges of high authority.

Thus, Australia is heading in a similar direction as other States. For example, in the 1974 Hamlyn Lectures, Sir Leslie Scarman of the English Court of Appeal foreshadowed correctly that English courts would have to become far more accustomed to taking account of the "human rights movement" in their decisions.[32] As Kirby J said in December 1993:[33]

> International law, unless incorporated by Parliament, cannot override our Australian law. But where, as so often happens, our laws are silent or ambiguous, the judges and lawyers of Australia can now look to international principles to fill the gaps and to help resolve the ambiguities. ...This is already happening in many cases in Australian courts and is the way in which fundamental human rights principles are becoming woven into the reinforcement of everyday common law in Australia. When this notion was propounded nearly a decade ago, it was regarded as legal heresy. Now it is becoming accepted as legal

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[29] For example, the appointment of Sir Ronald Wilson, former Justice of the High Court, as President of the Australian Human Rights and Equal Opportunity Commission.

[30] (1992) 175 Commonwealth Law Reports 1.

[31] Kirby, "The Australian use of international human rights norms from Bangalore to Balliol – a view from the Antipodes" [1992] Australian International Law News 71.

[32] Scarman L, English Law – the New Dimension (1974, Stevens, London) 10-21.

[33] Kirby, "Taking a world view on law", Australian Financial Review, 17 December 1993 at 17.

orthodoxy and future lawyers and citizens of Australia should be aware of the fundamental principles of international human rights.

FROM STATEMENTS TO IMPLEMENTATION

The revolution continued to roll along. Getting governments accustomed to external involvement in their human rights affairs began in a gentle way by asking governments to submit periodic reports on what they had been doing to ensure respect for the rights listed in the treaties they ratified. Starting in the mid-1960s human rights treaties such as the ICCPR and the ICESCR had asked governments to produce periodic reports. Given the different nature of the rights dealt with in the ICCPR it required reports to be submitted to the Human Rights Committee consisting of independent experts. Under the ICESCR reports were submitted to the Economic and Social Council (ECOSOC). The Human Rights Committee and ECOSOC may make general comments on the reports received but States still cannot be punished for violating human rights.

States, including Australia, have been slow to submit reports. At the same time, human rights staff of the United Nations has been hampered in their jobs due to a shortage of staff, which in turn is caused by a shortage of funds received from States. States evidently do not mind the United Nations' slow work in this area, especially the examination of their reports. Although the United Nations has no power to punish States for the late submission or non-submission of reports the system is an advancement of that which existed during the League of Nations era, which represents a breakthrough. Having become accustomed to submitting periodic reports to an inter-governmental body, States are now steeling themselves for the next step, namely, a government granting permission for the United Nations to receive a petition from one of its citizens. For obvious reasons, States have been moving gingerly into this area.

The League's Minorities Treaties granted the right of petition. This basic idea, which had only a limited effectiveness at the time, has expanded considerably under the United Nations system where the work has been done in two main ways. The first is the 1970 ECOSOC Resolution No 1503 procedure ("the 1503 procedure") and the second is the right of petition contained in certain human rights treaties.

Thousands of people write each year to the United Nations Secretary-General alleging mistreatment by their governments. Some believe that the organisation is a form of world government that can overrule their own domestic governments and redress the alleged wrongs. Although complaints dealing with human rights may be sent to the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities the Sub-Commission can do little with them because it has no power to intervene in domestic affairs. However, aggrieved individuals continue to write and complain to it. Some members of the Sub-Commission, which consists of experts who serve in their own capacity, and NGOs have lobbied the Commission on Human Rights. Unlike the Sub-Commission, the Commission itself consists of government delegates and makes recommendations to ECOSOC under a formal process for receiving and examining the communications.

The 1503 procedure was established to deal with "communications relating to violations of human rights and fundamental freedoms, indicating a consistent pattern of serious violations". The communications are passed to a working group for assessment, which then reports in a closed session to the Sub-Commission. However, as stated above, the United Nations lacks the power to be more effective about these communications and much of its work is performed away from the public eye.

The main purpose of the 1503 procedure was to reassure States that the right of petition, which operates very well within the Council of Europe system for protecting human rights, could also operate within the United Nations system. Under Article 25 of the European Convention on Human Rights a State may permit its citizens to complain to the European Commission of Human Rights about alleged violations of the treaty. If the petition meets established criteria such as the exhaustion of all domestic remedies the Commission will examine the petition. If the Commission finds the complaint substantiated, it will encourage the State to change its policies. If the State refuses to do so, the case goes to the European Court of Human Rights with the Commission acting for the complainant.[34]

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[34] In the early 1970s, a person from the Isle of Man complained to the European Commission. He had been flogged with a cat o' nine tails for committing a crime. The team regarded this as cruel and inhuman punishment. The British Government disagreed and stated that the Commission had no a right to interfere in the domestic criminal matters of the Isle of Man. The European Commission rejected this argument and eventually the government agreed to stop flogging as a form of punishment.

Some United Nations human rights treaties now contain a provision whereby a State may explicitly allow the United Nations to receive petitions from its citizens who claim that the treaty rights contained have been violated. An example where this may be found is the Optional Protocol to the ICCPR. Australia, like all States, has been tentative about accepting this provision and so far only about a third of the United Nations' membership has accepted the Optional Protocol that provides the aggrieved citizen with the right of petition to the Human Rights Committee. The Optional Protocol is a major step forward because it puts an aggrieved citizen on par with the State in a body at international level.

Following lobbying by Australian human rights NGOs and an appreciation of the experiences of States that had accepted the Optional Protocol without much difficulty,[35] Australia ratified it on 25 September 1991. On Christmas Day 1991 when the Optional Protocol came into effect for Australia, Tasmanian gay activist Nick Toonen filed a petition to complain about Tasmania's 1924 Criminal Code as discriminatory against homosexuals.[36] Tasmania was the only Australian State that still outlawed all forms of same sex relationships between consenting adults in private.[37]

The case was an instance of a person using an international treaty to protect himself against Tasmania's parochial legislation. Since the legislation was similar to some round the world, the Australian Government expected the petition to fail. However, the United Nations Human Rights Committee did not deal with the issue of homosexuality and instead treated the issue as one of privacy, agreeing that the legislation violated Australia's obligations to respect privacy. Following this decision the Australian Government introduced federal legislation to override Tasmania's legislation in accordance with the law on privacy and the 1994 Human Rights (Sexual Conduct) Act. This angered those who complained that the move amounted to international interference in Tasmania's domestic affairs.

THE EXTERNAL AFFAIRS POWER

According to the Australian Constitution, Section 51(xxix) provides that the federal Parliament shall have power to make laws for the peace, order

[35] Examples are Canada and New Zealand.

[36] United Nations Human Rights Committee, UN Doc CCPR/C/50/D/488/1992, 8 April 1994.

[37] In practice, the law had not been implemented since 1981.

and good government of the Commonwealth with respect to external affairs. WJ Hudson, in his biography of Lord Casey, recalled the background to this provision at a time when foreign policy received little attention in the debates leading up to Federation in 1901:[38]

> [W]hile the colonies enjoyed a high degree of internal self-government, they were part of an empire, and the empire's foreign policy and diplomacy were the preserve of the United Kingdom government in London. Independence from the empire was simply not on the agenda of the federation fathers in the Antipodes; as Victoria's Alfred Deakin, not the humblest of colonists, declared, "there is no pretence of claiming the power of peace or war, or of exercising power outside our own territories".

Thus, external affairs meant the federation's monopoly over the link with London.

The evolution of external affairs has moved along three paths. The first is the creation of a foreign policy that is not so reliant upon London. The second is the creation of a separate, professional department of external affairs, now the Department of Foreign Affairs and Trade. Finally, the third is the first use of the "external affairs" power by Australia that first occurred during the era of the Whitlam Labor Government from 1972-1975. During this period Australia accepted United Nations treaties, particularly on human rights, as a deliberate way of shaping policy at the federal level for the Australian constituent states.

John McMillan, Gareth Evans and Haddon Storey in 1983 set out the main arguments over the Commonwealth's increasing role under the external affairs provision:[39]

> On one side, it is asserted that the Commonwealth's use of the external power in this area is spurious – a back-door means to meddle in the internal affairs of the States and erode the federal balance even further. The protection of human rights, it is said, is a matter that is still appropriate for regulation exclusively by the States: it is a matter of

[38] Hudson WJ, Casey (1986, Oxford University Press, Melbourne) 55.

[39] McMillan J and ors, Australia's Constitution: Time for Change? (1983, Allen and Unwin, Sydney) 96.

> local concern whether human behaviour in general, and governmental and business attitudes in particular, should be required to conform to over-arching social principles...
>
> The contrary argument proceeds from a belief that the protection of human rights is now, in many areas, a matter of international concern since a large number of States have acknowledged a need for universally recognised norms of conduct. Australia, it is said, must have the constitutional capacity to participate as an equal partner in the international community. For that reason, it is argued that the federal balance is not being destroyed; rather, in the light of changed social circumstances the range of matters appropriate for international agreement and national action has been expanded now.

The Commonwealth-state tension has been a constant factor of Australian politics since 1901. In a sense the argument over human rights treaties is but a variation on an old theme. All of this has to be viewed in the context of globalism and its complexity. Moreover, Australia is now party to thousands of treaties and the topics reflect modern life. They include highly publicised treaties on human rights, agreements on air services and payment of old age pensions to persons who have lived most of their lives in one country and are now residing elsewhere. As Edith Brown Weiss, ex-President of the American Society of International Law, has pointed out:[40]

> [The treaties] address almost every aspect of transnational and international relations. There are also a growing number of non-binding legal instruments in all fields; some treated virtually as if they were binding. This burgeoning body of international law is dramatically charting international "rules of the road"...

On the other hand, the Liberal Lawyers Association of Tasmania, annoyed at the decision in the *Toonen case,*[41] had this to say:[42]

> According to Commonwealth Government records, Australia had signed 198 treaties between January 1 1901 and June 30 1921.

[40] Weiss, "Notes from the President" [January 1995] American Society of International Law Newsletter 1.

[41] United Nations Human Rights Committee, UN Doc CCPR/C/50/D/488/1992 8 April 1994.

[42] Media release, "Survey of international treaties reveals 2238 for Australia and the need for reform", Liberal Lawyers Association of Tasmania, 25 January 1995 at 1.

> Australia had signed 308 treaties by 1935, 1268 in 1970 and 2018 in 1989. Between 1990 and December 5 1994, an extra 220 treaties or conventions were signed by, or affected, Australia. ... [T]he current treaty signing process dissipates our independence as a nation, is an assault on our Constitution, undermines our legal system and removes the right of ordinary Australians to have a say.

CONCLUSION

As the globalisation process gathers momentum, so there will be more treaties – and controversies – on human rights and other matters. Indeed, in mid-2000 the Australian Government responded to a domestic backlash against United Nations "interference" in Australia's policies on mandatory sentencing by reviewing its response to the United Nations human rights system. The new policy was not very specific[43] and did not foreshadow withdrawing from any treaty and this was criticised by those who supported the human rights work of the organisation.[44]

A lesson from that controversy is that much more is required for public education to explain the process of globalisation and its benefits. Progress in international law has run ahead of the public's awareness of it and public education is thus an important role for NGOs such as the International Law Association and the International Commission of Jurists.

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[43] Joint media statement, Minister for Foreign Affairs, Attorney General, and Minister for Immigration and Multicultural Affairs, "Improving the effectiveness of United Nations committees", 29 August 2000 (Parliament House, Canberra).
[44] For example, see Suter, "Defecting from the West", The Age (Melbourne), 31 August 2000 at 11.