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COMPARATIVE CONSTITUTIONALISM IN SOUTH ASIA

AFTERWORD

The Hon. Michael Kirby AC CMG

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So what does it matter? Why bother with comparative constitutionalism? What legitimacy do the pronouncements of foreign judges and legislators in other jurisdictions have to influence the development of constitutional law in one's own nation? Is not jurisdictionalism the essential anchor for the legitimacy of unelected judges: holding and exercising the large governmental powers of deciding constitutional conflicts? Is it not safer to hold steadfastly to the constitutional text and to local decisions, in charting the path forward for the governance for a sovereign people? Are there not dangers of regression to a new form of 'intellectual colonialism', in borrowing constitutional ideas from beyond the border? Don't we have enough to do, analysing and encouraging national constitutionalism, without troubling our minds about the problems faced by judges and lawyers in neighbouring and other countries, in accordance with their different constitutional charters?

Anyway, what is a retired Australian judge doing writing an Afterword for this book, which has deliberately chosen to focus its attention on developments in constitutional law in South Asia? Is this 'South Asia' anything more than a repackaging of the old imperial paradigm of the Sub-Continent? The jewel in the British crown, when it held sway over (or greatly influenced) all of the lands mentioned in this book - India, Pakistan, Bangladesh, Sri Lanka, Burma and also Nepal and Bhutan?

I acknowledge the legitimacy of all of these questions. They, or like questions, are not ignored in this book. As the editors have explained, the manuscript grew out of conferences of constitutional lawyers held in London in 2006 and in Singapore in 2009. The participants could have chosen a different configuration of national constitutions to study. They could have extended their perspectives to Malaysia, Singapore, the Maldives, even perhaps Mauritius. At a pinch, they could have thrown their net more vigorously and picked up Papua New Guinea, Solomon Islands, the Fiji Islands; even maybe Australia and New Zealand. After all, each of these countries has a constitutional law. Each has developed its legal system after a model planted in, or immediately after, colonial times. Each continues to use the English language, at least for constitutional and legal discourse. Each espouses the rule of law, independent courts and uncorrupted judges.

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The wider the net of comparativism is cast, the hazier the focus of the emerging picture. It is like the lens of a camera. To get the sharpest image, we need to narrow the focus. Narrowing it to the identified lands of South Asia still results in a study that addresses the governance of a third of humanity. And whilst they share the commonalities of a professional language and legal tradition with many others, the cultures and historical legacies of South Asia afford deep attitudinal and societal links that make the investigation specifically fruitful and promising.

I can only assume that the honour of writing this Afterword has fallen to me because of my many travels in the lands described in these chapters. And a desire on the part of the editors to have an outsider (but a sympathetic one) who can look at the topics that are reviewed, with dispassion and a certain distance. Perhaps an outsider will see linkages that those closer to the centre of the focus may themselves miss or take too much for granted.

Comparative constitutionalism is a relatively new and controversial subject. Political scientists, historians and governmental experts have long familiarised themselves with the way constitutional law operates in other lands. Yet, until recently, lawyers were not much interested in the topic. In part, this was because, in imperial times, the commonalities were substantially those imposed by the metropolitan power – such as the century and more of appeals to the Judicial Committee of the Privy Council in London and the instructions given to the viceroys about the need for protection of imperial political and commercial interests. In part, it was the principle of jurisdiction that demanded most of the attention of the newly emerging scholars of national constitutional laws. They had enough on their plates, analysing and contributing to the elaboration of their national constitutional charters. The doings of constitutional judges and scholars in other lands, even neighbours, were not sufficiently relevant to engage a lot of their time and attention. In part, there was probably a hierarchy of attitudes of indifference, mixed with disdain, for the ways that others approached constitutional law: with its mixture of political values and social aspirations that, inevitably, would differ from one country to another. Why would a judge or scholar in the Indian legal system, for example, be interested in the way others tackled problems arising under their own distinctive constitutions, with their different texts, books, cultures and learning?

One of the first efforts at comparative constitutionalism in Asia was undertaken in 1960 by the Australian National University in Canberra. The resulting dialogue was chaired by the then retired Chief Justice of the High Court of Australia, Sir John Latham. It was a one off event. Perhaps in 1960, even that distinguished jurist and former politician, considered that any study of comparative constitutionalism involved “teaching” the newly independent nations of Asia how to observe the most important British constitutional principles: elected parliaments; responsible ministers; a skilled and uncorrupted civil service; neutral armed forces; and independent judges with a

distinctively modest role. It is the danger of revisiting these perceptions of comparative constitutionalism that gives rise to an occasional measure of scepticism and hesitation, given voice in several chapters of this book. If the commonalities of the constitutional arrangements of most of the countries were little more than the link they once shared with imperial Britain, this would produce a questioning attitude about the value to be added by such a discourse. So what are the distinctively *South Asian* characteristics to be gleaned from comparing constitutional developments that have happened to each other?

Clearly, there are some common themes in the constitutional laws and practices of South Asian countries that are likely to be peculiar to them or at least not of great moment in other lands that share the same general legal and constitutional traditions. Thus, there is the problem of apostasy, with a demand of a person, born into a family of one religion, to convert to another religion. Or the problem of renouncing religion altogether. These represent a challenge to the legal order in South Asia that would hardly, if ever, arise in other parts of the world, such as Australia, Britain, Canada or New Zealand. There the right to change religious allegiance or to join the growing numbers of citizens who reject religion altogether, hardly raises an eyebrow. Still, as cases described in this book (and the *Lina Joy* case before the Federal Court of Malaysia[1]) show, this can be an acute issue in several countries of Asia, where religious, geographical and political concerns can sometimes trump the individual's right to enjoy the fundamental right to freedom of religion.

Racial, ethnic and cultural divisions now arise, in different guises, in most constitutional regimes throughout the world. However, the passions that they engender, in circumstances of communal conflict, attract much attention in this book and for obvious reasons. Reconciling the deeply felt beliefs of differing religions and the secular principle of equality and freedom of religion is never easy. Even in supposedly mature secular societies, the emerging differences can sometimes sharpen and aggravate serious hostilities. We have seen an instance of this in Australia in recent times. Although a rather limited provision in the Australian Constitution upholds religious freedom[2], it was the furious lobbying of religious organisations (and their threats of retaliation to elected parliamentarians who defied their will), that recently produced the defeat in the Australian Federal Parliament of a proposed amendment to the *Marriage Act* 1961 (Aust), designed up to open up the legal status of marriage to same-sex couples[3]. This became a "wedge" issue in local politics, despite the evidence of repeated opinion polls that suggested that 70% of

[1] *Lina Joy v Majlis Agama Islam Wilayah Persekutuan* [2007] 3 CLJ 557; M.D. Kirby, "Fundamental Human Rights and Religious Apostasy" (2008) 17 *Griffith Law Review* 151.
[2] *Australian Constitution* s116.
[3] The *Marriage (Amendment) Bills* 2012 (Aust.) were defeated in the Australian Parliament: House of Representatives, 19 September 2012, Senate 20 September 2012.

the Australian population favoured the proposed reform. And the fact that only one third of present marriages in Australia are actually conducted with religious rites.

Comparative constitutionalism in many western countries today includes debates over such issues as the constitutional principle of civic equality and the right to marry and the constitutional principle according respect to deeply held religious beliefs[4]. This may not be a particular attribute of constitutionalism that has yet reached South India, although reports suggests that the question may be lapping at the doors of courts in Nepal. Still, the extent to which constitutional ideas and challenges nowadays jump borders and turn up in what would once have been the most unexpected places can be seen in the stimulating chapter about the *Naz Foundation* Case in India[5]. In that case, the Delhi High Court (Shah CJ and Muralidhar J) upheld the constitutional challenge to section 377 of the *Indian Penal Code*, in so far as it purported to criminalise adult, consensual, private sexual conduct in India. Many countries which, like India and others in South Asia, inherited anti-sodomy criminal laws from the period of British rule, have witnessed their legislative repeal in recent years. But in other countries, with the same legal history, legislative timidityand inaction has led to constitutional challenges before the courts. Those challenges have been upheld in constitutional litigation in the United States of America[6]; South Africa[7] and in human rights challenges from Northern Ireland[8]; the Republic of Ireland[9], Cyprus[10] and Australia[11].

These constitutional cases, decided outside South Asia, naturally become a focus of the activities of local civil society organisations. Pro bono advocacy and court challenges have arisen in several countries. Ultimately, they have reached the courts of India. Some critics, harkening to jurisdictionalism, suggest that they are irrelevant to the differing languages, history, cultural and spiritual circumstances of India. But in India, the stigmatisation of homosexuals was somewhat akin to the humiliating diminution of the rights of dalits, by reference to their caste[12]. Against the background of a worldwide recognition of the irrationality of criminalising adult, consensual, private conduct, it would have been astonishing had the judges of the Delhi High Court ignored these legal developments, happening in other countries with similar legal systems at the same time.

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[4] *Minister of Home Affairs v Fourie* [2005] ZACC 19; *Halpern v Canada* (A-G) [2003] 65 OR (3d) 161 (CA); *Perry et al v Schwarzenegger et al* (2010) 3:09- cv- 02292.
[5] *Naz Foundation v Delhi and ors* [2009] 4 LRC 838(HC Delhi).
[6] *Lawrence v Texas* 539 US 558 (2003) reversing *Bowers v Hardwick* 478 US 186 (1986).
[7] *National Coalition for Gay and Lesbian Equality v Minister of Justice* (SAf) [1998] 3 LRC 648.
[8] *Dudgeon v United Kingdom* (1982) 4 EHRR 149.
[9] *Norris v Ireland* (1991) 13 EHRR 186.
[10] *Modinos v Cyprus* (1994) 16 EHRR 485.
[11] *Toonen v Australia* (1994) 1 Int Hum Rits Reports 97 (No. 3).
[12] *Indian Constitution,* Art 15 (2) [Prohibition of Discrimination on Grounds of Religion, Race, Caste, Sex or Place of Birth].

So this is how, in the world of today, constitutional developments arrive in one country, often at about the same time as they occur in others. This sharing and dialogue is not, of course, confined to geographical regions – whether within Europe, the Americas, Africa, the Pacific or South Asia. When the cases arise it is very hard today to suggest that judges, addressing similar problems, must totally ignore what has been written by highly intelligent judges in courts of great distinction in neighbouring lands, faced with analogous problems. Of course, each judge must observe fidelity to his or her own national law. On some occasions, the national law is relevantly different in text or context, permitting or requiring a differing outcome[13]. Nonetheless, experience teaches the merit of studying what others have written in their own constitutional setting and then making proper allowance for any differences of text, context, tradition and values. The availability of legal materials today is so much greater than it was to our forebears. Reading the approaches to common problems elsewhere, at the very least, helps a national judge to see the problems in a wider context; to harken to the arguments of principle and policy that are properly raised; and to tick all the boxes of domestic relevance, so as to make sure that no aspect of the problem has been overlooked or unappreciated.

The decision of the Delhi High Court in the *Naz Foundation* case was appealed to the Supreme Court of India, although not by the Union of India. The appeal has been argued and stands for judgment. In due course the Supreme Court will decide. But I did not perceive in the Delhi High Court's reason an illicit use of foreign constitutionalism. Rather, I saw at work a process that is both widespread and beneficial in constitutional law today. It is an invocation of trans-national jurisprudence to identify the broad constitutional context for the problem in hand. And resort to the national constitutional text and governing doctrine to provide the ultimate resolution of the problem for decision. Every other learned discipline in the world today approaches issues and problems in this way. The law need not be different or immune from global perspectives.

In Australia, with one of the oldest national constitutions, relatively impervious to formal amendment, the highest court has been well versed in comparative constitutionalism, from the very start. In part, this was because of professional habits of comparison, discursive opinion writing and analogous reasoning derived from the shared traditions of the English judiciary. But, in part, it arose out of the adoption of the federal principle and the early discovery of the utility of looking to the United States, Canadian and later Indian courts to clarify problems arising under Australia's own constitutional document[14].

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[13] *Banana v State* [1999] 1 LRC 120 (Zimbabwe SC). The differentiated texts of the Zimbabwean and South African Constitutions in respect of protection of sexual orientation were said to justify the different outcomes.
[14] M.D. Kirby, "The Supreme Court of India and Australian Law" in B. N. Kirpal et al (Eds), *Supreme but not Infallible: Essays in Honour of the Supreme Court of India* (OUP, New Delhi, 2000) at 66. 76-79.

In recent years, there has been a sharp debate about the relevance for constitutional adjudication of searching for analogies and comparisons from other countries and from the universal principles of human rights[15]. The limits of constitutional comparison are well understood. So are the special duties of fidelity to the national law and avoidance of the dangers of misusing of foreign comparisons[16]. Just the same, Australian judges today look beyond their own borders to cast light on the meaning and operation of the national constitution.

In a recent Australian case, the issue arose as to whether an attempt by the Federal Parliament to deprive all prisoners of the right to vote in federal elections was incompatible with the text and implications of the Australian Constitution. In reaching an affirmative conclusion on that issue, the majority of the High Court of Australia[17] referred to a constitutional decision in Canada[18] and to a decision of the European Court of Human Rights, seen as relevant by analogy[19]. The foreign decisions were not binding. They were not determinative. They did not control the Australian decision. But neither were they irrelevant. They represented useful background. Context. A review of values and issues. To ask lawyers and judges to ignore such considerations, in the age of the internet, is both undesirable and futile.

That is why this book is so timely. It is looking at the linkages of constitutionalism in a region of the world of growing significance, both in economic and legal terms. The rule of law is the alternative to the rule of power, of families, of guns, of influence, of corruption. It is in the interests of the people of the world to strengthen constitutionalism. With it comes individual freedom, fundamental human rights and economic equality. The prospects for the future are good. We can all learn from each other. South Asia can widen the lens of constitutionalism elsewhere so that we all come to appreciate the role of comparative constitutionalism for the human species, for the rights of other animals and for the whole complex wonder of the biosphere.

I pay respects to the honorands of this volume. Neelan Tiruchelvain has been there since the Creation. Upendra Baxi, then the youngest tutor in law at the Sydney University Law School, even taught me in the 1960s in my Master of Laws course - nearly 50 years ago. For their gifts of intellect and heart and leadership and wisdom, I offer a grateful pupil's praise and thanks.

Sydney Michael Kirby
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[15] *Mabo v Queensland* [No.2] (1992) 175 CLR 1 at 42; *Al-Kateb v Godwin* (2004) 219 CLR 562 at 589 [63], per McHugh J; cf at 617 [152], per Kirby J.
[16] *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 at 668, per Gibbs CJ.
[17] *Roach v Electoral Commissioner* (2007) 233 CLR 162, at 177-179 [13]-[19], per Gleeson CJ and at 203-204 [100] per Gummow, Kirby and Crennan JJ; cf at 220 [163] per Hayne J. and at 224-225 [181], per Heydon J.
[18] *Sauvé v The Queen* [2002] 3 SCR 519 (SC – Canada).
[19] *Hirst v United Kingdom* [No. 2] (2005) 42 EHRR 41.