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A CENTURY OF JUMBUNNA - INTERPRETIVE PRINCIPLES AND INTERNATIONAL LAW

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Justice Michael Kirby AC KMG

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**A CENTURY OF *JUMBUNNA* - INTERPRETIVE PRINCIPLES AND
INTERNATIONAL LAW**

The Hon Justice Michael Kirby AC CMG^{*}

THE *JUMBUNNA* CASE OF 1908

Paragraph (xxxv) of section 51 of the Australian Constitution was an unusual provision that found its way into the Constitution by a narrow vote of 22 votes to 19 at the Constitutional Convention in Melbourne in January 1898. The paragraph was intended to empower the Federal Parliament to enact laws on matters concerning what we now call industrial relations. Historically, it derived from a legal innovation adopted in New Zealand, copied in Australia following the serious economic dislocations caused by inter-jurisdictional strikes and economic problems in the Australasian colonies in the 1890s.

* Justice of the High Court of Australia. The author acknowledges the assistance of Ms Anna Gordon, legal research officer in the Library of the High Court of Australia, in the collection of materials for this lecture.

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The head of power in par (xxxv) permitted the Parliament to make laws on industrial relations but only laws of a limited kind. They had to be laws that fell within the terms of the paragraph, which, by another historical curiosity, is now rendered partly obsolete by the decision of the High Court of Australia in *New South Wales v The Commonwealth (Work Choices Case)*¹. It is appropriate to recall the constitutional formulation before it fades from the memory of practising lawyers:

"The Parliament may make laws for the peace, order and good government ... with respect to:

(xxxv) The prevention and settlement of industrial disputes extending beyond the limits of any one State".

Save for the equally familiar provisions of s 92, no words in the Australian Constitution were to occupy the time of the Justices of the High Court so much during the first century of federation. Every word in the paragraph was weighed, analysed, parsed, defined, re-expressed and applied. From the beginning of the Commonwealth until the *Work Choices* decision, the paragraph attracted some of the highest concentrated legal brain power and analysis that the Australian nation could afford.

¹ (2006) 229 CLR 1.

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Some of those who had supported the insertion of (xxxv) of s 51 of the Constitution, did so in the belief that it would have a relatively small and harmless operation, confined in effect to providing constitutional authority to the new Federal Parliament, to enact laws for the specific type of problem that had emerged in the inter-colonial maritime dispute of the 1890s. That dispute had proved insusceptible to resolution in the fledgling institutions of the pre-federation colonies. None of those bodies, nor any of the parliaments or governments of the colonies individually, could solve the dispute. That is why it was thought that a national approach to the problem of trans-jurisdictional disputes was needed, whilst most other such disputes would remain within the law making powers of the newly created States and any institutions that they might establish to deal with internal State industrial conflicts.

In part, the modest role envisaged for par (xxxv) was because, for many of the founders, the creation of national industrial relations machinery was seen as unnecessary, or certainly excessive to any pressing necessity. For these and other reasons it took the Parliament many attempts before it finally enacted the *Conciliation and Arbitration Act* 1904 (Cth) ("the Act")². The Act envisaged the establishment of a new federal court, the Commonwealth Court of Conciliation and

² J. Isaac and S. Macintyre (eds.) *The New Province for Law and Order: 100 Years of Australian Industrial Conciliation and Arbitration* (Cambridge Uni Press, 2004), 1-4 (hereafter "Isaac and Macintyre").

Arbitration. That court would perform the limited functions provided for the application of the new constitutional provision.

In the event, the Hon. Richard O'Connor, one of the three foundation Justices of the High Court of Australia, was appointed the first President of the new court. Over the ensuing century, eight of the Justices of the High Court would serve as presidential members of the court or its successor bodies, the Commonwealth Conciliation and Arbitration Commission, later the Australian Conciliation and Arbitration Commission, now the Australian Industrial Relations Commission. They would do so, originally, in conjunction with their duties as Justices of the High Court but later (in the case of Justices Gaudron and myself) pursuant to a commission held before elevation to the High Court.

A key aspect of the Act of 1904 was its recognition of the right of an association of employers or employees to be registered and thereby recognised as representing the interests of their members in industrial disputation³. Part V of the Act created a system by which associations of employers and associations of employees could, on complying with certain conditions, be registered as "organisations" under the Act⁴. By this registration, such organisations became statutory corporations. They then enjoyed defined powers but these were specifically limited to

³ Michael Kirby and Breen Creighton, "The Law of Conciliation and Arbitration" in Isaac and McIntyre, above n 2.

⁴ *Ibid*, 106-107

fulfilling the purposes of the Act. They could represent their members collectively. Thus, they might constitute the "parties" with whom the new court could deal for the purposes of discharging its functions of conciliation and arbitration of interstate industrial disputes and the enforcement of the awards made in settlement of such disputes.

Part V of the Act also provided that an organisation could hold property and sue its members for fees and fines. Being a party to an award, it was subject to penalties for any disobedience to the award provisions. Such penalties could be enforced against its property and funds⁵.

In 1907, an application was made to the Industrial Registrar, holding office under the Act, to register an organisation named the Victorian Coal Miners' Association. Despite its name, the Association sought registration as an organisation of employees⁶ in accordance with the Act. The application for registration was objected to by Jumbunna Coal Mine No Liability and by other coal mining company Outtrim, Howitt and British Consolidated Coal Co No Liability. Outtrim later disappeared from the litigation. But Jumbunna won for itself in an important page of Australian history.

⁵ *Ibid*, 61, 109

⁶ In the official report of the decision, according to the conventions of spelling at that time, it was called "employeés". See (1908) 6 CLR 309 at 310.

The two employer bodies objected to the registration of the employees' organisation on the basis that it was not truly an association of not less than one hundred employees in the relevant industry, as defined. That objection was later abandoned. It can be disregarded for the purposes of this chronicle. However, there was also Jumbunna's objection that was to cause the ensuing trouble. This was that the employees' organisation could not, in fact or law, be concerned in an industrial dispute "extending beyond the limits of any one State".

The Industrial Registrar disallowed the objection. He registered the association under the Act. In accordance with the Act, Jumbunna then appealed to the President of the new Commonwealth Court. By this stage, the President was the Hon. H B Higgins. In 1907, following his appointment to the High Court in 1906, Higgins had replaced Justice O'Connor as President. Before him lay a remarkable and creative service that was profoundly to influence the development of industrial relations law in Australia, as it unfolded⁷. It is probable that Justice Higgins did not appreciate that such an apparently minor appeal, against such a seemingly insignificant administrative decision by the chief official of the new court, would become so important for future generations of judges and lawyers concerned in the interpretation of the Australian

⁷ Most especially in his decision in *Ex parte H V McKay (Harvester Case)* (1907) 2 CAR 1. See *Work Choices Case* (2006) 229 CLR 1 at 218 [524].

Constitution and of laws made under it.⁸ But that is frequently the fate of such cases.

The grounds of appeal before Justice Higgins were that the Industrial Registrar had erred in disallowing the employers' objections; that the employees' association was not capable in law of registration under the Act; and that the provisions of Pt V of the Act, relating to registration of associations as organisations were, if they applied to the instant case, *ultra vires* the Constitution and therefore void.

Argument of the appeal before Justice Higgins took place between 20-26 November 1907. With commendable speed, on 14 December 1907, he dismissed the appeal. Jumbunna then lodged a further appeal to the Full High Court. Jumbunna was represented there by Mr Edward Mitchell KC. Counsel for the Industrial Registrar was Mr Frank Gavan Duffy KC, who, in 1913, was destined to replace Justice O'Connor on the High Court, following the latter's death in 1912. Duffy's Irish Catholic background, his radical reputation and his large practice as a barrister caught the eye of W M Hughes, Attorney-General in the Fisher Labor Government and later Prime Minister. As events were later to demonstrate, Duffy's radical rhetoric disguised an innate conservatism⁹; but then the same was true of W.M. Hughes.

⁸ Kirby and Creighton, in Isaacs and Macintyre, above in 2, 108-109.

⁹ G Fricke, "Frank Gavan Duffy" in T Blackshield & Ors, *The Oxford Companion to the High Court of Australia* (2001), 296.

Duffy took a preliminary objection to the "appeal" from the President to the High Court. He argued that no such "appeal" lay because the Commonwealth Court of Conciliation and Arbitration was not a "federal court" within the meaning of s 73 of the Constitution; nor was the President such a "court". In this argument, some of the seeds were already visible that were to bear fruit fifty years later in the High Court's decision in the *Boilermakers' Case*¹⁰, which struck down the validity of the creation of the Conciliation and Arbitration Court as a federal court within Ch III of the Constitution.

This was, nonetheless, a risky argument in the Jumbunna case. Had it succeeded, it might have prevented appeals being taken to the High Court, something organisations of employees would have wished to preserve. At the same time it could have revealed a serious constitutional flaw in the creation of that court; obliged redrafting of the legislation with the attendant risks to its passage; and effectively removed the power of the court to make orders binding not only on employees' organisations but also upon employers.

The preliminary objection to the validity of the appeal was rejected by the High Court. The notion that interference with the employer's

¹⁰ *R v. Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254. See Kirby and Creighton in Isaac and Macintyre, above n.2, 127.

liberty to carry on business in his own way could not be authorised under the power conferred by s 51(xxxv) did not appeal to the Court. In effect, the High Court put the preliminary objection to one side and turned to the substantive attack on the validity of s 55 of the 1904 Act¹¹.

The major substantive criticism of s 55 was that, by its unrestricted terms, it purported to apply to "any association", including therefore one that might contain, as members, persons who did not fall within the requirement of the interstate attributes said to be postulated by the Constitution. It was this argument that encouraged Justice O'Connor in the Full Court to reflect, in reasoning often quoted, both upon the general principle upholding the broad ambit of federal legislative powers under the Australian Constitution and the specific principle upholding general comity between Australia's municipal law and international law that is the focus of this article.

The general principle expounded by Justice O'Connor is written on the heart of every Australian lawyer. To this day, it is often quoted by the High Court. Justice O'Connor said¹²:

¹¹ (1908) 6 CLR 309 at 362.

¹² (1908) 6 CLR 309 at 367-368. See L Zines, *The High Court and the Constitution* (5th ed, 2008), 28-29.

"It must always be remembered that we are interpreting a Constitution broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve.

For that reason where the question is whether the Constitution has used an expression in the wider or the narrower sense, the Court should, in my opinion, always lean to the broader interpretation unless there is something in the context or in the rest of the Constitution to indicate that the narrower interpretation will best carry out its object and purpose".

Jumbunna's argument was that s 55 of the Act was invalid because the words of the section, on their face, were not limited "so as to restrict the right of registration to associations which could be concerned in an industrial dispute extending beyond the limits of one State" and because there was nothing in the Act otherwise to confine the application of the general words of the section "within constitutional limits"¹³. The section was invalid, so the argument went, for presuming to a potential operation beyond the ambit of the power assigned to the Federal Parliament by the Constitution. Hence, the employees' association, being registered under s 55 of the Act, was incapable of pursuing the rights purportedly granted by the Act.

Justice O'Connor faced a problem of reconciling the broad way in which he considered that the Constitution should generally be read and the immediate need to narrow the operation of s 55 of the Act so as to conform to the limited power of law-making granted to the Federal

¹³ *Jumbunna* (1908) 6 CLR 309 at 362.

Parliament. How could he read the general language of s 55 so as to confine its operation to organisations concerned with industrial disputes having the necessary character of interstate nature? To achieve this reading down, Justice O'Connor relied on an analogy drawn from international law, whereby courts, conforming to that law, would read municipal legislation so that it was confined to local application. He said¹⁴:

"In the interpretation of general words in a Statute there is always a presumption that the legislature does not intend to exceed its jurisdiction. Most Statutes, if their general words were to be taken literally in their wider sense, would apply to the whole world, but they are always read as being *prima facie* restricted in their operation within territorial limits. Under the same general presumption every Statute is to be interpreted and applied so long as its language admits as not to be inconsistent with the comity of nations or with the established rules of international law¹⁵. The same principle of interpretation is applied to enactments of a legislature of limited jurisdiction. In America the principle is well established as a rule of interpretation when the constitutionality of Statutes is in question¹⁶ '... [I]f possible, a construction should be given to it that will render it free from constitutional objection; and the presumption must be that the legislature intended to grant such rights as are legitimately within its power'".

As will be apparent, the reference to conformity with the general principles of international law was stated, in the context, for a limited

¹⁴ (1908) 6 CLR 309 at 363-364.

¹⁵ Citing *Maxwell on Statutes*, 3rd ed, p 200.

¹⁶ Citing *Granada County Supervisors v Brogden* 112 US 261 at 269 and *Marshall v Groves*, 41 Mis 31.

purpose. Nevertheless, it was expressed as a general principle of legal interpretation, applicable as such to Australian federal legislation. Whilst most of Australia's involvement in international law in 1908 was mediated through the imperial authorities in London, some direct Australian involvement with the subject had already commenced in colonial times¹⁷.

From the Treaty of Versailles of 1919, following the conclusion of the First World War and more especially after the end of hostilities in the Second World War, international law grew apace¹⁸. So did Australia's engagement with such law. A foundation member of the United Nations, Australia from the start took a leading part in the creation of the new international legal order that ensued after 1945. Specifically it took a leading role in the adoption of universal human rights law¹⁹. Over time, questions were presented as to how Australian law would relate to this new body of international law. In answering those questions, Australian courts have frequently had resort to the general principle of interpretation expressed by Justice O'Connor in *Jumbunna*.

¹⁷ *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 479-480.

¹⁸ *Al-Kateb v Godwin* (2004) 219 CLR 562 at 622-624 [169]-[176].

¹⁹ Especially the *Universal Declaration on Human Rights* UDHR (1948). See also *International Covenant on Civil and Political Rights* (ICCPR) and *International Covenant on Economic, Social and Cultural Rights* (1966) (ICESCR).

The principle, as stated, was sufficient to solve the immediate problem in the *Jumbunna* case. The constitutional power to enact s 55 of the Act was read broadly and upheld. The actual meaning of s 55 was read narrowly so as to uphold the validity of the section and to interpret it as falling within the federal law-making power. The substantive challenge by *Jumbunna* was rejected. The procedural contention for the Industrial Registrar was not embraced. The Act had passed one of its first great tests. The issue concerning whether the Conciliation and Arbitration Court was truly a "federal court" within the Constitution was postponed until 1956²⁰.

The question of whether federal laws on industrial relations disputes might be enacted in terms uncontrolled by the needs of 'interstateness'; pursuant to the law-making head of power granted to the Federal Parliament to make laws with respect to defined corporations²¹ (without the "irksome"²² requirements of interstateness and of independent conciliation and arbitration) was postponed until 2006. A new doctrine was then belatedly embraced in the *Work Choices*

²⁰ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

²¹ *Australian Tramway & Motor Omnibus Employers' Assoc. V. Commissioner for Road Transport & Tramways (NSW)* (1938) 58 CLR 436 at 439 per Evatt J; *R. V. Heagney; ex parte ACT Employers Federation* (1976) 137 CLR 86 at 98 per Mason J; *Attorney-General (Q) v. Riordan* (1998) 192 CLR 1 at 39-40.

²² Cf. *Victoria v. The Commonwealth* (1966) 187 CLR 416 at 565 per Dawson J.

Case²³. The fastidious statutory provisions governing registration of associations for the purpose of submitting their members' disputes to conciliation and arbitration were then revealed, effectively, as unnecessary legal *exotica*. No doubt, *Jumbunna*, the employees' organisation, the Industrial Registrar, and Justices Higgins and O'Connor would have been astonished by that proposition. Yet such is the way by which constitutional doctrine sometimes evolves in the hands of independent decision-makers.

APPLICATIONS OF THE INTERPRETATIVE RULE

Over the course of the century after *Jumbunna* was decided, many cases have arisen before the High Court of Australia in which the Court has reaffirmed the rule in that decision, drawing assistance from the principles of international law. This has occurred in cases involving the declaration of the common law and cases in which the Court has been called upon to interpret legislation, doing so by reference to considerations of international law that were regarded as directly applicable or helpful by analogy.

As well, at least in recent years, some reference to international law has occurred in cases involving the interpretation of the Australian

²³ (2006) 229 CLR 1.

Constitution. As the respective reasons of Justice McHugh and myself in *Al-Kateb v Godwin*²⁴ illustrate, it is in this last category of cases that the issue of the relevance of international law has proved most controversial.

So far as the common law of Australia is concerned, the clearest statement authorising reference to any relevant principles of the international law of fundamental human rights, for the purpose of deriving a modern statement of the common law, can be found in the approach taken by the majority in the important non-constitutional case of *Mabo v Queensland [No 2]*²⁵. The High Court was there faced with a claim to title over land by a community of indigenous people in Queensland whose forebears had occupied the land since long before its annexation by the Crown to the then colony of Queensland. The High Court confirmed the principle that the Crown's acquisition of sovereignty over successive parts of the Australian continent and its adjacent islands could not be challenged in an Australian municipal court. By its acquisition, the Crown had acquired the radical title to the land in question.

However, did the "native title" of the indigenous peoples survive the Crown's acquisition of political sovereignty and radical title? There

²⁴ (2004) 219 CLR 562 at 589-595 [62]-[73]; 617-630 [153]-[192].

²⁵ (1992) 175 CLR 1

was contrary authority in colonial laws²⁶; in long-standing decisions of the Privy Council²⁷ recognised and accepted in Australia in the High Court decisions,²⁸ upholding or affirming the extinguishment of the rights of Australia's indigenous peoples, including of legal rights to their traditional lands, as an element of the established legal doctrine. How, then, was such a "settled" view of established law to be overcome? Was it relevant that the settled law was based on differential and discriminatory treatment of human beings living in Australia, depending upon whether they were indigenous peoples, settlers or their respective descendants?

The answer to these questions was provided by Justice Brennan in his reasons in the second *Mabo* decision. He did so by reference to deep-seated principles of international law, as respected by the community of nations and as accepted by the Australian nation as evident in its adherence to international treaties of universal (or near-universal) application.

²⁶ eg *Attorney-General (NSW) v Brown* (1847) 1 Legge at 319 per Stephen CJ.

²⁷ *Cooper v Stuart* (1889) 14 App Cas 286 at 291.

²⁸ *Randwick Corporation v Rutledge* (1959) 102 CLR 54 at 71 per Windeyer J; *NSW v The Commonwealth (Seas and Submerged Lands Case)* (1975) 135 CLR 335 at 438-439 per Stephen J; *Mabo v Queensland* (1988) 166 CLR 186 at 236 per Dawson J.

To resolve the quandary, so important to a core principle of the Australian law on land title, Justice Brennan wrote in *Mabo [No.2]*²⁹:

"Whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the *International Covenant on Civil and Political Rights*³⁰ brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially where international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organisation of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands".

Upon the basis of this reasoning the High Court concluded that it was authorised to reopen and re-examine the previous understandings of the applicable Australian legal doctrines. A new rule of the Australian common law was fashioned and declared. In specific circumstances, it permitted recognition of the 'native title' of indigenous peoples in Australia. That decision led to the later application of the new rule in

²⁹ (1992) 175 CLR 1 at 42.

³⁰ See Communication 78/1980 in *Selected Decisions of the Human Rights Commission Under the Optional Protocol* (Vol 2, p 23).

many circumstances, including in the case of pastoral leases as decided in *Wik Peoples v Queensland*³¹. The decision in *Mabo* was delivered before my appointment to the High Court. However, I was part of decision of the majority in *Wik*.

Since the *Mabo* decision of 1992, there have been many instances where the High Court of Australia has invoked the principles of international law (especially where it declares the existence of universal human rights) in expressing and applying Australia's common law to particular fact situations³².

Similarly, in many cases, Australian courts, including the High Court, have drawn upon international human rights law in interpreting Australian municipal legislation. This is not really controversial when the legislation in question amounts, in terms or in effect, to an implementation in Australia's municipal jurisdiction of human rights principles expressed in an international treaty which Australia has ratified.

A well-known example is the *Refugees Convention and Protocol*³³. Although not incorporated, as such, as part of Australian municipal law,

³¹ (1996) 187 CLR 1.

³² See e.g. *Coleman v. Power* (2004) 220 CLR 1 at 92 [241]; cf. at 28-29 [20].

³³ *Convention Relating to the Status of Refugees*, signed at Geneva, 28 July 1951, [1954] *Australian Treaty Series No 5; Protocol*

this international treaty law is clearly referred to in the *Migration Act* 1958 (Cth). The definition of "refugee" is derived from the treaty provisions³⁴. It is therefore manifestly appropriate and sensible for Australian courts and tribunals, charged with the implementation of the Australian statute, to perform their functions by relying upon the jurisprudence of international bodies and national courts, having functions to give meaning to the concepts in the treaty.

It is quite common for Australian courts to use the *Handbook* of the Office of the High Commissioner for Refugees when considering the meaning and application of obligations of protection for "refugees" and, where appropriate, when seeking consistency with decisions of other national courts charged with applying the same treaty language and concepts³⁵.

More controversial is the extent to which it is relevant and useful, in interpreting Australian municipal legislation, to do so by reference to provisions in international law that are not directly applicable to the legal task in hand but which are thought to be relevant and useful, by analogy,

Relating to the Status of Refugees 1973, signed at New York, 31 January 1967, [1973] *Australian Treaty Series* No 37.

³⁴ *Migration Act* 1958 (Cth), s 36.

³⁵ *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225; *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2007) 231 CLR at 23 [64(2)], 27-30 [73]-[81].

to the performance of that task. Upon this subject, Australian judges have adopted different approaches. By reference to federal law, two instances may be mentioned. They illustrate the limits of the entitlement to reason by analogy from international law where the municipal law is relevantly clear and appears to negate, or to amount to an exception to, the international legal principle concerned.

One such case was *Brown v Classification Review Board*³⁶. It merits consideration because the leading opinion in the case was given by Justice Robert French, then a judge of the Federal Court of Australia, a decade before his appointment as Australia's twelfth Chief Justice.

The case concerned the decision of the Chief Censor in the Commonwealth Office of Film and Literature Classification to refuse classification to an edition of *Rabelais*, the student newspaper of the La Trobe University Students' Representative Council. The July 1995 edition of *Rabelais* included what the Retail Traders' Association of Victoria submitted was a "step by step guide to shoplifting". The editors of the journal applied for a review of the Chief Censor's decision to refuse it classification. They did so under the National Classification Code - a revised cooperative scheme for the uniform censorship of publications, applicable throughout Australia, as envisaged by the *Classification (Publications, Films and Computer Games) Act 1995* (Cth)

³⁶ (1998) 82 FCR 225; 154 ALR 67.

("the Classification Act"). The Chief Censor defended his decision on the basis that the offending publication was within a prohibition expressed by reference to a publication:³⁷:

"that promotes, incites and instructs in matters of crime or violence".

The Chief Censor's decision was confirmed by the Classification Review Board established by the Classification Act³⁸.

The primary judge in the Federal Court (Justice Merkel) held that the Review Board had not erred in its construction or application of the National Classification Code. Specifically, he held that the publication fell reasonably within the statutory expression "instructs in matters of crime", taking "instruct" as meaning "to furnish with knowledge" and "crime" as referring to conduct stipulated by law (as stealing is) to be a crime³⁹. It was relevant, in Justice Merkel's view, to take into account the constitutional implication of freedom of expression earlier upheld by the High Court. However, in Justice Merkel's view, there was no such

³⁷ Contained in the Classification of Publications Ordinance 1983 (ACT), s 19(4)(b). The ACT ordinance was the parent provision for the federal law.

³⁸ (1998) 82 FCR 225 at 229.

³⁹ (1998) 82 FCR 225 at 230-231.

unreasonableness in his decision as offended either the constitutional implication or the *Wednesbury* principle.⁴⁰

Essentially, Justice French's reasons followed a line similar to those of Justice Merkel. But in the Full Federal Court, an interesting division arose between the other judges. A majority (Justices Heerey⁴¹ and Sundberg⁴²) concluded that the publication was not covered by the constitutional protection of political speech. Each of those judges took a narrower view than Justice French did, as to what might constitute political speech for such constitutional purposes. Thus, Justice Heerey concluded⁴³:

"The concept that the political process (a synonym in this context for the democratic process) is a dynamic thing, an ongoing discourse about who ought to govern us, how we ought to be governed, and what laws should bind us. It is better seen from this perspective than considered as a static thing, dependent on a categorisation of subject matter. In the present matter, the article does not concern 'political or government matters'. The author is not advocating the repeal of the law of theft, either generally or in respect of theft from shops owned by large corporations. ... The article does not even advocate breaking one law as a means of securing the repeal of another law perceived as bad, as with draft card burning in protest against conscription for Vietnam ..."

⁴⁰ *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 KB 223; cf *WAPC v. Temwood Holdings Pty. Ltd.* (2004) 221 CLR 30 at 75 [121] per Callinan J.

⁴¹ (1998) 82 FCR 225 at 246.

⁴² (1998) 82 FCR 225 at 246.

⁴³ (1998) 82 FCR 225 at 246.

Justice Sundberg's opinion was not quite the same but was to similar effect⁴⁴:

"... [T]he article is not within the ambit of the [constitutional] freedom. This is so for two reasons. One is that it is not a communication concerning a political or government matter. Although its opening 'redistribution' paragraph is 'political' in one sense of the word, its true character is not political because it is overwhelmingly a manual about how successfully to steal. The other reason is that the article does not relate to the exercise by the people of a free and informed choice as electors".

In his reasons, Justice French was prepared to take a broader view of what was "political" or "governmental" for the purpose of the implied constitutional protection⁴⁵:

"... [I]nelegant, awkward or unconvincing as its attempts to justify its practical message about shoplifting by reference to the evils of capitalism, it is arguable that in some aspects [the publication] would fall within a broad understanding of political discussion. That characterisation, however, will not invalidate the effective operation upon it of a law which is enacted for a legitimate end, is compatible with representative and responsible government and is reasonably appropriate and adapted to achieving that end ... It is the construction of the [National Classification Code and the Classification Act] that presented the issue before the Federal Court".

Upon that issue, Justice French endorsed a broad approach⁴⁶:

⁴⁴ (1998) 82 FCR 225 at 258.

⁴⁵ (1998) 82 FCR 225 at 258.

"It is the construction of that law paying due regard to the common law value of freedom of expression, Australia's international obligations under the ICCPR and the implied constitutional freedom that is the Court's primary task. In my opinion properly construed for the reasons that follow, the relevant provisions of the Classifications Code and the supporting provisions of the [Classification] Act are enacted for a legitimate end, are compatible with representative and responsible government and are reasonably appropriate and adapted to achieving that end".

In reasoning to this conclusion, Justice French took a path illuminated by the approach expressed by Justice O'Connor in *Jumbunna* to which he, in turn, referred:⁴⁷

"International conventions to which Australia is a party do not form part of its domestic law unless and until given effect by statute. They can however supply content to a rule of construction that statutes are to be interpreted and applied, as far as their language permits, so as not to be inconsistent with the comity of nations or with the established rules of international law: *Jumbunna*⁴⁸ ... As Pearce and Geddes state in *Statutory Interpretation in Australia*⁴⁹:

'The courts generally endeavour to give effect to this proposition while conceding that it is possible for the domestic law to differ from international law'".

⁴⁶ (1998) 82 FCR 224 at 236.

⁴⁷ (1998) 82 FCR 235 at 236.

⁴⁸ (1908) 6 CLR 309 at 363.

⁴⁹ (4th ed. 1996), 137.

Obviously, judicial reasoning is a complex process. In explaining why Justice French was prepared to take a broader view of the ambit of political or governmental speech, more was obviously involved than were philosophical disposition (although this may certainly sometimes play a conscious or unconscious part. So much was revealed by Justice Heerey's criticisms of the appellants' arguments invoking the views of by Oscar Wilde, Mao, Thoreau and others). Justice French's reasoning illustrates the more general inclination of Australian judges in recent times, to recognise that international law may elaborate and reinforce the traditional tendency of the common law to favour freedom of expression. Thus Justice French's reasons state⁵⁰:

"[T]he designation of that freedom as 'fundamental' may be traced from Arts 1 and 55 of the Charter of the United Nations to the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*. ... The value accorded to freedom of expression will support a conservative approach to the construction of statutes which would impair or abrogate it".

This is a particular application of the general point made very early in the life of the High Court in *Potter v Minehan*⁵¹. Justice French listed and cited the UDHR, ICCPR and provisions of the *European Convention on Human Rights*. In a way, all of these citations by Justice French were

⁵⁰ (1998) 82 FCR 225 at 234.

⁵¹ (1908) 7 CLR 277 at 304 confirmed and applied in *Bropho v. Western Australia* (1990) 171 CLR 1 at 15; *Coco v. The Queen* (1994) 179 CLR 427 at 437.

preparing his mind for an appreciation of the broad (but not absolute) approach that is now commonly taken to the "fundamental right" to free expression.

It is interesting to note that, although stated in the context of construing the federal statute in question in the appeal, the ultimate object of the exercise was to define the ambit of the net cast by the immunity afforded by the constitutionally protected zone of free speech. The reasons of Justice French were delivered soon after the joint decision of the entire High Court in *Lange v Australian Broadcasting Corporation*⁵².

All judges, and doubtless most citizens, exhibit different values concerning fundamental rights in general as well as in respect of particular rights as they arise for consideration. Judges are obliged to tame their predilections on such matters by reference to normative material. This normative material does not exist only (although it does appear) in judicial decisions. Nowadays, on the ambit of fundamental rights, there is a very large amount of treaty and decisional law that may assist the judicial navigator to retain his or her bearings and proceed in an informed and rational way.

⁵² (1997) 189 CLR 520.

Where international law expresses universal rules of civilised nations, it is as true today as it was when *Jumbunna* was written, that Australian judges should endeavour, so far as municipal law permits, to keep Australian statements of the law in broad harmony with such universal rules. It cannot be entirely coincidental that the broader view that Justice French was willing to adopt in *Brown*, as to the ambit of the fundamental right of free expression, was affected or influenced by the international law material to which he referred in his reasons in that decision. The contents of those reasons stand in contrast to those of the other judges of the Full Court. This is not to disrespect the other reasons. It is simply to indicate that the source materials for judicial decision-making can sometimes affect the different ways in which judges respectively perceive and resolve legal problems and then proceed to resolve them.

LIMITS: EXPRESS INCONSISTENCY WITH MUNICIPAL LAW

It will be remembered that, in *Jumbunna*⁵³, in expressing the principle that local legislation should be interpreted so as not to be inconsistent with the comity of nations or with the established rules of international law, Justice O'Connor acknowledged that there were limitations upon the application of the rule. This was only a "*prima facie*" restriction. It applied only "as far as [the statutory] language admits". It was not an absolute rule; merely a presumption.

⁵³ (1908) 6 CLR 309 at 363.

A good illustration of the operation of the presumption is provided by the decision of the High Court of Australia in 2004 in *Minister for Immigration and Multicultural and Indigenous Affairs v B and Anor*⁵⁴. That was a case in which the Family Court of Australia, purporting to act pursuant to general powers to make orders relating to the welfare of children, directed the Minister for Immigration to release two boys who had been detained immediately on their arrival in Australia with their parents, none of them having entry visas. In consequence of provisions of the *Migration Act 1958 (Cth)*⁵⁵, the children were automatically detained. For their constitutional validity, those provisions relied on the large legislative powers afforded to the Federal Parliament, to make laws with respect to "aliens"⁵⁶ and "immigration"⁵⁷. The representatives of the children pointed to the fact that art. 37 of the United Nations *Convention on the Rights of the Child*⁵⁸ specifically provided in par (b) that:

⁵⁴ (2003) 219 CLR 365.

⁵⁵ ss 189 and 198.

⁵⁶ Constitution, s 51(xix).

⁵⁷ Constitution, s 52(xxvii).

⁵⁸ Adopted and opened for signature on 20 November 1989; entered into force in accordance with Art 49 on 20 September 1990; 999 UN Treaty Series 171.

"The ... detention ... of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time".

Because the *Migration Act* was said to oblige immediate detention of the children; (as a *first* and not a *last* resort; and possibly for a very long time), it was argued that the High Court should read down the federal legislation so as to leave room for the general powers of the Family Court to make orders with respect to the welfare of children. This argument relied on the fact that Australia had become a party to the Convention on 13 November 1980⁵⁹.

The provisions of the Convention, and specifically of art 37(b) had not, however, been expressly incorporated into Australian municipal law. It thus remained a principle of international treaty law, albeit in a Convention that has been ratified by virtually all nations. Following Australia's ratification, there might be a legitimate expectation that Australia's law and practice would generally conform to the Convention provisions⁶⁰. But it was not, as such, part of Australia's law. Could the *Jumbunna* principle be invoked so as to read down the provisions of the *Migration Act* so as to leave space for the operation of the provisions of the *Family Law Act* with the large powers that it conferred on judges of the Family Court to make orders protecting the welfare of children brought within its jurisdiction?

⁵⁹ [1980] *Australian Treaty Series* No 23. See (2004) 219 CLR 365 at 417 [146].

⁶⁰ *Minister for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273

Two considerations convinced me in B's case that the propounded reading down was not legally permissible. The first was that the language of the *Migration Act* concerning mandatory detention was expressed in apparently clear terms applying to all "persons" arriving in Australia as "unlawful non-citizens"; Thus, on the face of things, the Act applied to a child in that situation who was certainly a "person"⁶¹.

Moreover, there were specific provisions in the *Migration Act*, and in the Migration Regulations made under that Act, which differentiated between the treatment of children and adults in migration detention⁶². Additionally, the legislative history indicated that the possible breach of the Convention had been specifically drawn to the notice of the Parliament both by officials and advisory bodies⁶³.

In such circumstances, to read the *Migration Act* requirements down, in conformity with the presumption expressed in the *Jumbunna* principle, would result in a departure from the deliberately adopted policy to which the legislation gave expression. The appeal in *B* did not lead to

⁶¹ (2004) 219 CLR 365 at 421 [157].

⁶² (2004) 219 CLR 365 at 421 [158].

⁶³ Referring to the Human Rights and Equal Opportunity Commission Report, *Those Who Came Across the Seas: Detention of Unauthorised Arrivals* (1998); Australian Parliament, Joint Standing Committee on Migration, *Not the Hilton: Immigration Detention Centres: Inspection Report* (2000). See (2004) 219 CLR 365 at 423-425 [166]-[169].

exploration, as later cases did⁶⁴, as to whether the hypothesis of the legislation excluded its application to children because of the normal feature of Australia's constitutional arrangements that long-term detention is viewed as punitive and thus only to be imposed by a judicial order, not by legislative fiat. That was a constitutional proposition that was advanced in *Al-Kateb v Godwin*. That case became the occasion for a vigorous exchange between myself and Justice McHugh concerning the extent to which international law (specifically the international law of human rights) might be taken into account in elaborating the requirements of the Australian Constitution.

In my own reasons in companion decisions that coincided with the reasons in *Minister for Immigration v B*⁶⁵ I invoked the *Jumbunna* principle. In *Al-Kateb*, although not mentioned, *Jumbunna* constituted the implicit assumption that justified reference to the requirements of international law, on that occasion extending to an elaboration and explanation of the requirements of the Australian Constitution itself.

THE APPLICATION AND EXTENSION OF JUMBUNNA

The judicial decisions in *Brown* and in *B's* case illustrate the fact that the principle in *Jumbunna* is quite often utilised in contemporary

⁶⁴ *Al-Kateb v Godwin* (2004) 219 CLR 486.

⁶⁵ (2004) 219 CLR 365 at 416 [143].

judicial decision-making - although commonly, it has to be said, by judges who have a particular interest in the developments of international law and in the way in which such developments may impinge upon Australia's legal evolution. Many of the cases in recent years that have involved the specific invocation of *Jumbunna* have been those where my own reasoning, influenced by developments in international law, has led me to a conclusion different from that reached by the majority of the High Court. I am not saying that other judges have not acted in the manner that Justice O'Connor expressed in *Jumbunna*. Still less that Justice O'Connor presumption has been overtaken by more recent events. Quite the contrary. But invocation of the principle has certainly been a recurring feature of many of my own decisions.

Without attempting an exhaustive list, decisions in which I have referred to the subject *Jumbunna* principle include: *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs*⁶⁶; *Minister for Immigration v Al-Khafaji*⁶⁷; *Coleman v Power*⁶⁸; *Cornwell v The Queen*⁶⁹; *Truong v The Queen*⁷⁰; *Baker v The Queen*⁷¹; and *Thomas v Mowbray*⁷².

⁶⁶ (2004) 219 CLR 486 at 524 [109] and (2004) 219 CLR 486 at 529 [126].

⁶⁷ (2004) 219 CLR 664 at 674 [27].

⁶⁸ (2004) 220 CLR 1 at 91 [240].

⁶⁹ (2007) 81 ALJR 840 at 878 [175].

⁷⁰ (2004) 223 CLR 121 at 167 [121].

The principle has also been applied by several judges of the Federal Court, including in the influential decision of *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri*⁷³. In years to come, it will be interesting to observe the way in which, in the High Court, Chief Justice French maintains his engagement with international law, including the international law of human rights⁷⁴. However that may be, an indication of things to come may be seen in the important decision of the High Court in *Roach v Electoral Commissioner*⁷⁵. That decision not only concerned the utility and admissibility of the international principles of human rights law in giving meaning to legislative language. The issue in that case arose in the context of the language of the Australian Constitution, which is clearly a statute of a very special kind.

Roach involved a challenge brought by an Australian citizen who was enrolled as an elector in a federal electorate in accordance with the *Commonwealth Electoral Act 1918* (Cth). The elector, Ms Roach, wished to cast her vote in the then anticipated federal general election.

⁷¹ (2004) 223 CLR 513 at 560 [140].

⁷² (2007) 233 CLR 307 at 380 [208].

⁷³ (2003) 126 FCR 54 at 80 [138].

⁷⁴ See *Wurrijal v The Commonwealth* (2009) 83 ALJR at [] and [].

⁷⁵ (2007) 233 CLR 162.

The election was subsequently conducted in November 2007. In 2004, Ms Roach had been convicted of offences against the *Crimes Act 1958* (Vic). She was sentenced to an effective term of imprisonment of six years. Under provisions of the *Commonwealth Electoral Act*, she was disenfranchised from voting whilst serving her term of imprisonment. Provisions in federal law disqualifying convicted prisoners from voting dated back to the first federal election for the Federal Parliament and indeed back to colonial times. Ms Roach challenged the constitutional validity of all such disqualifying provisions. She contended that it was implicit in the constitutional provisions and their purpose that Australian nationals who were "electors" (a word used in the Constitution⁷⁶) could not be deprived by federal legislation of the entitlement to vote because of their imprisonment.

As an alternative to this broad proposition, Ms Roach fastened upon an amendment to the *Commonwealth Electoral Act* enacted in 2006. The amendment of that year altered the previous provision, disqualifying from voting prisoners serving custodial sentences of three years or longer, and substituted a total prohibition on all prisoners serving custodial sentences from fulfilling their rights and discharging their duties, as it was put, as constitutional "electors". It was this latter provision upon which much of Ms Roach's arguments focused. The

⁷⁶ See eg the Constitution, ss 30, 128.

majority of the High Court⁷⁷, whilst declining to endorse her larger proposition, accepted Mr. Roach's alternative that the disqualification of all prisoners, including those serving sentences of imprisonment for three years or less, was beyond the power of the Federal Parliament. To this extent, Ms Roach's challenge succeeded.

The Australian Constitution does not spell out explicitly the requirements to be an "elector". On the face of things, such requirements are therefore left to parliamentary prescription. However, no prescription could be enacted which would effectively frustrate the achievement of the constitutional design. In a text that is otherwise brief and sparse, the Australian Constitution contains quite detailed provisions governing the system of electoral democracy that it establishes. Amongst its provisions there were three, at least, that suggested a need for a measure of proportionality between any disqualification of electors from voting and the reasons for such disqualification.

The first were the provisions contained in ss 7 and 24 of the Constitution requiring that Senators and members of the House of Representatives should be "directly chosen by the people ...". The second was the provision in s 25 acknowledging State laws disqualifying persons "of any race" from voting at elections. The third was the language of in s 44(ii) providing expressly for disqualification from being

⁷⁷ Gleeson CJ and, in separate reasons, Gummow J, Crennan J and myself; Hayne J and Heydon J dissenting.

elected as a Senator or a Member of the House of Representatives, materially, where the person was:

"attainted of treason, or had been convicted or is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer".

The notion that, by the Constitution, a person could be elected to be a *member* of the Federal Parliament, although sentenced or subject to imprisonment of one year or longer, but that to perform the function of an *elector*, with its much lesser and transient obligations, any sentence of imprisonment *at all* should disqualify the constitutional "elector" from voting, seemed disharmonious and internally inconsistent.

Similarly, the scheme of the Constitution, by s 28, envisages that "every House of Representatives shall continue for three years from the first meeting of the House, and no longer, but may be sooner dissolved by the Governor-General". Thus, a person convicted and sentenced to an imprisonment of fewer than three years would inevitably be restored to society and, for part of the next electoral cycle, be subject not to rules of discipline laid down for the administration of the prison but, like other citizens and electors, to the laws established for the governance of Australian society by the elected Parliament.

It was by such analysis of the language and history of the Constitution, by examination of the provisions for disqualification in the United Kingdom and in the Australian colonies before Australian

federation and by a comparison of British and Australian electoral provisions that the majority of the High Court in *Roach* came to their conclusion that some limits had to be placed upon the parliamentary power to disqualify persons from exercising their constitutional functions as "electors". Drawing the line was obviously a difficult and contentious task. But this is a task that constitutional courts perform all the time. The main guideposts are to be found in the text and history of the Constitution itself. Yet the majority in *Roach* also considered it permissible to travel outside such sources and to examine how problems similar to those raised in *Roach* had been addressed in other countries and in international tribunals, necessarily operating under written laws different from those expressed in the Australian Constitution. This was an approach upon which the Justices of the High Court divided quite sharply.

In his dissenting reasons in *Roach*, Justice Hayne protested at the reference by the majority Justices to such international materials. He first recorded the arguments of Ms Roach, set out above, and then indicated why, in his view, such legal materials from outside of Australia could not be treated as helpful in any way to the task of constitutional interpretation in hand⁷⁸:

"Emphasis was placed, in argument, on the ways in which other nations, operating under different constitutional

⁷⁸ *Roach* (2007) 233 CLR 162 at 220 [163].

instruments and arrangements, have dealt with prisoner voting. Particular reference was made to several Canadian decisions⁷⁹ about the application of the *Canadian Charter of Rights and Freedoms* to federal laws disqualifying prisoners from voting, to the decision of the European Court of Human Rights in *Hirst v United Kingdom (No 2)*⁸⁰ concerning the compatibility of s 3 of the *Representation of the People Act 1983* (UK)⁸¹ with the First Protocol to the *European Convention on Human Rights* and to a decision of the Constitutional Court of South Africa⁸² concerning the validity of provisions depriving prisoners, serving a sentence of imprisonment without the option of paying a fine, of the right to participate in elections during the period of their imprisonment. ... It was said that these decisions, or these decisions read in conjunction with the international instruments such as the *International Covenant on Civil and Political Rights*⁸³ revealed a generally accepted international standard that could, even should, find application in a search for the 'common understanding' of which McTiernan and Jacobs JJ spoke in *McKinlay*⁸⁴ or otherwise in the construction of 'directly chosen by the people'. American decisions⁸⁵ upholding the validity of statutes providing for the life-long disenfranchisement of felons were said to be irrelevant on the ground that they depended upon the particular text and history of s 2 of the 14th Amendment to the *United States Constitution*".

⁷⁹ *Belczowski v The Queen* [1991] 3 FC 151; *Belczowski v The Queen* [1992] 2 FC 440; *Sauvé v Canada (Attorney-General)* (1992) 7 OR (3d) 481; *Sauvé v Canada (Attorney-General)* [1993] 2 SCR 438; *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519.

⁸⁰ (2005) 42 EHRR 41.

⁸¹ Providing that a "convicted person during the time that he is detained in a penal institution in pursuance of his sentence ... is legally incapable of voting in any parliamentary or local election".

⁸² *Minister of Home Affairs v National Institute for Crime Prevention and Re-integration of Offenders* (NICRO) 2004 (5) BCLR 445.

⁸³ As applied by General Comment No 25, "The right to participate in public affairs, voting rights and the right of equal access to public service (Art 25)" published by the Office of the High Commissioner for Human Rights, adopted 12 July 1996.

⁸⁴ *Attorney-General (Cth); Ex Rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 36.

⁸⁵ e.g. *Richardson v Ramirez* 418 US 24 (1974).

Justice Hayne saw a "fundamental flaw" in this line of argument⁸⁶:

"That the problem may be stated in generally similar terms does not mean that differences between the governing instruments may be ignored. Yet in essence that is what the appeal made by the plaintiff to 'generally accepted international standards' seeks to have the Court do".

For Justice Hayne it was therefore impermissible to invoke the foreign material to assist in the interpretation of the Australian Constitution, with its distinctive language, history and purposes. It was for the Australian Parliament to decide any disqualification of an elector. There was no relevant restrictive implication controlling its power to do so.

A similar opinion was expressed, in even stronger terms, by Justice Heydon. He too recorded Ms Roach's reliance on the terms of, and various decisions about and commentaries on, foreign and international instruments, including those noted by Justice Hayne. He described these references to the "foreign instruments" as "surprising"⁸⁷:

"It is surprising because these instruments can have nothing whatever to do with the construction of the Australian *Constitution*. These instruments did not influence the framers of the *Constitution*, for they all post-date it by many

⁸⁶ (2007) 233 CLR 162 at 221 [164].

⁸⁷ (2007) 233 CLR 162 at 224-225 [181] (citations omitted).

years. ... The language they employ is radically different. One of the instruments is a treaty to which Australia is not and could not be a party. Another of the instruments ... is a treaty to which Australia is a party, but the plaintiff relied for its construction on comments by the United Nations Human Rights Committee. If Australian law permitted reference to materials of that kind as an aid to construing the *Constitution*, it might be thought that the process of assessing the significance of what the Committee did would be assisted by knowing which countries were on the Committee at the relevant times, what the names and standing of the representatives of those countries were, what influence (if any) Australia had on the Committee's deliberations, and indeed whether Australia was given any significant opportunity to be heard. The plaintiff's submissions did not deal with these points. But the fact is that our law does not permit recourse to these materials. The proposition that the legislative power of the Commonwealth is affected or limited by developments in international law since 1900 is denied by most but not all of the relevant authorities - that is denied by 21 of the Justices of the Court who have considered the matter and affirmed by only one".

By reference to the footnoted decisions, cited by Justice Heydon in support of these propositions, it is plain that he thought that only one Justice of the High Court of Australia, in the past, had invoked international instruments, such as the ICCPR in aid of the process of construing the Australian Constitution. His footnotes show that he considered that, on this point, the one concerned was myself and that I had been in isolated dissent in this respect. However, with respect, this is not correct if regard is had to the many cases in which Justices of the High Court of Australia in the past have made references to international law in explaining their conclusions concerning the meaning of Australian constitutional provisions.

A useful reference to some of the cases in which this has been done may be found in an article by Mr Ernst Wilhelm, a past officer of

the Federal Attorney-General's Department of great experience, who collected many cases where sometimes extended references have been made to the *International Covenant on Civil and Political Rights*, the *European Convention for the Protection of Human Rights and Fundamental Freedoms* and other international instruments and principles⁸⁸:

"[L]ong prior to the current division in the High Court, members of the Court referred to international law principles in constitutional matters. In *Polyukhovich v The Commonwealth*⁸⁹ ... Deane J found support for his conclusion that Chapter III of the Constitution precluded ex post facto criminal laws, in 'provisions of international conventions concerned with the recognition and protection of fundamental human rights'⁹⁰. In *Nationwide News Ltd v Wills*⁹¹, Brennan J drew on European jurisprudence relating to the *European Convention for the Protection of Human Rights and Fundamental Freedoms* to support his view that a ban on political advertising was not unconstitutional⁹². In *North Australian Aboriginal Legal Aid Service Inc v Bradley*⁹³, a challenge to the constitutional validity of the appointment of the Chief Magistrate of the Northern Territory, Gleeson CJ in his treatment of the fundamental importance of judicial independence, referred to the *Universal Declaration of the Independence of Justice*, the *Beijing Statement of Principles on the Independence of the*

⁸⁸ E Willheim, "Globalisation, State Sovereignty and Domestic Law: The Australian High Court Rejects International Law as a Proper Influence on Constitutional Interpretation" (2005) 1 *Asia-Pacific Journal on Human Rights and the Law* 1.

⁸⁹ (1991) 172 CLR 501.

⁹⁰ (1991) 172 CLR 501 at 512.

⁹¹ (1992) 177 CLR 1.

⁹² (1992) 177 CLR 1 at 154.

⁹³ (2004) 218 CLR 146 at 152 [3].

Judiciary in the LAWASIA region, and the *European Convention for the Protection of Human Rights and Fundamental Freedoms*⁹⁴. Gummow J also referred to the *European Convention* in *Fardon v Attorney-General for the State of Queensland*⁹⁵ where the appellant unsuccessfully argued that conferral on the Supreme Court of Queensland of a power to order continuing (preventive) detention infringed Chapter III of the Constitution. In none of those cases did Deane J, Brennan J, Gleeson CJ or Gummow J find any necessity to justify their references to principles of international law and no other judge found reason to criticise their doing so".

There have been further decisions of the High Court since those collected by Mr Willheim that could be added to his list⁹⁶.

Those who oppose any reference to international law, specifically the international law of human rights, in resolving contested questions concerning the meaning and application of the Australian Constitution, have to be careful to observe a consistent stance. Unless they insist on a total prohibition of any reference whatever to such materials, the risk is run that their opposition to such citations and use will appear to be selective and affected, however unconsciously, by the undesired

⁹⁴ (2004) 218 CLR 146 at 152 [3].

⁹⁵ (2005) 223 CLR 575 at 607 [64].

⁹⁶ Eg *Koroitamana v The Commonwealth* (2006) 227 CLR 31 at 45 [44] where reference was made by Gummow, Hayne and Crennan JJ, in joint reasons, to the *Convention on the Reduction of Statelessness*, which was adopted at New York on 30 August 1961 and entered into force for Australia on 13 December 1975. See also *ibid* at 50-54 [66]-[70].

information and analogies which the overseas decisions may provide to the local decision-makers⁹⁷.

CONCLUSIONS: WORK IN PROGRESS

All of the judges in the majority in *Roach*, being Chief Justice Gleeson⁹⁸ and, jointly, Justices Gummow and Crennan and myself⁹⁹, had no hesitation in referring to the decisions, and instruments, to which Justices Hayne and Heydon took exception. In doing so, the majority Justices did no more than to reveal, and acknowledge candidly, considerations of a contextual kind which had played a part in their reasoning. Just as they would with references to academic articles, encyclopaedias, histories and other reading material that had influenced their minds.

Such materials afford context, background and developments perceived as offering material analogies for the judicial decision-making process. Today it is increasingly recognised that words of a statute, regulation (or constitution), as of any legal document, take their meaning

⁹⁷ See *Wurrijal v The Commonwealth* (2009) 83 ALJR at []; cf at [].

⁹⁸ *Roach* (2007) 233 CLR 162 at 178-179 [16]-[19]; 203-204 [100].

⁹⁹ *Roach* (2007) 233 CLR 162 at 203-204 [100].

from the context in which the document is designed to operate¹⁰⁰. In recent years, the High Court of Australia has repeatedly stressed that considerations of context and purpose necessarily play an important part in affording the meaning of legal provisions¹⁰¹. It is in this way in the contemporary world that legal texts, including of a national constitution, are affected by material provisions and elaborations of international law, including the international law of human rights.

The Australian Constitution is akin to a statute that is "always speaking", in the sense that it is intended to operate and apply to circumstances as they arise from time to time, indeed indefinitely and certainly for decades and generations to come. In such circumstances, to ignore the conditions in which the Constitution now operates is to overlook an inherent feature of its character as an instrument of government¹⁰².

¹⁰⁰ M D Kirby, "Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts" (2002) 24 *Statute Law Review* 95. See also *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 396-397 applying *R v Brown* [1996] 1 AC 543 at 561

¹⁰¹ Cf. *CIC Insurance Ltd v Bankstown Football Club Limited* (1997) 197 CLR 384 at 408; *Newcastle City Council v GIO Ltd* (1997) 191 CLR 85 at 112-113; *Project Blue Sky Ltd v Australian Broadcasting Corporation* (1998) 194 CLR 355 at 381 [69], 384 [78].

¹⁰² See *Grain Pool (WA) v The Commonwealth* (2000) 202 CLR 479 at 523 [111].

These issues were canvassed respectively by Justice McHugh and me in our respective opinions in *Al-Kateb v Godwin*¹⁰³. I will not repeat them now. It is sufficient to note the trend in other final courts with like traditions, that supports the approach that I have expressed¹⁰⁴. My views, in turn, are consistent with the particular principle of statutory interpretation stated by Justice O'Connor in *Jumbunna*. There is no reason why that principle should not also apply to the Constitution. Certainly, it was stated as a general principle of statutory construction. Incontestably, in 1908, Justice O'Connor would have regarded the Australian Constitution as a statute because expressing a law, as it was then perceived, enacted by the Imperial Parliament at Westminster. On the face of things, therefore, his presumptive canons of construction applied to the Constitution as well as to other legislative provisions.

I acknowledge that caution has to be deployed in using, and making reference to, international treaty and other law that has not been specifically incorporated into municipal law or decisions of other national and international courts and tribunals concerning such laws. In my own extra-curial writings, I have accepted, and explained, the reasons for

¹⁰³ (204) 219 CLR 562 at 586-595 [50]-[73]; cf at 616-630 [149]-[193].

¹⁰⁴ M.D. Kirby, "International Law - The Impact on National Constitutions", 21 *American University International Law Review* 327 at 346-356 (2006); M.K. Kirby, "Transnational Judicial Dialogue, Internationalisation of law and Australian Judges" (2008) 9 *Melbourne Journal of International Law* 171.

such caution¹⁰⁵. No one suggests that an unincorporated treaty or other norm of international law is, as such, part of Australia's domestic law, still less of its constitutional law. No judge citing such materials should do so in a belief that (outside perhaps the norms of international law of universal jurisdiction¹⁰⁶) the rules must be given effect in same the way that a national constitution or local statute or subordinate law must be. It seems likely that the clash between those who consider that citation of such materials is proper and those who do not, derives, in large part, from different notions concerning the use that may be made of the international materials. Concepts such as natural exceptionalism, perceived democratic deficiencies, and the importance of international law and human rights doubtless influence the way in which individual judges approach such questions.

There are significant reasons of law and principle why such use is limited. In part, in our constitutional tradition, those go back to the famous decision in the *Seven Bishops* case¹⁰⁷ which remains part of Australian law¹⁰⁸. That decision, which immediately preceded the

¹⁰⁵ As I, for example, did in *Minister for Immigration v B* (2004) 219 CLR 365 at 416 [143].

¹⁰⁶ See S Macedo (ed), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (2006) Penn, 40.

¹⁰⁷ *The King v. Sancroft (Trial of the Seven Bishops)* (1688) 12 St. Tr 183.

¹⁰⁸ See eg *O'Donoghue v Ireland* (2008) 234 CLR 599 at 653 [178] and *Hearne v Street* (2008) 82 ALJR 1259 at 2367-1268 [41]. See also *Mann v O'Neill* (1997) 91 CLR 208 at 266.

"Glorious Revolution" of 1688, has been taken to affirm that the Executive Government may not override a law made by Parliament, except with the express authority of Parliament to do so. Treaties, in our tradition, are negotiated, signed and ratified, by the Executive Government. Care must therefore be taken in suggesting that a treaty may override a law made by the legislature.

Normally, however, there is no such deliberate attempt by the Executive to use such a law to override the will of the Parliament. Ordinarily, the question is presented at a higher level of abstraction. It is not whether a treaty or other international law can override local legislation but whether, as Justice O'Connor explained in *Jumbunna*, once the treaty has become part of the law of civilised nations (and particularly where the home nation has acknowledged this and has subscribed to the treaty and ratified it), it is to be presumed that the local law will operate (so far as its language permits) conformably with the relevant international law. In practical terms, the treaty then is nothing more than an aid to the reasoning of the decision-maker. It affords assistance that is harmonious with the age in which we live: an age of nation states that are closely connected with each other by rapid means of travel, by instantaneous telecommunications, by the internet, by trade, by global problems and challenges, and by the international law of human rights¹⁰⁹.

¹⁰⁹ P. Sales and J. Clement, "International Courts and Domestic Courts: The Developing Framework" (2008) 124 LQR 388; but see R.

Harmonising international and municipal law is one of the great challenges before the law today. In achieving a proper degree of harmony, municipal courts have their own role to play. There are limits and these must be observed. But in my respectful view there should be no going back to parochial nationalism and inward looking disregard for the reasoning of experienced judges and other decision-makers beyond our shores, grappling with relatively similar legal problems as those presented by our own laws. We are not bound by what they write. But what they write can sometimes stimulate our own thinking, afford a check list against oversight and a reminder of basic considerations of legal doctrine and human dignity.

Contemporary Australian judges may be encouraged in this attitude by a number of features of our own legal tradition. Australia was never cut off, as the American courts largely were, from the source of comparative law materials available to courts generally elsewhere in the English-speaking legal tradition. From colonial times, Australia's links to the judiciary and laws of the United Kingdom stimulated local judicial minds to the frequent utility of comparative law. Some of the stimulus came to us through the opinion/s of the Judicial Committee of the Privy Council¹¹⁰. Other sources were presented, or suggested, by the

Provost, "Judging in Splendid Isolation", 56 *American Journal of Comparative Law* 125 (2008).

¹¹⁰ F.C. Hutley, "The Legal Traditions of Australia as Contrasted with those of the United States" (1981) 55 ALJ 63 at 63-64.

decisions of courts of high authority throughout the Empire, later the Commonwealth.

Therefore, in constitutional matters, Australian judges have, from the beginning, looked with great advantage to the decisions of the Supreme Court of the United States. They continue to do so and do not question their entitlement to do so. Our shared language itself and now the technology of the internet provide copious source materials that are frequently useful to legal analysis and judicial deliberation¹¹¹. Australian judges commonly use other source materials, including academic, historical and philosophical writings, literature, poetry, and even occasional humour. It would be unrealistic to suggest that we had to impose upon ourselves a complete prohibition on considering for any relevance and guidance it affords, the decisions of other respected courts and their analysis of the emerging universal principles of international law.

At the time the *Jumbunna* case was decided, the Adelaide Law School had already been operating for 25 years. Had the University of Adelaide been established in the United Kingdom at the time it was created in South Australia in 1874, it would have been the fourth oldest university in that country. It is equally remarkable to reflect on the

¹¹¹ There are also links afforded by the *Law Reports of the Commonwealth*, published by LexisNexis Butterworths, London since 1985 and the *Commonwealth Law Bulletin* published by the Commonwealth Secretariat, London.

forward-looking quality of the views expressed by Justice O'Connor in his reasons in *Jumbunna*. Like those who founded the University of Adelaide, and its Law School, O'Connor looked forward to the future. He was engaged with it and its likely developments - including as they affected the growth of international law and the comity of nations. The patriots who created the Australian federation were aware of the need for their new Commonwealth, geographically isolated from natural allies, to relate to the surrounding world. In this they were in much the same position as the founders of the United States of America had earlier been.

In retrospect, the opinion expressed by Justice O'Connor in *Jumbunna* can be seen for what it was: an expression of the open-mindedness of a fine lawyer and judge a century ago who declined to embrace an approach to law constrained by narrow legal patriotism and parochialism. And who saw local law as sometimes invoking a search for the municipal manifestation of universal principles, as applied to particular cases.

The events of the century that have passed since *Jumbunna* demonstrate the prescience of Justice O'Connor's opinion and his approach. Other judicial decisions in Australia suggest that it is an approach that is still appropriate to our decisions; indeed increasingly so. In this, despite its somewhat unpromising provenance, lies the continuing importance of *Jumbunna*. It is why, a century on, contemporary judges and lawyers can still draw useful lessons from the

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case for the resolution of some of the most hotly contested questions in our jurisprudence.