

Human Rights—The International Dimension

*The Hon. Justice Michael Kirby AC CMG**

A Question of Rights

The subject of a Bill of Rights is interesting and important. Some commentators have unkindly suggested that, if we wait a short time, the High Court of Australia will provide a catalogue of fundamental constitutional rights which, so far, the people of this country have obdurately declined to adopt in their constitution, at least in express terms.¹ Others have

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¹ D. Rose, 'Judicial Reasonings and Responsibilities in Constitutional Cases' (1994) 20 *Monash University Law Review* 195; A. Fraser, 'False Hopes: Implied Rights and Popular Sovereignty in the Australian Constitution' (1994) 16 *Sydney Law Review* 213; L. Zines, 'A Judicially Created Bill of Rights?' (1994) 16 *Sydney Law Review* 166.

suggested that the adoption of such a Bill of Rights is now necessary to put a brake on judicial invention and to give a legitimacy to the process which judicial creativity lacks.²

I have addressed these topics in previous addresses in Brisbane,³ Canberra,⁴ and also at the Australian Rights Congress in Sydney on 16 February. These addresses, recording my views, are available to any who are interested. Instead of repeating to you what I have previously said on the subject, I have decided to address a topic which is related, but distinct. In some ways it is more immediately important, and urgent. I refer to the growing impact of international human rights principles and of the institutions which define and apply them.

This question came to the fore as a result of the debates which accompanied the passage of the *Human Rights (Sexual Conduct) Act 1994* (Cth).⁵ But that law was simply the latest of a number, under successive federal governments and parliaments, which have presented the topic of these remarks for consideration in the Parliament, and by the people, of Australia. The quandaries were already there in the 1920s when Federal Parliament enacted the Air Navigation Act to give effect to the ratification, including on behalf of Australia, of the *Paris Convention* of 1919 regulating international aerial navigation.⁶ It was certainly there when the Parliament enacted conservation legislation under which the Governor-General, pursuant to the *World Heritage Convention*,⁷ made regulations protecting an area of national park in Tasmania.⁸ But there was something about the passion and emotion of the recent debate which called forth the most strongly voiced reservations yet expressed about what was seen by some as a worrying, even undesirable, legislative trend.

Some of the commentary was ill-tempered and confused. One writer to the *Sydney Morning Herald*, after citing scripture, said:

The fact that the United Nations wishes to confer obligations on this country to make way for sodomy and to give family status and rights to sodomites needs no recognition and there is no right alternative for the government of this country but to stand resolutely and in proper dignity against the UN Human Rights Commissioner in this matter...Every right minded and principled person stands

² G. Griffith, Lecture, Monash University, reported *The Age*, 6 May 1994, 5; cf., H. Charlesworth, 'The Australian Reluctance about Rights' (1993) 31 *Osgoode Hall Law Journal* 195.

³ Address to Young Presidents, Brisbane. Reproduced *Australian Lawyer*, December 1994, vol 29 # 11, 16.

⁴ Address to Seminar on a Bill of Rights for the Australian Capital Territory, 22 August 1994.

⁵ See (1994) 3 *Human Rights Defender* 1; (1994) 5 *HIV/AIDS Legal Link* 1.

⁶ See *The King v Burgess* (1936) 55 CLR 608.

⁷ *Convention for the Protection of the World Cultural and Natural Heritage* (UNESCO).

⁸ See *The Commonwealth v Tasmania* (1983) 158 CLR 1. (*The Tasmanian Dams Case*).

up firmly in support of the Tasmanian Government's steadfastness regarding this issue.⁹

One journalist declared:

The rights of Australians as individuals have been tossed aside by those who favour the rights of cultures. That some of these cultures embrace the idea that some humans are superior to others because they belong to one caste or another is ignored. That others are based on a foundation of sexual inequality is disregarded. In this utopian non-judgmental climate, the politically correct have deemed it unacceptable to question Third World cultures, even when some practices clearly violate individual rights.¹⁰

The same writer observed:

The Federal Government has acted with its usual pusillanimity when confronted with a noisy minority in this case acting against the democratically elected State Government. The issue is not about [the Coalition] leadership, it is about the basis of our Federation.¹¹

One letter writer even worked the Queen into this debate:

It appears to many to be quite hypocritical of the 'republicans' to push for the severance of ties with Great Britain, which are now only of maternal nature, whilst successive Federal...governments have signed UN protocols and covenants which make us answerable to UN committees of a dubious democratic nature, which have not been elected or sanctioned by the Australian people.¹²

Yet behind some of the emotive language lies the expression of serious concern which requires the attention of those who are generally sympathetic to the incoming tide of international human rights law and its influence upon Australia. John Hyde, writing in the *Australian* said

There is something amiss with a polity that, to achieve its aims, enters treaties with undemocratic committees of the United Nations, the International Labour Organisation or whomever, to overrule the processes by which it itself is governed. This was not the intention of those who drafted the constitution; nor is it the wish of Australians today...Because foreign treaties are so numerous, their

⁹ Letter by Gavin Alderton, *Sydney Morning Herald*, 26 August 1994.

¹⁰ Piers Akerman, *Telegraph Mirror*, 25 November 1994.

¹¹ *ibid*, *Telegraph Mirror*, 30 August 1994, p.12.

¹² Letter by Bailey, *Courier Mail* (Queensland), 28 November 1994.

terms so general and their implementation after signature within Canberra's discretion, misuse of the external affairs power is a big threat to our Federal structure.¹³

To the same effect were the remarks of Senator Rod Kemp who concluded:

Involving UN committees in Australian domestic disputes will inevitably, over time, undermine our own legal institutions...Australia's major constitutional problems [are]...the expansive use of the external affairs power, the ruthless use of ILO and UN treaties to over-ride States and the ceding of sovereignty to foreign committees. The present generation of Australians do not want their laws made in London or at the UN.¹⁴

The Premier of Victoria wrote to the *Melbourne Age* to protest against its support for the Federal Sexual Privacy Bill:

The rights of individuals are what the States protect. Let the people in each State decide what they want for their own community, through the ballot-box, and through the constitutional and democratic way of bringing about change.¹⁵

The former Prime Minister, Mr Malcolm Fraser, also criticised the process of the use of international conventions:

In one case, in December 1992, the Governor-General was asked to ratify a treaty only hours before the dissolution of Parliament. No media release was issued. This particular convention, ILO 158, has been ratified by only 17 countries. Of major industrial states, only France and Sweden have ratified this convention. It has also been ratified by the Cameroon's, Cyprus, Gabon, Malawi, Niger, Uganda, Venezuela, the Yemen Republic, Yugoslavia, Zaire and Zambia. [A]re Australians to be masters of their own affairs or are Australians to give away their sovereignty to United Nations committees? The point becomes all the more relevant when you look at the membership of these committees. The membership is appointed by governments that often ignore the decisions of the committee and yet Australia binds itself and feels required to obey.¹⁶

¹³ J. Hyde, the *Australian*, 2 September 1994.

¹⁴ R. Kemp, 'Let's Make our Own Laws', *Herald Sun*, 30 August 1994, p.15.

¹⁵ G. Kennett, Letter to the *Age*, 29 August 1994, p.12.

¹⁶ M. Fraser, 'UN Poses Biggest Threat to our Sovereignty', the *Australian*, 17 August 1994. Contrast E.G. Whitlam, 'National and International Maturity' (1992) 46 *Australian Journal of International Affairs* 29.

There are similar statements by many thoughtful Australian politicians and ex-politicians. Not all of them are members of the Coalition side of politics. For example, the former Senator Peter Walsh observed in this connection:

I am not and never have been a monarchist, but find it ironic that so many contemporary Australians determined to protect us from the non-existent threat of English tyranny, fall over each other in a scramble to surrender Australian sovereignty to a rag-tag and bobtail of unrepresentative United Nations committees, accountable to nobody.¹⁷

Rather more bluntly, the Hobart *Mercury* reported that one member of the Tasmanian Legislative Council, the Hon. George Brookes, expressed the hope that the State Government will 'tell the United Nations to go to buggery'.¹⁸

There are undoubtedly questions here for serious reflection. They derive from the democratic and federal nature of our Constitution; from our traditional willingness to leave our human rights to be determined, from time to time, by parliaments elected by our people and upheld by independent courts. They concern the suspicion of an island people who have long seen themselves as something of a geographical oddity in an alien part of the world: vigilant to defend the culture and rights brought here by the settlers. Such a people, inheriting an often xenophobic attitude to foreigners, fall naturally enough into a suspicion of things done by overseas committees. That suspicion is fuelled when the committees are those of the often inefficient United Nations and made up of people whose commitment to the kind of values which Australians share is generally thought to be doubtful.

Let me therefore concede at the outset that this is a legitimate debate about matters of genuine and proper concern.

The International Perspective

A week from now I will present my latest report to the Commission on Human Rights of the United Nations, sitting in Geneva. This will be my third report as the Special Representative of the Secretary-General of the United Nations for Human Rights in Cambodia. I was appointed to that post in December 1993. It has taken me on five missions to Cambodia. The missions are exhausting and sometimes even a little dangerous. They have to be squeezed into my extremely busy court duties. I see, and report upon, aspects of Cambodian human rights which are discouraging and even depressing: the abiding problems of security; the ever-present reminders of the genocide; the landmines which claim daily victims; the poverty, low expenditure on health and education; the new peril of HIV/AIDS; corruption; the poor standard of some elements of

¹⁷ P. Walsh cited in M. Fraser, *op. cit.*, n 16.

¹⁸ As reported *Star Observer*, 17 June 1994, p.14.

the media and the intolerance of criticism of some officials. All of these problems I endeavour to chronicle accurately and report with, I hope, constructive suggestions for improvements.

But I also report upon the many advances which are made daily in the rebuilding of Cambodia. You rarely hear of these in the Australian media; good news is said to be of little interest. You do not hear of the judge in Battambang who works long hours, with paper and pens in short supply, to bring justice and order to his people. You do not hear of the prison governor in Siem Reap who has reorganised his prison and provided benefits of education and recreation for the prisoners. You hear nothing about the brave human rights groups who speak up for rights and demonstrate their concerns in a way that would have meant death not so long ago. You do not hear of the newsstands which are full of papers and journals where formerly the authorities controlled and allowed just a few, or of the hospitals which are being reconstructed. You do not hear of the brave French doctors of *Médicins sans frontières* who perform their heroic work and teach their Khmer colleagues to carry on. And you do not hear of the fine Australian soldiers helping in the task of landmine clearance. A government with democratic legitimacy is in place: the King acts with constitutional propriety. He agreed to my request to help lead the national struggle against HIV/AIDS. So in the midst of discouragement, every day, I see in Cambodia people who defy recent history and are an inspiration, offering a daily commitment to upholding human rights and human dignity.

These people are assisted and sustained in highly practical ways by dedicated officers of the United Nations—UNESCO, helping to safeguard the treasures of Angkor; ILO, stimulating labour-intensive works programmes; WHO, advising on malaria control, clean water and the fight against AIDS; FAO, helping with high yield rice grain and technical advice to improve irrigation and crop production; UNDP, in countless programmes of development; and everywhere the UN volunteers, young people, giving a time of their lives for Cambodia.

The Centre for Human Rights in Phnom Penh helps me in providing virtually daily guidance to the Government and National Assembly of that country. It is not done by reference to our personal whims or idiosyncrasies. The guidance is given by reference to the great charters of the United Nations which have laid down the post World War framework for the respect for fundamental human rights. Most of those charters seem terribly familiar to us of the English-speaking democracies. Fortunate are we who can take most of those rights for granted.

It is no coincidence that they seem so familiar to us. Most of them were written in the late 1940s and early 1950s by lawyers of the Anglo-American tradition. Things that parliaments at Westminster and Australia struggled and fought for over centuries are by no means so assured in a country such as Cambodia. These international instruments are far from seen as a threat to sovereignty. They are the guiding stars to human respect and dignity, to the control of oppression and to the repair of a strife-torn country of much suffering.

I believe that the Government of Cambodia knows that, in my work there for Cambodia and for the United Nations, I have no cause to pursue other than the cause of principle. I speak to Cambodia and to the United Nations with a single voice. I tell the good news; but I fearlessly

expose the bad. I offer advice and technical assistance (which may or may not be accepted) to bring law and policy into line with universally accepted human rights principles.

My reports on Cambodia must be given twice a year: once in March to the Commission on Human Rights in Geneva and then, in November, to the General Assembly in New York. The experience of doing this is, I must say, a humbling one. The hall is huge. It is packed with the great variety of humanity. Virtually every nation on earth and many inter-governmental and international agencies are there. It is an amazing scene.

It is, of course, an imperfect place, just as our world is imperfect. Doubtless at the tables sit not a few who have little real commitment to fundamental human rights or whose agenda puts any such concerns below others. But one after another, the UN Special Representatives and Special Rapporteurs are heard. They have complete freedom to speak as they see things. They call dictators and tyrants to account before the bar of the international community and the judgment of humanity. Those whom I have known are courageous. They are people of experience, sensitivity and integrity. For the countries upon which they report, human rights is not just a matter of theory or an esoteric constitutional issue. It may be a matter of survival for a dissident or a person from a minority group.

It is the pressure of these almost continuous sessions of international scrutiny of human rights which has helped bring about the fundamental changes we have recently seen in South Africa, in Malawi, in Palestine and elsewhere. It is there that reports are made on particular countries and on abiding themes of importance to global human rights. Pressure is applied to countries such as Cuba, China, Haiti, Iran, Iraq, Sudan, Afghanistan, Burma and the states of the former Yugoslavia. Once, in the name of 'sovereignty', they would have ignored such pressure. In front of the world community, that is now impossible.¹⁹

Pressure is also applied to Equatorial Guinea, to Indonesia in respect of East Timor, to Papua-New Guinea in respect of Bougainville, to India and Pakistan in respect of Kashmir, to China in respect of Tibet. Pressure is even applied to Australia in respect of our long neglected Aboriginal people. Of course, the pressure sometimes fails. In an electric moment, immediately following my last report on Cambodia, the Rapporteur on Sudan was denounced by the government of that country. Some voices have even declared him an 'Enemy of the Believers' for his forthright condemnation of the attempts of the Government of Sudan to force the sharia law on the Christian people in the south of the country. But the important point is that the representative of Sudan was obliged to answer to the world and to very specific criticisms.

The lesson of recent decades is that this requirement may eventually have a beneficial effect. It gives a voice to the oppressed. It lifts the hopes of those who would otherwise be without hope. In the one big room, the essential inter-dependence and ultimate unity of humanity is brought home to all. In a world of jumbo jets, of instantaneous telecommunications, of global warming

¹⁹ See Commentary, 'The United Nations Commission on Human Rights: 50th Session' (1994) 52 *The Review (ICJ)*, 66.

and of AIDS we are forced to see human rights as they are: a cause of international concern. Anyone in doubt about this—and in particular any member of a national parliament—should take the opportunity to observe this process in action. It is still in its early historical phase. Doubtless it has many inefficiencies and weaknesses. But it grew out of the awful revelations of the last world war and the flash, brighter than a thousand suns, which lit over Hiroshima. Suddenly it was perceived that international peace and security were interrelated with human rights. Security would have no lasting reality unless built on universal respect for fundamental rights. So long as that is not assured, our world will continue to be an angry and a dangerous place.

We in Australia, who enjoy so many blessings of nature, history, law and democratic institutions, cannot be entirely cut off from the international moves for the protection of universal human rights. In our continental country, we are part of the world. The thought that we can pull up the drawbridge and shut out the influence of this global development of such potential for the coming millennium is as unrealistic as it is unworthy.²⁰

The Path of Gradualism

Some, at least, of the concerns that have been voiced in Australia about the growing influence of international human rights principles upon our law can, I think, be adequately answered.

Firstly, the international committees which are frequently criticised stand in an entirely different relationship to the Australian legal system from that of the Privy Council in London. By our Constitution, the Privy Council was part of the Australian judicial hierarchy. No United Nations committee and no international court has the same power. So far as the committees are concerned, their decisions derive only from the power which we, as a nation, have accorded them. Their decisions are not self-executing. As in the case of the decision of the UN Human Rights Committee on the complaint of Mr Toonen against the Tasmanian laws,²¹ the decision is only translated into action in Australia by the authority of an Australian law-maker. I do not comment on the constitutional validity of the *Sexual Conduct Act*; that will be for the High Court. But the authority of the statute rests upon a decision, duly debated, of the Australian Parliament. No Australian law was changed, as such, by the decision of the United Nations committee.

Secondly, the United Nations committee has, it is true, members from a number of states which do not share all of our perspectives on human rights; but they are states of the world we live in. The members of the committee are elected for their individual expertise. When serving, they do not act as representatives of their country but in a personal capacity. They must make a solemn

²⁰ A. F. Bayefsky, 'Making the Human Rights Treaties Work', in L. Henkin and J. L. Hargrove (eds) *Rights: An Agenda For the Next Century*, ASIL, Washington DC, 1994.

²¹ United Nations, Human Rights Committee, Communication No 688/1992. Nicholas Toonen and AustralianDoc: CCPR/C/50/D 488/1992 (4 April 1994).

and public declaration to that effect. The Toonen decision was unanimous. This suggests that, even in a matter as controversial in some countries as the rights of homosexuals, nationality and legal tradition had little final influence. The members from cultures as different as Australia, Jordan and Venezuela shared a similar juristic analysis and conclusion.²² The decision of the committee may be criticised on its merits, as it has been, by experts in international law who think that it went too far²³ or not far enough.²⁴ Some criticism was directed to the inability of Tasmania, as such, to be heard directly by the committee. But that was simply the result of the fact that, by the Australian Constitution, the Commonwealth is the international representative of Australia. In fact, the federal authorities consulted Tasmania. Extracts from Tasmania's submissions were included in the Australian statements to the committee; but rejected.

Thirdly, the notion that Tasmania's democratically elected Parliament should have the right to override fundamental rights, globally declared and relevantly held applicable, begs an important question. I share the view that it would have been preferable for the people of Tasmania, through their Parliament, to have accepted the justice of repealing the sections of the Tasmanian *Criminal Code* which threatened to punish, and which stigmatised Mr Toonen and other homosexual and bisexual men. After all, there is now an Australia-wide legal standard on this matter. International human rights courts had earlier declared what fundamental respect for human rights required of the law on this subject.²⁵ Scientific enlightenment had made it clear that to punish or stigmatise a person on the grounds of sexual orientation is as wrong, and indeed wicked, as to do so on the grounds of gender or race and as irrational as to do so on the basis of left-handedness. But Tasmania has an unusual electoral system. The prospect of a change of mind in the Upper House seemed remote, at least in the short term. Australia's international obligations have been declared. We were either to ignore the declaration and justify it by reference to our Constitution and politics — or we were obliged to act to fulfil the duty we ourselves had accepted.

Fourthly, the democratic argument and the complaint about loss of 'sovereignty' have an undoubted appeal to a proud people with a long constitutional history of their own. But I think it is increasingly recognised that democracy is not simple majoritarianism, as we tended to think a few years ago. Democracy, as it is practised at the end of the twentieth century, is a system of government which accords power to persons elected and accountable to the majority of citizens, but upon the condition that they will respect the fundamental rights and dignity of minorities. Professor Ronald Dworkin has explained that human rights are promises to minorities that their

²² H. Charlesworth, 'Protecting Human Rights' (1994) 68 *Law Institute Journal* (Vic), 462 at 463.

²³ See A. Funder, 'The Toonen Case' (1994) 5 *Public Law Review* 156.

²⁴ See G. Selvaner, 'Gays in Private, the Problems with the Privacy Analysis in Furthering Human Rights' (1994) 16 *Adelaide Law Review* 331; W. Morgan, 'Protecting Rights or Just Passing the Buck?' (1994) 1 *Aust Journal of Human Rights* 409.

²⁵ See *Dudgeon v United Kingdom* (1981) 3 EHRR 40; *Monnell and Norris v Ireland* (1988) 10 EHRR 205 and *Modinos v Cyprus* (1993) 16 EHRR 485 (decisions of the European Court of Human Rights). Cf., D. W. Jackson, 'Judging Human Rights: The Formative Years of the European Court of Human Rights' (1993) 13 *Windsor YB Access J* 217, 236.

dignity and equality be respected by the majority. This is, he declares ‘one feature that distinguishes law from ordered brutality’.²⁶ It seems unlikely to me that Australians would accept a State law that criminally punished people because they were of Jewish or Chinese ethnicity or because they were women or because their skin was dark. Seen in this light, the limits of democracy are ultimately reached. Far from being a surrender of ‘sovereignty’, measures taken to uphold minority rights, authoritatively declared by an expert international committee, may be seen as an exercise of sovereignty. Those who talk of ‘sovereign States’, or for that matter ‘the sovereign Federation’, indulge in metaphors which are not sustained by the Australian Constitution as it has been interpreted. Ours is a complex sovereignty. In 1901 we divided up great power by adopting the Federal system of government. Yet we did not adopt the other means of dividing power by an entrenched, written bill of rights. But that did not mean that our people did not enjoy fundamental rights. Increasingly, these rights are becoming clear, both from the declarations of the High Court and the stimulus of international treaties. This movement has caused many commentators to call for an Australian constitutional bill of rights. At least such a measure, if approved, would have the legitimacy of acceptance by the Australian people.²⁷

Fifthly, a little known change that has come about in recent years parallels the passage of legislation through Parliament to give effect to international standards. I refer to the impact of international human rights jurisprudence upon Australia’s court decisions. As Justice Brennan pointed out in *Mabo*,²⁸ it is inevitable that, over time, the influence of the *International Covenant on Civil and Political Rights* will be brought to bear upon the perception by Australian judges of what judge-made law requires. If there is a gap in the common law, or if a statute is ambiguous, it is both inevitable and right that Australian courts, in today’s world, should fill the gap, or resolve the ambiguity, by reference to any applicable international rule. Better that the judge should do this than that the judge should rely upon personal, idiosyncratic values or upon distant analogies derived from distant judges in a distant country from distant times. This is simply the next natural phase in the development of the Australian common law as it adapts to the world of internationalism. Fortunately, our brilliant system of law has a never-ending capacity to respond to new problems and to adapt sensible solutions from new sources.²⁹

Sixthly, for those who say that Australia has nothing to learn from these international developments, which may be useful enough to the poor people of Cambodia and to the oppressed in Cuba, Sudan, Burma and elsewhere, the response comes back: ‘Are we so perfect that we have nothing to learn from the wisdom of others?’ Recent history denies it. The dismissal of judicial officers by Australian governments and parliaments of different political persuasions, federal and state, by the simple expedient of reconstituting a court or tribunal shows that even in a matter so

²⁶ R Dworkin, *Taking Rights Seriously*, 1977, p.205.

²⁷ See M. D. Kirby, ‘The Bill of Rights Debate’, *Australian Lawyer*, vol 29, December 1994, p.16.

²⁸ (1992) 175 CLR 1, 42.

²⁹ See M. D. Kirby, ‘The Australian Use of International Human Rights Norms’ (1991) 16 *University of New South Wales Law Journal* 363.

fundamental as the independence of the judiciary, we in Australia fall down. In the matter of the human rights of homosexuals, the law stood as an oppression to that section of our community in all parts of Australia for more than a hundred and fifty years. It still remains on the statute books of Tasmania. In hindsight, what is remarkable is not that these things were changed, but that they lasted so long.³⁰ It is also notable that this country enjoyed one hundred and fifty years of elected, representative government and not a single parliament of this nation saw fit to explode the manifest fiction that Australia was *terra nullius* when the settlers arrived. It was left to the High Court of Australia in *Mabo* to shatter the fiction and propel our country to a juster law. This is the way a free people, through their constitutional government, strive toward enlightenment. But the point is that sole reliance upon the democratic assemblies may not always ensure that respect is accorded to the fundamental rights of minorities. Occasionally, an external stimulus is useful. One such stimulus in today's world is international human rights law. The instruments of stimulus include such bodies as the UN Human Rights Committee, the International Penal Tribunal just established, the UN Commission on Human Rights (to which I will shortly report) and the team of Special Representatives and Special Rapporteurs, of whom I am one. We should see these instruments as a natural development of the history of our planet to which this much blessed country has an obligation, and a privilege, to contribute.

Lessons for the Future

This said, the concerns of fellow Australians about respect for democracy, the preservation of the Federal compact and local responsibility for human rights matters must not be lightly dismissed. As I have shown, they are views sincerely held, strongly argued and they have a foundation which is legitimate.

How can we reconcile what seems to be the natural tide of history, one that is often, if not usually, beneficial, with the Constitution of this country drawn up for utterly different international circumstances and for a significantly different Australian people? That is a challenge which is before us now.

Of course, we could amend the Constitution by referendum: redefine the external affairs power, reorganise the Federation, abolish the states, revamp local government and incorporate a fundamental bill of rights of our own. Some of these changes, and others, may come about. But in the meantime, it is legitimate to consider reform less drastic and more immediately achievable. The Minister for Foreign Affairs, Senator Evans, who has done a great deal to support the United Nations work in human rights and who is justifiably honoured in Cambodia for his contribution there, has rejected the proposal that Australia's ratification of international treaties should be submitted to parliamentary approval. 'No way, José' was his response to this proposal, which was strange because he was addressing not José but Rod — Senator Rod Kemp. To Senator Kemp's rhetoric: 'We could not have the people at all involved in this', Senator Evans told an estimates committee bluntly, 'Dead right'. Later Senator Evans, before an estimates committee,

³⁰ See for Amnesty's criticism of Australia (1994) 3 *Human Rights Defender*, 1.

agreed that treaties would be tabled in Parliament before action is taken to adhere to them. This was described as a ‘sort of halfway José.’³¹

It is certainly our tradition that the Executive Government, succeeding to the prerogative powers of the Crown, has reserved to itself the right, and the duty, to subscribe to international treaties in the name of Australia. There are arguments for persisting with this tradition. Not the least of these is the frequent need for Australia to act swiftly and with a single voice in matters of international concern. Procedures have been introduced for consultation on new treaties with state governments and, where relevant, with industry and community groups. This is a beneficial development. The question is whether it has gone far enough.

Some important treaties have been ratified with little parliamentary or public debate.³² The growing body of treaty law has an increasing impact on Australian law. It therefore seems legitimate, in some way, now to involve the national Parliament in the superintendence of executive action in respect of treaties. The old rule may have been apt for a time when international law was in its infancy. But nowadays, in economic matters as well as those relevant to human rights, the growth of international treaty law is extremely significant and growing even more important. Whilst I fully understand the politics of resistance to parliamentary scrutiny and would regret a move to the United States requirement of advice and consent of the legislature, which has proved such a reinforcement of isolationism, there is surely an intermediate position. Parliamentary scrutiny is not the same as parliamentary approval. Scrutiny could be part of the larger function of raising Australian awareness of the growing body and importance of international law. As that law comes to sustain Australian statutes (such as the Sexual Conduct Act), Australian executive action (such as the Tasmanian Dams regulations) and Australian court decision (such as, in part, *Mabo*), it is appropriate that the actions of the Federal Executive in ratifying treaties should be assisted by the voices of the representatives of the Australian people. I do not believe that those voices favour an isolationist Australia. Still less do I believe that they are unaware of the important moves which I have described, in the international community, for the better protection of human rights everywhere. In my view we can trust the Australian people,

³¹ See Australian Senate, Estimates Committee, *Hansard*, 29 November 1994, 157. See also the tabling by Senator Harradine, on 23 August 1983, of a proposal for a Standing Committee on Treaties, reintroduced on motion in each session since 1983 and the introduction by the Australian Democrats of the Parliamentary Approval of Treaties Bill 1994 (Cth). The Bill would provide a system of Parliamentary disallowance of subscription to treaties disapproved by Parliament. On 21 October 1994, Senator Evans and the Federal Attorney-General (Mr Michael Lavarch) issued a statement reaffirming ‘the Government’s commitment to responsible and transparent treaty making’, stating that the Government was ‘happy to take further steps to strengthen the flow of information to Parliament’.

³² The Government’s action of depositing the instrument of accession to the First Optional Protocol to the ICCPR before the tabling of the instrument in Parliament was described as ‘extraordinary...without any public debate or even public awareness of its existence, let alone its scope and significance’. See A. Twomey, Parliamentary Research Service Background Paper No 27, 1995, *Procedure and Practice of Granting and Implementing International Treaties*, 9 February 1995, 9. In 1961 Prime Minister Menzies announced that, in general, the Australian Government would not proceed to ratify or accede to a treaty until it had lain on the table of both Houses of Federal Parliament for twelve sitting days. See *Commonwealth Parliamentary Debates*, 10 May 1961, 1693. This practice should be restored.

and their representatives in Parliament, to understand that it is possible to reconcile our Federal Constitution and the growing province of international law. In their genius, the Founders provided the means to do so. It takes legislators and judges of understanding to ensure that the Constitution continues to serve Australia and its people in a time when human rights, like so much else, assumes an expanding international dimension.

No-one, least of all a member of parliament or a judge, should forget that the external affairs power in the Australian Constitution appears, both by express terms and by its location in the document, as an element of a constitution which is federal in its basic character. Although the grant of power is large indeed, it is not uncontrolled. It is the function of successive parliaments and of the High Court, to chart the boundaries of the power in new circumstances. Amongst the new circumstances are the growing sense of national identity of Australians, the changing role of Australia in its region and in the world, the changing features of international law and the role of the United Nations and other international or regional bodies. To say this is simply to say that our Constitution adapts to the changing nation and world in which it must operate. We have institutions, working in constant symbiosis, which provide the solutions for changing times. Should these solutions sometimes prove unacceptable we have the remedy in our own hands. Those who enjoy the temporary responsibility of exercising power in Australia should not forget the federal character of the Constitution. That character itself protects our freedoms. But they should also have a view of our changing world and a vision of the future so that they see Australia as it is — part of a world of increasing economic and human interdependence.

In January this year it was my privilege to meet Rigoberta Menchu, Nobel Peace Laureate. Her journey to international recognition began on the steps of the Spanish Embassy in Guatemala. There she saw her father shot down by military oppressors as he sought to present a petition about human rights. Later she saw her two brothers killed in a similar way. Later still she was brought with remaining members of her family to see her mother killed. She was required to stand there as the dogs were set upon her mother's body. She stood until it was dark and the military and the dogs had departed. She then picked up the remains of her mother and took them home for burial. Yet, despite all this, she continued her peaceful demands for reform, justice and human rights. Not peace at any price; but peace founded on recognition of universal human dignity. She went on to learn Spanish so that she could communicate her story. Then she learnt English. She went to the United Nations. She was asked how her life had prepared her for the United Nations. She pointed out that her early life had involved her shepherding sheep. It was a good preparation, she declared.

We can learn from such people, new shepherds, to have insight into our own failings. As good international citizens we can contribute to a better world where the suffering of Rigoberta Menchu, and people like her, is a source of astonishment, pain and determination to redress. Such a world will not come soon; it will not even come in our lifetime. But it will surely come in the millennium which we are about to enter, and every one of us, parliamentarian, judge and citizen, of this fair land has a duty to assist, and not to impede, the coming.

At the conference in Mexico City, Rigoberta Menchu read a number of her poems as a way of communicating her thoughts. So I rose and, in my speech, I read to the assembled people a poem

of one of our great poets, Oodgeroo of the Noonuccal, Kath Walker, upon whom it was my privilege to confer an honorary degree when I was chancellor at Macquarie University. This is what the late Oodgeroo wrote, *A song of hope*:

Look up, my people,
The dawn is breaking,
The world is waking
To a new bright day,
When none defame us,
No restriction tame us,
Nor colour shame us,
Nor sneer dismay.

Now brood no more
On the years behind you,
The hope assigned you
Shall the past replace,
When a juster justice
Grown wise and stronger
Points the bone no longer
At a darker race.

... ..
See plain the promise,
Dark freedom-lover!
Night's nearly over,
And though long the climb,
New rights will greet us,
New mateship meet us,
And joy complete us,
In our new Dream Time.

To our father's fathers
The pain, the sorrow;
To our children's children
The glad tomorrow.

Questioner — I would like your permission to refer to the subject of a bill of rights for Australia but also to the remarks that you have made today. You pointed out that there has been a wide call for a bill of rights from all over Australia and it has been generally assumed that a bill of rights will give us a lot of rights that we do not have now. You would be well aware that some people have pointed out that some of the proposed bills of rights destroy rights which we have held for a long time, traditionally, and which are most important to our existence as human beings.

I have here a newspaper report concerning a proposed bill of rights to declare a fundamental right to — among other things — freedom of association and to be free from all forms of discrimination. I would like to put it to you that those two rights are incompatible. If the contemplated freedom from discrimination contemplates the fortification and, perhaps, the advancement of existing anti-discrimination laws, then this is going to be a repressive move, for the reason that anti-discrimination laws destroy freedom of association. Let us note in passing that freedom of association requires not only that we shall be free to come together and meet each other; it also requires that we shall not be compelled to associate with people we do not want to have anything to do with.

Under anti-discrimination laws, people are forced into an association — employers with employees, landlords with tenants. Restaurant owners are forced into an association with diners they do not want to serve and clubs are forced into an association with members they do not want to have. How many people in this room realise that, because anti-discrimination laws in this territory provide that there shall be no discrimination on the ground of political conviction, a Jewish club can be compelled to take neo-Nazis as members?

May I conclude by asking you what influence you have to prevent such a provision ever going into an Australian bill of rights so that people may one day alter this state of affairs if they wish to, and I do think they will wish to?

Justice Kirby — First of all, it is true that freedom of association is not mentioned either in the United States Bill of Rights or in the Canadian Charter of Fundamental Rights and Freedoms. On the other hand, we in Australia generally think we have the freedom to associate with whom we like and that that is something that should be respected and protected.

One of the best things that has happened in Cambodia since the UNTAC period has been the flowering of human rights groups — these are wonderful, brave people, most of whom have lost members of their family — associating together, speaking up and demonstrating for human rights. But they do not feel safe unless they have an act which says that they can have an association and which permits them to do this or that. I always tell them that in our legal tradition you can do what you want to unless there is a law stopping you. But in the Cambodian legal tradition you have got to have a law which permits you to do it, which is a very different way of looking at human rights and other things.

About two days out of three in my life the problem that is presented in the court of appeal is fairly simple: you get the facts; you find the law; the law is clear; you apply the law to the facts; pull the lever; and there is the decision. Most people think that is what it is like on three days out of three. It is not. On the third day, you reach a problem upon which the law is silent or upon which the statute, with all respect to the Clerk, is very ambiguous, and then we have to try to find out what the law is and that gives judges a tiny bit of latitude.

The point I make is that obviously in human rights matters, in balancing two fundamental rights, judges will have to draw the line — just as today, in one out of three days, we are drawing the

line as to where the law stands and what it means. That is what we are paid to do. Drawing the line between the right of free association and the right not to have discrimination on the grounds of gender or race is a matter of line drawing and that jurisprudence would develop over time. There would be some in our community who would say, ‘You can have a club but, at least in a general club, it should not be allowed to exclude women.’ I saw in yesterday’s *Age* that there is an ancient club in Melbourne, all of whose members were said to be eighty-three and to have voted in favour of having women in the club. The question that was raised was: ‘Why did they take such an awful long time to do it?’

It is true. The point you make is right. In any matter of constitutional decision and in any matter, especially of bill of rights decisions, there will be lines to be drawn. Those lines have to be drawn — one hopes and tries in a consistent way — by independent judges striving to reach the right conclusion and one which will not be set in concrete but which will change with the perception of social circumstances over time.

I made the point that I am inclining in favour of a bill of rights, partly because I feel that if we are to have a bill of rights it will be better if it is debated in this Parliament and other parliaments so that elected representatives take part in the debate and the people endorse it and give it legitimacy. I would prefer that to a bill of rights which is donated to us by judges — with all respect, and however distinguished.

The point I made which was not reproduced in any of the media reporting of it was that the bottom line is that it all depends on the package you are offered. It is one thing to be generally in favour of a bill of rights, but it is another thing to be in favour of a particular bill of rights. Therefore, I believe that when we address that issue we have to have at the back of our minds, even if we are inclined to be in favour of a bill of rights, a mental reservation about the bill of rights on offer. In that respect, it is a bit like the talk of the republic. There may be many people who favour a natural progression of our history; they would think that Australia should move towards a republic. But then arise the hard questions: ‘What is the form of republic? What is the form of the head of state? Will the people of Australia be content that the head of state be elected in this Parliament?’ Continued opinion polls, with every respect to any members of parliament who are present, indicate that the Australian people would not be content.

In looking at these issues you have to look at the detail. You cannot just talk in superficial generalities. You have to look at what is being offered to the people before you change the Constitution.

Questioner — As for referendums, we had two referendums in the ACT. Two-thirds of the people twice said ‘no’ to self-government and yet the government — I suppose in its wisdom — said, ‘yes’. So what is the use of a referendum for a bill of rights?

Justice Kirby — Those referenda were advisory whereas the referendum under the Constitution becomes part of the law. For that purpose, the people become part of the law making process.

Questioner — You touched on criticisms that have been made of the United Nations committee, and I would add another. In my understanding, the case for the Tasmanian government was not

put. The Commonwealth, as I understand it, put a case which did not address the arguments which could have been put for the Tasmanian position.

Justice Kirby — Professor Hillary Charlesworth, who is one of the leading Australian international lawyers, answered that point and said that, in fact, in Australia's own submissions there were extensive references to the arguments of the government of Tasmania and that the government of Tasmania was closely involved in the preparation of the Australian argument. I have no knowledge of this, but that is what an informed and respected international lawyer says.

Questioner — Thank you for that information. But, going to a general point of criticism against the United Nations committee, you stated that the committee after all has no legislative power, that it is up to the Commonwealth Parliament to legislate. On the other hand, with respect, you also put before us compelling moral — indeed, one might say technological — considerations which impel the Commonwealth Parliament to adopt a recommendation of the committee. I put to you, in respect of the committee, the point that you made in respect of a bill of rights: we should not look only at the desirable principle; we should look at the actual package offered.

Justice Kirby — So far as the committee is concerned, I was simply seeking to answer the points being made by a number of commentators whom I have referred to in my paper, including Senator Rod Kemp who said that we have not released our rule from London — which I took to be a reference to the Privy Council, the imperial parliament — to be accepting rule from Geneva or New York. You often hear that said.

The point I made was that, whereas a statute from Westminster in the days of the empire was binding in Australia and whereas a decision of the Privy Council when it was part of our judicial hierarchy was a decision that was binding and enforceable by the sheriff's offices of this country, the decision of the United Nations committee, though extremely important and, I believe, usually beneficial, is not self-executing. It then requires action and decisions by Australian law-makers either by the parliaments of Australia, as happened in that case, or by judges who can use international jurisprudence in the ways that I mentioned to fill the gaps and the nooks and crannies of the common law. This is not something to be afraid of or ashamed about. If you look at it historically, it is a natural progression, a natural phase, as the common law moves from a country which was fairly isolated into a country which is part of the world community.

I was first appointed in 1974, so I have been in judicial life of one form or another, federal and state, for twenty years. I have seen governments come and go; I have seen parliaments come and go, and it gives you something of a perspective. That is what I wanted to leave with you today: an appeal to a perspective. If you stand back from our planet, as the orbiting satellites permit us, and see this little blue speck in the mighty universe, and if you stand in the rooms of the United Nations Commission on Human Rights and see assembled humanity, then you come back and put on SBS and hear Mozart's *Requiem* with the rockets and gunfire of Bosnia or Chechnya and all the other evil works of nationalism, you can see the logic of humanity standing outside its planet and seeing our world as it is in its essential unity.

It is an appeal to that perspective that I came along to make today.

