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THE INTERNATIONALIZATION OF DOMESTIC LAW AND ITS CONSEQUENCES

American Bar Association
Section of International Law

Banco Court, Supreme Court of New South Wales,
Sydney
9 February 2010.

PUBLIC CONVERSATION BETWEEN THE HON.
JUSTICE ANTONIN SCALIA, ASSOCIATE JUSTICE OF
THE SUPREME COURT OF THE UNITED STATES OF
AMERICA AND THE HON. MICHAEL KIRBY

The Hon. Michael Kirby AC CMG

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THE HON. MICHAEL KIRBY AC CMG

THE AMERICAN REVOLUTION AND ITS CONSEQUENCES

I welcome Justice Scalia and the other American lawyers present to this court room. It is here, with Chief Justice Gleeson, our chairman, and other judges and lawyers that I served as a judge before my appointment to the High Court of Australia in 1996. In courtrooms like this, throughout Australia, the rule of law is upheld and basic rights protected. It is a good experience to be back in this seat.

The establishment of the colony of New South Wales was itself a direct outcome of the American Revolution of 1776. The effects of that momentous event were felt on the far side of the world. When they lost the American settlements, the British authorities needed somewhere to transport their convicted felons. Various options were considered: West Africa (too many mosquitoes) and South America (too dangerous). The reports of the great navigator, Captain James Cook, were then

remembered and so the Australian penal colony began. With the convicts and soldiers came the common law of England. This courtroom, like courtrooms throughout the United States, follows the common law tradition. By that tradition, the judges, developing and adapting earlier precedents, have a large part to play in the declaration and evolution of the common law and basic legal doctrine.

We are surrounded here by the portraits of the successive chief justices of New South Wales. They date back to the early colony. The first of them is that of Sir Francis Forbes. He had been born in 1784 in Bermuda, just eight years after the events of 1776. He was educated in England and returned to the Americas in 1816 as Chief Justice of Newfoundland. In 1822, he was appointed the first Chief Justice of the new Supreme Court of New South Wales which was to replace the early tribunals of convict days. This Supreme Court began operations in 1823 with the *Charter of Justice*. Forbes was an outstanding chief justice. He served until 1837. He was strong and independent and a fine example to his successors.

The British learned from the loss of their American colonies. Thereafter, as in Australia, they encouraged notions of self-government in settler communities. They fostered and defended independent courts. Australia's legal history was one of evolution, not revolution. Our courts were supervised by the Privy Council. This supervision linked us to one of the great world legal systems. Reading decisions in appeals from colonies all over the world, Australian lawyers became (as Commonwealth lawyers generally are) knowledgeable about comparative law. Our minds did not dwell exclusively in our own country. We became aware of the worldwide system of law of the

Empire and Commonwealth, with later acquaintance with the decisions of courts of the United States and other lands. By the revolution, the United States cut itself off from this global interaction.

I have always thought that this severance was a reason for the comparative isolation of American legal thinking. Save for occasional references to Blackstone's *Commentaries on the Laws of England* and English judicial decisions, particularly before the 19th century, the United States lawyer was typically kept busy by examining the decisions in the many jurisdictions back home. In Australia, our legal imagination was constantly stimulated by reading the reasons of judges in other common law countries. This is an approach that comes naturally to us. It extends to every branch of the law.

In the new global report series, *The Law Reports of the Commonwealth* (published by LexisNexus, London), the case reports contain constitutional and other decisions written in the English language in the fifty-three nations of the Commonwealth. There one can find important decisions on each member nation's constitutional doctrines. We do not hesitate to reach for insights and analogies written in the courts of other Commonwealth nations. Thus, a recent volume includes a report on the sensitive issue of apostasy in Malaysia¹; court jurisdiction in Ghana²; and the law of mandatory punishment for rape in Botswana³. All of these contain references to court decisions in Britain and other countries of the Commonwealth as well as to decisions in the United States, invoked for use by analogy and logical reasoning.

¹ *Joy v Federal Territory Islamic Council* [2009] 1 LRC 1 (Fed Court Malaysia).

² *Republic v High Court of Accra; Ex parte Commission on Human Rights* [2009] 1 LRC 44 (SC Ghana).

³ *State v Matlho* [2009] 1 LRC 133 (CA Botswana).

It is important to start our dialogue today by calling attention to this difference in attitude to global legal culture. When judges and lawyers within our legal culture read Justice Scalia's dismissal of the discussion of foreign legal authorities as "meaningless dicta" and his observations that the court "should not impose foreign moods, fads or fashions on Americans"⁴, their first response is usually one of puzzled astonishment. Yet Justice Scalia's approach is by no means confined in the United States to his opinions. That is why we are here to explore the questions of principle raised by his observations.

HELP FROM AMERICAN HUMAN RIGHTS EXPERIENCE

Australia is currently considering whether it will end its isolation, as virtually the only developed western country not to have a general human rights instrument. The issue, subject to a national consultation, is whether Australia should introduce a charter of rights and responsibilities (the "Charter"), such as has now occurred in the State of Victoria and the Australian Capital Territory. A federal commission of enquiry (chaired by Professor Frank Brennan) recommended that this should be done. One question posed for us in this session is whether the United States judicial experience with the *Bill of Rights* affords any guidance for Australia in this local dialogue.

The immediate answer is that guidance there would be but it would be limited. In the United States, both federal and state bills of rights have a constitutional provenance. This means that United States case law and experience will be of little immediate relevance to the Australian proposal:

⁴ *Lawrence v Texas* 539 US 558 at 598 (2003) citing *Foster v Florida* 537 US 990 (2009). See Lord Bingham, Hamlyn Lectures 2009, "Foreign Moods, Fads or Fashions" (Tspt. Lecture 2, ms4).

- * The Australian federal government has made it clear that no constitutional bill of rights is on the agenda. The terms of reference of the Brennan enquiry excluded that possibility, unsurprisingly, therefore, the Brennan committee made no recommendation on it. The prospect of Australian judges striking down legislation on the basis of a human rights instrument can thus be put out of consideration. In this country, it is not going to happen any time soon; and
- * The option which is advanced by the Brennan enquiry is, effectively, that lately adopted in the Capital Territory and Victoria. In turn, it is copied there from the legislation adopted in the United Kingdom⁵ and in New Zealand⁶. This involved a much more limited participation by the courts in upholding human rights standards.

Nevertheless this Charter model still involves a number of useful consequences:

- * It gives ordinary citizens an opportunity to approach the independent courts to consider and decide human rights grievances;
- * Potentially, it activates the democratic process by calling infractions to the notice of the legislature;
- * It enlivens specific political debate over proposals for laws “notwithstanding” their departure from Charter standards. This is what has happened recently in Victoria in a proposed new “stop and search” power for police. The Minister had to certify derogation from the requirements of the Charter. Naturally, this

⁵ *Human Rights Act 1998 (UK).*

⁶ *Bill of Rights Act 1990 (NZ).*

action enlivened a vigorous political debate, as it was intended to do;

- * It envisages that courts would be enjoined to interpret legislation in line with the provisions of the Charter. If compatible interpretation were not possible because of intractable language of the challenged law, the most that the courts could do would be to provide a declaration to that effect. The expectation then would be that the legislature would give consideration to the suggested disharmony between the law or practice complained of and the Charter provision; and
- * It might require a certificate from the relevant Minister when proposing legislation to parliament which involves departure from the standards of the Charter.

All of this is a much softer option than constitutional invalidation of laws as in the United States. Yet it is still useful.

Justice Scalia, as a champion of electoral democracy, would doubtless support these proposals. The powers they give judges are restricted and closely confined. Their object is to stimulate political attention to uncomfortable challenges to complacent legislative power. As I read Justice Scalia's opinions, they are directed to returning judges to modest functions and self-conceptions in human rights litigation. The Brennan proposals offer no more than that. They promote democratic solutions to problems rather than judicial ones. This too is a purpose of the proposals.

If the Brennan proposals are rejected, despite their undoubted modesty, this will leave Australia completely out of step with the rest of the world.

I have never read Justice Scalia to express regret over the existence of the *Bill of Rights* in the United States Constitution. He has never proposed its repeal. But as he has repeatedly said, it is not a full human rights charter. It is (with *Magna Carta* and the *English Bill of Rights of 1688* and the *French Declaration of the Rights of Man and of the Citizen of 1789*) the oldest such measure in the world. The American *Bill of Rights* has been operating continuously since 1791. It is confined to particular aspects of civil and political rights and then only to limited attributes. There is no present prospect that this confined measure will be adopted in Australia. It follows that American case law and experience on their constitutional provisions are of limited relevance to us.

In three particular respects, however, the United States judicial decisions may be of relevance to our Australian debates:

- * First, the fact that American judges have been engaged with such basic concepts of rights for 220 years shows that it is neither alien to the judiciary of our shared legal tradition, nor likely to be beyond the capacity of Australian judges, confronted with the provisions of a Charter, limited as I have explained. There may, of course, be criticisms of particular decisions under the US *Bill of Rights*. Some decisions have attracted virtually universal condemnation⁷. Other decisions have attracted mixed reviews⁸. But United States lawyers usually see the *Bill of Rights* as an integral part of their constitutional freedoms. They recognise that it places necessary checks on unbridled popular democracy. Normally, they find it hard to imagine a civilised legal system that lacks such checks;

⁷ Eg, *Korematsu v United States* 323 US 214 (1944), which Justice Scalia has himself condemned.

⁸ Such as *Lawrence v Texas* (above) and various abortion decisions starting with *Roe v Wade* 410 US 113 (1973).

- * The existence of such measures also has a silent operation that can be easily overlooked. It was mentioned at a recent seminar on statutory interpretation held in Melbourne, addressed by Parliamentary Counsel of Victoria (Ms. Gemma Varley). She emphasised the fact that the enactment of the Charter had introduced official practices in Victoria that are defensive of fundamental rights, without any involvement of the courts. Laws are now drafted in that State to comply with the Charter and to call possible derogations to notice; and
- * Most importantly, the existence of a Charter assists in the education of the community, including school children, so that they come to know that they *have* civic rights and responsibilities, something that can be achieved in the United States by reference to the *Bill of Rights*. A recent Australian text on comparative human rights law identifies the problem. Dr. Paula Gerber of Monash Law School conducted research to compare the knowledge of young people in Victoria and Massachusetts about basic civil rights. The existence of the *Bill of Rights* was evident in the responses to the survey by the Massachusetts' students. They proved generally familiar with rights discourse in terms of the somewhat dated list contained in their national and state Constitutions. On the other hand, Australian school children emerged as much less familiar with the conceptions of fundamental rights and with the content of such rights for their citizenship. Dr. Gerber pronounced her findings "depressing"⁹. In this respect, the American experience is a source of important instruction.

⁹ Paula Gerber, *From Convention to Classroom: The Long Road to Human Rights Education: Measuring States' Compliance with International Law Obligations Mandating Human Rights Education* (VDM Velag, Germany, 2008). See review (2009) 83 *Australian Law Journal* 849 at 850.

USE OF FOREIGN PRECEDENTS

The next, and more controversial question presented for debate, is whether “international precedent and experience” may inform decisions of judges in national courts, especially on constitutional questions and human rights issues. It is important to note here the distinction between the role of such material as “precedent” and its role as background material on the “experience” of foreign countries.

When asked during his confirmation proceedings about the use of foreign jurisprudence in Supreme Court opinions, Chief Justice Roberts gave what, at the time, I thought to be a very intelligent answer, deflecting the controversy. Such materials should not be cited, he said, as “precedent”. This appeared to satisfy his questioners.

Yet no-one that I know believes that international law or trans-national decisions should be used as a “precedent”, in the sense of binding decisional authority. No national court, least of all a final national court, is bound by the decisions of foreign judges. In Australia, the abolition of the last appeals to the Judicial Committee of the Privy Council in 1986 meant that, here too, Australian courts have the last say¹⁰. But can such decisions, and the reasoning contained within them, be cited in domestic judicial opinions? Can they be even looked at? This is where I part company from Justice Scalia. He is totally opposed to the citation of such opinions. He made this absolutely clear in his reasoning in *Atkins v Virginia*¹¹, *Lawrence v Texas*¹² and *Roper v Simmons*¹³. In *Roper*, he said:

¹⁰ *Australia Acts* 1986 (UK and Aust).

¹¹ 536 US 304, 347-48 (2002).

¹² 539 US 558-586 (2003).

“[T]he basic premise of the Court’s argument – that American law should conform to the laws of the rest of the world – ought to be rejected out of hand.”

If anything, in *Lawrence*, Justice Scalia was even more emphatic¹⁴. He dismissed the majority’s discussion of foreign legal developments and authority in that constitutional challenge to criminal laws addressed to the criminal liability of homosexuals. He described the foreign judicial opinions as “meaningless dicta”. He ruled that the Court “should not impose foreign moods, fads or fashions on Americans”¹⁵. This became one theme of Lord Bingham’s Hamlyn Lectures in England in 2009 (“Foreign Moods, Fads or Fashions”, m.s. p.4-5).

Justice Scalia deploys a number of arguments to support this view. They include:

- (1) That a national constitution is a special national law, reflecting national history, culture and values. It should not be influenced by the opinions of foreign judges who will generally be unaware of, and insensitive to, national considerations;
- (2) Such opinions are counter-majoritarian in nature. They are written by judges who are in no way part of the national judiciary. They are not accountable to the national electorate for their offices. Reaching for their opinions aggrandises local judges and may push them into undemocratic and alien directions;
- (3) International law and human rights principles are generally expressed in very broad and vague terms, potentially meaning all things to all people. They lack the clarity and specificity of national

¹³ 543 US 551 (2005).

¹⁴ 539 US 558.

¹⁵ *Lawrence* 539 US 558 at 598 (2003), citing *Foster v Florida* 537 US 990 (2002).

legal developments. They should not pollute the local stream of binding national law;

- (4) In choosing foreign authority, judges can generally find something to support every proposition. They can be too easily tempted to look for views that confirm their own prejudices rather than disciplining their minds in a properly lawyerly way; and
- (5) Above all, for Justice Scalia, such citation is totally contrary to the basic principles of constitutional elaboration that he favours. This is 'originalist'. Only by going back to the meaning of the national constitution at the time of its making can a single, objective and principled interpretation be adopted by the judiciary.

There are many difficulties with these propositions, although they do indicate the care that is needed in any use of foreign authority in national constitutional decisions:

- 1) In today's world, national constitutions speak to other nations about one's own local values¹⁶. The United States Constitution, in particular, has been profoundly influential in the constitutional development of other countries, including Australia. There is now a global constitutional discourse, including amongst judges. Why should they have to reinvent every doctrinal wheel when they can have access to the thinking and reasoning of very clever judges in other lands to help, by analogy, in their own judicial reasoning?
- 2) Democracy is truly a precious feature of modern constitutions, including those of the United States and Australia. But understanding democracy's demands can be made easier by reading what foreign courts have said in analogous circumstances. Naturally, it is essential to make all due allowance for any

¹⁶ *Newcrest (WA) Pty Ltd v The Commonwealth* (1997) 190 CLR 513.

differences of text and history. In any case, there are many fictions about electoral democracy. The notion that the legislature fixes everything up in a democratic polity is contrary to Justice Scalia's correct assertion that constitution and constitutional bills of rights exist to put restraints on populist democracy. As Justice Breyer has said, citations of Blackstone and of modern academic scholars have no democratic provenance. But they are common, including in the opinions of Justice Scalia¹⁷; and

- 3) It would be wrong for any judge simply to read foreign judicial opinions of those of like opinion to the judge's own. An honest judge will consider, and acknowledge, contrary opinions and any material differences. For example, United States Supreme Court opinions on the validity of the disqualification of prisoners to vote in federal elections could, with respect, be greatly assisted by reading, and reflecting upon, the principles that have existed behind contemporary judicial opinions in Canada, the United Kingdom, Europe and Australia on the limits of the legislature's power to deprive citizens of the right to vote in a democratic polity¹⁸. At the very least, a reflection on more modern, overseas thinking on that issue would allow the local judge to tick the boxes of consideration and to reflect on any need to reconsider past judicial approaches, where such recommendation was open to the judge. Not all wisdom is home-grown. Occasionally, we can all learn from others.

¹⁷ The Relevance of Foreign Legal Materials in US Constitutional Cases: A Conversation Between Justice Antonin and Justice Steven Breyer, 3 *Int'l J Const L* 519 (2005).

¹⁸ *Sauvé v Canada* [1993] 2 SCR 438; *Hirst v United Kingdom* [No.2] (2005) 42 EHRR 41; *Roach v Electoral Commissioner* (2007) 233 CLR 162. Cf. Ewald, "'Civil Death', The Ideological Paradox of Criminal Disenfranchisement Law in the United States", *Wisconsin Law Review* 1045 (2002).

The fundamental objection of Justice Scalia's approach is addressed to his 'originalist' approach to constitutional interpretation. He must sometimes feel disconsolate that his approach has not attracted the warm embrace of his colleagues. I understand that feeling. Like him, I was often in dissent. Sometimes, like him, I despaired of my colleagues' opinions. However, on this point, there are many reasons why the 'originalist' approach does not work and why the majority's rejection of it is correct:

- (1) The writers of the American Constitution themselves did not intend later generations to be confined to the implementation of their intentions in 1791. In Australia, the drafters of our constitution also made this abundantly plain. Throughout the Australian convention debates, our founders recognised the need for language that would adapt to the changing requirements of the new federal nation. One of our founders, Andrew Inglis Clark, made this clear in expressing the "living tree" notion of the Constitution in one of the first texts that followed its adoption¹⁹. If Justice Scalia is truly adhering to the 'originalist' intention of the founders, this will take him to an approach that itself recognises the need for change, modernisation and adaptation. Ironically, his own theory affords a *renvoi* to the living tree doctrine;
- (2) Any other approach would be unworkable and unjust. It would mean, in the American cases, that judges were forever chained to the opinions (often ignorant or misinformed) of an earlier age. A time proximate to witchcraft trials, notions of hobgoblins and the reality of slaves. A time long before cyberspace, fast air travel, instantaneous telecommunications, nuclear fission and other

¹⁹ A.I. Clark, *Studies in Australian Constitutional Law* (2001 reprint 1997).

modern developments to all of which American inventiveness has contributed greatly; and

- (3) The 'originalist' view is also inconsistent with the very purpose and function of a national constitution. Of its nature, such a document is to be a law that adjusts to serve successive generations and to respond to entirely new and uncontemplated governmental and social problems in an appropriately flexible way. The United States and Australian Constitutions contemplate a core of democratic governance. But they also envisage a proper role for bodies that are inherently elitist and specialised: the military forces; the public service and the judicature. It is in the nature of the functions of these parts of the governmental structure that they will respect the democratic institutions, whilst at the same time performing their own proper roles.

In *Grainpool of Western Australia v The Commonwealth*²⁰, I tried to express these ideas in terms that I adhere to:

“[T]hose who were present at the conventions which framed the Constitution are long since dead. They did not intend, nor did they enjoy the power, to impose their wishes and understandings of the text upon contemporary Australians for whom the Constitution must, to the full extent that the text allows, meet the diverse needs of modern government. Once the Constitution was made and brought into law, it took upon itself the character proper to an instrument for the governance of a new federal nation. A constitution is always a special law. It is quite different in function and character from an ordinary statute. It must be construed accordingly. Its purpose requires that the heads of lawmaking powers should be given an ample construction because their object is to afford indefinitely, and from age to age, authority to the Federal Parliament to make laws responding to different times and changing needs.”

²⁰ (2000) 202 CLR 479 at 522-523 [111], (citation omitted).

My satisfaction with these words (one of the comforts of retired judges) was diminished somewhat in 2003 when I read the way in which Justice Kennedy expressed his opinion in one of the decisions that Justice Scalia least likes. Writing for the Court in *Lawrence*, Justice Kennedy wrote thus²¹:

“Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty and its manifold possibilities, they might have been more specific. They did not presume to have this insight. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”

Whilst we are on *Lawrence*, I will say something because of Justice Scalia’s repeated reference to anti-sodomy laws; the decision in *Lawrence* and his special *bête noir*, same-sex marriage.

This day, the second Tuesday in February, is the very day that my partner, Johan van Vloten, and I met 41 years ago. Forty-one years of loving, faithful companionship and support. For this, Johan deserves the Victoria Cross; not discrimination or a second-class legal status. There is strong evidence that such long-term relationships (normally sustained in the case of other citizens by marriage) are good for those blessed with them. They are good for their mental and physical health. They are also good for society. For the life of me I cannot see how such relationships damage the marriage of heterosexual couples or the unions of unmarried heterosexual couples. No Australian lawyer has been able to explain to me how this could possibly be so. If there is any American lawyer present here who can offer an explanation, I would welcome it

²¹ 539 US 558 at 578-79 (2003).

because I regard it as an unconvincing and ignorant falsehood. It is based on infantile notions that nothing in society can ever change. And that some cohorts of citizens must forever be denied equal civic rights. This is a notion that I could never accept: as a judge, as a citizen or as a rational human being.

Some Australians were surprised by the recent decision of the United States Supreme Court, intruding into the procedural ruling of the Federal District Court in California, hearing the challenge to the overturning (by Proposition 8) of the state judicial decision in California mandating equality in access to marriage in that State. In a 5-4 decision, the Supreme Court forbade the telecasting of the federal trial hearing. That decision seemed strangely inconsistent with American First Amendment values and with appellate restraint in disturbing procedural rulings made by trial courts. However, that is entirely an American issue. Before the ban descended, enough was broadcast to record the concession, reportedly given to the Californian Court by leading counsel for the supporters of Proposition 8. When asked by the judge whether he could identify any way in which the opening up of marriage to same-sex couples could possibly damage the marriages presently conducted in California, counsel properly conceded that he could not²². And, according to reports, in a very American way, once the ban took effect, it was circumvented by actors repeating the transcript of argument before the court so that, in all its tedious detail, it came to the attention of those who wanted to see and hear it.

²² Theodore Olson, "Conservatives Should Celebrate Same-sex Union, Not Lament It", *Sydney Morning Herald*, 16 January 2010, 13.

GLOBALISM AND LEGAL IDEAS

In Australia, it has been accepted that citation of foreign judicial opinions, including in constitutional cases, do not constitute 'precedents'. They are not binding. At most, they are as helpful to the working judge as the ideas they contain appear to be.

Our chairman, Chief Justice Gleeson, did not hesitate, where he thought it relevant, to cite trans-national and international jurisprudence to explain his thinking on particular points, whether of private law²³, and in constitutional adjudications²⁴.

In the United States, learned judges have expressed similar views from time to time. Whilst serving on the Federal Court of Appeals, Judge Sonia Sotomayor was explicit about the proper use of such materials²⁵:

"Ideas have no boundaries ... International law and foreign law will be very important in the discussion of how we think about the unsettled issues in our own legal system.

[To discourage the use of foreign or international law would] "be asking American judges to close their minds to good ideas."

[In cases such as *Roper* and *Lawrence*, the Supreme Court was using foreign or international law] "to help us understand what the concepts meant to other countries and ... whether our understanding of our own constitutional rights fell into the mainstream of human thinking."

These were temperate, modest and sensible observations which, in Australia, would, in my view, be uncontroversial. Controversies

²³ *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680 at 686-691 (holding that local government authorities could not sue for defamation; referring to English and South African decisions and the *European Convention on Human Rights*).

²⁴ *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 177 [13]-[19] (referring to Canadian and European authorities on disenfranchisement of prisoners from voting where these were held "consistent with our constitutional concept").

²⁵ Collin Levy, "Sotomayor and International Law", *Wall Street Journal*, 14 July 2009, citing the judge's speech to the American Civil Liberties Union of Puerto Rico in April 2009.

remain²⁶. But we are too deeply imbued with comparative law training and experience, from our earliest days of lawyering, to close our minds to useful thoughts from abroad. Why, in the age of the internet (an American invention) should the law be cast out from the Garden when every other learned profession in the world daily draw on ideas from other lands? As Lord Bingham remarked in his Hamlyn Lectures 2009:²⁷

“In no other field of intellectual endeavour – be in science, medicine, philosophy, literature, architecture, art, music, engineering or sociology – would ideas or insights be rejected simply because they were of foreign origin. If, as most of us would probably like to think, the law is a human science reflecting the product of intellectual endeavour century after century, it would be strange if in this field alone practitioners and academics were obliged to ignore developments elsewhere, or at least to regard them of no practical consequence. Such an approach can only impoverish our law; it cannot enrich it.”

The proposition that such sources must be ignored is therefore simply not tenable. It is important that lawyers should explain why this is so, particularly to the American people and to their elected representatives.

In *Fairchild v Glenhaven Funeral Services Pty Ltd*²⁸, Lord Bingham, in the House of Lords, summarised what he saw as the correct approach to distilling transnational authority in matters of private law:

“Development of the law in this country cannot of course depend on a head-count of decisions and codes adopted in other countries around the world, often against a background of different rules and traditions. The law must be developed coherently, in accordance with principle, so as to serve, even-handedly, the ends of justice. If, however, a decision is given in this country which offends one’s

²⁶ See e.g. *Al-Kateb v Godwin* (2004) 219 CLR 562 at 589, 593, 595; *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 224-25 (per Heydon J, dissenting).

²⁷ Hamlyn Lectures, Lecture 1, 2009, p.7

²⁸ [2002] UKHL 22; [2003] 1 AC 32

basic sense of justice, and if consideration of international sources suggests that a different and more acceptable decision would be given in most other jurisdictions, whatever their legal tradition, this must prompt anxious review of the decision in question. In a shrinking world (in which the employees of asbestos companies may work for those companies in any one or more of several countries) there must be some virtue in uniformity of outcome whatever the diversity of approach in reaching that outcome.”

Finally, it cannot be a tenable position to say, as Justice Scalia did in his conversation with Justice Breyer, that it was alright for Justice Breyer to inform himself on international legal developments but he should just “keep it out of [his] opinions”²⁹. This is not an acceptable intellectual position. As a law professor, Justice Scalia would have failed students for omitting to acknowledge sources important for the development of their reasoning. Decorating opinions with immaterial citations to give them the appearance of “lawyering” is unjustifiable. But acknowledging useful ideas written by others is an honest judge’s intellectual duty.

Sadly, as the confirmation hearing involving Justice Sotomayor demonstrated, the fuss that is presently created in the United States over citations of overseas legal decisions will tend to silence the acknowledgment of international sources. This is already evident in the Supreme Court of the United States since its decision in *Roper* in 2005. The fuss just does not seem to be worth the trouble. It is also evident in other federal courts, in the same way as judicial writing for law reviews fell off after the confirmation hearings involving Judge Bork. This demonstrates the price that judges pay not for having opinions, but for expressing them candidly.

²⁹ Scalia and Breyer discussion, above n at 534.

I agree with Justice Scalia that the decline in the citations of United States courts by foreign constitutional courts, since this controversy arose, is not a significant matter. Judges do not write their opinions to win foreign or academic applause. More relevant is the risk of cutting off the United States judiciary from the mainstream of global constitutionalism.

The United States of America has, for 60 years and more, been an important inspiration and example to the emerging new world order. The American Bar Association (ABA) has shown that United States lawyers are not cut off from this engagement. In the 1990s, the ABA established the CEELI programme, to bring notions of the rule of law and basic civil rights to the newly emerging democracies of Central and Eastern Europe. In January 2010, I attended a conference in Chiang Mai, Thailand, organised by the ABA. At that conference, legal experts from the United States and Australia engaged with representatives of civil society in Asia to explore the ways in which American and other human rights concepts can play a beneficial role in the development of the new Human Rights Commission of the Association of South East Asian Nations (ASEAN). Today the section on international law of the ABA has organised this conference on cross-border collaboration, convergence and conflict in Sydney, Australia. These are most useful initiatives that expand the global dialogue amongst lawyers.

Many lawyers of the United States of America realise the growing integration of legal ideas in the world today, including ideas of human rights to which Eleanor Roosevelt contributed so notably in chairing the Commission that produced the *Universal Declaration of Human Rights* in

1948. The judiciary of the United States should not be cut off from these global developments. The developments are compatible with the geopolitical interests of the United States and the legal notions that lie at the heart of American law and constitutionalism. They are inherent in the global idea of constitutionalism that is an important legacy of the recent American contributions to world peace and security.

This is why an Australian lawyer will reject the ‘original intention’ notion of constitutional interpretation advocated by Justice Scalia and why Australian law will not deny, but will acknowledge, the utility of international and trans-national law. It is not ‘precedent’. But, by analogy, it may sometimes be useful to our reasoning and helpful to our law.

Earlier generations have sometimes been blinded to the truth. Later generations of judges and lawyers may invoke the law of other lands in the universal search for greater freedom.

Like Lord Bingham, I will leave the last words to Amartya Sen:

“Even though contemporary attacks on intellectual globalisation tend to come not only from traditional isolationists, but also from modern separatists, we have to recognise that our global civilisation is a world heritage – not just a collection of disparate local cultures”³⁰

³⁰ A. Sen, “The Diaspora and the World” in *The Argumentative Indian* (Penguin Books, 2006), p.85, cited by Lord Bingham in *Hamlyn Lectures 2009* (Lecture 3 “Nonsense on International Stilts?”, ms p.33.