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INTERNATIONAL HUMAN RIGHTS AND DOMESTIC LAW AND ADVOCACY

John W. Perry[1]

The Universal Declaration of Human Rights[2] affirms that every human being is born free and equal in dignity and is entitled to all the rights and freedoms set out in it, without distinction of any kind.

In the preamble to the Declaration, it speaks of "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family" as "the foundation of freedom, justice and peace in the world".

The word *recognition* was very deliberately used and is especially significant. The Declaration makes it clear that every person is born with these rights. It is not for governments to create or to bestow them: only to recognise them.

So it is then that governments must recognise human rights, and it falls to the courts to enforce them.

Regrettably, the track record of Australia's recognition and enforcement of international human rights as part of its domestic law, is patchy to say the least.

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[1] A Judge of the Supreme Court of South Australia The author acknowledges the invaluable assistance with research given by his Associate, James Falconer LLB (Hons) and some perceptive advice on constitutional matters from Dr Melissa Perry QC. Full responsibility for the opinions expressed in the paper rests with the author.

[2] UN Doc A/811.

The role of the courts in this area has been very limited.

It has virtually been restricted to the application of two principles.

The first principle is that doubt or ambiguity in the construction of statutes may properly be resolved by favouring a construction which accords with the rules of international law, including the provisions of any relevant international instrument, particularly those which give expression to human rights.

It was said as long ago as 1908 in the High Court:

> "… every statute is to be so interpreted and applied as far as its language admits so as not to be inconsistent with the comity of nations, or with the established rules of international law."[3]

As was pointed out in *Teoh*:[4]

> "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."

Recently when I participated in a decision of the Full Court of the Supreme Court of South Australia, *McGee v Gilchrist-Humphrey*,[5] I had occasion to

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[3] *Jumbunna Coalmine NL v Victorian Coal Miners Association* (1908) 6 CLR 309 per O'Connor J at 363. See also *Polites v Commonwealth* (1945) 70 CLR 60 per Williams J at 80-81 and the cases there cited, *Chu Kheng Lim and Ors v Minister of Immigration* (1992) CLR 1 at 38, *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 384 [97] and *Al-Kateb v Godwin and Ors* (2004) 219 CLR 562.

[4] *Minister for Immigration and Ethnic Affairs v Teoh* [1994-1995] 183 CLR 273 per Mason CJ and Deane J at 287.

[5] (Unreported) 12 July 2005, Judgment No [2005] SASC 254.

address the question whether that principle applied when the signing of the relevant treaty occurred after the enactment of the statute in question.

Counsel argued that certain provisions of the *Royal Commissions Act 1917* (SA) should not be construed so as to abrogate the common law privilege against self-incrimination. Counsel called in aid of that argument, the International Covenant on Civil and Political Rights ("the ICCPR"), more particularly, the provisions in that instrument against self-incrimination.[6]

The difficulty with counsel's argument was that the ICCPR was not signed by Australia until after the relevant provision in the *Royal Commissions Act* had come into force. There is a line of authority both in the United Kingdom and in Australia which supports the view that the principle which obliges the court to adopt a construction of a statute, where there is doubt or ambiguity, which accords with a relevant international treaty, is confined to cases where the treaty was in force in the jurisdiction in question before the statute was enacted.[7]

The question was addressed recently in *Coleman v Power and Ors*.[8]

In the High Court sitting on appeal from the Queensland Court of Appeal, Kirby J held that in construing the relevant provisions of the *Vagrants, Gaming and Other Offences Act 1931* (Qld) the right of freedom of expression contained in Article 19 of the ICCPR should lead the court to prefer a restricted reading.

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[6] See ICCPR Article 14, par 3(g) for an expression to contrary view see Kirby J for judgment in *Coleman v Power and Ors* (2004) 209 ALR 182.

[7] See *Garland v British Rail Engineering Ltd* (1983) 2 AC 751 per Lord Diplock at 771, *Yager v R* (1977) 139 CLR 28 per Mason CJ at 43-4 and *Kruger v Commonwealth* (1997) 190 CLR 1 at 71.

[8] (2004) 209 ALR 182.

He rejected the view that because the ICCPR was made, signed and ratified by Australia well after the Queensland Act was passed, the principle did not apply.

The only other judge who commented on the issue, Gleeson CJ, disagreed with the views expressed by Kirby J on this issue. Given other High Court authorities,[9] I was reluctantly driven to the conclusion that the balance of authority favoured the traditional view.

None of the other judges who sat on *McGee* (supra) dealt with the matter.

The other principle is that in developing the common law, courts may have regard to international law. As Brennan J observed in Mabo v Queensland (No 2):[10]

> "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".[11]

That dictum was expressly affirmed by Mason CJ and Toohey J in their joint judgment in *Environment Protection Authority v Caltex Refining Co Pty Ltd*:[12]

> "As this court has recognised, international law, while having no force as such in Australian municipal law nevertheless provides an important influence on the

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[9] See footnote **?**.
[10] (1992) 175 CLR 292 at 306.
[11] See also *Jago v District Court of NSW* (1988) 12 NSWLR 558 per Kirby J at 569, *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680 at 699 and 709 and *Environment Protection Authority v Caltex Refining Co Pty* (1993) 178 CLR 477 per Mason CJ and Toohey J at 499.
[12] (1993) 178 CLR 477 at 499.

> development of Australian common law, particularly in relation to human rights."

Both principles have been reaffirmed on many occasions in recent years by the High Court.

Despite that, however, the fact remains that State and Territory courts rarely draw on either of those principles in the course of their decision-making. The reluctance of Australian courts to embrace these principles and to make greater use of international human rights jurisprudence is a product of a number of factors.

The first of them is that Australian jurisprudence is characterised by what I have previously described[13] as a virulent strain of legal positivism.

Nowhere does this find more forceful expression than in the words of Sir Owen Dixon, uttered as long ago as 1952, when he said:

> "It may be that the court is thought to be excessively legalistic. I would be sorry to think that it is anything else. There is no other safe guide to judicial decisions in great conflict than a strict and complete legalism".[14]

Another negative factor is that, by and large, judges in Australia simply do not read international instruments. Likewise, counsel in Australia tend to lack the inclination to read and to cite international instruments to the court, even in the area of the two principles to which I have referred, where use of such instruments has clearly been legitimised.

As well, in the wider community, we have seen a strong tendency to view with suspicion, if not scepticism, any attempt by courts to embrace the developing international human rights jurisprudence. It is commonly thought that to allow them to do so, would result in judges having too much power at the expense of parliamentary sovereignty.

Of the many writers who fulminate against so called judicial activism, none holds a more acerbic pen than Janet Albrechtsen, who writes regularly in *The Australian* newspaper. Not so long ago I read an article by her entitled *Injudicious activism on the Bench*, subtitled *Courts can't take liberties with the law in the service of the human rights industry*.[15]

Another article written by her was headed in part *Judges should butt out of politics*. She described the true agenda of judges as a grab for "greater power to make laws".[16]

The strong reaction by popular writers such as Albrechtsen and by politicians against perceived incursions by judges, invariably labelled as "unelected", into what is seen to be the exclusive domain of parliament, has been a very negative factor in cultivating a balanced understanding of the importance of human rights in the enrichment and development of the common law.

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[13] Paper presented at a colloquium of the Judicial Conference of Australia, April 2002.
[14] On the occasion of Sir Owen Dixon's swearing-in as Chief Justice (1952) 85 CLR xix.
[15] *The Australian*, Wednesday 17 April 2002.
[16] *The Australian*, 27 March 2002.

This situation is in stark contrast with developments in the northern hemisphere, particularly since the United Kingdom's incorporation of the European Convention on Human Rights into its domestic law which was effected by the enactment of the *Human Rights Act 1998*.

The manner in which the courts of the United Kingdom have construed this legislation, and the cautious and principled way in which it has approached the integration of human rights principles with the development of the common law, goes a long way towards answering those critics who suggest that legislation of this kind will inevitably bring the courts into a collision course with parliament.

Against the somewhat pallid judicial landscape in the area of recognition and enforcement of human rights in the domestic law of Australia, I thought that the enactment of the ACT *Human Rights Act 2004* and the proposed enactment in Victoria of the *Charter of Human Rights and Responsibilities Act 2006*,[17] represented a welcome flicker of light.

When I looked at the ACT Act and the Victorian Bill, to say the least, I was disappointed.

The ACT Act has virtually no teeth. The Victorian Bill is much better, but lacks a dimension which I will explain.

I can best explain the reason for my concerns by diverting for a moment to tell a story about gypsies.

In the United Kingdom gypsies are a vulnerable minority. Their nomadic lifestyle fits uncomfortably with the structured rigidity of modern planning controls. But their occupation of caravans on public lands is an integral part of their ethnic identity.

In three cases recently heard together,[18] the House of Lords had occasion to consider the extent to which the *Human Rights Act 1998* (UK) might come to the aid of gypsies, whose occupation of certain lands brought them into conflict with local planning laws.

In each case, the respondents, who were gypsies, lived in caravans on land which they owned within what was described as the Green Belt, or its equivalent. Local planning authorities had rejected applications for planning approval to use the sites in this way. When the gypsy families declined to comply, the local authorities applied to the court for injunctive relief, other enforcement procedures having proved ineffective.

The relief was granted in the first instance. The local authorities obtained orders forcing the gypsies to vacate the land.

However, the gypsies successfully appealed to the Court of Appeal.

Further appeals by the local planning authorities to the House of Lords were dismissed.

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[17] At the time of writing, the Bill for the Charter awaits consideration by the upper house of the Victorian Parliament.

[18] *South Buckinghamshire District Council v Porter and Anor*, *Chichester District Council v Searle and Ors*, and *Wrexham County Borough Council v Berry* [2003] 2 AC 558.

The judgments of the Court of Appeal and of the House of Lords in favour of the gypsies illuminate the way in which recognition of rights guaranteed by the European Human Rights Convention has served to stimulate the development of common law principles.

At the same time, the judgments demonstrate the shortcomings in the legislation recently enacted in the ACT, and which is on the way towards enactment in Victoria.

In the gypsies case, reference was made to Article 8 of the European Convention on Human Rights which gives expression to a fundamental right. It is in terms which includes a right to respect for a person's home, a right the exercise of which may not be interfered with by a public authority, except in the interests of national security, public safety, economic wellbeing of the country or to protect health or the rights and freedoms of others.

Under s 6(1) of the *Human Rights Act* (UK) it is unlawful for a public authority, which expression includes a court, to act in a way which is incompatible with a Convention right.

It followed that in considering the application by the planning authorities for injunctions to restrain the gypsies from continuing to occupy the lands in contravention of the planning laws, the court was obliged to give appropriate recognition to the rights of the gypsies with respect to the homes which they had chosen to make.

The court was obliged to strike a balance between the particular hardship which would be suffered by them by being forced to move, and the public interest involved in enforcement of the planning laws. The balancing of those rights involved a consideration of what has been described in the context of human rights jurisprudence as the principle of proportionality.

In the gypsies' case, the words of Simon Brown LJ in the Court of Appeal were adopted by Lord Steyn in his judgment in the House of Lords. Those words were:

> Proportionality requires not only that the injunction be appropriate and necessary for the attainment of the public interest objective sought – here the safeguarding of the environment – but also that it does not impose an excessive burden on the individual whose private interests – here the gypsies' private life and home and the retention of his ethnic identity – are at stake".[19]

So it was then that the equitable jurisdiction to grant injunctions, which inevitably would have been granted were it not for the *Human Rights Act*, when enriched by reference to human rights which the court was obliged under that Act to recognise, afforded relief which tempered what otherwise would have been disproportionate hardship resulting from the application of the relevant planning laws to this particular group of vulnerable individuals.

If one could imagine equivalent planning provisions in Victoria, and gypsies in their caravans occupying land in Victoria in breach of those provisions, would recourse to the Courts in which the Victorian Charter of

Human Rights and Responsibilities Act (assuming the Bill to be enacted) was invoked, produce the same result?

The answer is almost certainly "no".

For at least two reasons, the reasoning adopted by the House of Lords could not apply under the Victorian Bill.

In the first place, Part 2 of the Victorian Bill does not define a right, at least expressed in similar terms, corresponding to that found in Article 8 of the European Convention, although it may be that Clause 13 of Part 2, which defines a right of privacy to include a right in a person not to have his or her home interfered with, would suffice.

Even if one assumed that to be so, there is a major problem.

Section 38 of the Victorian Act provides that it is unlawful for a public authority to act in a way that is incompatible with a human right, or in making a decision, to fail to give proper consideration to a relevant human right.

But who is a public authority? Public authorities are defined in the Act[20] to include a variety of authorities and entities. But the definition expressly excludes a court or tribunal, except when it is acting in an administrative capacity.[21]

There lies the rub.

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[19] [2003] 2 AC at 588.
[20] Section 4.
[21] Section 4 (1)(j).

It was an essential element in the reasoning of the House of Lords which led to the decision in the gypsies' case, that under s 6(1) of the UK Act, it is unlawful for the court to act in a way which is incompatible with a Convention right. It was that provision which enabled the court to move away from the more narrowly defined discretion which otherwise would almost certainly have been exercised in favour of ejecting the gypsies from the land.

Not so under the proposed Victorian legislation. In the result, courts in Victoria will still lack the ability which exists in the United Kingdom, to give direct and positive effect to the human rights which the Victorian legislation purports to protect.

The failure to confer on courts in Victoria a jurisdiction to have regard to human rights in the functions which they perform apart from in the construction of statutes, stems from the recommendation contained in the report of the Human Rights Consultation Committee headed by Professor George Williams, upon the basis of which the Bill now under consideration was drawn up. In the report,[22] the committee accepted the view that:

> "… the inclusion of the courts as a 'public authority' may create challenges in Australia's federal system which, according to the High Court, has one unified common law."

In expressing that view, the committee adopted a submission made to it by the Australian Human Rights Centre at the University of New South Wales. That submission was in the following terms:

> "[T]he prospects of the Charter of Human Rights having an indirect horizontal effect in Victoria are limited. Following the decisions of the High Court of Australia in *Lipohar v The Queen*[23] and *Esso Australia v The Commissioner of Taxation*,[24] the current position … is that there is one unified common law of Australia[25] which is not susceptible to direct influence by legislation in any one State."

With great respect to the authors of the submission and to the consultation committee, I do not accept that this submission represents a correct statement of the law.

The fact that there is one body of common law applicable throughout Australia does not mean that the individual States may not modify or displace the common law applicable in a particular State or Territory. To deny that obvious fact is to deny the sovereignty of State and Territory parliaments.

Examples of modification of the common law abound. In recent years there have been substantial modifications of the common law of negligence, occupier's liability, and of defamation, to give but a few examples. Furthermore, modifications of the common law in various States and Territories have resulted in significantly different laws in those areas in the different jurisdictions.

Neither the Human Rights Centre nor the consultation committee could have intended to suggest that specific amendments to the common law of that

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[22] Chapter 3, par 3.4.1, page 59.
[23] (1999) 200 CLR 485.
[24] (1999) 183 CLR 10.
[25] There is much other authority which supports the proposition that there is a single common law in Australia: see *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 518 [15] and *Sweedman v TAC* (2006) 224 ALR 625 and the cases there cited. The position is different in the United States of America,

kind are beyond power. But they infer that a broadly cast amendment having what they describe as an "horizontal" effect may be unconstitutional.

I see nothing in either *Lipohar* or *Esso Australia* to support the proposition adopted by the consultation committee.

In *Lipohar* in the joint judgment of Gaudron, Gummow and Hayne JJ appears the following comment:[26]

> "… within their respective spheres of competence, the common law may be abrogated or amended by the Federal parliament and the parliaments of the States and legislatures of certain Territories. Laws so made may be repealed and the common law revived. The result at any give time may be that the operation of the common law upon a particular subject may vary according to the circumstances of litigation, including the identity of the forum and of the lex causae. For example, in one Australian forum the applicable lex causae may be found in a statute enacted by the legislature, and in another Australian forum that statute would not operate to displace or vary the common law. Further, in that second forum the common law may be displaced or varied by a statute enacted by its legislature."

In *Esso*, Toohey J observed that the common law right to publish a report of court proceedings was so central to the operation of a democratic society that it might be that the right could not necessarily be abrogated by statute.[27] I do not see that observation as having any relevance to the question whether or not an individual State or Territory has the ability to oblige courts to have regard to specific human rights principles in exercising non-statutory jurisdictions.

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where there is no such uniformity between States: see *Klaxton Co v Stentor Electric Mfg Co Inc* 313 US 487 at 496 (1941).

The very recommendations of the consultation committee which find expression in that part of the proposed Victorian legislation which will oblige courts to have regard to specific human rights criteria in construing statutes is itself an across-the-board modification of the common law principles which otherwise apply to the construction of statutes. The existing common law principles do not extend to a specific definition of the human rights to which reference must be made by courts in construing statutes, in the way set out in the proposed Victorian legislation.

Another example is to be found in the various *Acts Interpretation Acts* of the Federal, State and Territory governments. Those Acts effect an across-the-board qualification of the common law principles which otherwise apply to the construction of statutes.

Whether any constitutional issue is involved is a difficult question. Certainly, the fact that the High Court is at the apex of the judicial system in Australia derives from its status under the Commonwealth Constitution. But arguably the principle that there is a unified common law throughout Australia stems from the very nature of the common law. The traditional view is that when courts expound common law principles, they are not *formulating* those principles, they are simply identifying principles which, in theory at least, have always been in place, although "[t]he content of the common law will, in the

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[26] 200 CLR 509-510.
[27] 183 CLR at 43.

ordinary course of events, change from time to time according to the changing perceptions of the Courts".[28]

Furthermore, there are no relevant differences in social or other conditions between the States such as would justify any differentiation in the common law principles applicable in each State and Territory.

Where intermediate courts of appeal differ, as they do occasionally, in defining common law principles, it is for the High Court to lay down what the true principle is. The common law doctrine of precedent then applies to oblige lower courts to follow suit.

If a particular State or Territory has the benefit of a Bill of Rights which enables it to condition the application of common law principles by reference to human rights, that process is an example of modification of the common law by statute. I do not accept that the fact that it has been described as a horizontal process makes any difference.

If in the course of following such a process a State or Territory court was to incorrectly identify what the common law principle is to start with, that would be subject to correction by the High Court, notwithstanding the fact that the State or Territory court might also have an obligation to qualify the application of the common law principles by reference to human rights.

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[28] *Western Australia v The Commonwealth* (1994-1995) 183 CLR 373 at 486.

In such cases, the State or Territory court would be applying a combination of common law and statute law.

I accept that opinions may differ as to that analysis of the position. I can see the strength of the argument that if the statutory obligation to observe human rights precepts is imposed on the courts rather than on the individuals concerned, this may run counter to the principle that Australian courts must apply a single, unified common law.

My answer is that the difficulty may arise simply because of the assumption that a charter of human rights introduced by the State or Territory legislature will necessarily follow the United Kingdom model.

But it need not be so.

The perceived difficulty would not arise if the State or Territory legislature shifted the focus of the human rights legislation to address the substantive law. For example, such a law could provide that all procedural and substantive non-statute law was amended so as to conform to the defined human rights, and that any conflict with those rights was to be resolved in favour of those rights.

Courts applying such a law would then be applying a mix of common law and statute law, just as they do now in so many other more specific contexts.

At all events, as things stand in the light of the ACT Act and the Victorian Bill, contrary to the UK experience and, for example, New Zealand, we do not see, either in the Victorian or ACT legislation, any conferral of power on the

courts to recognise and apply human rights precepts in the application by them of non-statutory law. I am disappointed that what appears to me to have been an opportunity to give the courts real teeth in the application of a genuine human rights regime, for the time being at least, has been lost.

Given the nature of the proposed legislation, the major sphere of direct operation of the Victorian Bill, will be with respect to public authorities rather than the courts.

Notwithstanding the criticisms in other areas which I have so far voiced, this will be a major step forward in the recognition and enforcement of human rights in this State. Its effects should not be underestimated. The ambit of administrative decisions affecting the lives of ordinary people is forever widening. That such decisions will be open to scrutiny to determine compliance with human rights norms will have a pervasive effect, not only with respect to the decisions themselves, but in the development of a rights culture.

Judicial review of such decisions will underpin the significance of the human rights legislation by adding to it the authority of the courts.

There will be as well the new jurisdiction conferred on the courts, pursuant to s 32 of the Victorian Bill. Under that section, where possible, statutory provisions must be interpreted in a way that is compatible with human rights and international law. Judgments of domestic, foreign and international courts and

tribunals relevant to human rights may be considered in interpreting a statutory provision.

Although it might be argued that s 32 does little to change existing law, this statutory provision, when it is in force, will operate to turn around what I have earlier described in this paper as the lethargic approach by the courts and by counsel in applying the existing common law on this topic.

There is a similar provision in the ACT *Human Rights Act*. That expresses the court's duty in a slightly different way. Section 30(1) of the Act provides that in working out the meaning of a Territory law, which is defined to mean an Act of Parliament or statutory instrument, an interpretation that is consistent with human rights is as far as possible to be preferred.

But s 30(2) provides that subsection (1) is subject to s 139 of the *Legislation Act*. That in turn provides that the interpretation that would best achieve the purpose of a law is to be preferred to any other interpretation (the purposive test).

So that, in the result, the perceived purpose of a law (as defined) will trump the application of a relevant human right!

I have a further concern as to s 33 of the ACT Act. The phrase "working out the meaning of a territorial law" is defined in the Act to mean resolving an ambiguous or obscure provision of the law, and interestingly, "confirming or displacing the apparent meaning of the law".

I do not know whether those last words, more particularly the word *displacing*, mean that the meaning which would ordinarily be accorded to plain, clear words in a statute may be displaced in favour of recognition of a relevant human right, so that the words no longer mean what they say. If that is how the statute is to be construed, I do not think that it is a desirable provision. Clear words should be left to mean what they say. Much uncertainty and difficulty will arise otherwise. In the context of statutory construction, human rights principles should only be brought to bear to resolve ambiguity or doubt.

A striking feature of the ACT Act is that it gives neither to the courts nor to administrative bodies an obligation to have regard to and apply the human rights defined in the Act in decision making apart, from statutory construction.

So that in the ACT we have a situation under their legislation which falls even further short of the obligations imposed by the UK legislation, than will be the case in Victoria, where human rights principles will apply directly to administrative decision makers.

I have not overlooked the fact that both the ACT and the proposed Victorian provisions incorporate provisions providing for the scrutiny of Bills being presented to parliament to see whether they are consistent with human rights,[29] and in both jurisdictions a court may issue a declaration of inconsistency

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[29] ACT *Human Rights Act 2004*, Part 5 and *Proposed Victorian Charter of Human Rights and Responsibilities Act, Part 4, Division 1.*

between a statutory provision and a human right.[30] While such a declaration is not binding, it is to be hoped that this provision helps in time to develop a sensitivity to human rights norms.

Economic, Social and Cultural Rights

I notice that it is part of the published aims of the Human Rights Law Resource Centre to promote the recognition of economic, social and cultural rights, particularly rights to health, housing, education and social security.

Australia has ratified the International Covenant on Economic, Social and Cultural Rights. The question arises as to whether or not courts should be given a direct role to play in the recognition and enforcement of rights of that kind, as opposed to the civil and political rights which are the subject of the legislation to which I have been referring.

I notice that under periodic statutory reviews of the operation of the legislation in both the ACT and in Victoria, consideration is to be given as to whether or not economic, social and cultural rights should be included.

Opinions differ, even as between the most ardent proponents of human rights, as to whether or not courts have a role to play in this area.

The argument in favour of equating those rights with civil and political rights and the adoption of a single mechanism for enforcing them, is that all rights of both kinds are inter-related and mutually supporting. Realising social

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[30] ACT *Human Rights Act 2004*, s 32 and *Proposed Victorian Charter of Human Rights and*

and economic rights enables people to enjoy other rights of a civil and political kind.

The contrary argument is that consideration of socio-economic issues involves decisions on spending priorities, availability of government funds and differing positions which may be taken by governments of differing political colour. It is said that the courts are not suited to deal with such matters. There is a serious risk that if courts were given a role in this area, the boundary defined by the separation of powers would be crossed.

The role played by the Constitutional Court of South Africa and the Supreme Court of India in enforcing socio-economic rights might be thought to give some buoyancy to the argument that such matters are justiciable.

The scope of this paper does not allow me to examine the issue in depth.

However, I will quote the dictum of the South African Constitutional Court in the case of *Government of the Republic of South Africa v Grootboom*:[31]

> "… human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in [the Constitution]. The realisation of these rights is also key to the advancement of race and gender equality in the evolution of a society in which men and women are equally able to achieve their full potential."[32]

Responsibilities Act 2006, s 36.

[31] 2001 (4) SA 46 (CC), para 23.

[32] See also *Soobramoney* 1998 (1) SA 765 (CC) par 8 and *Khosa v Minister of Social Development; Mahlaule, v Minister of Social Development* 2004 (6) BCLR 569 (CC).

Nobody could seriously join issue with that statement.

The real problem is whether or not protection and advancement of the socio-economic rights of people in the community is best achieved by turning alleged denial of these rights into issues justiciable by the courts.

All I can say is that however appropriate and effective the measures to that end, which have been taken in South Africa and in India may be, I doubt that it would be appropriate to look in the direction of the courts of this country for the enforcement of socio and economic rights.

That does not mean that organisations such as yours should not have the achievement of those rights as part of your aims. Furthermore, there is no reason why efforts should not be made to give powers of overview, reporting and recommendation to governments by other institutions, such as Human Rights Commissioners, when there appear to be shortcomings in the delivery of economic, socio-economic and cultural rights, just as they may now do so in the exercise of their supervisory role over legislation which effects civil and political rights.

Conclusion

I hope that I have not painted too dark a picture of the role of the courts with respect to protection of human rights in Australia. But the fact remains that we lag behind the developments which are occurring in Europe and the United Kingdom, not to mention New Zealand and most other western nations.

It was Sir Anthony Mason who has observed:

> "… human rights jurisprudence does not have as strong an impact in Australia as it has had elsewhere. Indeed, … there are grounds for apprehension that Australia is not as deeply committed to judicial protection of human rights as a number of Western nations, including the United States, the United Kingdom, Canada and New Zealand."[33]

What I had thought might be developments which promised to lift us out of our somewhat stagnant jurisprudence in this area, in the form of the legislation in force in the ACT and proposed in Victoria, particularly in the ACT, do not go far enough, and will not take us far down the path of leading towards the development of more effective judicial mechanisms for the recognition and enforcement of human rights in Australia.

I can only suggest that your organisation might put its shoulder to the wheel, together with other similarly minded non-Government organisations, towards changing the culture of this country so that we might eventually achieve the reforms which are so sadly overdue.

Judges' Chambers
Supreme Court of South Australia

July 2006

[33] *The Role of the Judiciary in developing Human Rights in Australian Law*, the Hon Sir Anthony Mason AC KBE in *Human Rights in Australian Law* (1998) Ed David Kinley (Federation Press) Chapter 2 at page 26.