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Barbarians at the Gate: Challenges of Globalization to the Rule of Law

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The title given to this panel session had me a little stumped. After all, I come from a jurisdiction where the gates to law have always been open. As a small island nation at the ends of the earth, New Zealand has always been willing to borrow and adapt. We have not seen the influences that arrive at our gates as barbarian.

I start with globalisation, about which I express some slight scepticism in relation to the rule of law, illustrated by reference in part to New Zealand experiences. I discuss some general aspects concerning the application and reach of international and comparative law (including global initiatives on the rule of law) before commenting on some challenges ahead, with particular reference to human rights.

First, some context. New Zealand's isolation from the rest of the world ended nearly 300 years ago when Abel Tasman reached the shores of New Zealand, fleetingly. Allan Curnow wrote of that event:²

Simply by sailing in a new direction,
You could enlarge the world.

Of course, that was conceit. The physical world was not enlarged, but knowledge and the human spirit expanded with the exploration and the ideas of the old world enlarged the new.

In New Zealand, the first Governors of New Zealand were instructed to look for precedents beyond England, to the laws of other jurisdictions for ideas. The first judges in New Zealand looked in particular to the law of the United States. Pacific trade and travel links may have helped, as did the common problems faced by establishing law in a sparsely-settled land with native peoples to accommodate. It also helped that *Kent's Commentaries and Story's Digest* were readily transportable library resources, but American cases continued to be commonly cited in New Zealand courts into the 20th century. The *New Zealand Law Jurist* republished extracts from the Albany Law Journal through the 1870s and New Zealand law libraries from the 1870s held significant United States materials.

¹ The Rt Hon Dame Sian Elias, GNZM, Chief Justice of New Zealand.

² Allen Curnow "Landfall in Unknown Seas" commissioned in 1942 by the Department of Internal Affairs to mark the tercentenary of Abel Tasman's voyage to New Zealand. A published copy can be found in Allen Curnow *Early Days Yet: New and Collected Poems, 1941-1997* (Auckland University Press, Auckland, 1997).

That outlook declined markedly after the First World War. Subscriptions were cancelled and English texts came to oust American. The loosening of wider influences may have followed the sense of participation in Empire that was a result of the War. The old voyaging links across the Pacific may have become less important and the vast increase in immigration from the United Kingdom and the domination of New Zealand trade by the United Kingdom all helped narrow the influences on New Zealand law. With publication from 1920 of the English and Empire Digest, interest in wider sources fell away. Whether or not there was strict cause and effect, innovation in New Zealand law, which had been a feature of the New Zealand legal system, also declined for much of the 20th century. It was not until the late 1960s that a local voice in law started to re-emerge. The change was assisted by a move to professional teaching of law in the universities, which encouraged lawyers to engage with the principles underlying the precedents and by a move back to wider sources of law than British sources.

What is to be taken from this brief history? Global pulls are nothing new. The sense of empire following World War I was itself an earlier wave. In New Zealand, as I have suggested, it was not an unmixed blessing. We fell into a malaise of slavish imitation despite earlier having been innovative in isolation and willing to barrow ideas from all sources. That I think illustrates some of the dangers in through-going globalisation in law.

Jerome Frank, distinguished academic as well as a member of the United States Court of Appeals, Second Circuit, expressed the view that harmonisation ought to be always “an unfinished symphony”. The end to be served was not “a stifling regimented unity” “which would efface desirable differences in cultural values and monopolistically obstruct local originalities, initiatives, inventive creations”.³ He was writing at the time of the Cold War. We live in an age that is more optimistic about harmonisation of law. Even so, there is truth in the view that singing from the same song-sheet has its risks.

Chief Justice Menon is dealing in this session with some of the challenges arising out of convergence in commercial and financial law. I thought I would concentrate on some of the challenges arising out of the globalisation of human rights. First I make some more general comments about the international background and comparative law in the context of the rule of law.

The impact of international law

I want to start by saying something generally about the umbrellas for convergence provided by international law and comparative law. Domestic Law in all jurisdictions is profoundly influenced by international law. New Zealand is said to be party to more than 200 treaties – and treaties are only one source of international law. The coverage of treaties is extraordinarily

³ Jerome Frank “Civil Law Influences on the Common Law – Some Reflections on “Comparative” and “Contrastive” Law” (1956) 104 University of Pennsylvania Law Review 887 at 924.

wide.⁴ Much domestic statute law is based on these treaties and in our dualist system gives them effect in domestic law. Of course direct enforcement is only one of the ways in which international obligations are applied domestically and a strictly dualist notion of law is increasingly tattered as domestic courts look to international obligations as standards against which to measure the appropriateness of the exercise of public power and private law obligations.

Some of the more intrusive impacts of international law on domestic legal systems are now arising in the context of Investor-State Dispute Settlement processes. The Chief Justice of Australia has recently asked whether such processes are set up as “a cut above the courts?”⁵ It has clearly been disconcerting for Australia’s highest court that it may be argued that one of its decisions is a breach of a bilateral investment treaty.⁶ Given the proliferation of bilateral and multilateral investment treaties and free trade agreements containing Investor-State Dispute Settlement processes, we can expect that experience to become not uncommon.⁷

It is feared that Investor State Dispute Settlement processes will undermine capacity to regulate the banking and finance sector or control environmental impacts. It is conceivable that human rights based determinations of domestic courts may similarly give rise to claims. Quite apart from impact on domestic sovereignty and constitutional issues, these disputes impact potentially upon the rule of law within domestic legal systems.

By contrast with the far-reaching effect of international agreements protective of investment and trade, there seems more caution about international regulation of human rights. Hilary Charlesworth asked whether the international appears threatening in the context of human rights. Many who embrace globalisation are focussed on its application in matters of commerce and capital flows. She points to the paradox that the global forces

⁴ They cover matters of war and peace and what one of my colleagues has called international constitutional law (the body of treaties which govern the international agencies including regional organisations), international trade, international financing and investment, international commercial transactions, international communications, international space (such as the law of the sea), environmental protection, human rights, labour conditions, movements of people, international criminal law and many other areas of international and social and economic cooperation.

⁵ RS French, Chief Justice of Australia “Investor-State Dispute Settlement — A Cut Above the Courts?” (Supreme and Federal Courts Judges’ Conference, Darwin, 9 July 2014).

⁶ Phillip Morris Asia Ltd has served a notice of claim on the Australian government stating that the plain packaging laws deprived Phillip Morris of their investments in breach of the Hong Kong Agreement. As French CJ, above n 5, at 6 points out this means that the correctness of some of the conclusions of the High Court in *JT International SA v Commonwealth* [2012] HCA 4, (2012) 250 CLR 1 may be considered.

⁷ The reports published by the United Nations Conference on Trade and Development indicate the numbers and range of these claims which target measures relating to resource conservation, domestic patents, criminal prosecutions, and revocation or imposition of conditions on licences and permits. Moratoriums imposed in Quebec and Ontario on fracking and offshore wind farms have given rise to such claims. So too have domestic court decisions such as the challenge to Canadian judicial decisions holding patents to be invalid for want of utility. In a case concerning Bangladesh and Italy it was alleged that the decision of the courts in Bangladesh “abused their supervisory jurisdiction over the arbitral process”.

which have led to privatisation of public functions in many states themselves provide resistance to internationally based guarantees of human rights.⁸

Turning to comparative law, there are those who are suspicious of creeping internationalism such as is achieved by recourse to comparative law. That attitude strikes me as hardly consistent with the traditions of the common law. The principles of the common law have been borrowed and adapted from any source that persuades. The New Zealand Law Commission, speaking of the common law applicable in New Zealand, said that the courts, “of course” draw on judicial decisions in many different jurisdictions over time and up to the present day”.

The use of comparative law does not entail abdication to foreign values and views. As Sir John Salmond said in his text on Jurisprudence, the study of comparative law assists in our understanding of the conceptions and principles in our own systems.⁹ The legal problems we face are similar. Close attention to the reasons which have convinced in other jurisdictions is good sense in the search for reasons that convince in our societies too. And the sources of comparative law are not only the decisions of courts of other jurisdictions, but the legal doctrine developed by academics and drawn on in judgments.

What about the international effort in relation to the rule of law? Quite apart from international regulation, there may be room to question whether the effort being put into rule of law projects is itself capable of developing a civil society globally. This ties back into questions of the understanding of the content of the rule of law, which I referred to in my opening remarks.

Differences in understanding turn largely on whether the rule of law is seen as largely formal, as Raz maintained it is, or includes values which are fundamental.¹⁰ Lord Bingham, disagreeing with Raz, maintained that human rights are part of the rule of law, even if rights in this sense are not the same as those that may be enacted or codified at any particular time.¹¹ In between these are the suggestions that some values of a legal order are part of the rule of law. So, in New Zealand, the White Paper that preceded enactment of the Bill of Rights, explained why there is no reference to equality before the law in our Act as being that such reference was unnecessary since that equality before the law is part of the rule of law. (Of course, how value-laden equality before the law is, depends on whether it includes a requirement of substantive equality).¹²

⁸ Hilary Charlesworth “Globalisation, the Law and Australian Sovereignty: Dangerous Liaisons” (Papers on Parliament No 33, May 1999) <<http://www.aph.gov.au>>.

⁹ John Salmond *Jurisprudence: or the Theory of the Law* (2nd ed, Stevens & Haynes, London, 1907).

¹⁰ Joseph Raz “The Rule of Law and its Virtue” in Joseph Raz (ed) *The Authority of Law: Essays on Law and Morality* (Oxford University Press, Oxford, 1979).

¹¹ Lord Bingham “The Rule of Law” (2007) 66 *Cambridge Law Journal* 67 at 76.

¹² Geoffrey Palmer “A Bill of Rights for New Zealand: A White Paper” [1984–1985] 1 *AJHR* A6 at 86.

Given the realities that legal systems which are relatively impartial and capable of efficiently enforcing their judgments are rare and properly seen as the result of historical conditions hard to replicate, a global conception of the rule of law may inevitably be a formalist view. Should we perhaps be concerned that, if so, we risk compromising more rich visions of the rule of law? Is there a risk of undermining the different culture of law in different jurisdictions? Allied to this, is there a risk that human rights standards will erode to a lowest common denominator under the influence of globalisation?

The local matters too. As is perhaps best illustrated by the application of human rights norms to which I now turn.

Forty years ago, when I first practised in the courts of New Zealand, human rights were something invoked in other jurisdictions. We did not think to invoke in argument international instruments respectful of family relationships or human dignity or political speech. Indeed, when the United Nations Declaration of Human Rights was cited in a New Zealand case in 1967, judges were indignant. McCarthy J said “it needed no Charter of the United Nations” to remind us in the New Zealand about the importance of freedom of speech.¹³

What happened? We became part of what Lord Lester, the distinguished British public lawyer, has called “overseas trade in the American Bill of Rights”.¹⁴ Of course, the direct influence came from the International instruments – the Declaration of Human Rights and its progeny, most importantly to date the International Covenant on Civil and Political Rights.

Although so far the International Covenant on Economic, Social and Cultural Rights has had less impact domestically in most jurisdictions, it would be unwise to think that we will continue to value political and civil rights over the economic, social and cultural rights. As lawyers, we have to watch that space.

Ten years ago, Lord Cooke of Thorndon expressed confidence that the world was moving gradually to a single law of human rights.¹⁵ He was writing against the background of the great success of human rights instruments following the Second World War. Even those countries which lacked constitutional statements of rights gradually became open to the scrutiny of international or supranational agencies. The United Kingdom became subject to the European Court of Human Rights. The accession by New Zealand and Australia to the First Optional Protocol to the International Covenant on Civil and Political Rights brought access to the Human Rights Committee for those who had exhausted their domestic remedies. The cold wind of measurement against international human rights standards took

¹³ *Melser v Police* [1967] NZLR 437 (CA) at 445.

¹⁴ Anthony Lester “The Overseas Trade in the American Bill of Rights” (1988) 88 *Columbia Law Review* 537.

¹⁵ Robin Cooke “The Road Ahead for the Common Law” (2004) 53 *International Comparative Law Quarterly* 273 at 273.

away some of the warm complacency with which we regarded common law protection.

Protection of human rights in domestic law was given impetus by the adoption in Canada of a Charter of Rights and Freedoms. The Charter overtook a rather feeble experiment with a statutory statement of rights adopted in 1960.¹⁶ New Zealand and later the United Kingdom looked to the Canadian model to provide more systematic domestic measures of protection for human rights.

Lord Cooke's optimism about ultimate world-wide convergence was expressed with knowledge of the legislative enactment of statements of rights in New Zealand and in the United Kingdom. He would have regarded the adoption of similar legislative responses in the Australian Capital Territory and Victoria as further evidence of the trend to convergence.

Ten years later, I am not so sure about directions. It is true that the common derivation of the domestic statements of rights in the International Covenants may be expected to promote common outcomes in the very long haul. The work of international agencies such as the United Nations Human Rights Committee is likely to provide encouragement towards commonality. So it would be rash to think that domestic legal regimes will not shift over time under such influences, but there is significant divergence in the methods of addressing human rights in all common law jurisdictions (something I expand on). For present purposes, my point is that the effort required in working with domestic expressions of human rights which draw on international instruments and their different application in comparable jurisdictions is not to be underestimated.

I now touch on some of the challenges for human rights law. They are areas in which some divergence may be expected between jurisdictions.

In looking at human rights in the global context it is necessary to talk about differences as much as what we have in common. These differences arise only in part out of different methods of reception into domestic law of human rights and different cultural and legal traditions.

The differences in our traditions and legal order present challenges too. The most obvious are the constitutional differences which are in large measure responsible for the different choices made in the domestic statutes. Such problems are illustrated in the decision of the High Court of Australia in *Momcilovic*, where both French CJ and Gummow J expressed the need for care in the use of comparative legal material because of the different constitutional arrangements in Australia.¹⁷

Separation of powers concerns in Australia impact on development of common law to accommodate human rights and make advisory opinion

¹⁶ Canadian Bill of Rights SC 1960 c 44.

¹⁷ *Momcilovic v R* [2011] HCA 34, (2011) 245 CLR 1 at [20] per French CJ and at [155]–[159] per Gummow J.

problematic – in contrast with the position in Canada. The separation of powers doctrine followed in Australia sets up a further point of distinction with Canada, where a form of the Chevron doctrine¹⁸ partly explains why the Supreme Court has been more relaxed about deference to primary decision-makers in their assessments of rights-compliant determinations than has been acceptable in Australia or New Zealand.¹⁹ The United Kingdom position seems to remain unsettled on application of proportionality analysis to administrative decision-making.

More generally, differences in our traditions of administrative law impact on the basis of review for human rights compliance of the discretionary powers conferred for public purposes. So, for example, Canadian preparedness to countenance primary agency choice is partly explained by the case-law developed by the Supreme Court of Canada in *Baker*, requiring reasons to be given by administrative decision-makers (allowing better supervision for rationality).²⁰ In Canada, too, reasonableness is treated as a contextual standard (as it is increasingly recognised to be in New Zealand and the United Kingdom). Australian preference for a strict division between review and merits in administrative decision-making and insistence on jurisdictional error (admittedly understood in an increasingly broad sense) or *Wednesbury* unreasonableness impedes integration of human rights and administrative law.

I do not intend to contend that any one system is to be preferred. They no doubt are each serviceable in their own domestic context and may well yield comparable outcomes for human rights overall. My point is that without insight into these differences, translation of approaches to human rights assessments from one jurisdiction to another is risky. I am not sure that we are good enough as comparative lawyers always to be sufficiently discerning in such matters.

An age of terrorism poses particular challenges for the rule of law. There is of course the direct threat to life under the security of law. There is the risk to the rule of law through meeting the direct threat.

Throughout the world governments have responded to the new terrorism launched since 2001 by enacting laws to protect their societies. Some of these measures have posed challenges for the courts and for the legal profession. Some clash with other values in the legal order and their reconciliation has posed real difficulties for the courts. They are cases in which national values and the deepest traditions of law in a particular society are often resorted to by Courts struggling to fulfil their constitutional role. So,

¹⁸ See *Chevron USA Inc v Natural Resources Defense Council Inc* 467 US 610 (1984).

¹⁹ *Dunsmuir v New Brunswick* 2008 SCC 91, [2008] 1 SCR 190 established that correctness and a single, context-specific reasonableness standard are the two standards applicable to review of administrative decisions. Formal distinctions between law, fact and discretion are mostly dispensed with. The deferential reasonableness standard will apply to almost all questions of fact and discretion and most questions of law.

²⁰ *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817.

in England, in the human rights cases that came before the House of Lords in the context of terrorism, the deep values of the British legal tradition were memorably invoked in the Belmarsh cases.²¹ And in Australia, the High Court split in *Al-Kateb* on the basis of principles of fundamental importance to Australian society.²²

Privacy poses particular challenges for the rule of law and opportunities for global response. The right to be left alone – to enjoy freedom from unreasonable intrusion into what is personal, has long been recognised as an aspect of human dignity, and a human right. Article 17 of the International Covenant on Civil and Political Rights confirms what had earlier been stated in the Universal Declaration of Human Rights in 1948 that “no one shall be subjected to arbitrary or unlawful interference with his privacy” and has “the right to the protection of the law against such interference”.

Despite this recognition, in New Zealand and in other common law jurisdictions outside North America, the development of laws protective of personal privacy has been very slow. Most of us now have legislation which protects against collection, use and access in respect of personal data developed in accordance with the OECD guidelines concerning the Protection of Privacy and Trans-border Flows of Personal Data and the Conventions adopted in 1981 by the Council of Europe and in 1990 by the United Nations General Assembly Guidelines for the Regulation of Computerised Personal Data Files.

In most jurisdictions in the United States a common law tort of privacy provides protection, but actions for public disclosure of private facts runs up against First Amendment protections. In New Zealand, where the Bill of Rights Act enacted in 1990 does not establish a right to privacy, a tort protective of privacy has been recognised by the Court of Appeal in a case in 2005,²³ but remains uncertain in scope and has yet to be considered by the Supreme Court. A recent first instance decision would extend the tort to cover intrusion into solitude and seclusion, such has been recognised in Ontario.²⁴ In other cases in New Zealand, including Supreme Court decisions, privacy interests have been recognised to require limits on other rights, such as freedom of expression, despite the absence of reference to a right of privacy in the Bill of Rights.²⁵ In Australia, recognition of a tort of invasion of privacy was left open by the High Court of Australia,²⁶ but has been doubted in recent decisions of the Federal Court and State Supreme

²¹ See *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68; and *A and others v Secretary of State for the Home Department (No 2)* [2005] UKHL 71, [2006] 2 AC 221.

²² *Al-Kateb v Godwin* [2004] HCA 37, (2004) 219 CLR 562.

²³ *Hosking v Runting* [2005] 1 NZLR 1 (CA).

²⁴ *C v Holland* [2012] NZHC 2155, [2012] 3 NZLR 672.

²⁵ For example see the dissenting judgment of Thomas J in *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91.

²⁶ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 (HCA).

Courts.²⁷ In the United Kingdom, breach of privacy remains protected only under actions for breach of confidence.²⁸

In the meantime, and before we have really got our houses in order in most jurisdictions, the prospect of control of personal information seems to be slipping beyond reach because of the advent of modern technology. The seeming inability of national and regional courts to respond adequately to privacy protection on the internet is the focus of much attention following the recent decision of the Court of Justice of the European Union to require search engine operators such as Google to erase links to data which is “inadequate, irrelevant ...or excessive” where there is no strong public interest in access.²⁹ Regulators in Europe are working on the challenges provided by this decision. Removal in one jurisdiction does not mean removal in others and access to unfiltered information is readily obtained. The technical issues appear to be huge. As are the limits of the authority of national and regional courts to enforce privacy protection. This may well be an area where local solutions will not work and international convergence will be necessary in protection of human rights.

Conclusion

In New Zealand, the times when our law most disappointed were the times when our sources narrowed. It is wrong to see that simply as a result of New Zealand’s size and geographical isolation. It occurred when we most closely identified with the very large grouping of the British Empire. That larger tradition proved too rigid until refreshed by the break-up of Empire and the spread of new ideas. We have to be careful in our time that globalisation does not impose comparable rigidities, ultimately impoverishing of law.

As I have tried to point out, convergence in human rights requires deep engagement with the domestic legislation and domestic traditions. Although convergence over the long haul may provide the comfort of analogy and a more beaten track and may open the way up for international enforcement of human rights, there is considerable work to be done to get there. In the meantime, the profession has the responsibility to ensure that in the domestic setting the rule of law is not compromised by international forces for conformity insufficiently deferential to local values and the different capacity of local jurisdictions to protect the rule of law.

²⁷ See *Kalaba v Commonwealth of Australia* [2004] FCA 763; *Milne v Haynes* [2005] NSWSC 1107; and *Moore-Mcquillan v Work Cover Corporation* [2007] SASC 55.

²⁸ See *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457; and *Douglas v Hello! Ltd (No 3)* [2005] EWCA Civ 595, [2006] QB 125.

²⁹ Case C-131/12 *Google Spain SL and Ors v Agencia Española de Protección de Datos and Ors* [2014] CJEU.

