

# HART LECTURE 2009

## CONSTITUTIONAL LAW AND INTERNATIONAL LAW – NATIONAL EXCEPTIONALISM AND THE DEMOCRATIC DEFICIT?

Georgetown University Law Center  
Washington D.C., United States of America  
April 16, 2009

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EXCEPTIONALISM AND THE DEMOCRATIC DEFICIT?**

The Hon. Michael Kirby AC CMG\*

**THE HART MEMORIAL LECTURE**

It is a privilege to return to Georgetown Law and especially to be asked to deliver the Hart Lecture. The lecture is named for Phillip A. Hart, *cum laude* graduate of Georgetown University in 1934 and later three times United States senator for Michigan.

Throughout his lifetime, Senator Hart was noted for the humanistic ideals that he advocated. This lecture is designed to promote continued dialogue on topics of law or public policy of the type that concerned him. There can be no doubt that the topic I have chosen, involving the relationship between municipal constitutional law and international law, is such a topic. I am to give the lecture in succession to distinguished scholars who have given it in the past. Some of them, like Justice Aharon Barak, Judge Guido Calabresi and Professor Robert Post, I number among my friends.

\*Formerly Justice of the High Court of Australia (1996-2009), President of the International Commission of Jurists (1995-98); Honorary Counselor of the American Society of International Law (2009-); Honorary member of the American Law Institute.

Most of the Hart lecturers have been citizens of this great and diverse country. However, my lecture will invite the listeners, and those who may later read it, to lift their sights from an exclusive concern with the constitutional doctrines of the United States of America, fascinating though these may be. I will not place too much strain on those who consider my thoughts because I plan to refer mostly to American developments and to some that are parallel and have occurred in my own country, Australia. The foreign laws I will mention will not be unduly burdensome because, as I shall show, many of the controversies upon my chosen topic that have emerged in the United States are also present in Australia. Indeed, when I recount some of the judicial interchanges about the topic, that have occurred between colleagues in the High Court of Australia, an American audience, momentarily closing their eyes, will feel completely at home. The sharp and conflicting opinions will be familiar. Whilst most of the rest of the world looks on in bemusement at our passionate debates, Australian and American judges and lawyers are participants in, and beneficiaries of, common contests.

In a sense, these contests are natural and predictable in two countries that share so many legal links. Most especially, we share the link of the English language and constitutional tradition, the common law and a written constitution, federal in character, continental in reach, whose application is of necessity determined authoritatively by the independent judicial branch of government, which has been playing this inescapably political role in our democratic politics for far longer than has happened in most other countries on earth.

Historically, Australia's modern existence was a direct outcome of the American Revolution of 1776. Within little more than a decade of that struggle, the penal settlement in Sydney was established in 1788. And, a century later, the free settlers of the Australian colony worked together on a constitution which, in its judicial branch, derived many of its central ideas from the Constitution of the United States. Above all, like the United States,

Australia is a land in which it is accepted that, in great constitutional conflicts, touching the meaning and operation of the Constitution, the last word belongs not to a legislature elected by the people (as was the political theory and practise of the United Kingdom) but to a constitutional court fulfilling the responsibility of a national umpire. In Australia, as in the United States, constitutional and judicial review are accepted as axiomatic features of the legal system. Thus, in Australia, *Marbury v. Madison*<sup>1</sup> states the established law. In the theory of the Constitution, the people and their representative made and may change the document. But meantime, all laws derive their validity and binding force from the Constitution, subject to the power of the courts to determine that an apparent law is not a law at all but is null and void.

This, it must be noted, is a democratic conception of constitutionalism but with distinctly elitist and undemocratic elements to it. The subject of this lecture is how we are reconciling the democratic features of our constitutionalism with one of the most powerful forces for change in the law today. I refer to the rapid advance of international law and especially of the international law of human rights. Necessarily, this latter development derives from institutions and processes that answer to a constituency beyond the democracy of the nation state. One of the challenges before every legal system in the current age is how to accommodate the continuing role of the nation state with the international order as it is emerging and how to reconcile the functions, powers and dignity of national courts with international law, including as that law is declared by international and regional courts and other relevant decision-making bodies.

### **INCORPORATED TREATIES, CONSTITUTIONAL RULES & COMMON LAW**

My immediate purpose is to examine the extent to which judges of our legal traditions may refer to, and use in their reasoning, opinions written in foreign

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<sup>1</sup> 1 Cranch (5US) 137 (1803)

courts and tribunals, when discharging their municipal responsibilities to the local constitution and the laws made under it.

Posed in that way, the question is over-broad. At least in most countries, there is no particular problem, where a local statute expressly (or with sufficiently clear implication) imports into municipal law obligations assumed by the nation state under a treaty. Reference to the jurisprudence that has developed around the treaty will then be a legitimate tool of analysis for the municipal judge. In Australia, for example, where the Refugees Convention and Protocol have been ratified by the nation and a definition of “refugee” adopted in federal law designed expressly to reflect the definition expressed in that international law, there has been no real question but that local courts may have resort to the *travaux préparatoires* preceding the treaty<sup>2</sup> and also to the *Handbook* of the High Commissioner for Refugees, expounding state practice under the treaty<sup>3</sup>.

As well, the courts of Australia, like courts and tribunals of other countries of asylum, regularly examine the analysis, exposition and application of the shared treaty language, expressed by the to courts and tribunals of other countries. They do so in an endeavour (so far as they can) to promote consistency in the local understandings of this branch of international law. In a sense, this is done because courts impute to the legislature, when it effectively incorporates the treaty provisions into municipal law<sup>4</sup>, an intention to import the meaning of the treaty as it evolves in its international understanding. So far, so good.

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<sup>2</sup> Applicant A v. Minister for Immigration & Ethnic Affairs (1997) 190 CLR 225 at 252-258 per McHugh J; 294-296 per Kirby J (dissenting).

<sup>3</sup> Minister for Immigration & Multicultural & Indigenous Affairs v. QAAH of 2004 (2007) 231 CLR 1 at 29-30 [80]

<sup>4</sup> Migration Act 1958 (Aust.), s 36(2)

In some countries, with constitutional documents more recent than those of the United States or Australia, provisions have been incorporated that expressly enjoin the local courts, with constitutional authority, to pay regard to international law, in discharging their municipal functions. Thus the INDIAN CONSTITUTION, in Art 51(c), directed at the State, requires it to endeavour to “foster respect for international law”. The SOUTH AFRICAN CONSTITUTION is in somewhat stronger terms. Both in its interim form of 1994 and in its post-apartheid provisions of 1996, it adopts an internationalist methodology. Thus s 39(1) specifically requires the Constitutional Court of South Africa to have regard to international law when giving meaning to the South African Bill of Rights. Moreover, in other matters, the same subsection provides that the court “may consider foreign law”. These provisions have been described as reflecting the SOUTH AFRICAN CONSTITUTION’s “plural heritage”, identifying the country “as a global participant”<sup>5</sup>.

The supremacy clause of the UNITED STATES CONSTITUTION, in Article VI, adopted what for the time was an unusually strong statement about the supremacy of law expressed in treaties. It declared them, together with “this constitution”, and the “laws of the United States which shall be made in Pursuance thereof”, so long as made “under the Authority of the United States” to be “the supreme Law of the Land; and the Judges in every state shall be bound thereby ...”<sup>6</sup>. A safeguard against untrammelled government by the Executive was afforded by the requirement in Article II, sec 2 that treaties could be made by the President but only “with the Advice and Consent of the Senate ... provided two-thirds of the Senators present concur”. These arrangements represented an innovative departure from the British practice that both preceded and followed them.

To untutored eyes, unfamiliar with more than two centuries of decision-making, such a provision would seem to give extremely high authority in the

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<sup>5</sup> Justice Yvonne Mokgoro *Homegrown Constitutional Jurisprudence: the Case of South Africa*, unpublished paper, Hong Kong, 28 April 2000. See also SOUTH AFRICAN CONSTITUTION ss 232, 233.

<sup>6</sup> UNITED STATES CONSTITUTION, Art VI.

United States to the substance of the international law of treaties so far as the United States is a party to them. In most other common law countries, perhaps all, a treaty, made by the Executive is not, as such, part of the supreme law of the land. Generally, it has no constitutional status as such, relying for any municipal authority upon the acts of another lawmaker, proceeding under lawful power, to bring the treaty provision specifically into municipal legal effect. Generally, this requirement is explained in terms of the need for local legislation to breathe domestic life into treaty provisions. But, of course, the Executive can do so under any powers afforded to it by the legislature. And judges may also do so, to the extent that they exercise their limited powers of law-making and do not pretend to bring an entire treaty into effect, as it were, by “the back door”<sup>7</sup>. That would not be a proper use of the judicial power.

In a country such as Australia, where there is no such supremacy clause in the national constitution, nor a construction clause of the Indian or South African kind, the dualist doctrine governing the relationship between international and municipal law continues to reign supreme. Indeed, since the decision of the Supreme Court of the United States in *Medellin v. Texas*<sup>8</sup>, and despite the supremacy clause and its apparently emphatic language applicable to ratified treaties in this country, something like the traditional dualist doctrine appears to have been restored to the United States. Certainly, many lawyers of the English common law tradition would feel quite comfortable with the majority holdings in *Medellin*, with their strong resonances of the dualist theory. Again, so far, so good.

I now reach two forks in the road upon which I have embarked. The first is important and I will describe it. However, I will not tarry overlong to explore it because, interesting though it may be, pursuit of it would deflect me from my

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<sup>7</sup> Minister of State for Immigration & Ethnic Affairs v. Teoh (1995) 185 CLR 373 at 288, 313. See also *Capital Cities Communications Inc. v. Canada Radio, Television and Telecommunications Commission* [1978] SCR 141 [52]-[61] per Iacobucci J.

<sup>8</sup> 128 S.Ct. 1346 (2008).

main purpose. I refer to the use of international law (as least so far as it declares universal human rights) in adapting, correcting and expressing the content of the municipal common law.

Like the United States, Ireland and virtually all countries of the Commonwealth of Nations (more than a quarter of humanity) Australia's foundational law is derived from the common law of England as received at specific dates in colonial times. In Australia, unlike the United States, in part because of the integrated appellate structure of the judiciary provided by the Constitution<sup>9</sup>, there is a single common law, not separate common laws of the several states and territories<sup>10</sup>:

“With the establishment of the Commonwealth of Australia, as with that of the United States of America, it became necessary to accommodate basic common law concepts and techniques to a federal system of government embodied in a written and rigid constitution. The outcome in Australia differs from that in the United States. There is but one common law in Australia which is declared by this Court as the final court of appeal. In contrast to the position in the United States, the common law as it exists throughout the Australian States and Territories is not fragmented into different systems of jurisprudence, possessing different content and subject to different authoritative interpretations<sup>11</sup>”.

Because State statutes often contain differential provisions, this rule occasionally gives rise to conceptual problems<sup>12</sup>. However, for a large country with a comparatively small population, the rule works tolerably well. It permits nation-wide declarations of the common law to be made from time to

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<sup>9</sup> AUSTRALIAN CONSTITUTION, Ch.III

<sup>10</sup> See e.g. *Lange v. Australian Broadcasting Corporation* (1997) 189 CLR 520 at ????????

<sup>11</sup> Cf. *Black & White Taxi Co. v. Brown & Yellow Taxi Co.* 276 US 518 at 533-534 (1928); *Erie Railroad Co. v. Tompkins* 304 US 64 at 78-79 (1938).

<sup>12</sup> *Victorian Workcover Authority v. Esso Australia Ltd.* (2001) 207 CLR 520



time. Such became necessary in 1992 in an important case, *Mabo v. Queensland [No.2]*<sup>13</sup>.

*Mabo* was a decision that changed the established holding of earlier judicial authority to the effect that the common law of Australia recognised no land rights of the indigenous peoples of the country. That rule rested on the conclusion that, at the time of the acquisition of British sovereignty, the indigenes had been uncivilised nomads with no developed legal order and specifically no laws governing ownership of land. In *Mabo*, this long-standing decisional authority was undermined by much evidence demonstrating that it was based on a factually erroneous premise: the indigenous Aboriginals being shown to have had highly developed customary laws which attached great importance to land and its part in Aboriginal communal life.

Such a factual difference would not, alone, have been sufficient to persuade the High Court of Australia to re-express the common law. Some other development of a legal character was necessary to do this. At a time three years before my own appointment to the High Court, the majority of the Justices found the legal “key” to unlock the door established by past judicial authority. They found it in the international law of human rights.

The leading exposition of the governing principle, held to be applicable, was given by Justice F.G. Brennan, later to be Chief Justice of Australia:<sup>14</sup>

“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

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<sup>13</sup> (1992) 175 CLR 1; [1993] 1 LRC 194

<sup>14</sup> (1992) 175 CLR 1 at 42; [1993] 1 LRC 194 at 230.

the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports<sup>15</sup>. 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 when international law declares the existence of international 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 ...”.

Chief Justice Mason and Justice McHugh concurred in this opinion. The conclusions of Justices Deane, Toohey and Gaudron were to similar effect. Only Justice Dawson dissented, holding that any alteration of a rule of land law of such duration and importance was properly a matter for legislators not courts. In short, he felt that any new rule and any use of international human rights to derive it, suffered the fatal defect of a democratic deficit.

The minority view notwithstanding, in Australia, following *Mabo*, the foregoing interpretative rule for checking and re-expressing earlier declarations of the common law has been deployed on many occasions. Indeed it is not now controversial and is applied from time to time<sup>16</sup>. In a sense, this rule can be seen as a modern variation on a theme long established, as an interpretative principle, in most countries of the common law. The interpretation of statutes and the exposition of common law rules are regularly re-assessed to ensure that they are in harmony with basic notions of fundamental civil rights, whether expressed in the Constitution or elsewhere in municipal law. Because of the differing development of the common law in our countries and the differing histories, as settler societies, of our respective dealings with indigenous peoples, it would be unfruitful for me to examine this common law

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<sup>15</sup> See Communication 78/1980 in SELECTED DECISIONS OF THE HUMAN RIGHTS COMMITTEE UNDER THE OPTIONAL PROTOCOL, Vol.2, p.23.

<sup>16</sup> e.g. *Coleman v. Power* (2005) 220 CLR 1.

doctrine at greater length. It is sufficient to note it. Stated as it was in 1992, the principle in *Mabo* is one that acknowledges the ongoing law-making role of common law courts in Australia; the fact that that role is today discharged in the context of a plethora of international laws, treaty and otherwise; and the acknowledgement that views will differ on whether, in the particular case, it is appropriate for courts to harmonise old rules with developing understandings of universal rights or whether such functions should be left exclusively to the elected representatives in the legislatures of the nation.

Having put this third instance to one side, I now reach the crucial point upon which strongly differing views, in divided judicial decisions, have arisen both in the United States and in Australia. I refer to the extent to which the judiciary, in interpreting a national constitution, may have regard to, and cite, developments of international law (including on the subject of universal human rights) in interpreting the basic law of a nation state.

### **INTERNATIONAL AND CONSTITUTIONAL LAW**

Upon this point there is incontestably a very strong difference of judicial opinion, at least in the final courts of the United States and Australia. Over this issue, there have been differences of opinion that have come to the fore during the past two decades as municipal judges and lawyers have become more familiar with international law and specifically the international law of human rights.

In Canada, a turning point in the way the Supreme Court of that country was prepared to utilise international law arose in *Baker v. Canada*<sup>17</sup>. The majority in that case concluded that the Immigration Act<sup>18</sup> of Canada should be interpreted in conformity with international obligations arising from Canada's

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<sup>17</sup> [1999] 2 SCR 815.

<sup>18</sup> RSC c1-2 (1985)

ratification of the Convention on the Rights of the Child<sup>19</sup>. Justice Claire L’Heureux-Dubé, writing for the majority, agreed that, as the Convention had not been implemented as part of municipal law, it had no direct application within Canadian law. However, she said:<sup>20</sup>

“Nevertheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review.”

Strong dissents were filed in Baker by Justices Frank Iacobucci and John Major. They insisted, in a more traditional dualist way, that “an international convention, ratified by the executive branch of government, is of no force or effect within the Canadian legal system until such time as its provisions have been incorporated into domestic law by way of implementing legislation<sup>21</sup>. As far as they were concerned, it should simply be ignored.

Nevertheless, when interpreting the requirements of the Canadian Charter of Rights and Freedoms, a constitutional text, just two years later in its decision in *United States v. Rafay and Burns*<sup>22</sup>, the Supreme Court of Canada was unanimous in invoking the movement discerned in international law towards abolition of capital punishment in support of its interpretation of the Charter. It held that the international trend was useful to it in discovering and declaring Canadian values in relation to capital punishment. That, in turn, was relevant to the lawfulness in Canada of the extradition of the accused to the United States.

Still more important, in the following year, was the decision of the same court in *Suresh v. Canada*<sup>23</sup>. The applicant had contested a deportation certificate

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<sup>19</sup> (1977) UNTS 3.  
<sup>20</sup> [1999] 2 SCR 817 at [70]  
<sup>21</sup> [1999] 2 SCR 817 at [79]  
<sup>22</sup> [2001] 1 SCR 283.  
<sup>23</sup> [2002] 1 SCR 3.

based on his alleged association with terrorist activities in Sri Lanka. He did so on the ground that he would likely be subjected to torture if deported there. In a unanimous opinion, the Supreme Court of Canada offered a detailed analysis of the Convention Against Torture<sup>24</sup> and said<sup>25</sup>:

“A complete understanding of the Act and the *Charter* requires consideration of the international perspective. International treaty norms are not, strictly speaking, binding in Canada unless they have been incorporated in Canadian law by enactment. However, in seeking the meaning of the Canadian Constitution, the courts may be informed by international law. Our concern is not with Canada’s international obligations *qua* obligations; rather our concern is with the principles of fundamental justice. We look to international law as evidence of those principles and not as controlling in itself.”

Over the past decade there have been a number of similar decisions in Canada, both in the Supreme Court and in intermediate appellate courts<sup>26</sup>.

An important ingredient in the willingness of the Canadian courts to look to the jurisprudence that has developed around various international treaties, has been the introduction of certain treaty provisions into constitutional language in the form of the Canadian Charter. Indeed, this has been a feature of constitutional and quasi-constitutional laws in many common law countries. The introduction of post-war independence constitutions in India, Pakistan, Ireland, Ceylon, and then many parts of Africa, Asia and the Caribbean, has resulted in the adoption of human rights provisions that sometimes reflected a international template. Quite often such provisions repeated language that could be traced to earlier progenitors, including the English Bill of Rights of

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<sup>24</sup> 999 UNTS 171

<sup>25</sup> [2002] 1 SCR 3 at [59]-[60].

<sup>26</sup> See e.g. *Mugesera v. Canada* [2005] 2 SCR 100; *Hape v. Canada* [2007] SCC 26. See also *Ahani v. Canada* [2002] 208 DLR (4<sup>th</sup>) 66 (Ont.CA); *Reference re Bill C-7 on the Criminal Justice System for Young Persons* (2003) 10 CR (6<sup>th</sup>) 281 (CAQ); *Bouzari v. Iran* (2004) 243 DLR (4<sup>th</sup>) 406 (Ont.CA). See also discussion R. Provost *Judging in Splendid Isolation* 56 AMERICAN JOURNAL OF COMPARATIVE LAW 125 at 128-134 (2008).

1688; the Bill of Rights of the American Constitution after 1791 and the Universal Declaration of Human Rights of 1948<sup>27</sup>.

To many judges, in national courts, faced with cases for decision involving the meaning of their own constitutional charters of rights, it has seemed appropriate and useful over recent years to reach for the exposition of analogous problems, written by judges and decision-makers in the courts of other countries, international or regional courts and other bodies, grappling with similar problems. Doing so has not generally been viewed as evidencing any illegitimate loyalty or deference to non-binding texts. Still less has it been seen as exhibiting obedience to the norms of other countries or of the international community or the opinions of judges and others outside the municipal court hierarchy. Instead, reference to such elaborations has occurred because such expositions have been found helpful and informative and therefore useful in the development of the municipal decision-maker's own opinions concerning apparently similar problems presented by the municipal constitution or other laws.

### **UNITED STATES CASE LAW**

If one surveys the international judicial scene, I believe that none of the foregoing statements would be regarded as contestable or even controversial in any common law country (or indeed in most civil law countries with which I am familiar), save for the United States of America and Australia. In both of the latter countries, for some similar and some different reasons, strong opinions have been expressed antagonistic to any such references to foreign material in construing the provisions of the national constitution. The attitude has been evident in the United States, in respect of Bill of Rights provisions, even where, as in the case forbidding "cruel and unusual punishments"<sup>28</sup>, this expression was itself derived from the English Bill of Rights and later adapted

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<sup>27</sup> The United Nations General Assembly, Resolution 217A(III) of 10 December 1948; H. Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law* 25 GEORGIA J. OF INT'L AND COMPARATIVE L. 287 (1966).

<sup>28</sup> US CONSTITUTION, Amdt. VIII

in the Universal Declaration of Human Rights<sup>29</sup> and in the International Covenant on Civil and Political Rights<sup>30</sup>.

In the United States, a series of decisions involving constitutional questions, in which Justices of the Supreme Court have referred to provisions of international and foreign law, in explaining their conclusions, occasioned such an antagonistic response from other members of the Court, both in their reasons<sup>31</sup> and in extra-curial writing<sup>32</sup>, that a large public explosion of vituperation occurred. This was directed at the allegedly foreign law-friendly Justices, culminating both in reported death threats directed at some of them and the introduction of purported legislation, designed to make it an impeachable offense for a federal judge in the United States to base a decision on foreign law<sup>33</sup>. Thus, section 201 of the proposed Constitution Restoration Act states:

“In interpreting and applying the Constitution of the United States, a court of the United States may not rely upon any constitution, law, administrative rule, executive order, directive, policy, judicial decisions or any other action of any foreign state or international organisation or agency, other than the constitutional law and English common law”.

Commenting on this Bill, one United States Senior District Judge observed<sup>34</sup>:

“Aside from its grammatical incompetencies, the proposed Act does not define what it means by ‘constitutional law’ and ‘English common law’. ... As for the English common law, one would need to tread softly. Most American States included within their constitutions or statutes a

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<sup>29</sup> UDHR, Art 5 (“No-one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”).

<sup>30</sup> ICCPR, Art 7 (in the same terms as Art 5 of UDHR).

<sup>31</sup> See e.g. *Roper v. Simmons* 125 SCt. 1183, 1200 at 1226 (2005) per Scalia J.

<sup>32</sup> Justice A. Scalia *Romancing the Constitution: Interpretation as Invention* in G. Hushcroft and I. Brodie (eds.) *CONSTITUTIONALISM IN THE CHARTER ERA* (London) LexisNexis, 2004, 341

<sup>33</sup> Constitution Restoration Act of 2004; HR 3799; 108<sup>th</sup> Cong.§ 201 (204); Constitution Restoration Act of 2005 S 520; 109<sup>th</sup> Cong.§ 201 (2005). The death threats were described in Charles Lane, “Ginsburg Faults GOP Critics, Cites a Threat from ‘Fringe’” in *WASHINGTON POST*, March 17, 2006, p.A3.

<sup>34</sup> Judge John Kane, *International Law from the Trial Judge’s Vantage Point* 35 *DENVER JOURNAL OF INT. LAW & POLICY* 379 at 386 (2007)

provision that the common law that can be considered of full force stops as of March 24, 1607: the day the last ship sailed from England to what would become the lost colony of Jamestown, Virginia. I would dare not cite the Statute of Frauds which was enacted by the British parliament in 1677. A host of other precedents, such as the *McNaghten Case*, would be swept away from the American lexicon. I think the point is made that this proposed statute is utterly stupid. In the unlikely event that Congress would enact [it], it would not be enforceable and the first court to review it would likely strike it down without having to rely on any foreign law.

[Beyond] the xenophobic blindness of this proposed legislation, a more insidious danger lurks. We cannot afford to ignore outrageous demonstrations of ignorance such as the canard that the Holocaust never happened nor the instant one which presumes that the fundamental law of the United States can be understood without reference to the history of western civilisation.”

The decisions of the Supreme Court of the United States in which strong exchanges have occurred between the participating Justices over the references to foreign and international law in constitutional adjudication include *Atkins v. Virginia*<sup>35</sup>, *Lawrence v. Texas*<sup>36</sup> and *Roper v. Simmons*<sup>37</sup>. As these decisions are recent and familiar, I will not repeat them or revisit their content once again<sup>38</sup>.

Because of my own sexuality, I naturally read, with the closest attention, in faraway Australia, the decision of the Supreme Court in *Lawrence*. That was a decision, reversing the earlier holding of the Court in *Bowers v. Hardwick*<sup>39</sup>. The Supreme Court in *Lawrence* invalidated a Texan law criminalizing sodomy

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<sup>35</sup> 536 US 304 (2002)

<sup>36</sup> 539 US 558 (2003)

<sup>37</sup> 125 S.Ct. 1183 (2005)

<sup>38</sup> See the writer's Grotius Lecture for the American Society of International Law: Michael Kirby, *International Law: The Impact on National Constitutions* 21 AM.U.INT'L.REV. 327 (2006)

<sup>39</sup> 478 US 186 (1986)



between adults of the same sex even if they were consenting and acting in private. The Lawrence court not only overruled Bowers. It declared that the decision had been wrong when decided. No mention had been made in the Bowers opinion to the decision of the European Court of Human Rights, issued five years earlier in *Dudgeon v. United Kingdom*<sup>40</sup>. That decision had rejected similar statutory prohibitions in the law of the United Kingdom applicable in Northern Ireland. The European Court held that such laws constituted a violation of the right to privacy guaranteed by the European Convention on Human Rights. The assertion by the majority of the Supreme Court in Bowers that the sodomy law reflected ancient and universal values of civilised states would have been at least subjected to some doubt and heightened scrutiny if a reference to the then recent decision of the European Court had been made and considered.

Writing for the Supreme Court in Lawrence, Justice Kennedy took note of the European precedent, declaring<sup>41</sup>:

“To the extent Bowers relied on values we share with the wider civilisation, it should be noted that the reasoning and holding in Bowers has been rejected elsewhere. The European Court of Human Rights has followed not Bowers, but its own decision in *Dudgeon v. United Kingdom*, *Modinos v. Cyprus* [and] *Norris v. Ireland*.”

At the conclusion of his opinion for the Court in Lawrence, Justice Kennedy eloquently went on to explain how the concepts expressed in the United States Constitution have themselves evolved, just as the modern standards of decency and justice do in every civilised country:

“Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us

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<sup>40</sup> (1981) 45 Eur.Ct.HR 41; (1982) 4 EUR.HUM.RTS.REP. 149

<sup>41</sup> 539 US 558 at 578-579 per Kennedy J. The “living tree” approach to constitutional interpretation has a long history. See *Edwards v. Canada (Attorney-General)* [1930] AC 124 136 (PC).

to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”

Reasoning of this kind produced not only strong reactions in the Congress and various civic groups. It also elicited extremely angry words from judicial dissenters. Thus, in *Lawrence*, Justice Scalia complained<sup>42</sup> that the “Court has taken sides in the culture war, departing from its role of serving, as neutral observer, that the democratic rules of engagement are observed. [It is] a product of a law-profession culture [that has] largely signed on to the so-called homosexual agenda”. In *Roper v. Simmons*, Justice Scalia again expressed his contrary opinion powerfully<sup>43</sup>:

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

Foreign readers of these exciting exchanges might conclude that the more temperate views of the majority Justices had the better of the argument. Thus, in *Roper*, Justice Kennedy remarked<sup>44</sup>:

“The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”

Justice O’Connor, whilst dissenting and herself more cautious about the use of foreign law, was defensive about its occasional utility<sup>45</sup>:

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<sup>42</sup> 539 US 558 at 602-3 per Scalia J (dissenting).

<sup>43</sup> 125 S.Ct. 1183, 1226 (2005) per Scalia J (dissenting). See also *Romer v. Evans* 517 US 620,636 per Scalia J (dissenting)

<sup>44</sup> 125 S.Ct. 1183 at 1200 per Kennedy J.

<sup>45</sup> 125 S.Ct. 1183 at 1212 per O’Connor J (dissenting)

“[W]e should not be surprised to find congruence between domestic and international values ... expressed in international law or in the domestic laws of individual countries.

The fact remains that, after the sharp exchanges in the Supreme Court and in the Congress up to 2005, the reliance upon foreign and international legal materials in constitutional decisions of the Supreme Court appears to have receded. Perhaps no-one thought that any foreign analogies presented to the Court were sufficiently close and useful to warrant their mention. This would seem surprising when it is remembered that the Court has had to grapple during the past four years with important questions of fundamental principle and values in a number of cases involving detainees in Guantanamo Bay and elsewhere.

Perhaps those Justices who are inclined to inform their minds about reasoning on common problems, expressed in foreign courts and tribunals, have noticed the fuss that such citations commonly cause in the Court, in the Congress and in sections of society of this country and decided, instead, to accept Justice Scalia’s advice to Justice Breyer in their public conversation. This was to the effect that it was alright for Justice Breyer, to inform himself on international legal developments but he should just “keep it out of his opinions”<sup>46</sup>. For some judges, such a course might seem to be a path of prudence and wisdom. For others, it might seem a surrender to intellectual dishonesty and a departure from decisional transparency.

### **AUSTRALIAN CASE LAW**

If United States lawyers are now missing the vehemence of the exchanges over this subject, they have only to transfer their attention to Australian case law. Parallel judicial interchanges have taken place in Australia, including in recent

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<sup>46</sup> *The Relevance of Foreign Legal Materials in United States Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer* 3 INT’L J CONST.L Const.L 519 at 534 (2005).

times. Sharing, as we do, the same attributes of a common judicial system, discursive reasoning; dissenting opinions; and robust interchange, many of the debates in the United States, recounted above, have resonances with those that have occurred in the High Court of Australia.

In 2004, the High Court of Australia was required to decide whether the provisions of the Migration Act 1958 (Aust.) authorised the indefinite detention, without judicial order, of an illegal migrant, and, if so, whether such an enactment was constitutionally valid. A majority upheld the government's interpretation of the Act, concluding that, in the circumstances, the Act required the detention of Mr. Ahmed Al-Kateb indefinitely. On this point, the Court was divided 4:3<sup>47</sup>. The Act contained a provision that envisaged that an illegal migrant in detention could terminate the incarceration immediately by requesting the Minister to return him or her to the country of nationality. The problem arose because Mr. Al-Kateb was a stateless Palestinian. Kuwait, where he had been born, would not receive him. Israel would not permit him to pass through its territory to Gaza. There was no other access. No other country would accept him. On the face of the Minister's submission, Mr. Al-Kateb could be kept forever in the Womera Detention Camp in the middle of Australia. The minority Justices concluded that such an interpretation should not be attributed to the Act, given that a basic postulate of the Act, envisaged by its terms, could not be fulfilled as the Act contemplated in the particular case.

The majority went on to hold that the result that they favored was not inconsistent with the Australian Constitution. That Constitution evinces the purest form of federal democratic governance. There is no general bill of rights. The founders rejecting the American model, in this respect, because they believed that Parliament could always be trusted to protect the rights of the people. This, Americans will remember, was the initial reaction of James Madison to the request that he draft a Bill of Rights for the United States. Mr.

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<sup>47</sup> Per McHugh, Hayne, Callinan and Heydon JJ; Gleeson CJ, Gummow and Kirby JJ dissenting.

Al-Kateb's constitutional objection in Australia had therefore to be framed in terms of a suggested intrusion by the legislature into territory reserved by the Constitution to the Judicature (Ch III), on the footing that long-term (and certainly indefinite) detention had to be subjected to judicial scrutiny. The majority dismissed this argument. But Justice Gummow and I would have upheld it: *Al-Kateb v. Godwin*<sup>48</sup>.

A passing observation by me to the effect that the judicial chapter of the Australian Constitution should be construed today, so far as possible and consistently with the text, so as to conform with the principles of international human rights law, which demanded the subjection of prolonged deprivation of individual liberty to judicial supervision<sup>49</sup>, drew an extended coda from Justice Michael McHugh, the senior Justice of the Court after the Chief Justice. With reference to Australian and foreign authority and to history and arguments of legal principle, he declared that my invocation of international law in resolving the purely Australian constitutional question was impermissible, unsustainable and legally heretical<sup>50</sup>:

“[C]ontrary to the view of Kirby J, courts cannot read the Constitution by reference to the provisions of international law that have become accepted since the Constitution was enacted in 1900. Rules of international law at that date might in some cases throw some light on the meaning of a constitutional provision. ... [But] the claim that the Constitution should be read consistently with the rules of international law has been decisively rejected by members of this court on several occasions. As a matter of constitutional doctrine, it must be regarded as heretical. ... [R]eading the Constitution up or down to conform to the *rules* of international law is to make those rules part of the Constitution, contrary to the direction in s 128 that the Constitution is to be amended only in accordance with the referendum process. ... It is even more difficult to accept that the Constitution's meaning is affected by rules created by the agreements and practices of other countries. If that were

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<sup>48</sup> (2004) 219 CLR 562 at 611-613 [135]-[146] per Gummow J (dissenting); (2004) 219 CLR 562 at 615 [146] per Kirby J (dissenting).

<sup>49</sup> (2004) 219 CLR 512 at 616 [150] per Kirby J (dissenting).

<sup>50</sup> (2004) 219 CLR 562 at 589 per McHugh J.

the case, judges would have to have a ‘loose-leaf’ copy of the Constitution. If Australia is to have a Bill of Rights, it must be done in the constitutional way – hard though its achievement may be – by persuading the people to amend the Constitution by inserting such a Bill”.

In my reasons, I rejected the arguments of Justice McHugh, proceeding through the same authorities and examining the approaches adopted in other countries. Specifically, I rejected the suggestion that what was involved was the application of “rules” of international law rather than an “interpretative principle” for the reading of the AUSTRALIAN CONSTITUTION in today’s world. In that world, any nation’s constitution must necessarily operate in a context profoundly affected by the growing body of international law<sup>51</sup>. The role of both formal amendment and of judicial re-interpretation, in the ongoing evolution of the constitutional text was emphasised by me<sup>52</sup>, including the many cases in which, by re-interpretation, Justice McHugh had himself made distinguished contributions to new understandings of that text<sup>53</sup>. I suggested<sup>54</sup>:

“[T]he willingness of national constitutional courts to look outside their own domestic legal traditions to the elaboration of international, regional and other bodies represents a paradigm shift that has happened in municipal law in recent years. There are many illustrations in the decisions of the courts of, for example, Canada, Germany, India, New Zealand, the United Kingdom and the United States”.

As to the last, I noted the similar debates which had arisen in the Supreme Court of the United States in *Atkins v. Virginia* and *Lawrence v. Texas* (also *Grutter v. Bollinger*<sup>55</sup>). I concluded<sup>56</sup>:

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<sup>51</sup> (2004) 219 CLR 562 at 623 [173] per Kirby J (dissenting).

<sup>52</sup> (2004) 219 CLR 562 at 625 [179] per Kirby J (dissenting).

<sup>53</sup> (2004) 219 CLR 562 at 625-6 [180] per Kirby J (dissenting).

<sup>54</sup> (2004) 219 CLR 562 at 727 [185] per Kirby J (dissenting) (footnotes omitted).

<sup>55</sup> 539 US 306 at 344 (2003) per Ginsberg J. See also *Al-Kateb* (2004) 219 CLR 562 at 627 [186], fn. 294 per Kirby J.

<sup>56</sup> (2004) 219 CLR 562 at 629 [190]

“... [O]pinions that seek to cut off contemporary Australian law (including constitutional law) from the persuasive force of international law are doomed to fail. They will be seen in the future much as the reasoning of Taney CJ in *Dred Scott v. Sandford*<sup>57</sup>, Black J in *Korematsu v [v. United States]*<sup>58</sup> ... are now viewed: with a mixture of curiosity and embarrassment. The dissents of McLean J<sup>59</sup> and Curtis J<sup>60</sup> in *Dred Scott* strongly invoked international law to support the proposition that the appellant was not a slave but a free man. Had the interpretative principle prevailed at that time, the United States Supreme Court might have been saved a serious error of constitutional reasoning; and much injustice, indifference to human indignity and later suffering might have been avoided. The fact is that it is often helpful for national judges to check their own constitutional thinking against principles expressing the rules of a ‘wider civilisation’<sup>61</sup>.”

American readers, observing these sharp exchanges in the Australian court, should note that, whilst there was disagreement about the suggested use to be made of international law, no-one questioned the legitimacy and utility of referring to the reasoning of the United States judges, as that reasoning threw light on the meaning of the Australian constitutional text. This is something that is done all the time. In part, it is done because of the power of analogies and, in part, because some features of the AUSTRALIAN CONSTITUTION (like those of many other later written constitutions) were borrowed from the American template and are shared with other countries.

Although, in *Al-Kateb*, the view propounded by me was a minority one, as it has been on other earlier<sup>62</sup> and later<sup>63</sup> occasions, shortly before my retirement

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<sup>57</sup> 60 US 593 (1856).

<sup>58</sup> 323 US 214 (1944)

<sup>59</sup> *Dred Scott* 60 US 393 at 534, 556-557 (1856)

<sup>60</sup> 60 US 393 at 594-597, 601 (1856).

<sup>61</sup> A reference to the reasons of Kennedy J in *Lawrence* 539 US 558 at 576 (2003)

<sup>62</sup> e.g. *Newcrest Mining (WA) Ltd v. Commonwealth of Australia* (1997) 190 CLR 513 at 657-658, 661.

<sup>63</sup> e.g. *Thomas v. Mowbray* (2007) 233 CLR 307 at 442 [384].

from the High Court of Australia a case arose which may indicate a shift in the tectonic plates. I refer to *Roach v. Electoral Commissioner*<sup>64</sup>.

That was a case which involved a challenge by a prisoner to the constitutional validity of a federal enactment depriving all prisoners of the right to vote in the then forthcoming federal election, held in November 2007. Before a 2006 amendment to federal legislation, prisoners serving three years or more in prison were disqualified from voting in federal elections but shorter-term prisoners could vote. Indeed, under Australian electoral arrangements, they were required to vote, in discharge of their civic duty because casting a vote is compulsory in Australia. No express provision in the AUSTRALIAN CONSTITUTION governed the validity of the amending law. No Bill of Rights provision applied to resolve the point. From colonial times, longer term prisoners, attainted of treason and other grave crimes, were disqualified from voting. The issue for the High Court of Australia was whether the detailed scheme for an elected representative democracy, as provided in the Constitution, rendered *total* disenfranchisement of *all* prisoners invalid. If they could be so disqualified, could Parliament restore the disqualifications that once existed in England for all Roman Catholics? Or that had earlier existed in Australia for Aboriginals? Could all Asian citizens be disqualified as a group? And if not, why not?

The challenger pressed upon the Court developments that had occurred resolving like questions both in Canada under the country's Charter<sup>65</sup> and in the European Court of Human Rights in respect of the United Kingdom<sup>66</sup>. The citation of these authorities was regarded by the government lawyers as provocative. The Solicitor-General urged that all such foreign law should be disregarded as immaterial to the meaning of the AUSTRALIAN CONSTITUTION. This irrelevance rested, he declared, upon the principle that the AUSTRALIAN CONSTITUTION placed its trust in the Federal Parliament and rendered it

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<sup>64</sup> (2007) 233 CLR 162.

<sup>65</sup> *Sauvé v. Canada (Chief Electoral Officer)* [2002] 3 SCR 519 at 585 [119].

<sup>66</sup> *Hirst v. United Kingdom [No.2]* (2005) 42 EHRR 41.



accountable to the electors if they considered that the trust was abused. Of course, the notion that the electors would rise in wrath to defend the civic rights to electoral participation of prisoners appeared a trifle ethereal, in the real world of Australian politics. If anyone would defend such rights, it had to be the Court.

Nonetheless, a reflection of the governmental submission was accepted by Justice Heydon in his dissenting opinion. This was published with the reasons of the majority who upheld, in part, the prisoner's challenge. In effect, the Court majority disallowed the 2006 amendment to the Electoral Act. It thereby restored the previous law confining the disqualification to prisoners serving three year terms or more. In terms of the text of the AUSTRALIAN CONSTITUTION, this conclusion was explained by reference to the three year electoral cycle provided for the election of the Australian House of Representatives. Disqualification of prisoners serving a lesser sentence would be disproportional to the power proposed in Parliament to enact statutory disqualifications. Each of the opinions in support of the majority conclusion (by Chief Justice Gleeson<sup>67</sup> and jointly by Justice Gummow, Crennan and myself<sup>68</sup>), referred without embarrassment to the Canadian and European case law, whilst insisting that such law was not directly applicable and needed adaptation for any relevance to the Australian text.

This approach was still unacceptable to Justice Heydon, who, with Justice Hayne, dissented. Something of the flavor of recent American dissents can be observed in his reasons<sup>69</sup>:

“It is ... surprising that the plaintiff submitted that [her] arguments were ‘strongly supported’ by decisions under the [ICCPR, European Convention on Human Rights, the Canadian Charter and the Constitution of South Africa] ‘which found that prisoner disenfranchisement provisions were invalid’. It is surprising because these instruments can

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<sup>67</sup> (2007) 233 CLR 162 at 177-179 [13]-[19] per Gleeson CJ.

<sup>68</sup> (2007) 233 CLR 162 at 203 [100] per Gummow, Kirby and Crennan JJ.

<sup>69</sup> (2007) 233 CLR 162 at 224-225 [181] per Heydon J (citations omitted).

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 years. It is highly improbable that it had any influence on them. 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 ... 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 these 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, though not all, of the relevant authorities – that is denied by 21 of the Justices of this Court who have considered the matter, and affirmed by only one.”

The “only one” referred to in the footnote was myself. The sharp language in which this disagreement was expressed suggests that the persistence of the majority in the citation of international law materials was deliberate. Certainly, it could not be said that it was offered in oversight of the feelings that such citations appear to stir up in those of the contrary persuasion, whether in Australia or in the United States.

### **THE CONCERN OF NATIONAL EXCEPTIONALISM**

Inevitably, the foregoing analysis brings scholars and judges face to face with the essential reasons that lie behind the vehement rejection of foreign legal

materials, by learned judges and commentators<sup>70</sup>. One of these considerations is, I suggest, relevant to the United States, although it is not of much relevance to the thinking of Australian opponents. The other is a consideration that lies at the heart of the objections in both countries. It is by no means meritless, although, in my view, it is not controlling.

The consideration that is particular to the United States is a notion of a special American exceptionalism, so far as international law is concerned. Over the two and a quarter centuries of the history of the United States of America that notion has had to compete with the alternative notion, stated in 1900 in the decision of the Supreme Court in *The Paquete Habana*<sup>71</sup> in these well-known terms:

“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling or executive or legislative act or judicial decision, resort must be had to the customs and usages of civilised nations ...”

As Dean Harold Koh has pointed out<sup>72</sup>, in the earliest days of the Republic, the United States was reliant upon the support and good opinion of civilised countries that supported it against its enemies. Its engagement with the world has continued intermittently ever since. It has witnessed great periods of moral, intellectual and legal leadership in the world. Especially so during and after the Second World War when the new world legal order was created in the United Nations Organisation and when the international law of human rights was constructed, based substantially on notions derived from the Anglo-American legal tradition.

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<sup>70</sup> See e.g. Richard Posner, *Could I Interest You In Some Foreign Law? No Thanks, We Already Have our Own Laws*, LEGAL AFF., July-Aug. 2004, at 40, 41; James Allan, *Portia Bassanio or Dick the Butcher? Constraining Judges in the 21 Century* (2006) 17 KINGS COLLEGE LAW JL 1; Ken I Kersch, *Multilateralism Comes To The Courts* THE PUBLIC INTEREST, Winter 2004, 3.

<sup>71</sup> 175 US 677 at 708 (1900)

<sup>72</sup> Harold Hongju Koh *International Law As Part Of Our Law* 98 AMJ INT’L LAW 43, 47 (2004). See also Harold Hongju Koh, *On American Exceptionalism* 55 STAN.L.REV 1479 at 1482 (2003)

Yet intertwined with this engagement with the world there has always been a notion of exceptionalism – isolationism and hostility or indifference to aspects of international law which is thought to cut across United States’ laws and interests. And the determination to achieve the protection of those interests, if necessary alone, by the United States, currently the most powerful nation on earth. A striking instance of this latter attitude may be found in a document published by the White House in September 2001, asserting the right of the United States to take pre-emptive action against terrorists<sup>73</sup>:

“While the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting pre-emptively against such terrorists, to prevent them from doing harm against our people and our country.”

The Australian scholar Owen Harries has identified American “exceptionalism” as a feature of United States policy in recent years. He concludes that “the really interesting and important debate is not between anti-Americans and pro-Americans; it is between two different American traditions concerning how the United States can best promote its values and ideals”<sup>74</sup>.

The Australian government has also occasionally been given to adopting exceptionalist policies. For example, these have involved excluding parts of continental and political Australia from the “migration zone” within which refugee applicants may claim asylum in Australia and also well-known circumstances invoking obligations under international law in respect of persons rescued on the high seas and thereafter seeking access to Australian

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<sup>73</sup> United States, *The National Strategy of the United States of American* (White House, Washington, September 2001).

<sup>74</sup> O. Harries quoted SYDNEY MORNING HERALD, December 12, 2003, 5<sup>th</sup> Boyer Lecture 2003 published by the Australian Broadcasting Corporation, Sydney, 2004.

territorial waters<sup>75</sup>. Australian exceptionalism does not matter greatly, whereas that of the United States matters a lot and tends to affect the whole world. Occasionally, when reading of the intolerance of American and (fewer) Australian judges and lawyers to the citation, reference to, and use of, foreign law in constitutional adjudication, one cannot escape the impression that national exceptionalism is creeping into the law and the courts. It is here that we see the unfriendly face of legal nationalism, self-sufficiency and self-satisfaction. These are the attitudes of fortress America and fortress Australia. They have made several appearances in both countries in recent years.

There is a particular reason why this fortress attitude is much less successful, and therefore less worrying, in the case of Australia than in the United States. Until very recently, 1986 to be exact<sup>76</sup>, the Australian legal system and its Judicature were institutionally tied into the world-wide system supervised by the Judicial Committee of the Privy Council in London. That link (which excluded only a limited category of constitutional cases in Australia<sup>77</sup>), instilled in all Australian lawyers a generally comfortable attitude towards the use of inter-jurisdictional comparative law, as much in constitutional and public law as in cases involving questions of private law. The global linkage so established had its downside. However, one of its undoubted advantages was that it rescued its beneficiaries from narrow parochialism; set high standards of logical judicial reasoning; discouraged and corrected any corrupt or incompetent decisions; and promoted a global view of law and of the relevance of international law.

With the decline of the British Empire, the jurisdiction of the Privy Council has receded almost to nothing. By chance, the last Australian appeal to the Privy

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<sup>75</sup> Michael White, *Tampa Incident: Shipping, International and Maritime Legal Issues* (2004) 78 AUST'N LJ 101 (a reference to the rescue of 433 asylum seekers rescued by The Tampa, August 26, 2001. See also PUBLIC LAW REVIEW (2002) 13(2) 85.

<sup>76</sup> AUSTRALIA ACT 1986 (Aust. & UK), s 11.

<sup>77</sup> AUSTRALIAN CONSTITUTION, s 74.

Council was from a decision of the New South Wales Court of Appeal in which I presided, twenty years ago<sup>78</sup>. The appeal was dismissed.

In the place of the Privy Council, the successor final courts in virtually all of the fifty-three countries of the Commonwealth of Nations, now have the last word on the meaning of their respective constitutions and the content of their local laws. Nonetheless, an examination of the decisions of those final courts, long after the formal institutional links to the Privy Council have been severed, evidences a continuing, unembarrassed reference, in all of them, to decisions of final and intermediate courts in other Commonwealth countries.

To demonstrate that this is so, I need do no more than take the latest volume of the LAW REPORTS OF THE COMMONWEALTH<sup>79</sup>. The volume is full of public law cases, mostly concerned with constitutional law. Many of the cases deal with issues that are highly sensitive in their own national context, such as the apostasy case in Malaysia: *Joy v. Federal Territory Islamic Council & Ors.*<sup>80</sup>; the jurisdiction of the High Court in Ghana<sup>81</sup>; the constitutional validity of mandatory minimum sentences for rape in Botswana<sup>82</sup>; and the response to the problem of a sleeping judge in Australia<sup>83</sup>.

A common feature of each of these and the other cases in the volume is the wealth of reference, in elucidating constitutional provisions and clarifying contested issues of public law, to what is done in other Commonwealth courts, courts in Europe and also courts of the United States. Thus, in the apostasy decision in Malaysia, there are thirteen citations of United Kingdom judicial authority; four from the Indian Supreme Court; and one from the High Court of

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<sup>78</sup> *Austin v. Keele* (1987) 61 AUST.LJ REPS. 605 (PC).

<sup>79</sup> [2009] 1 LAW REPORTS OF THE COMMONWEALTH (Gen.eds. J.S. Read and P.E. Slinn (LexisNexis Butterworths, London))

<sup>80</sup> [2009] 1 LRC 1.

<sup>81</sup> *Republic v. Fast Track High Court Accra; Ex parte Commission on Human Rights & Administrative Justice* [2009] 1 LRC 44.

<sup>82</sup> *State v. Mathlo* [2009] 1 LRC 133.

<sup>83</sup> *R. v. Cessan* [2009] 1 LRC 416

Australia. In the Ghana case, there are eleven United Kingdom citations, two from South Africa and one each from Canada and the United States. Decisions of the Supreme Court of India in the volume contain numerous references to the decisions of the United Kingdom and Australian courts. The reports of the opinions of the National Court of Papua New Guinea refer to United Kingdom, Australian and Irish decisions. In the Australian sleeping judge case, the opinion of Chief Justice French is replete with citations from other lands with similar problems: notably the United States. No fewer than thirteen such American decisions on the problem are noted, from both federal and state courts. This is done without embarrassment, self-consciousness or recrimination. It is a feature of a mature legal system which, for nearly 200 years, has been sharing judicial decisions across the world, including in very sensitive, local constitutional decision-making. This is a confident, comparativist outlook that the United States lost, in part, following the embrace of national judicial and legal self-sufficiency that occurred in this country after the Revolution.

Perhaps in the future, a similarly mature attitude may be accepted in the United States. The key to doing so is to realise that decisions of foreign courts, tribunals and other bodies and the content of international and regional law, outside one's own legal system, are not studied because they provide a binding *rule* that governs a municipal case and determines its outcome. They offer no more than a contextual setting that helps the municipal decision-maker to see his or her problem in a wider context. And to check local reasoning by reference to the discursive elaborations of judges and other decision-makers operating in a different system of law, making proper allowance for what will usually be distinct rules that the others are applying.

### **THE CONCERN OF THE DEMOCRATIC DEFICIT**

There remains, however, the democratic deficit. This is an objection common to the hesitation of United States and Australian jurists when analogies to the resolution of a municipal law problem are propounded with reference to the

principles of foreign or international law as expressed in courts, tribunals and other bodies outside the judicature of the nation state.

Professor Frank Michelman, in a moving tribute to Justice William Brennan's writings on democracy<sup>84</sup>, has remarked:

“American constitutional theory has over its life span been hounded and pre-occupied, if not totally consumed, by a search for harmony between what are usually heard as two clashing commitments: constitutionalism and democracy. ... Do we see some slight to democracy, some ‘Counter-Majoritarian Difficulty’ to recall Professor Bickel’s famous phrase, in unelected judges deciding the legal validity of the enactments of popular assemblies and thereby effectively ruling the country?”

In the context of the present subject matter, this question can be broadened. “Do we see a [particular] Counter-Majoritarian Difficulty” in those potential judicial rulers resolving cases by reference to the international law, which does not have the legitimacy of democratic endorsement by anyone, unless it be the officials of the nation states who approved the principles or (much more indirectly) the legislators who gave advice and consent to approve a treaty, although not actually enacting it as part of the substantive law of the land? Do we feel a particular sense of disquiet in their doing so, especially, in that most political, national and sensitive a document – the Constitution – which, of its nature, is designed to channel the institutions of popular democracy that grow out of the history and culture of a particular people in a given part of the world’s surface?

This is not an entirely theoretical issue. As Dean Alfred Aman has pointed out in his 2004 monograph *THE DEMOCRATIC DEFICIT*<sup>85</sup>, the problem of the democratic deficit extends far beyond the incorporation of international law in

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<sup>84</sup> F.I. Michelman, *Brennan and Democracy*, 86 CALIFORNIA L.REV. 399 at 399 (1998)

<sup>85</sup> A.C. Aman Jr., *THE DEMOCRATIC DEFICIT: TAMING GLOBALISATION THROUGH LAW REFORM* (NYU Press, 2004, New York)



judicial reasoning. Most acutely, it is presented by the chilling effect on representative democracy that has arisen since markets came to be called upon to do some of the work that governments in the past traditionally used to perform, in ways answerable to a political process. The world-wide moves towards privatisation of governmental services have many implications to be resolved; not least in consequence of the 2009 global economic downturn. Professor Aman correctly poses the question whether citizens, organised in the nation state, can influence, even if they cannot control, private sector organisations that now play an increasing role in the world? Some large transnational corporations are much wealthier and more powerful than many poorer nation states. How can democratic impulses be brought to bear upon them? Finally, how can such impulses influence the outcomes of international meetings where, with compromises, back-room deals and power politics at an ultra-elite level, texts are hammered out that are later propounded as expressing “universal principles” of international law?

Concern about the comparative lack of democratic input into the content of international law is understandable and reasonable. Anyone who has actually participated, as I have, in the development of international law will know that the input of popular and local opinions is minimal and, at best, theoretical and a legal fiction. Writing of the influence of democratic values on law-making in the United States, Professor Aman<sup>86</sup> declared:

“Democracy is more than a set of tools or a public apparatus to be manipulated by the elite. It is, in the last resort, embedded deeply in our culture and our legal system. To date our apparent lack of response is due to the fact that we have not fully grasped the profound way in which globalisation is embedded in our democratic institutions, now necessitating change and a reconceptualisation of our basic operating assumptions. Recognising how globalization has created a new public private sector, broadening the range of influential state, non-state and inter-state actors, positions us to reconceptualise administrative law as a resource for reform. Such a reconceptualisation is necessary if we are to retain the values on which democracy is based – transparency,

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<sup>86</sup> Aman, above n 60, 180-181.

accountability, and a body politic of engaged and informed citizens. Globalization highlights the importance of such values, ever more strikingly, as fundamental to the ways in which we govern ourselves, every day, at the domestic level.”

There are several answers to the concern about the democratic deficit, as it impinges upon the kind of judicial deployment of the principles of international law in constitutional adjudication, for which I would argue:

1. It is important to stress once again that the judicial use of such material is not normative. No-one believes that the principles of international human rights law, unless incorporated into municipal law by a lawmaker acting within power, operate as binding rules. No-one suggests that they *bind* a judge to give effect to them, unless trumped by local constitutional or statutory law. The principles provide a context, a reminder of universal notions and a stimulus to the judge’s own thinking. That thinking remains always anchored in the task presented by municipal law. In turn, this is generally controlled by the text of a municipal law, whether found in a national or sub-national constitution, statute, subordinate law or decisional authority;
2. At this level of influence, it is not reasonable, nor is it logical, to demand a direct democratic component for such international law principles. In a world of nearly seven billion people, how would that be humanly possible, except by authority delegated to representatives of nation states, to agree on any principles or rules on international questions? To expect such rules to be internationally answerable, in some direct way, to the opinions of local communities, or even to national communities in a country of great population such as the United States, is to indulge in a romantic concept of democracy. The building of international law is essential for the extension to all human beings of the benefits of the rule of law. It is necessary for building effective support for universal human rights. In such matters, romance must give way to reality. The United States, as a major actor and potential beneficiary of the spread of international law, including the law of human rights, will in its own interests support this development locally and not seek to frustrate it by

unrealistic demands for direct accountability of international law to all citizens of the United States. If this were demanded by one nation, it would necessarily be required by all.

3. Used in the way propounded, international human rights law is simply part of the “dialogic process”<sup>87</sup>. As Justice Breyer pointed out in his public conversation with Justice Scalia: “It is common for an opinion to refer to material that ... has no ‘democratic provenance’. Blackstone has no democratic provenance. Law professors have no democratic provenance. Yet I read and refer to treatises and I read and refer to law review articles”. The principles of international human rights law are thus used in an analogous manner. They are deployed by independent members of the judicial branch whose justification in countries such as the United States and Australia need be no more than established constitutional principles governing judicial review and the necessity of creating and obeying an independent umpire with the power to decide contested constitutional questions; and
4. Within our own national politics, there remains a large element of fiction in the democrat component of law-making. To say this is not to decry the great benefits of living in a representative democracy. Both in Australia and in the United States we have witnessed the democratic principle at work in the recent electoral changes of the national government. Yet once one gets away from the activities of local government, the notion of popular participation in the content of law is at best theoretical and at worst romantic<sup>88</sup>. To conceive of national electors, visiting polling stations every two or three years, as actually approving every law and every provision in every law that is thereafter enacted in their name, is rather unpersuasive. Election campaigns in a modern democracy are typically concerned with bread and butter issues, if not with entertainment and personality. They are often controlled by huge donations of funds to political parties. Rarely do such electoral contests descend to the particularity of the rights of long-term refugees

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<sup>87</sup> Koh, above n 47, *International Law As Part of Our Law* at 55.

<sup>88</sup> A.F. Mason, *Democracy and the Law: The State of the Australian Political System*, NSW LAW.SOC.J (Nov.2005), 68 at 69; M.D. Kirby, *Law Reform, Human Rights and Modern Governance: Australia’s Debt to Lord Scarman* (2006) 80 AUST.LJ 299 at 311-314.

or the entitlements to vote of short-term prisoners. For such decisions, the rulings of national courts are required.

Democracy is a kind of symphony in which the democratic elements found in the legislative and executive branches are the violins and noisy trumpets. But for a true harmony, it is necessary to have the woodwinds of the civil service and the double basses provided by judges, tribunals and other authorities. As law makers in a minor key, the judiciary, even in a final court, will often defer to the elected branches of government<sup>89</sup>. Yet, even then, there will be cases where they do not do so. The Mabo case on the recognition of native title in Australia was one such instance. So was the decision of the High Court of Australia striking down the Communist Party Dissolution Act of 1950<sup>90</sup>. So were the decisions in Australia and United States upholding the right of indigent prisoners to legal representation<sup>91</sup>. So too was the case, brought in Australia, on behalf of prisoners, demanding the right to vote<sup>92</sup>.

If the reader can see a common thread here, it is the protection of vulnerable and sometimes unpopular minorities. For the rights of such people, democracy imports protection by the independent courts. Such courts remind transient majorities that a democracy includes *all* of the people. Minorities have fundamental rights that the majority may not neglect or override. International human rights law is useful in expressing and clarifying what such rights entail. That is what sometimes makes it useful for municipal judges to have regard to the growing body of international law and jurisprudence.

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<sup>89</sup> Dame Mary Arden, *The Changing Judicial Role: Human Rights, Community Law and the Intention of Parliament* [2008] Cambridge LJ 487 at 499-500.

<sup>90</sup> *Australian Communist Party v. Commonwealth of Australia* (1951) 83 CLR 1 at 192-194. Cf. *Dennis v. United States* 341 US 494 (1951)

<sup>91</sup> *Gideon v. Wainwright* 372 US 335 (1963); *Dietrich v. The Queen* (1992) 177 CLR 292 at 300.

<sup>92</sup> *Roach v. Electoral Commissioner* (2007) 233 CLR 162

To the extent that familiarity with relevant provisions of international law reminds judges of these simple truths, it helps them to discharge their municipal tasks more accurately and carefully. It reminds them that every land today, even one as great and powerful as the United States of America, is part of the world so that it should generally act as such.

In navigating the present times, the United States of America and Australia, as mature democracies with independent judges and lawyers, must play leading parts in bringing international law and municipal law into greater harmony. This is a large challenge for judges in particular. However, I am confident that, though the judges do not personally feel the movement of the world, they know that it is moving. They sense its forward direction. They will not attempt to deceive themselves and others into believing that it is motionless and unaffected by the globalisation that is everywhere about us. And with globalisation comes an appreciation of the obligation of being part of common humanity and of protecting its universal values, including through the exposition of national laws and the operation of municipal judicial institutions.

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