A GLOBAL CONSTITUTIONAL DIALOGUE ON HUMAN RIGHTS CHALLENGES FOR THE JUDICIARY IN THE 21ST CENTURY

NINE CHALLENGES FOR CONTEMPORARY JUDGES*

Hon Michael Kirby AC CMG**

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** Justice of the High Court of Australia (1996-2009); President of the International Commission of Jurists (1995-98); Co-Chair of the International Bar Association's Human Rights Institute (2018 -).

I. KEEPING UP WITH RAPIDLY CHANGING TIMES

A conference convened on the 80th anniversary of the commencement of the Second World War inevitably draws attention to the huge changes that have occurred in the intervening years in every nation state and in the global judiciary. The war that unfolded after 1939 had a great impact on the entire world, not least on the British Empire and the judiciary that was a jewel in its crown. When the War came to an end, the huge loss of lives, the massive destruction of property, the effective termination of British imperialism and colonialism and the growing scepticism about national and international institutions altered the course of history beyond the expectation of most of the survivors. The end of war revelations of the Holocaust and the other crimes against humanity that shocked the conscience of mankind produced the optimism and determination that led to the creation of the United Nations, the adoption of its *Charter*, with its aspirations of universal justice and human rights; and a new dream of peace and security with economic advancement, that would bring better lives for all. However, overshadowing the end of the conflict in August 1945 were the nuclear explosions over Hiroshima and Nagasaki that commenced the atomic age. Soon afterwards, the Cold War, deep ideological divisions in the world and later existential challenges placed pressures on governments that far exceeded those of the pre-war age.

Despite the dangers and uncertainties of the world that followed the Second World War there were definite moments of hope and idealism. True to the aspirations of the *Charter*, the Allied victors in the War did not simply shoot the leaders of the Axis powers. Many of those leaders who had survived the War were put on trial at Nuremberg, Tokyo and in other smaller courtrooms. They faced charges of war crimes and the newly proclaimed international crimes of genocide and against humanity.¹ Such trials were imperfect.² But they were a most idealistic attempt to respond to the yearning of humanity to replace brutality and violence with law and death squads with transparent and reasoned justice as decided by judges.

In the midst of the War, the British and American leaders had met on the Atlantic and identified fundamental values amongst the Allied war aims. Not only were those values reflected in the language of the *Charter*, they eventually led to the adoption of the *Universal Declaration of Human Rights* (UDHR), voted into effect by the General Assembly of the United Nations on 10 December 1948. This instrument sought to express those features of the dignity of individual human beings that were inalienable and had to be respected by all nations and individuals, however powerful.³ The dismantlement of the British Empire was deftly turned into the granting of political independence and freedom to more than 50 nations previously subjected to British imperial rule. The jurisdiction of the Judicial Committee of the Privy Council in Whitehall shrank from being that of the mightiest international court ever created by human hand to power over a small assortment of remnants that, for the most part, voluntarily submitted to its rulings.

¹ PHILIPPE SANDS, *EAST WEST STREET: ON THE ORIGINS OF GENOCIDE AND CRIMES AGAINST HUMANITY* 327 (2016).

² John D. Heydon, *Japanese War Crimes, Retroactive Laws and Mr Justice Pal*, 85 *AUSTL. L. J.* 627 (2011).

³ Universal Declaration of Human Rights, G.A. Res. 217 (III), U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

Immediately following the War, and led by Britain, a Council of Europe was created. It gave birth eventually to the *European Convention on Human Rights* to which Britain was the first adherent.⁴ That Convention, and others in the Americas and in Africa, filled the serious gap in the UDHR. They provided regional commissions and later courts with jurisdiction to make binding rulings. This in turn, but separately, led to the European common market and later the European Union to which Britain for a time adhered. On the eve of the 80th anniversary of the Second Great War, the United Kingdom was struggling to extricate itself from the European solution to its post-war destiny. Brexit⁵ saw the United Kingdom seriously divided over its future. In that struggle it soon fell to the newly created Supreme Court of the United Kingdom to defend the process of legality in the political discussions that, at least potentially, endangered the continued membership of two component parts of the Kingdom that was looking decidedly Disunited.⁶

Three anniversaries in 2019 further reinforced the reminder of just how far the world and the judiciary have changed since the age of the British Empire. In October 2019 India and the wider world remembered the sesquicentenary of the birth in 1869 of M.K. Gandhi, later designated Mahatma ('Great Soul'). Born into a family of officials of provincial nobility, Gandhi was later admitted to the Bar in London. He became a herald of independence by non-violence, both in South Africa and India.

In April 2019, another anniversary in India was remembered: the massacre at Amritsar. This event represented the dark side of the British Empire. A thousand unarmed protestors were shot at close range by soldiers under British command. The killing shocked Gandhi and many others, convincing them that British subjects in India would have to fight for their independence. They would not receive it on a platter like the settler dominions, as an attribute of their ethnic heritage or nationality status.

In February 2019 a peaceful reminder of the other side of the British Empire was remembered. This was the centenary of the first publication of the *English and Empire Digest* (now named *The Digest*).⁷ That anniversary reminded lawyers at least of the continuing source that keeps on giving throughout the Commonwealth of Nations that has replaced the British Empire. This is the sharing of the work of thousands of judges and still more lawyers practising their profession throughout the English-speaking world. They have retained and continue to cultivate the basic ideal of the rule of law that is one of the most important continuing legacies of the earlier, darker imperial times.

The symbol of an independent judge, uncorrupted, learned in the law and diligent in resolving legal conflicts according to express rules is a feature that remains potent

⁴ MARCO DURANTI, *THE CONSERVATIVE HUMAN RIGHTS REVOLUTION* (2017).

⁵ Brexit, the withdrawal of the United Kingdom from membership of the European Union following a vote at a national referendum on 23 June 2016.

⁶ *R. (Miller) v. Prime Minister*, [2019] UKSC 41 (Eng.). The reference is to the potential loss of six Irish counties constituting the Province of Northern Ireland in the UK and the potential independence of Scotland and its possible application to re-join the European Union.

⁷ See Rt. Hon. Lady Arden of Heswall, DBE, PC, *Centenary Foreword in THE DIGEST: 100TH ANNIVERSARY (1919-2019) CENTENARY BOOKLET* 18 (Ravinder Rehsi ed. 2019); Hon. Michael Kirby AC, CMG *Centenary Reflections on the Global Digest of Law*, *id.* at 20.

in the 54 nations of the Commonwealth of Nations. Much else has changed. The foreign judges, installed in territories under palm and pine have now been replaced by local lawyers. Unlike Gandhi, they need access to Britain to learn their craft. The independent legal practitioner continues to appear, for the most part still with courage and skill, to contribute to the rule of law. They still play a central role in developing and extending the common law heritage. Academic lawyers play an ever increasing role in questioning, criticizing and stimulating the judiciary in every land of the common law. There are defects and failures evident in these legacies. Every judicial system is to some extent unique with different histories and different needs and opportunities. As well, great achievements have also made in countries that were never part of the British Empire, including by the judges of Brazil, present at this dialogue. However, to identify and explain the challenges of the judiciary in the contemporary world, it will be enough for me to do so by concentrating on the judiciaries of the United Kingdom and the Commonwealth for I know them best.

To understand the challenges to the judges of today, we need to be alive to the origins and traditions of our own judicial family. The judges in this family now share their reasoning and with others no longer subject to Privy Council orders through reports of continuing pages of *The Digest*; through the selected leading cases published in the *Law Reports of the Commonwealth*;⁸ and increasingly, through the freely available reportage of judicial reasons found on the internet.⁹ In a world in which so much has changed, therefore, some features continue to afford global links to permit the sharing of judicial experience, innovation and encouragement. The history of the English-speaking judiciary is a special story. Its record is not unblemished. However, even today judges of this tradition exchange ideas and experiences by addressing the universal challenges that judges face in today's world and by explaining and reasoning to their conclusions in a substantially common style and in a language that, with the law, constitute some of the most beneficial shared experiences of this judicial tradition. In a world of declining multilateralism, this is a link worth preserving.

II. PRESERVING JUDICIAL INTEGRITY

To defend the rule of law, to uphold universal human rights and to strive for justice, it is not sufficient for nations simply to provide institutions called “courts”, headed by officials called “judges”. It is essential that the persons so designated should have the qualities that make them worthy of that title and conscious of the best traditions of their forebears. This represents a further ongoing challenge to the judiciary in the 21st Century.

At the beginning of the twenty-first Century, a Judicial Integrity Group (JIG), comprising Chief Justices and other senior judges from many lands, adopted a set of principles, called in the *Bangalore Principles on Judicial Integrity*.¹⁰ Drawing

⁸ THE LAW REPORTS OF THE COMMONWEALTH (1975).

⁹ Online accessibility to statutory, judicial and other legal sources. See *infra*.

¹⁰ U.N. Office on Drugs and Crime (UNODC), *Commentary on the Bangalore Principles on Judicial Conduct* (September 2007), https://www.unodc.org/documents/nigeria/publications/Otherpublications/Commentry_on_the_Bangalore_Principles_of_Judicial_Conduct.pdf.

upon United Nations treaties and declarations as well as national codes of judicial conduct, these principles identified a number of essential qualities of a judge. These were adherence to the principles of: independence; impartiality; integrity; propriety; fidelity to the principles of equality; as well as competence, professionalism and diligence in the discharge of their duties. The *Bangalore Principles* were tested in a variety of jurisdictions that reflected differing legal traditions, particularly those of the common law and of the civil law approaches. They explained the essential features of judicial office that included professional training, competence and non-corruptibility.

The Judicial Integrity Group (JIG) which developed these *Bangalore Principles* emphasized that the judges, constitutionally speaking, were part of the government of any country. Normally they were not elected to office although different procedures were followed for the appointment of judges.¹¹ Traditionally, in most common law countries appointment was left to the Executive Government conforming to constitutional and statutory qualifications and procedures. Recently, in many newly independent countries, as an attempted defense against politicization of the judiciary new procedures have been adopted to safeguard the preservation of high qualities and standards on the part of judges.

Because of the constitutional importance of judges, strict rules and procedures need to be observed governing any removal of a judge from office. In many Commonwealth countries, these rules follow the British constitutional procedures, limiting removal of appointed judges to narrow grounds (proved incapacity or misconduct) and requiring the adoption of resolutions for that purpose by Parliament.¹² The important principle of respect and protection for the tenure of judges exists so that they are not susceptible to political interference or transient popular disapproval. The interposition of procedures for parliamentary removal, commonly subject to specified supermajorities, is a substantial protection for the tenure of judges and hence for their independence.

In the United States of America, impeachment and removal after trial in Congress follows, in substance, a rule established in the “Glorious Revolution” in England in 1688. However, in many jurisdictions tenure is less well protected. In some states, judges must submit to re-election in order to remain in office. In other states they may be subjected to procedures of electoral recall by popular vote. Such procedures constitute a challenge for judicial independence. Removals of judges are sometimes politically motivated, constituting retaliation against the conscientious and independent discharge of judicial authority.¹³ More commonly, however, interference in judicial independence has occurred by governmental conduct involving force, sometimes violence, false charges and brutal treatment.¹⁴

Apart from tenure of the judiciary, the rule of law requires obedience to judicial orders, including by the Government. It also requires procedures for complaint and

¹¹ Many States of the United States of America provide for the election of State judges and some for ‘recall’ of judges by popular vote. See Michael D. Kirby, *Attacks on Judges: A Universal Phenomenon*, 72 AUSTL. L.J. 599, 601-03 (1998).

¹² See e.g. *Australian Constitutions* 72(ii) (“proved incapacity or misconduct”).

¹³ Kirby, *supra* note 11.

¹⁴ As in the treatment of Venezuelan Judge Maria Lourdes Afuni and others. Int’l Comm’n of Jurists, *Mission on Venezuela*, (Oct. 29, 2014), <https://www.icj.org/wp-content/uploads/2015/05/Universal-ICJ-Annual-Report-Publications-Annual-Report-2015-ENG.pdf>.

discipline where these are provided by law. In many countries the judiciary is poorly paid and grossly overworked. In a number of countries, appointed judges have effectively been removed from office by the reconstitution of their courts or tribunals.¹⁵ Politicians, used to having their own way, sometimes embark on campaigns against judges who are not then easily able to defend themselves or their officers. In such cases, the support of colleagues in the global legal profession can be essential.

The activities of the International Commission of Jurists, Human Rights Watch, the Human Rights Institute of the International Bar Association and other bodies have been energetic in defending and seeking to protect judges, and also prosecutors and other independent lawyers, in the discharge of their duties. The very nature of the judicial office is that it is liable, virtually every day, to make decisions that disappoint at least some parties to the litigation. The numbers of governmental attacks on judges have increased in recent years. Instances in Venezuela, Turkey, Hungary and Poland spring to mind.

In India, a constitutional requirement for the government to “consult” with designated judges on appointments to be made to the Supreme Court of India and the high courts of the States has been interpreted to mean that governments must secure concurrence of the judiciary to appointments that the judges favour. Whilst this may not have been the initial intent of the constitutional requirement and whilst concurrence may have certain disadvantages, the virtual veto that this requirement imposes on political appointments of judges does restrain politicization of the judiciary and cronyism in appointments.¹⁶ However, it may result in the appointment of judges from an excessively narrow band of qualified lawyers who enjoy professional or political favor. Establishing and appointing a judiciary is only the first step in a rule of law society. The office-holders must fulfil and observe the essential requirements described in the *Bangalore Principles on Judicial Integrity*. New initiatives are now being considered to this end by United Nations agencies.¹⁷ These new initiatives are expanding and elaborating the *Bangalore Principles*, sometimes on a regional basis.¹⁸ The judiciary in every land should be aware of them and engaged with them.

III. PROTECTION OF HUMAN RIGHTS

Whereas the traditional view of the common law tradition of law was that the rights of individuals were best preserved by judicial decisions in contested cases (or by legislation as a secondary source of law) there were a number of statements of basic

¹⁵ Purported attempted reconstitution of the Polish Constitutional Court. See Press Release, European Commission, *Rule of Law: European Commission Acts to Defend Judicial Independence in Poland*, (Dec. 20, 2017) https://ec.europa.eu/commission/presscorner/detail/en/IP_17_5367.

¹⁶ *The Judges Cases* (Supreme Court of India). See GRANVILLE AUSTIN, WORKING A DEMOCRATIC CONSTITUTION: THE INDIAN EXPERIENCE 517-33 (2001).

¹⁷ For the UNODC and UNDP (United Nations Development Programme) initiatives on judicial integrity 2018 see https://www.unodc.org/documents/dohadeclaration/JI/infosheet/info_sheet_JI_EN.pdf.

¹⁸ The UNDP has initiated a regional network on judicial integrity for the ASEAN Region 2018.

guiding principles over the long course of English legal history. These included the promises of King John in *Magna Carta* (1215), regularly renewed thereafter by the English Parliament, and other statements of broad principles, including in the English *Bill of Rights* of 1688. The latter became a precedent which influenced the Bill of Rights appended to the United States Constitution as adopted by the American settlers after their successful revolution after 1776.¹⁹

The American attempt to express fundamental principles in a symbolic document was copied by France during the French Revolution at about the same time.²⁰ Later, as dominions and colonies of the British Crown secured political independence from Britain in the twentieth century, almost universally they adopted a statement of fundamental rights and values which were expressed in the national constitution providing for their political independence. These measures placed the selected basic rights beyond legislative or judicial contradiction.²¹ They bound the judges and it fell to them to interpret and apply these provisions.

Such statements of fundamental rights challenged the notion of parliamentary sovereignty in that they stated universal principles which the courts were required to interpret, define and enforce. They were to do so, in the face of legislative inaction, indifference or hostility.²² The consequence was that, in the years following Second World War, as new constitutions were adopted, judges had increasingly to assume the sometimes controversial tasks of giving effect to basic rights that were not necessarily popular with elected politicians and sometimes with other citizens. Generally speaking, legislatures, at least in countries observing effective democracy, can be counted upon to enact laws protective of the majority of the citizens. But many cases concerning human rights related to minorities, including unpopular minorities. These included indigenous people, women asserting their rights against patriarchal resistance; minority racial groups; prisoners; detainees and refugees; minority religious groups; and sexual minorities.

Inevitably, the judicial determination of cases in these areas occasionally led to resistance and attacks aimed at the judiciary. Even in countries which had enjoyed effective constitutional courts which had been respected by impartial observers, political viewpoints sometimes clashed with judicial rulings. In consequence, retaliation against judges whose rulings were unpopular led to various forms of retaliation. These included attempts to force the forced retirement or removal from office of judges whose opinions were unpopular with elected politicians or those of like mind.²³

A flashpoint of litigation of this kind concerned the implementation of treaties laying down human rights protections for a particularly unwelcome minority, such

¹⁹ The first ten amendments to the United States Constitution were added on Dec. 15, 1791.

²⁰ DÉCLARATION DES DROITS DE L'HOMME ET DU CITOYEN [Declaration of the Rights of Man and the Citizen], (Assemblée Nationale Constituante 1789) [National Constituent Assembly 1789] (Fr.).

²¹ Included in the Constitution of the Irish Free State (Eire) (Ireland), adopted 1922; and in the Constitution of India (1950).

²² See e.g. the successive decisions in *Naz Foundation v. Delhi*, (2009) 4 LRC 838 (Delhi HC) (India); *Koushal v. Naz Foundation* (2014) 2 LRC 555; 2014 SCC 1 (India); and *Johar v. Union of India* (2018) LRC (India).

²³ See Polish Constitutional Court. There have also been similar criticisms of developments in Hungary. Cf. writings of Professor Kim Lane Scheppele (Princeton University).

as migrants and refugee applicants. Even Australia, normally a country that has observed universal human rights requirements, introduced laws redefining the nation's "migration zone". It also introduced policies diverting would-be arrivals to specially unpleasant places of detention in other countries. Inferentially, these places were chosen to deter the flow of refugee applicants by making the conditions of detention inhospitable, unpleasant and sometimes unsafe.²⁴

Judges in national courts and international tribunals were sometimes attacked for their rulings on the human rights of various claimants. Prime Minister David Cameron of the United Kingdom was specially critical of a decision of the European Court of Human Rights concerning the entitlement of certain prisoners to enjoy the right to vote in national elections.²⁵ He declared that a decision of the European Court of Human Rights on that subject had induced in him a desire to "vomit". There were similar responses by politicians and media to the assertion of voting rights by prisoners in Canada²⁶ and Australia.²⁷

When, in the Australian case concerning the requirements of the Australian Constitution the judges in the majority made reference to the decisions on the same subject in Europe and in Canada, one judge voiced strong opposition.²⁸ He was not alone. Especially in the United States and Australia, judicial hostility to universal human rights has been frequently attacked by those who resist the notion that "human" or "universal" rights exist in any normative sense.²⁹ Perhaps the strongest resistance to the developing judicial use of universal human rights in local jurisdiction has arisen in the United States.

In June 2018, having lobbied successfully to be elected to the United Nations Human Rights Council, the United States opted to resign from membership. Subsequently, the U.S. Secretary of State, Mr Mike Pompeo, established an Executive Commission to redefine human rights according to "natural law" principles.³⁰ This initiative was particularly surprising given the instrumental role that had been played by the United States in the establishment of the post-

²⁴ As in cases brought in reliance on the Refugees Convention and Protocol referred to in the *Migration Act* 1958 (Cth) heard in the High Court of Australia. See e.g. *Plaintiff M681 v. Minister for Immigration* (2017) 257 CLR 42 (Austl.).

²⁵ *Hirst v. United Kingdom* (No 2) (2005) 42 Eur. Ct. H.R. 41. Mr Cameron threatened to ignore the ruling of the European Court of Human Rights. See Matthew Holehouse, *David Cameron: I Will Ignore Europe's Top Court on Prisoner Voting*, TELEGRAPH, Oct. 4, 2015.

²⁶ *Sauvé v. Canada* [1993] 2 S.C.R. 438; [2002] 3 S.C.R. 519, 585 [119]; 2002 S.C.C. 68 (Can.).

²⁷ See e.g. *Roach v. Electoral Commissioner* (2016) 233, CLR 162, 225 [181]-[182] (Austl.).

²⁸ See Hayne, J. in *Roach*, *supra* note 27, at [164].

²⁹ Michael D. Kirby, *International Law—The Impact on National Constitutions*, 21 AM. U. INT'L L. REV. 321, (2006), (Grotius Lecture 2005) (citing Scalia, J. (dissenting) in *Roper v. Simmons*, 543 U.S. 541 (2005)).

³⁰ Carol Giacomo, Editorial, *A New Trump Battleground: Defining Human Rights*, N.Y. TIMES June 17, 2019; Edward Wong & Eileen Sullivan, *New Human Rights Panel Raises Fears of a Narrowing US Advocacy*, N.Y. TIMES, July 8, 2019; Masha Gessen, *Mike Pompeo's Faith-Based Attempt to Narrowly Define Human Rights*, THE N. YORKER, July 15, 2019; Editorial, *Mike Pompeo's New Panel on Human Rights Is Unnecessary and Maybe Dangerous*, L.A. TIMES, July 12, 2019.

war UN human rights machinery.³¹ The selection of a committed advocate of religious (and specifically Christian) values, Professor Mary Ann Glendon, former U.S. Ambassador to the Vatican, appeared to indicate the direction that the U.S. Commission of “Unalienable” Rights was expected to take. The stated objective of Secretary Pompeo, also a fundamentalist Christian, was to return the notion of universal human rights in the United States to the concepts contained two centuries earlier in United States *Declaration of Independence*. That document asserts that “as human beings, we—all of us, every member of our human family—are endowed by our Creator with certain unalienable rights”.³²

A new assertiveness on the part of Faith organisations and religious believers in the United States and Australia appears likely to confront the judiciary in many lands with new challenges arising from the clash between protections claimed by other minorities and the new assertiveness of religious adherents.³³ A new level of animosity seems likely to rise. It will not be limited to Christian believers but will extend to conservative adherents to Islam, Hinduism, Orthodox Judaism and other beliefs. Decades of the largely consistent elaboration of fundamental human rights norms in the institutions, international national that followed 1945, will apparently have to rejoin battle in national and regional courts over the meaning of the universal principles as expressed in UN treaties and in the regional instruments of human rights. Judges will have to interpret such principles. They should do so against the background of the language and purposes of the UDHR.

IV. GLOBALISM, DEMOCRACY AND THE JUDICIARY

A connected challenge for the judiciary seems likely to arise from those who question the extent and existence of universal principles of human rights and whether each nation and community is entitled to define for itself the rights that it will accord to those living under its laws.

In the past, such issues have arisen before the judiciary in many communities with immigrants concerned over the issues of race. The UDHR declares in article 1 that “All persons are born free and equal in dignity and rights”.³⁴ However, serious inequality was exhibited in earlier times in many countries based on racial grounds. Thus, in the United States, until the basic principle was resolved by the civil war, a large minority in parts of that country lived in the legal status and condition of slavery. The judiciary provided no redress against slavery despite the memorable language of the *Declaration of Independence*. To secure these fundamental rights,

³¹ Mrs. Eleanor Roosevelt, widow of President F.D. Roosevelt, chaired the committee that drafted the UDHR. Calls for systemic improvement to the UDHR, especially the complaints mechanism, have been made within the UN system but without result. See Olivier de Frouville, *The Universal Declaration of Human Rights at 70: The Challenges that Await the UN*, Institut Universitaire de France, Apr. 16, 2019.

³² The language of the *Declaration of Independence* of the United States, 4 July 1776 cited by Secretary Pompeo.

³³ In Australia also there are many new advocates of “religious liberty” and the need for greater protection. See *Religious Freedom Bills 2019* (Cth) (Austl.).

³⁴ Universal Declaration of Human Rights. G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948), Art. 1.

it was necessary to resort to arms. Yet even when that conflict was decided, the advent of the gold rush in California produced legislation designed to terminate and reverse Chinese immigration.³⁵ This immigration legislation inspired equivalent measures in the Australian colonies of the time.³⁶ Occasionally, local judges provided temporary protection by insisting on the application to immigrants of different races the general principles of law that were not limited by reference to race.³⁷ In the United States, judges later sometimes gave protection to racial minorities under the “equal protection” principle of the constitution.³⁸ However, as the wartime decision in *Korematsu v. United States*³⁹ showed, the judiciary not infrequently failed to rise to the challenge of protecting a racial minority deemed unacceptable by politicians and the electorate.

In Australia, lacking any equal protection guarantee, relief from racial discrimination rarely came from the courts. However, because the British Empire contained millions of British subjects of non-Caucasian ethnicity, the officials in Whitehall were constantly seeking to discourage colonial legislatures from the worst forms of racial discrimination. Eventually, copying a precedent derived from California and Durban, South Africa, Australia introduced a “dictation test”. Although ostensibly racially neutral, the application to immigrants of an obligation to satisfy a dictation test in a “modern European language” became the means of enforcing the White Australia policy. That policy lasted in Australia until 1966. The judiciary could do little about it. For the most part, the policy was supported by most of the population. Racial discrimination towards migrants, and also towards indigenous peoples, survived into the current age. Eventually, the judiciary in South Africa proved incapable of stemming of tide of racial apartheid.⁴⁰ As in the United States, it eventually required an armed rebellion to finally lay that ghost to rest.

A most egregious instance of racial discrimination in Australia was the refusal to respect the rights to traditional lands of the Indigenous peoples.⁴¹ On the basis that they were “nomadic” and that the land was “terra nullius”, no treaty was negotiated in Australia to govern and redress the dispossession of Indigenous land and other rights.⁴² This approach was upheld in the courts for 150 years, until the decision of the High Court of Australia in 1992 in *Mabo v Queensland*

³⁵ *Chinese Migration Restriction Act 1855* (California). Marilyn Lake, *Colonial Australia and the Asia Pacific Region in* Vol 1 THE CAMBRIDGE HISTORY OF AUSTRALIA 542-43 (Alison Bashford & Stuart Macintyre eds., 2013).

³⁶ *Chinese Immigration Act 1855* (Vic); *Chinese Immigration Restriction and Regulation Act 1861* (NSW). See later *Immigration Restriction Act 1901* (Cth).

³⁷ Stephen Gageler, *A Tale of Two Ships: The MV Tampa and the SS Afghan* 40(3) ADELAIDE L. REV. 615 (2019).

³⁸ Equal Protection Clause, U.S. Const., amend. XIV §1 cl. 4 (1868); See, e.g. *Strauder v. West Virginia*, 100 U.S. 303 (1880) and *Shapiro v. Thomson*, 394 U.S. 618 (1969).

³⁹ *Korematsu v. United States*, 323 U.S. 214 (1944).

⁴⁰ Michael D. Kirby, *Australian Racism: The Story of Australia's First and Only Black Premier and Chief Justice—Sir Francis Villeneuve Smith*, NSW BAR NEWS 55, 56-57 (Summer 2019).

⁴¹ See *Harris v. Minister of the Interior* (SA), March 20, 1952, Decision of the Appellate Division of the Supreme Court of South Africa (Centlivres, C.J., declaring the *Separate Representation of Voters Act 1951* (South Africa) invalid).

⁴² *Cooper v Stuart* (1889) 14 App. Cas. 286 (JCPC).

[No.2]⁴³ in that case, six of the seven Justices of the Court upheld the challenge to such uncompensated dispossession of property interests. The court invoked a value which, it declared, was an attribute of all civilized countries, also given effect by universal human rights law.⁴⁴ Although that law was not, as such, part of the law of Australia until incorporated into the law the judges concluded that, by analogy, it should henceforth guide the understanding of the common law. In this way, Australia's significant injustice to the Indigenous people was corrected by unelected judges; not by elected legislators. Subsequently, enacted law gave force and effect to the court decision and it was extended by later determinations of the courts.⁴⁵

The extent to which universal or global principles of human rights exist and are taken into account by analogical reasoning of the judges in the definition of municipal law is a controversial question. In countries that have constitutional or statutory principles of human rights it is not unusual for reference to be made to the developing understanding of what those human rights provide.⁴⁶ In 1988, another and different set of *Bangalore Principles on the Domestic Application of International Human Rights Norms*,⁴⁷ was adopted by an international meeting of senior judges also convened in Bangalore. These *Bangalore Principles* declared that where there was a gap or an ambiguity in the law, regard could be had to universal human rights law to fill the gap or resolve the ambiguity. Attempts to extend this principle in the Australia have proved highly contentious.⁴⁸

However, I do not doubt that this principle will eventually gain universal acceptance. This is because of the functional need of all legal systems to reconcile human rights law and national law, i.e. the basic principles of international law with contemporary municipal legal systems.⁴⁹ It is not necessary or likely that global principles will govern all of the affairs of humanity. However, where universal human rights are concerned, the development of a large body of international, regional and national law affords a significantly uniform and consistent expression of the content of "human dignity" and the meaning of the basic norms that must be achieved if human rights are to apply to all human beings, without exception. Giving content to this important principle is another challenge for the judiciary in this century. It grows out of the new world legal order that arose at the end of World War II and in the face of the revelations of crimes against humanity and other international crimes that had accompanied that war. Judges need to be aware of the controversy and to play a constructive role in resolving it.

⁴³ (1992) 175 CLR 1.

⁴⁴ *Id.* at 42.

⁴⁵ See e.g. *Native Title Act* 1993 (Cth); *Cf. Wik Peoples v. Queensland* (1996) 187 CLR 1.

⁴⁶ E.g., *Devonshire County Council v. Times Newspapers Ltd.* [1992] QB 770 at 812-813 (CA). See also *Newcrest Mining (WA) Ltd. v. The Commonwealth* (1997) 190 CLR 513 at 657 (Kirby, J.); *Kartinyeri v. The Commonwealth* (1998) 195 CLR 337 at 418 [168] (Kirby, J.).

⁴⁷ See Michael D. Kirby, *The Judicial Application of International Human Rights Norms* 62 AUSTL. L.J. 514, 531-32 (1988) (The Bangalore Principles appear as an appendix entitled: *Report of Judicial Colloquium on the Domestic Application of International Human Rights Norms, Bangalore, India: Chairman's Concluding Statement*).

⁴⁸ See e.g. *Al Kateb v. Godwin* (2004), 219 CLR 562 (McHugh, J.); (*cf. Kirby, J.*, at 617-30 [152]-[192], *Roach* (2016) 233 CLR162 at 224-25 at [191] & nn. 181-82 (Heydon, J.).

⁴⁹ Kirby, *supra* note 47.

V. REFLECTION OF JUDICIAL VALUES

In earlier decades of the common law, it was commonly denied that judges had any discretion to give effect to basic legal values or to contribute to the resolution of uncertainties unless specifically granted that power by law. Thus it was believed that if judges faithfully observed the correct rules of interpretation and utilized the ordained techniques for finding and applying the applicable rules of law, there was no real ambiguity.

There had always been critics of this theory of the limited judicial role, particularly amongst advocates of a more realistic jurisprudence in Britain (like Jeremy Bentham), in the United States (Dean Roscoe Pound)⁵⁰ and in Australia (Professor Julius Stone).⁵¹ However, defenders of the traditional theory held influential positions in the judiciary and in politics. They declared that the law “would have lost its meaning” if there were not a pre-existing rule applicable to the case which could be found merely by applying the settled techniques to discover it.⁵² By the latter half of the twentieth century judges and scholars in increasing numbers were acknowledging the “leeways for choice”,⁵³ commonly available to the judge in deciding cases, especially non-routine cases, presenting to the higher appellate courts. This candour undermined the “fairy tale” view of the judicial role.⁵⁴ Yet, in its wake, it brought new challenges for the judiciary.

Members of the public, politicians, political scientists and some legal philosophers felt disquieted by too candid an acknowledgement of the creative features of the judicial role. How could this notion be reconciled with the non-political functions of the judge? How could it be consistent with the non-elected judiciary? How should it affect the writing of judicial reasons? How far should judges disclose the values that influenced their decision-making in interpreting ambiguities in a written constitution or enacted statute? Or in re-expressing for new circumstances rules of the common law developed in much earlier times and for significantly different factual circumstances?

There are still advocates of the former theory of judicial decision-making. However, most judges today accept the inescapable element of creativity inherent in the judicial role. Once such creativity is adequately acknowledged, it should encourage increased attention to the backgrounds, experience and values of appointees to judicial office. It should also open up scrutiny of judicial reasoning that goes beyond viewing the role as a purely technical or mechanical one. The greater willingness to examine judicial outcomes and reasons imposes higher

⁵⁰ Dean Roscoe Pound, Address to the American Bar Association Convention 1906, reproduced as *The Causes of Popular Dissatisfaction at the Administration of Justice*, 46 J. AMERICAN JUDICATURE SOC’Y, 55 (1962).

⁵¹ JULIUS STONE, PROVINCE AND FUNCTION OF LAW (1946) & JULIUS STONE, SOCIAL DIMENSIONS OF LAW & JUSTICE 649, (Hand, Maitland, Sydney, 1965) (referring to K.N. Llewellyn’s theory).

⁵² Justice Owen Dixon, *Concerning the Judicial Method in JESTING PILATE* (1965 ed., 155) (2019 ed. 112), cited in Michael D. Kirby, *The Judges*, Boyer Lectures 37 (1983).

⁵³ Llewellyn’s phrase. See Stone *supra* note 51.

⁵⁴ Lord Reid, *The Judge as Lawmaker* 12 J. PUB. TEACHERS OF LAW 22(1972). See also JOE MCINTYRE, THE JUDICIAL FUNCTION— FUNDAMENTAL PRINCIPLES OF CONTEMPORARY JUDGING 85 (2019).

burdens on judges; but also on those who appoint them and are served by them.

To the extent that judges are appointed from particular universities, from elite social backgrounds or education in private or religious schools and come from a narrow or privileged experience in the law, this will inescapably affect their decisions. It does not mean that judges who do not acknowledge such considerations are necessarily dishonest or devious. But it does carry lessons for politicians who rightly play a significant part in the nomination of judges concerning the varied qualities that they should seek out in making such appointments.

Some such qualities (like gender) are plain enough. So may be the needs of geographical and educational background. The under-representation of minority racial groups is another matter that needs correction. No one suggests that the judiciary must match exactly the proportions of gays, peoples with disabilities, agnostics or Sikhs in the community. However, given the wide range of decisions that must be made by the judiciary and the general acceptance that values can inescapably affect some decisional outcomes, it is desirable that there should be more attention to diversity in the judiciary. This should affect the procedures and outcomes in judicial selection. It seems likely that those considerations will affect the process of judicial recruitment and appointment.

VI. TECHNOLOGY AND TRANSPARENCY

One of the greatest changes that has occurred, affecting the judiciary and legal practice in recent years, is the accessibility of judges and other members of the legal profession to legal data. In part, this has come about because of developments in new information technology. Just a few decades ago, it was often extremely difficult and sometimes expensive or even effectively impossible to be sure that even a conscientious lawyer had access to the accurate current state of statute law and the most up to date judicial decisions relevant to the case in hand. If practitioners did not have such access they were not always able to fully assist the judicial decision-maker in the case. In a federal country, where there are sub-national jurisdictions with laws concurrently applicable to individuals living in the same place, the need for up-to-dateness became specially urgent.

In 1995, a number of Australian legal academics⁵⁵ developed the AustLii automated information system. To do so required not only a thorough understanding of, and access to, legal source material. It also necessitated skills in the development and use of legal information technology and powers of persuasion to secure the cooperation of legislatures, courts, universities and legal institutions. What began as an automated system for instantaneous access to statutory and case materials in Australasia quickly developed into the legal informational institute system that has spread to Britain and Ireland (BAILII); India (LII of India); the Pacific Islands (PacLII); Southern and Eastern African Legal Information Institute (SAFLII); New Zealand (NZLII); Hong Kong (HKLII) and Cyprus (Cylaw).

These developments have afforded great benefits to judges and lawyers which are only just beginning to be felt. However, they also indicate the likelihood of new questions that will have to be addressed by the judiciary in the future:

⁵⁵ Professor Graham Greenleaf (UNSW); Professor Andrew Mowbray (UTS) and Professor Philip Chung (UNSW).

- * Whether live proceedings and recordings of trial and appellate courts should be permitted;
- * Whether selectivity of court coverage on the internet should be required;
- * Whether coverage and recording of final court arguments should be facilitated;⁵⁶
- * Whether the appointment of professional media intermediaries (even judicial rapporteurs) should be provided to facilitate reportage and the understanding of judicial work;
- * Whether, and if so to what extent, judges should be encouraged/discouraged from using social media to communicate insights into their lives and values. Or whether this would undermine public confidence which may still thirst for judges whose values and attitudes are treated as immaterial or non-existent.

Information technology has opened up access to traditional textual outcomes (published reasons) of judicial work. Doing so simply suggests further ways in which modern technology can enhance contact with, and understanding of, judges and their role in the courts and in society. Not a few practitioners have concern that the previous traditional remoteness and mystique of judicial office handily covered a multitude of personal imperfections and institutional peculiarities. With greater transparency will come new problems; but probably also enlarged expectations and demands.

VII. ARTIFICIAL INTELLIGENCE AND THE WILL TO JUSTICE

Judges work within an institutional setting whose methodology and expectations were substantially fashioned in much earlier times. In all countries the imperfections of litigation practice have led to demands for rapid modernization and improvement. The Civil Justice Council⁵⁷ was established in the United Kingdom to oversee and modernise the civil justice system in England and Wales. This has led to courts confronting a basic flaw in all judicial systems, but particularly in those that follow the common law model. Whereas in civil law countries, some portion of fact gathering and finding is commonly undertaken by the judicial officer, the ideal of the common law is for the gathering of evidence to be left to independent advocates operating in front of a decision-maker neutral as between the parties and conducting a trial that follows the continuous oral tradition, now increasingly broken up into pre-trial hearings.

⁵⁶ This is not permitted in the U.S. Supreme Court although recordings of oral argument are retained and may later be released. Filming of argument is available in the Supreme Court of Canada and was permitted in live time by the Supreme Court of the United Kingdom in October 2019. Filming is only permitted in the High Court of Australia on ceremonial occasions, although internal filmed records of argument are retained and written transcripts of argument are published.

⁵⁷ Established under the *Civil Procedure Act* 1997 (U.K.). Cf. K.M. Hayne, *The Australian Judicial System: Causes for Dissatisfaction*, 92 AUSTL. L. J. 32, 42 (2018).

In 1988 a distinguished German judge told an Australian legal audience, that the common law system was the *Rolls Royce* standard of judging in comparison with the *Volkswagen* system that operates in Germany. However, he asked how many citizens could afford these respective models. It is this distinction that identifies a major flaw in common law judicial procedure. This is the cost and delay of securing justice. This is problem enough at the trial level but greatly increased if there are subsequent appeals. In these circumstances, as every lawyer knows, many (probably most) civil disputes have to be over very large amounts or issues to warrant the costs and delays of litigation. Criminal trials will often be unavoidable; although these too may be rendered more efficient by appropriate plea bargaining and control of the issues. In the hope of providing greater access to justice than would otherwise be available, methods of online dispute resolution have recently been developed for low value civil claims.⁵⁸ Tier 1 provides online evaluation of a grievance. Tier 2 provides online facilitation of negotiated settlements. Tier 3 provides judges to decide cases, or parts of cases, on material supplied electronically by the parties. Critics may complain that this is ‘justice on the cheap’, providing imperfect access to law and justice for poorer people. But if the alternative is no access to justice at all the modification will often be justified.

Many governmental functions are now being performed by forms of artificial intelligence. Migration decisions that until quite recently were made by experienced officers at the border are now made by the instantaneous scrutiny of electronic travel documents. Likewise taxation decisions, including the accumulation of computer sources of income and expenses, can utilize efficient and speedy assessments. This would not be possible by purely manual examination of paper documents as in the past.

A major challenge to the efficiency of the judicial system has led to many experiments aimed at tackling the dual problems of costs and delay. These include (1) imposition of limitations on pretrial procedures involving great cost but marginal utility as to outcomes;⁵⁹ (2) provision for controls over expert evidence;⁶⁰ (3) introduction of costs and sanctions against the running up of costs;⁶¹ (4) use of delegation to deputy judges whilst avoiding delegation of full decision-making to clerks;⁶² (5) imposition of control over the process of arbitration and alternative dispute resolution;⁶³ (6) introduction on limits on the reservation of judgment and encouraging the writing of shorter judicial opinion;⁶⁴ and (7) overcoming the mentality of “no stone left unturned” that adds greatly to the cost and delay of legal process.⁶⁵

Of course, we have not yet witnessed the development of machines with a will to do justice or a sensitivity to respond to every complex human rights challenge. To that extent, human decision-making must survive. However, reserving the judicial role to circumstances where it is best deployed or indispensable is likely to be a major challenge for judicial administration in the decades ahead.

⁵⁸ Wolfgang Zeidler, *Australian and German Court Procedures*, 55 AUSTL. L.J. 390 (1981).

⁵⁹ Hayne, *supra* note 57, at 34.

⁶⁰ *Id.* at 35.

⁶¹ *Id.* at 36.

⁶² *Id.* at 38-39.

⁶³ *Id.* at 40-41.

⁶⁴ *Id.* at 43-44.

⁶⁵ *Id.* at 46-47.

No matter how dedicated and gifted contemporary judges may be, the complexity and dimension of many of today's social problems are such that judges cannot tackle them because their processes are too costly and slow. They are therefore frequently confined to smaller and more manageable wrongs. The judiciary's largest challenges today grow out of existential changes in human society, including huge movements of populations; endemic global poverty; climate change and its impacts; and religious, political and racial extremism. In such matters the modern judge may sometimes have a vital role to play. A willingness to innovate and see local problems in the context of large international challenges is an increasing challenge for contemporary judges.⁶⁶

VIII. GLOBAL PANDEMICS AND MULTILATERALISM

By chance, in the past 40 years, I have become involved two global pandemics. Each of them has quickly demonstrated the inescapable necessity of multilateral engagement. The nature of a pandemic caused by a virus is that it rapidly moves beyond the national borders of the territory in which it first manifested itself. In large part, this is a result of modern means of rapid human movement, particularly air travel.

Such was the case with the Human Immunodeficiency Virus (HIV) that causes Acquired Immunodeficiency Syndrome (AIDS). Very soon after that virus first appeared in Central Africa, it was too late for attempts to block its spread by the traditional response of quarantine and strict physical isolation. There was just insufficient barbed wire on earth to confine the infected and to prevent HIV from spreading, especially by planes, first to North America, then to Europe and Australasia and finally worldwide. With admirable speed, the World Health Organization (WHO) created the Global Program on AIDS (GPA). It established the Global Commission on AIDS, to which I was appointed. The success of global cooperation through WHO and later the Joint UN program, UNAIDS, came to depend less on the criminal law of punishment or the health law of quarantine than on removal of penal laws and engagement with vulnerable groups at risk of infection and of spreading the virus.

This experience with HIV taught judges, lawyers and even epidemiologists the paradoxical lesson that sometimes effective action relies more on *abolition* of oppressive laws (and thus engaging with those at risk) than on enacting new strict rules.⁶⁷ Modification of intellectual property laws to make antiretroviral therapy (ART) available more cheaply to the infected became vital.⁶⁸ Trying to persuade

⁶⁶ Michael D. Kirby, *Environmental and Planning Law in the Age of Human Rights and Climate Change*, 36 ENVTL. PLANNING L. J. 181 (2019) referring to *Gloucester Resources Ltd v. Minister for Planning* [2019] NSWLEC 7 [530]-[540] (Preston, C.J.) (involving reference in a NSW planning decision to the *Framework Convention on Climate Change*, Paris, 2015).

⁶⁷ United Nations Development Programme, *Global Commission on HIV and the Law, Risks, Rights and Health* (July 2012) 26-59. JONATHAN D. QUICK, *THE END OF EPIDEMICS – THE LOOMING THREAT TO HUMANITY AND HOW TO STOP IT* (2018).

⁶⁸ United Nations, *Report of the Secretary-General's High-Level Panel on Access to Medicines, Promoting Innovation and Access to Health Technologies* 21-27. (Sept. 2016).

recalcitrant nations to repeal punitive laws against homosexuals, sex workers and drug users turned congenial past approaches on their head. Such changes could not be achieved unilaterally. They required multilateral cooperation and United Nations leadership.⁶⁹

The same lessons were presented to the world soon after the dialogue in Birmingham that gave rise to the lecture on which this article is based. I refer to the outbreak of the novel coronavirus pandemic, reportedly first detected in Wuhan, China, in November 2019.⁷⁰ At first, China responded with denial and then the traditional remedy of lockdown and quarantine. It notified WHO fairly quickly on the last day of 2019. WHO quickly alerted the international community. The Chinese scientists were encouraged to share the genetic sequence of the new virus which they did by 12 January 2020.⁷¹ Immediately a scientific test was developed to identify exposure of humans to the causative agent. By 22 January 2020 in accordance with international regulations a WHO emergency committee was convened. Daily briefings were given to the increasingly alarmed international community.

Although these steps were relatively swift by the standards of a huge global agency, a side issue intervened. President Donald Trump on 14 April 2020 accused China and WHO of serious mismanagement and “covering up of the spread of the coronavirus”.⁷² He announced a termination of United States funding to WHO. This was criticized by scientists as counterproductive. At the World Health Assembly (WHA), Australia moved the establishment of an “independent internal inquiry into the genesis of COVID-19”, the name by which the virus was by now known. Such an investigation was eventually created unanimously by WHA and is now proceeding.⁷³

Within six months of first engagement, WHO, and the world, were dealing with a pandemic presenting in 188 countries, leading to more than 350,000 deaths, with more than 100,000 deaths in the United States and 37,000 deaths in the United Kingdom. Australia, which followed more closely cautious public health guidance suffered only approximately 100 deaths. This demonstrated that combined national and multilateral responses are vital in the present world for effective control of global pandemics and challenges of a similar kind. The notion that such a challenge could be adequately and effectively controlled by laws and policies of individual nations, however powerful, is contradicted by what COVID-19 has demonstrated to the world. No country is an island, whatever geography might say. If the United Nations did not exist, it would have to be invented for problems like COVID-19.

⁶⁹ Commonwealth of Nations, Eminent Persons Group, *Commonwealth of the People: Time for Urgent Reform*, London, 2011

⁷⁰ *South China Morning Post* (March 11, 2020) reporting an unverified case in Wuhan in November 2019.

⁷¹ On Chinese sharing of the genetic sequence of COVID-19 see WHO Novel Coronavirus-China, *WHO Archived* from the original on 2 March 2020. Retrieved 9 April 2020.

⁷² Daniel Victor & Christine Hauser, *What the W.H.O. Does and How U.S. Funding Cuts Could Affect It*, N.Y. TIMES, <https://www.nytimes.com/2020/04/12/health/who-world-health-organization-coronavirus.html>.

⁷³ Anthony Zwi, *The WHO Coronavirus Inquiry Will Be More Diplomatic than Decisive. But Australia Should Step up in the Meantime, The Conversation* <https://theconversation.com/the-whos-coronavirus-inquiry-will-be-more-diplomatic-than-decisive-but-australia-should-step-up-in-the-meantime-139030> (last visited June 3, 2020).

If international law and UN agencies were lacking, the need for them would very soon be felt. This is the world in which national judges and lawyers of today must operate. Blindly asserting unilateralism, and raising political diversions are bound to fail. This is just the nature of the earth that we now inhabit. Politicians, judges, lawyers and citizens must recognize and act on these realities.

IX. ADAPTING TO CHANGE

Only a decade ago, most judges and lawyers would have agreed with the suggestion of President Obama that the world was on a journey to enlightenment and that its trajectory leads towards the achievement of universal human rights and social progress. Now, in consequence of the contemporary challenges to multilateralism, increases in autocratic government; the rise of racism; and challenges to liberalism, we can no longer be sure that judges of the future will enjoy the optimism, self-assurance and confidence even of the judges of the recent past.

Nevertheless, institutions and laws are often in place to rescue humanity from unhappy outcomes. Dedicated and highly trained judges who are uncorrupted continue to perform their vital functions in preserving the means to decide serious conflicts in society by peaceful, rational and non-violent means. They do so by bringing people every day to justice according to law; by upholding legal provisions protecting universal human rights; and by reaching for the ideals of judicial integrity, transparency, professionalism, efficiency and appropriate accountability to the people whom the judges serve.

There is no room for complacency about the role of the judge in the present world. Yet at least in the countries that trace their legal system to the judiciary of England we have almost a millennium of experience and many fine examples to draw upon. Change is the challenge. Continuity is sometimes wise. Universal human rights and social progress provide the right path. Globalism is increasingly our context. The arc of the moral universe is long; but it still bends in the direction of justice.⁷⁴ Part of the credit for this belongs to the judges.

⁷⁴ Senator Barack Obama, Speech at Grant Park, Chicago on the occasion of his election as President of the United States of America, WASH. POST, Nov. 5, 2008. The text was borrowed from Martin Luther King Jr, in turn adapting a sermon of Rev. Theodore Parker (1853).