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AUSTRALIA AND THE EUROPEAN COURT OF HUMAN RIGHTS

The Australian National University,
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A SWIFT AND ASTONISHING EUROPEAN ACHIEVEMENT

By any account, the *European Convention on Human Rights*¹, and the European Court of Human Rights that authoritatively interprets it, constitute remarkable developments for the law, for human society and global culture.

In a continent with a multitude of languages, legal systems and historical, religious and political differences, an agreed standard of human rights has been established. Against a background of wars, rivalries, animosities, suspicions and differences, many basic commonalities have been achieved. This has occurred without war or even of the adoption of an integrated federal polity, such as earlier

* Former Justice of the High Court of Australia (1996-2009); former President of the International Commission of Jurists (1995-8); laureate of the UNESCO Prize for Human Rights Education (1998).

¹ A. Lester and D. Pannick, *Human Rights – Law and Practice* (2nd ed., 2004), LexisNexis, London (“Lester and Pannick”), 5 [1.13].

united the disparate communities of the continental nations of the United States of America (1776), Canada (1867) and Australia (1901).

The growth of European institutions, in such unpromising soil, has surprised even the Europeans themselves. It probably took the combined impact of two world wars, the shock of widespread genocide and physical, economic and emotional destruction to act as the catalyst for such changes. On the whole, supported by general economic success and popular support, the Europe Project has been a very large achievement for humanity over the past 60 years.

The birth pangs of the *European Convention* were by no means easy. In May 1948, at The Hague, proponents of the idea adopted a “message to Europeans”. This declared a desire for a “court of justice with adequate sanctions for the implementation of this Charter”². In the United Kingdom, the Attlee government showed no more than lukewarm support. It endeavoured to weaken the provisions of the Convention and to render acceptance of the jurisdiction of the proposed court optional³.

English law at that time was resistant to general statements of rights. It regarded such notions as unforgivably vague, grounded in natural law ideas attributed to the Roman Catholic Church whose hegemony in Britain had been rejected by the Reformation. It was an approach to law seen by many in Britain as alien to the practical, problem-solving approach of the common law. That approach preferred to resolve individual cases, allowing broad principles to emerge only after many instances were scrutinised by clever and respected judges.

² *Ibid*, 6.

³ *Ibid*, 6-7.

This antagonistic approach overlooked the embrace of broad principles in the English *Magna Carta* of 1215; the English *Bill of Rights* of 1689; the American statement of English rights in the *Bill of Rights* of 1791; and the acceptance of popular sovereignty in the United Kingdom *Parliament Act* of 1911⁴. Still, against the modern legal hostility in Britain, the embrace of the *European Convention on Human Rights* was all the more remarkable.

The other great court of Europe, the European Court of Justice in Luxembourg, is also a remarkable achievement. It addresses the large body of administrative, statutory and economic regulation of the European Union. But although its jurisdiction is wide and important (including for individual rights), its remit has not been as sensitive and its geographical reach is smaller. Moreover, its traditions have more closely followed the syllogistic and opaque approach of the civil law tradition that prevails in most of Europe.

The European Court of Human Rights at Strasbourg has had a greater impact on English-speaking countries beyond the United Kingdom because of the more universal notions with which it grapples; its embrace of common law discursive reasoning; its acknowledgement of judicial dissent; and the broader range of nations, religions and cultures that it seeks to accommodate.

In offering this tribute to the post-war European courts from Australia, it is therefore appropriate for me to concentrate on the Strasbourg Court,

4 *Parliament Act 1911* (1 and 2 Geo 5, c13).

although decisions of the European Court of Justice have also proved useful and influential in Australian judicial reasoning⁵.

The United Kingdom was, as it happens, the first state to ratify the *European Convention on Human Rights*, in March 1951. At first, it did not accept a right of individual petition. Nor did it acknowledge the European court's jurisdiction in individual cases. Also, at first, there was no legislation to incorporate the European standards into United Kingdom municipal law⁶. Gradually, however, the "sleeping beauty" of the Convention came to influence British judicial reasoning, whenever it was held that particular decisions were out of line with the Strasbourg court's jurisprudence⁷.

It was a series of such cases that led Lord Scarman, in his Hamlyn Lectures in 1976, to appeal for the incorporation of the Convention into United Kingdom municipal law⁸. That was a step finally taken by the *Human Rights Act 1998 (UK)*, that took effect from 2 October 2000. It was strongly supported by leading lawyers on the cross benches in the House of Lords, including Lord Wilberforce, Lord Ackner, Lord Scarman, Lord Bingham and Lord Cooke of Thorndon⁹. The opponents were the usual suspects who clung to the *status quo*. They were unconcerned about the effective disempowerment of people who claimed deprivation of their basic rights. Large media interests were also amongst the

5 See e.g. *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* (2008) 237 CLR 473 (Goods and Services Tax).

6 *Ibid*, 7 [1.23].

7 *Sunday Times v United Kingdom* (1979) 2 EHRR 245. By a narrow majority, the Court favoured an interpretation consistent with the right of free expression.

8 L Scarman, *English Law - The New Dimension* (Hamlyn Lectures, Published 1976); cf M D Kirby, "Law Reform, Human Rights and Modern Governance: Australia's Debt to Lord Scarman" (2006) 80 ALJ 299 at 310-311.

9 Lester and Pannick, 11-14 [1.34-1.40].

opponents. They were fearful of affording ordinary citizens fresh avenues to challenge their own burgeoning power¹⁰.

The European Court of Human Rights now serves 54 states in a “continent of 41 languages in which complaints can be brought to the Court”¹¹. The number of applications to the European Court now totals about 40,000 a year, and at any time there are nearly 90,000 pending¹². Lobbies, media magnates and social conservatives may oppose the European Court and the operation of its jurisdiction. But, clearly enough, with the people of Europe, it is extremely popular. It has contributed to a sense of community in disparate countries, stretching from Galway in the west to Vladivostok in the east. With the possible exception of the Judicial Committee of the Privy Council in the heyday of the British Empire, no court in human history has had such an impact on so many people of so many different countries, traditions and cultures.

It is appropriate for us, in Australia, to acknowledge this legal and historical phenomenon. It is one far greater than anything we have achieved on our continent, difficult and even miraculous, as our achievement is sometimes described.

CONTINUING ANGLO HOSTILITY

Despite the expansion of the European Court of Human Rights, it continues to attract vociferous enemies and critics. Remarkably, few of them exist in the continent of Europe itself, outside the British Isles.

¹⁰ *Ibid*, 14 [1.43].

¹¹ L Wildhaber, "The European Court of Human Rights: The Past, the Present, the Future" (2007) 20 *National Journal of Constitutional Law* 183 at 196.

¹² Michael O’Boyle, "On Reforming the Operations of the European Court of Human Rights" [2008] EHRLR #1, 1.

True, the dissenting voices of judges of the Strasbourg Court sometimes give expression to assertions in favour of a “margin of appreciation”¹³, claimed by European states, as litigants, before the Court. In such cases, those states assert exceptional local reasons for allowing different standards in different parts of the Court’s wide jurisdiction. The recently dismissed mayor of Moscow, for example, was strongly and defiantly resistant to the efforts of the European Court to uphold the rights of sexual minorities to hold a “gay pride” march in his city. The same issue has, from time to time, attracted assertions of local culture in Eastern Europe and the Baltic States. Just as secularism and veil-wearing in public spaces have, for differing reasons, engendered opposition in Turkey and France. Yet, on the whole, the loyal acceptance of the Strasbourg Court’s rulings throughout its jurisdiction has been amongst the most remarkable achievements of the Court, once one crosses the English Channel.

The position in the United Kingdom has been somewhat more ambivalent. Doubtless, this can be attributed to historical and cultural insularity and the fact that older citizens were raised in the foregoing traditions of the British world view and its common law. Lawyers were specially susceptible to this outlook because most of them were educated in the instructions about parliamentary sovereignty contained in A.V. Dicey’s influential *Introduction to the Study of the Law of the Constitution*¹⁴. Written at the zenith of the British Empire and the apogee of the powers of the Imperial Parliament, Dicey was contemptuous of the

¹³ See e.g. the dissenting opinion of Judge Walsh (Ireland) in *Dudgeon v United Kingdom* (1981) 4 EHRR 149.

¹⁴ 1885 (10th ed., 1959), London, Macmillan & Co.

European legal systems and championed a Parliament of supposedly unlimited powers.

The tenth anniversary of the patriation of the European Convention, signalled by the commencement of the *Human Rights Act* 1998 (UK) in 2000, passed in Britain in 2010 with occasional conferences of celebration¹⁵. Before the 2010 British elections, the Conservative Party opposition stated that, if elected to government, it would launch a reconsideration of the *Human Rights Act*, with a view to examining the role of civic duties, not rights, and modifying and limited the present statutory provisions. In particular, it promised to consider a simpler means whereby the United Kingdom Parliament could override future adverse rulings of the European Court with which it disagreed. The need to form a coalition government with the Liberal Democrats, who are generally strong supporters of the *Human Rights Act*, appears to have put this plan on the backburner. At least for the moment.

Nevertheless, the lingering suspicion and hostility toward the notion of universal rights in domestic British jurisdiction; the role of trans-national courts in relation to local ones; the influence of the decisions of such courts; and of the European Court of Human Rights in particular, continue to attract critics in Britain and the English-speaking world more generally. Some of these critics have been heard in Australia in recent days:

- At a conference in Adelaide in February 2011, Justice Antonin Scalia of the United States Supreme Court used the occasion of his Crawford Lecture to “let fly” (as a journalist described it) at the

¹⁵ See e.g. M.D. Kirby, “Getting By Without A Charter: An Australian Perspective”, in Commonwealth Law Bulletin, 2011 (forthcoming), delivered at the University of Salford, 2010.

“undemocratic” European Union and the European Court of Human Rights. According to the media report¹⁶, he was “most scathing of the European Court of Human Rights, which he said lacked the democratic authority to rule on controversial topics like same-sex marriage and abortion”. They are often “the controversial topics on which democratic elections are won or lost”, Justice Scalia said. “It is a prescription for the elimination of democracy to establish a court that is to provide binding and authoritative answers to these questions. ... “In the course of the argument, the petitioner pointed out [in *Lawrence v Texas*¹⁷], “that homosexual sodomy was lawful throughout Europe”, he said, “Indeed it was – not because of democratic choice by the people of Europe, but because of an agreement in the Court of Human Rights. We would never think of leaving questions of economic policy to judges because in that field there is plenty of room for debate. That same attitude of moral certainty explains why the Europeans are so self-righteously critical of the United States with respect to capital punishment”.

The views of Justice Scalia on this topic are well known. They are shared by many Americans. But they are not universal. And some of them are surprising. His fairytale notion of democracy is specially surprising to foreign observers because many remember his part in the controversial decision of his Court in *Bush v Gore*¹⁸. There, in apparent conflict with earlier Court authority, the

¹⁶ Mark Schliebs, “Scalia Shoots From the Hip On ‘Undemocratic’ European Union”, *The Australian*, 4 February 2011, 33.

¹⁷ *Lawrence v Texas* 539 US 558 (2003). See discussion M.D. Kirby, “International Law – The Impact on National Constitutions” 21 *American Uni International Law Review* 327 at 344ff. See also *Al-Kateb v Godwin* (2004) 219 CLR 561.

¹⁸ 531 US 98 (2000).

Supreme Court intruded the reach of federal courts into state jurisdiction and actually stopped the counting of votes by state officials in Florida in the democratic determination of the most significant and powerful elected official in the world. As well, the notion that democracies are completely unchecked by human rights provisions is contradicted in the United States by two centuries of experience of the *Bill of Rights* of that country. Modern democracy today normally involves an interaction of popular will with judicially determined fundamental rights of citizens in the polity. Respectfully, some observers see Justice Scalia as only an occasional supporter of democracy. The criticisms of the European Court of Human Rights in his Adelaide lecture were unconvincing. What Justice Scalia sees as “self-righteous” criticism of the United States over capital punishment, others will see as a righteous assertion of the emerging opinion of humanity that sometimes puts checks and limits on crude populism and unreasoned prejudice.

- A publication by the Institute for US Law in February 2011 reveals that the kind of view expressed by Justice Scalia in Adelaide has been having an impact on popular initiatives in several states of the American Union. Thus, on 2 November 2010, more than 70% of voters in the American state of Oklahoma approved an amendment to the State Constitution promoted, under the catchcry of “Save Our State”. It sought to insert in the Oklahoma Constitution a provision requiring that “courts shall not look to the legal precepts of other nations or cultures ... [S]pecifically, the courts shall not consider international law or Shariah law”. A week later, a federal judge in Oklahoma entered a temporary restraining

order, preventing the State Board of Elections from certifying the popular vote on that provision. Soon after, the federal judge granted a preliminary injunction, blocking the amendment from taking effect as part of the state Constitution on the ground that the language “may be viewed as signalling out Shariah law”. He found that the plaintiff had made a persuasive case that the amendment disfavoured one religion in violation of the First Amendment to the United States Constitution. That order has now been appealed to the Federal Court of Appeals¹⁹. But there have been similar attempts in other states during 2010, responding to the xenophobic attitudes, such as those expressed by Justice Scalia in Adelaide. They too are under challenge, as is the power of a small plurality of Californian voters by referendum to deprive the homosexual minority in that State of equal rights to marry, as state law had earlier provided. Sometimes human beings have fundamental rights which popular majorities cannot take away. In the self-same issue of *The Australian* newspaper which reported Justice Scalia’s speech in Adelaide, appeared a note that a challenge to the Obama administration’s health care laws was on its way to the Supreme Court. This arises out of a preliminary rule of a federal court in Florida that the *Affordable Care Act*, passed by the United States Congress last March, was unconstitutional as imposing unconsensual duties on individuals²⁰. In most modern democracies, including the United States and Australia, popular majorities do not have the last say on everything. Upon some points of general importance for basic rights, courts stand as

¹⁹ Institute for US Law (IUS Law), *News*, Feb 1, 2011 (accessed 11 February 2011) (“Controversy Erupts Over Foreign Law and International Law in US Courts”)

²⁰ B. Norrington, “Courts to Decide Future of Obama Health Laws”, *The Australian*, 4 February 2011, 11.

guardians of universal values. Just as the European Court has done over five decades.

- On 7 February 2011, Lord Hoffmann, a past member of Britain's final court (the House of Lords) condemned the European Court of Human Rights for "foolish decisions" and for having made "the very concept of human rights ... trivialised by silly interpretations of grand ideas"²¹. Specifically, Lord Hoffmann cited the decision of the Strasbourg Court denying the power of the United Kingdom Parliament to deprive all prisoners of the right to vote in British elections. This saw this as an extraordinary tendency "to micro-manage the legal system". Of course, Lord Hoffmann is entitled to his point of view. The *European Convention* itself helps to protect his right to express it. As it happens, I agree with the European Court's opinion in *Hirst v United Kingdom*²². It there held that depriving all prisoners of the right to vote was incompatible with the fundamental democratic postulates of the European Convention. A similar conclusion was earlier reached in Canada and later in 2007 by the High Court of Australia²³. Reference was made in the Australian decision to the European Court reasoning²⁴. Lord Hoffmann would have known that the European Court had to respond to the prisoners' legal contentions. Doing so would have an impact; but one that scarcely involved "micro-management". Rather, it was a "macro" impact, in defence of the rule that punishment does not take away prisoner's basic human rights and civic status. Most prisoners will be released to live in

²¹ Oliver Wright, "Pull Out of Human Rights Court Says Ex-Law Lord", *Policy Exchange*, 7 February 2011.

²² *Hirst v United Kingdom* [No.2] (2005) 42 EHRR 41.

²³ *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 178 [16] per Gleeson CJ, 203 [100] per Gummow, Kirby and Crennan JJ.

²⁴ *Ibid*, *loc. cit.*

the society whose government is elected at a general election. Because such prisoners remain citizens, it is strongly arguable that they should not be subject to blanket exclusion from their basic democratic rights. Resorting to a “little England” or a “little America” strategy as Justice Scalia and Lord Hoffmann seem to favour, is out of harmony with these post-Imperial times. The fact that some of the drafters of the American Constitution and the European Convention would be surprised with current rulings is scarcely a reason for withdrawal from the jurisdiction of the courts. Virtually all of the decisions affirming the equal rights and dignity of gay citizens would have been surprising in Britain back in the 1940s. And of black citizens in the United States before 1954. But that does not mean that they are wrong today. On the contrary, they have been a clarion call to equality, justice and rationality that one tends to deprecate if ever they have themselves been victims of unfair discriminatory laws.

- As part of the media campaign against an Australian Charter of Rights, a journalist, commenting on Justice Scalia’s opinion, has lamented the steps of the Australian Senate’s Legal and Constitutional Affairs Committee, calling for a Charter of Rights. He has described this as a decision to “abandon self-government ... to downgrade democracy and embrace international jurisprudence”, forcing “Australians to turn to international jurisprudence, not Australian law, for guidance”²⁵. Coming from this source, it no longer surprises us that those with present power must be expected to resist protection of the universal rights of ordinary people. More surprising, is the occasional support for

²⁵ C. Merritt, “World Rights Approach Erodes Sovereignty”, *The Australian*, 11 February 2011. 30.

similar views offered by local scholars who jump on this superficial and ignorant bandwagon²⁶.

Clearly enough, therefore, we have failed to inform Australian citizens of the admirable achievements of the European Court of Human Rights. And the contribution that court has made to basic principles of justice and equality for all in Europe. The narrow nationalists in the Anglophone world are, I believe, in the minority. Yet it is important to rebut their propaganda by describing in detail the ways in which, to this time, Australian courts, notably the High Court of Australia, have utilised, and learned from, the jurisprudence of the European Court.

I therefore turn to that task. Appropriately enough, I will begin with the prisoners' voting rights case. I will then offer other and earlier examples both in public and constitutional law and in specific areas of private law. I will illustrate my theme with decisions of the High Court of Australia, the Family Court of Australia and the Federal Court of Australia as well as of judges in the State Supreme Courts. A fair review of these decisions will, I believe, justify my suggestion that the European Court of Human Rights has had a most beneficial effect on judicial thinking in Europe and by analogy and example in this country. I hope and expect that this impact will continue.

THE PRISONERS' VOTING RIGHTS CASE

In *Roach v Electoral Commissioner*²⁷, the High Court of Australia was concerned with an amendment to the *Commonwealth Electoral Act*

²⁶ See e.g. J. Allan in J. Allan and M.D. Kirby, "A Public Conversation on Constitutionalism and the Judiciary Between Professor James Allan and the Hon. Michael Kirby" (2009) 33 *Melbourne Uni L Rev* 1032 and articles there cited. See e.g. fn.15.

²⁷ (2007) 233 CLR 1.

1918 (Cth), enacted in 2006. The amendment had the effect of disenfranchising from voting in federal elections, electors who were serving sentences of imprisonment regardless of the duration of their sentences and whether for offences against federal, State or Territory law.

Previously, the disenfranchisement of prisoners in Australia had applied only to prisoners serving custodial sentences of three years or longer. By majority, the High Court held that the 2006 amendments were invalid under the Constitution; that a substantial reason was required to disqualify an eligible elector from voting; and that the new provisions, in making no distinction between short and long term prisoners or relative culpability, was incompatible with the constitutional concept of universal suffrage as it had evolved in Australia. The amending provisions were thus struck down. In effect, the previous form of the legislation revived. It was held valid.

In each of the majority opinions in *Roach*, the judges of the High Court referred to the decision of the European Court in *Hirst v United Kingdom [No 2]*²⁸. There, the European Court of Human Rights, by majority, held that a blanket ban imposed on voting by *all* convicted prisoners in the United Kingdom, violated Article 3 of Protocol 1 to the European Convention²⁹. In his reasons in *Roach*, Chief Justice Gleeson explained how the majority in the European Court had concluded that the blanket ban "was arbitrary ... and lacked

²⁸ (2005) 42 EHRR 41 (the decision of the Grand Chamber of the European Court was delivered by a vote of twelve judges to seven. The reasons in *Hirst* were earlier referred to in *ABC v O'Neill* (2006) 227 CLR 27 at 112 [160].

²⁹ (2007) 233 CLR 162 at 178.

proportionality ... even allowing for the margin of appreciation to be extended to the legislature".

It was, of course, impossible to apply such jurisprudence "directly" to the meaning of the Australian Constitution. Yet, Chief Justice Gleeson pointed out: "Even so, aspects of the reasoning are instructive"³⁰. By analogy, the extension of prisoner disqualification, effected by the Australian Parliament in 2006, was seen as "abandoning any attempt to identify prisoners who have committed serious crime". It was thus viewed as "breaking the rational connection necessary to reconcile the disenfranchisement with the constitutional imperative of choice by the people"³¹.

Hirst's case in the European Court of Human Rights was also referred to in the joint majority reasons of Justices Gummow and Crennan and myself. Those reasons likewise acknowledged the difference that existed in the legal questions respectively presented to the European Court of Human Rights and the High Court of Australia³². But the joint reasons pointed to the way the decision of the European Court of Human Rights had impacted upon consideration of a like question in the Supreme Court of Canada, decided in accordance with the *Canadian Charter of Rights and Freedoms*³³. In justifying the acceptability of a disqualification for prisoners serving three years of imprisonment or more, the joint reasons concluded that such provisions

³⁰ (2007) 233 CLR 162 at 178.

³¹ (2007) 233 CLR 162 at 182.

³² (2007) 233 CLR 162 at 204.

³³ (2007) 233 CLR 162 at 203-4. The reference was to *Sauvé v Canada (Chief Electoral Officer)* [2002] 2 SCR 519 (SC Canada).

were not "necessarily inconsistent, incompatible or disproportionate in the relevant sense"³⁴.

The dissenting judges in *Roach* (Justices Hayne and Heydon) rejected the relevance of the reasoning of the European Court in what, ultimately, was a question about the requirements of the Australian Constitution. Justice Hayne³⁵ rejected the relevance in elucidating the demands of the Australian Constitution of any reference to "generally accepted international standards". Justice Heydon was even more emphatic on this point³⁶. He referred to the strong statements to like effect by Justice Michael McHugh in *Al-Kateb v Godwin*³⁷. Somewhat sharply, he stated that, in previous authority, twenty-one of the Justices of the High Court of Australia who had considered the matter had rejected the proposition that international law could affect or limit the meaning of the Australian Constitution. Only one Justice had decided otherwise³⁸. That other Justice was identified by Justice Heydon as myself.

The discursive form of reasoning followed by courts in Australia; the importance typically assigned to contextual developments deemed relevant; the process of judicial reasoning by analogy; and the habits of transparent revelation of intellectual stimuli, make it inevitable, even in constitutional cases, that Australian judges will draw upon international sources viewed as in some way relevant. Especially so where those

³⁴ (2007) 233 CLR 162 at 204.

³⁵ (2007) 233 CLR 162 at 220-221.

³⁶ (2007) 233 CLR 162 at 224.5 [181].

³⁷ (2004) 219 CLR 562 at 589-593 [62]-[71].

³⁸ (2007) 233 CLR 162 at 223-5 [181] referring to *Newcrest (WA) v The Commonwealth* (1997) 190 CLR 513 at 651-653; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 417-419 [166]-[167]; *Al-Kateb v Godwin* (2004) 219 CLR 562 at 622-623 [169]-[170].

sources are thoughtfully and persuasively reasoned as, typically, the decisions of the European Court of Human Rights are.

The recent use of the European Court's decision in *Hirst*, over the protests of the dissenters in the High Court of Australia, may therefore be significant. Especially so if, and when, Australian human rights legislation presents analogous questions for judicial decision. It seems inevitable³⁹ that busy Australian judges faced with a problem upon which the European Court has passed in elaborate reasons, will look to that court's reasons for the guidance that such reasons may sometimes afford in applying Australian law to the case in hand. Especially in identifying material considerations of legal principle and legal policy, such decisions may be (as *Hirst* proved) helpful although in no way binding or determinative for the Australian judges⁴⁰.

AN EARLY EXAMPLE: LAW OF ATTAINDER

One of the earliest significant references to the jurisprudence of the European Court occurred in the 1978 decision of the High Court of Australia in *Dugan v Mirror Newspapers Ltd*⁴¹. At issue was whether Darcy Dugan, a prisoner serving a commuted death sentence, could sue the Sydney *Daily Mirror* for defamation. The *Daily Mirror* argued that Dugan had no civil right to sue in tort. It submitted that the ancient English law of attainder and “corruption of the blood” had been absorbed into Australian law when Great Britain acquired sovereignty

³⁹ The word used by Brennan J in analogous consideration of the impact of the *International Covenant on Civil and Political Rights* on Australian common law. See *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42.

⁴⁰ cf *William Smith v K D Scott (Electoral Registration Officer)* (2007) SC 345; [2007] CSIH 9 (Scottish Registration Appeal Court), applying *Hirst* to the electoral law of Scotland.

⁴¹ (1978) 142 CLR 583.

over the Australian continent in 1788. This had stripped Darcy Dugan of his civil rights because of his status as a convicted capital felon.

In a majority decision, the High Court upheld this argument. It accepted that the law of attainder had been received from English law. It was therefore part of Australian law, at least until it was overridden by a law validly enacted by an Australian Parliament.

The lone dissenter in the High Court of Australia was Justice Lionel Murphy. In his reasons, Justice Murphy referred to international materials and opinions. He concluded that the civil death doctrine violated “universally accepted standards of human rights⁴².” Specific reference was made by him to the decision of the European Court of Human Rights in *Golder v United Kingdom*⁴³. That decision had concerned the interpretation of Article 6 of the *European Convention on Human Rights and Fundamental Freedoms* (“the *European Convention*”). Justice Murphy cited with approval the Strasbourg Court’s acknowledgement that:

“In civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts ... The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally ‘recognised’ fundamental principles of law: the same is true of the principle of international law which forbids the denial of justice. Article 6(1) must be read in the light of these principles.”⁴⁴

After considering the “overwhelming weight of evidence against the doctrine” of attainder and corruption of the blood with removal of access

⁴² *Dugan* (1978) 142 CLR 583, per Murphy J at 607.

⁴³ (1975) E.H.R.R. 524 at 527.

⁴⁴ *Ibid*, at 533.

to the courts to assert ordinary civil rights Justice Murphy ultimately concluded that it “does not accord with modern standards in Australia”. He found that attainder and corruption of the blood should not be recognised as part of the existing Australian common law.⁴⁵ But his was a lone voice.

Justice Murphy’s reference in *Dugan v Mirror Newspapers Ltd* is characteristic of the way in which the High Court of Australia in more recent times has come to make use of the jurisprudence developed by the European Court. An examination of decisions referring to the jurisprudence of the European Court of Human Rights illustrates the progressive way that such materials have been cited by an increasing number of Australian judges to support attempts to develop and strengthen the protection of human rights and freedoms in Australia by reference to basic legal principles expounded in the decisions of the European Court.

Of course, such attempts have not always reflected the opinion of the majority of judges on the High Court of Australia. *Dugan v Mirror Newspapers Ltd* was an early example of this fact. Yet, gradually, the power of the exposition, and the persuasion of the reasoning, have encouraged Australian judges, and therefore Australian advocates, to look to Strasbourg and to invoke its holdings where they seem relevant.

A DEVELOPING PROTECTION FOR FREEDOM OF EXPRESSION

One of the most important human rights developments in Australian law over the past twenty years has been the recognition of a type of implied

⁴⁵ *Dugan* (1978) 142 CLR 583, per Murphy J at 608.

constitutional right to freedom of political communication. This implied "right" was initially explained as such, by the High Court, in *Australian Capital Television Pty Ltd v Commonwealth*⁴⁶. In that case Chief Justice Mason acknowledged that, in modern systems of representative government, the fundamental importance of freedom of political communication had been recognised by overseas courts in various jurisdictions⁴⁷. He specifically referred, amongst other courts, to the European Court of Human Rights and to its pronouncements of the importance of the basic right of generally free political expression in cases such as *Handyside v United Kingdom*⁴⁸, *The Sunday Times Case*⁴⁹ and *Lingens v Austria*⁵⁰.

The influence of the *European Convention*, and of the European Court of Human Rights expounding it, on the development of the implied constitutional right to freedom of political communication in Australia is demonstrated in several of the leading Australian cases in this area⁵¹. In Australia, the implied "right" has been held to derive textually as an implication arising from sections 7 and 24 of the Australian Constitution. The requirement that parliamentary representatives be "directly chosen by the people", as stated in the Australian Constitution, has been interpreted as carrying a necessary requirement that the constitutionally mandated choice by the electors must be an informed one. Accordingly, it should not be limited by impermissible restrictions on

⁴⁶ (1992) 177 CLR 106.

⁴⁷ (1992) 177 CLR 106, per Mason CJ at 140.

⁴⁸ (1976) 1 E.H.R.R. 737, at 754.

⁴⁹ *The Sunday Times v United Kingdom* (1979) 2 E.H.R.R. 245.

⁵⁰ (1986) 8 E.H.R.R. 407, at 418.

⁵¹ *Australian Capital Television Pty Ltd* (1992) 177 CLR 106, per Mason CJ at 140, Brennan J at 157-159; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, per Mason CJ at 29, Brennan J at 47; *Theophanous v Herald & Weekly Times* (1994) 182 CLR 104, per Mason CJ, Toohey and Gaudron JJ at 130; *Leask v Commonwealth* (1996) 187 CLR 579, per Brennan CJ at 593-595, Dawson J at 606, Toohey J at 615.

access to relevant political information. To emphasise the essential importance of free public discussion in sustaining a modern representative democracy, Justice Brennan, in *Nationwide News Pty Ltd v Wills*, referred to decisions of the European Court such as *The Observer and The Guardian v United Kingdom*⁵². He said⁵³:

“... it would be a parody of democracy to confer on the people a power to choose their Parliament but to deny the freedom of public discussion from which the people derive their political judgments.”

In the High Court of Australia, it was accepted that this implied constitutional right to freedom of political communication was not an Australian equivalent to Article 10 of the *European Convention*. Article 10 expressly creates a general right to freedom of speech, as such. The European Court of Human Rights has taken a broad approach in interpreting that provision⁵⁴.

This contrasts with the implied and more limited and particular, character of the guarantee upheld under Australian constitutional law. The interpretation of the latter is limited by the terms and structure of the Australian Constitution. Its operation has been confined to political communications necessary to ensure the efficacy of democratic parliamentary government. There are thus considerable differences between the scope of the protected rights to freedom of speech recognised in Europe and Australia.

⁵² (1991) 14 E.H.R.R. 153, at 178. In his reasons in *Lenah Game Meats* (2001) 208 CLR 199 at 305 [267] Callinan J contrasted the European Court's views and his own.

⁵³ (1992) 177 CLR 1.

⁵⁴ As seen in decisions such as *Lingens* (1986) 8 E.H.R.R. 407 and *Oberschlick v Austria*, Series A, No. 204, 23 May 1991.

In *Theophanous v The Herald & Weekly Times Ltd*, these differences led Justice Brennan in the High Court of Australia to suggest that the assistance to be gained from the ‘Article 10 cases’, in determining the scope and application of the Australian freedom of political communication, was extremely limited⁵⁵. On the other hand, in the same case, Chief Justice Mason and Justices Toohey and Gaudron recognised that, whilst the Australian guarantee was not the precise equivalent of the *European Convention* broad guarantee provided under either Article 10 or under the First Amendment of the United States Constitution⁵⁶:

“... that circumstance is not a reason for concluding that the United States and European approaches are irrelevant or inappropriate to our situation.”

PROPORTIONALITY IN AUSTRALIAN CONSTITUTIONAL LAW

The Australian “freedom of speech” cases have also been central to the development of the concept of proportionality and its application in Australian constitutional law. In this, the influence of the European Court of Human Rights is also directly evident.

The concept of proportionality has its origins in European, specifically German, constitutional law. This foundation was noted by Justice Gummow in the Federal Court of Australia, writing in *Minister for Resources v Dover Fisheries Pty Ltd*⁵⁷:

“The concept of ‘reasonable proportionality’ as a criterion for assessment of validity in constitutional and administrative law appears to have entered the stream of the common law

⁵⁵ *Theophanous* (1994) 182 CLR 104, per Brennan J at 162-163.

⁵⁶ *Theophanous* (1994) 182 CLR 104, per Mason CJ, Toohey and Gaudron JJ at 130. See also the application of the European Court's decision in *Golder v United Kingdom* (1975) 11 EHRR 524 at 535-536 in *APLA Ltd v Legal Services Commission (NSW)* (2005) 224 CLR 322 at 442 [353].

⁵⁷ (1993) 116 ALR 54, per Gummow J at 64.

from Europe and, in particular, from the jurisprudence of the Court of Justice of the European Communities and the European Court of Human Rights.”

The concept of proportionality essentially affords lawyers a formula for balancing competing principles and ensuring that measures adopted by governments are reasonably proportionate and harmonious to achieving the legitimate purpose for which such measures are introduced. The European Court has employed the concept appropriately in cases such as *Handyside*⁵⁸ and the *Sunday Times Case*⁵⁹. It has done so to determine whether breaches of the *European Convention* had been proved. To decide whether the restriction of a right guaranteed under the *European Convention* is valid, the European Court has considered whether the restriction is "proportionate" to a legitimate aim that is being pursued.

In Australia, the proportionality test was chiefly derived from the jurisprudence of the European Court of Justice and the European Court of Human Rights⁶⁰. The relationship between the Australian and European concepts of proportionality was expressly acknowledged by the late Justice Selway, a greatly respected judge of the Federal Court of Australia⁶¹:

“... [T]here are considerable differences between the test as applied in European law and the test applied in Australia, although the application of the proportionality test in Australia in respect of guarantees, immunities and

⁵⁸ (1976) 1 E.H.R.R. 737.

⁵⁹ (1979) 2 E.H.R.R. 245.

⁶⁰ *Leask* (1996) 187 CLR 579, per Toohey J at 615; *Dover Fisheries* (1993) 116 ALR 54, per Gummow J at 64; Sir Anthony Mason, “Trends in Constitutional Interpretation” (1995) 18 *University of New South Wales Law Journal* 237, at 246; J. Kirk, “Constitutional Guarantees, Characterisation and the Concept of Proportionality” (1997) 21 *Melbourne University Law Review* 1, at 2; T. H. Jones, “Legal Protection for Fundamental Rights and Freedoms” (1994) 22 *Federal Law Review* 57, at 77.

⁶¹ (1996) 7 *Public Law Review* 212, at 212.

limitations upon power does bear a striking similarity with the use of the test in European law.”

Justice Selway dated the first development of a "reasonable proportionality" test in Australia to cases in the 1930s. However, he noted that it was not until the 1980s that the notion of proportionality was explicitly discussed and its constitutional significance recognised.⁶² He said that since that time⁶³:

"... in Australia the proportionality doctrine has taken root and, indeed, extended its reach into the heartland of federal constitutional law. "

Certainly, 'proportionality' is a concept more understandable and useful than the one conventionally used in Australian constitutional discourse: "appropriate and adapted" – a test so obscure that I try to avoid it⁶⁴. The proportionality test has become part of the central test applied by the High Court for determining the validity of an alleged violation of an express or implied constitutional freedom or guarantee. The concept has been employed in this manner in cases considering, for example, the express guarantee of freedom of interstate trade under section 92 of the Australian Constitution⁶⁵, the express prohibition on legislative discrimination against the residents of other States under section 117 of the Australian Constitution⁶⁶, and the implied constitutional protection of freedom of political communication just mentioned⁶⁷.

⁶² B Selway, "The Rise and Rise of the Reasonable Proportionality Test in Public Law" (1996) 7 *Public Law Review* 212, at 213-214.

⁶³ *Dover Fisheries* (1993) 116 ALR 54, per Gummow J at 64.

⁶⁴ *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 266-270 [247]-[261].

⁶⁵ *Castlemaine Tooheys Ltd v State of South Australia* (1990) 169 CLR 436, per Mason CJ, Brennan, Deane, Dawson and Toohey JJ at 473; *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520.

⁶⁶ *Street v Queensland Bar Association* (1989) 168 CLR 461, per Brennan J at 510-512, per Gaudron J at 570-574.

⁶⁷ *Australian Capital Television Pty Ltd* (1997) 177 CLR 106, per Mason CJ at 142-144, Brennan at 157-160; *Theophanous* (1994) 182 CLR 104, per Brennan J at 150-152, Deane J at 178-179; *Cunliffe* (1994) 182 CLR 272, per Mason CJ at 300, Brennan J at 323-326, per Deane J at 339-340, Gaudron J at 387-388; *Leask* (1996)

The use of the concept of proportionality in this way, being a test of legitimate restrictions upon guaranteed human rights, essentially mirrors the application of the proportionality concept by the European Court in cases such as *Handyside*⁶⁸ and the *Sunday Times Case*⁶⁹. This point was made by Chief Justice Brennan in *Leask v Commonwealth*⁷⁰.

The precise scope of the concept of proportionality in Australian constitutional law, particularly in terms of its use as a test of characterisation, has been the subject of considerable debate amongst Australian judges and lawyers⁷¹. The use of proportionality as a test for the legitimacy of alleged violations of constitutional freedoms, immunities and guarantees – a use which mirrors the application of the concept by the European Court of Human Rights – is, however, now fairly well established. In developing the concept in this manner, the Australian courts have expressly drawn upon the jurisprudence of the European Court. This process is bound to continue in the coming years. As I have mentioned, the use of the concept of "proportionality" in constitutional decision-making, in place of the traditional but ungainly and opaque criterion ("appropriate and adapted") was evident in the

187 CLR 579, per Brennan CJ at 593-595, Dawson J at 606, Toohey J at 614-616; *Mulholland v Australian Electoral Commission* (2005) 220 CLR 181 at 266-268 [247]-[268].

⁶⁸ (1976) 1 E.H.R.R. 737.

⁶⁹ (1979) 2 E.H.R.R. 245.

⁷⁰ (1996) 187 CLR 579, per Brennan CJ at 594.

⁷¹ For an examination of the history and developments relating to this topic see eg Kirk, (1997) 21 *Melbourne University Law Review* 1; Selway, (1996) 7 *Public Law Review* 212; H. P. Lee, "Proportionality in Australian Adjudication", contained in G. Lindell (ed.) *Future Directions in Australian Constitutional Law* (1994), at 126-149.

High Court of Australia in *Roach v Electoral Commissioner*⁷², as in many other decisions⁷³.

A related concept, derived from the European Court of Human Rights is that of the “margin of appreciation”. In cases such as *The Observer and The Guardian v United Kingdom*⁷⁴, the European Court of Human Rights recognised that, when applying the proportionality test, it should allow a “margin of appreciation” to the lawmakers of a participating State in their decisions about the means that may be used to achieve a particular purpose that falls within a constitutional power but that also has the effect of inhibiting, to some degree, a constitutional guarantee or freedom. The “margin of appreciation” has been called a⁷⁵:

“foundational aspect of the jurisprudence of the Court of Human Rights.”

In cases such as *Leask*⁷⁶, *Cunliffe*⁷⁷ and *Australian Capital Television Pty Ltd*⁷⁸ Chief Justice Brennan drew directly from the European Court in suggesting that the concept of a parliamentary “margin of appreciation” was also applicable to Australia. Whilst this concept remains a “controversial importation” into Australian constitutional law⁷⁹, the influence of the European Court is obviously apparent in discussions about its application in Australia. The difficulties of the concept include that it is unclear in expression, somewhat vague in

⁷² (2007) 81 ALJR 1830 at 1852 [101].

⁷³ For example *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567, fn 272; *Mulholland v AEC* (2004) 220 CLR 181 at 266-270 [247]-[261].

⁷⁴ *The Observer and the Guardian v United Kingdom* (1991) 14 E.H.R.R. 153, at 178.

⁷⁵ Kirk, (1997) 21 *Melbourne University Law Review* 1, at 56.

⁷⁶ *Leask* (1996) 187 CLR 579, per Brennan CJ at 595

⁷⁷ (1994) 182 CLR 272, per Brennan J at 325.

⁷⁸ (1992) 177 CLR 106, per Brennan J at 159.

⁷⁹ *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at [204] of my own reasons.

purpose and liable to allow departure from basic norms on grounds that are necessarily imprecise. On a continent as diverse as Europe, this may be an inescapable necessity. In a continental country with relatively few basic internal differences, such as Australia, the notion seems less attractive.

THE RIGHT TO A FAIR TRIAL

The European Court of Human Rights has also influenced developments in Australian criminal procedure, most notably in cases considering the content of the right to a fair trial. The Australian Constitution does not contain an expressly guaranteed right to a fair trial, in a form equivalent to the general guarantee provided by Article 6 of the *European Convention*. Indeed, the only express constitutional protection relating to trials (save for guarantees of judicial tenure in section 72(ii)) is afforded by section 80 of the Australian Constitution. This mandates a right to trial by jury for all indictable federal offences. However, section 80 has been given a narrow interpretation by the High Court.⁸⁰ It has been repeatedly held that, if a criminal charge is not tried on indictment (a formal document initiating the trial process), s 80 of the Constitution has no application. Its guarantee of jury trial may then quite easily be by-passed.

There has been some judicial support for the concept of an implied constitutional right to a fair trial arising from the text, structure and purposes of Chapter III of the Australian Constitution dealing with the judicature and the vesting of the judicial power of the Commonwealth in

⁸⁰ *R v Archdall and Roskrugge; Ex parte Carrigan and Brown* (1928) 41 CLR 128; *Kingswell v The Queen* (1985) 159 CLR 264; *R v Cheng* (2000) 203 CLR 248.

the courts⁸¹. The existence of a broad implied constitutional right to a fair trial, however, has not yet been accepted by a majority of the High Court of Australia⁸². The content, scope and nature of any such implied right, contained in Chapter III of the Australian Constitution, remains a subject of considerable legal debate.

Despite the lack of an express constitutional guarantee of fair trial or due process, or an Australian equivalent to Article 6 of the *European Convention*, the right of an accused person to have a fair trial according to law has been recognised as a fundamental element of Australian criminal law⁸³. The precise elements of such a right have never been exhaustively listed. In each case where an infraction is pleaded, it ultimately falls to the courts to develop, express and apply this concept. Justice Brennan once referred to this continual process of elaboration as being⁸⁴:

“... the onward march to the unattainable end of perfect justice.”

However, at least the march is generally in a forward direction. In Australia, it is not a retreat.

There are obvious differences between Australian and European law in relation to the application of the right to a fair trial, particularly in terms

⁸¹ *Dietrich v The Queen* (1992) 177 CLR 292, per Deane J at 326, Gaudron J at 362;

⁸² See, however, *Ebner v Official Trustee* (2001) 205 CLR 337 at 363 [82] per Gaudron J; 373 [116]-[117] of my own reasons.

⁸³ *Dietrich* (1992) 177 CLR 292, per Mason CJ and McHugh J at 299-300; *McKinney v The Queen* (1991) 171 CLR 468, at 478; *Jago v District Court (NSW)* (1989) 169 CLR 23, per Mason CJ at 29, Deane J at 56, Toohey J at 72, Gaudron J at 75; A. Mason, “Fair Trial” (1995) 19 *Criminal Law Journal* 7; K.P. Duggan, “Reform of the criminal law with fair trial as the guiding star” (1995) 19 *Criminal Law Journal* 258; J. J. Spigelman, “The truth can cost too much: The principle of a fair trial” (2004) 78 *Australian Law Journal* 29, at 30.

⁸⁴ *Jago v District Court (NSW)* (1989) 168 CLR 23, per Brennan J at 54.

of the context within which this guarantee must be considered. As a result, there are limits to the direct application within Australia of decisions of the European Court of Human Rights concerning Article 6 of the *European Convention*. Nevertheless, on many occasions, reference has been made by the High Court of Australia to the general approach of the European Court and to the development of specific elements of the right to (and elements of) a fair trial as explained by the Strasbourg Court. Recent decisions by the High Court such as *Mallard v The Queen*⁸⁵, *Antoun v The Queen*⁸⁶; and *Strong v The Queen*⁸⁷ are cases in point.

One clear example of the influence of the European Court of Human Rights in this context may be seen in *Dietrich v The Queen*⁸⁸. That case concerned the extent of an indigent accused's entitlement to the provision of legal representation in a trial of a serious criminal offence. The High Court of Australia, by majority, allowed Mr Dietrich's appeal. It held that the right to a fair trial could be violated where an indigent person, accused of a serious crime, was not able to secure legal representation through no fault of his or her own.

A notable aspect of this decision was the High Court's willingness to consider international developments in this area. Thus, specific consideration was given in *Dietrich* to several decisions of the

⁸⁵ (2005) 224 CLR 125 at 154-155 referring to *Edwards v United Kingdom* (1992) 15 EHRR 417 at *Fitt v United Kingdom* (2000) 30 EHRR 480.

⁸⁶ (2006) 80 ALJR 479 at 506 [40] on the right to trial before a manifestly impartial tribunal, referring to *Ferrantelli v Italy* (1996) 23 EHRR 266; *Incal v Turkey* (1998) 29 EHRR 221; *Stafford v United Kingdom* (2002) 35 EHRR 1121 at *Beaumartin v France* (1994) 19 EHRR 485.

⁸⁷ (2005) 224 CLR 1 at 33 [87] on limitations on preventive or additional detention, referring to *Winterwerp v Netherlands* (1979) 2 EHRR 387 and *Johnson v United Kingdom* (1997) 27 EHRR 296.

⁸⁸ (1992) 177 CLR 292.

European Court of Human Rights. In their joint reasons in *Dietrich*, Chief Justice Mason and Justice McHugh expressly noted the approach of the European Court in cases such as *Monell and Morris v United Kingdom*⁸⁹ and *Granger v United Kingdom*⁹⁰. They stated that⁹¹:

“... the European Court of Human Rights has approached the almost identical provision in the European Convention on Human Rights [Article 6(3)(c)] by emphasising the importance of the particular facts of the case to any interpretation of the phrase “when the interests of justice so require”. As will become clear, that approach is similar to the approach which, in our opinion, the Australian common law must now take.”

Many signs, therefore, point to Australian judges continuing to refer to decisions of the European Court to assist in the development of the concept of what is meant by a “fair trial” according to Australian common law notions expressed in contemporary Australian conditions. Those decisions help to render the elements of this fair trial right more precise. This continuing influence was expressly acknowledged by Justice Duggan of the Supreme Court of South Australia in extra curial remarks. That experienced Australian judge said that⁹²:

“It is to be expected that the future content of a “fair trial” in Australia will be influenced at least to some extent by international conventions, the views of the European Court and the reactions to those views by the English courts.”

APPLYING INTERNATIONAL STANDARDS IN MIGRATION LAW

The approach taken by the European Court of Human Rights in protecting the fundamental rights of migrants, and particularly refugees, has also directly influenced the approach adopted in a number of

⁸⁹ (1987) 10 E.H.R.R. 205, at 225.

⁹⁰ (1990) 12 E.H.R.R. 469, at [480]-[482].

⁹¹ *Dietrich v The Queen* (1992) 177 CLR 292, per Mason CJ and McHugh J at 307.

⁹² K.P. Duggan, “Reform of the Criminal Law with Fair Trial as the Guiding Star” (1995) 19 *Criminal Law Journal* 258, at 271.

Australian decisions in the context of migration law. This has most notably occurred in the context of considering the approach taken by the European Court to the *Refugees Convention and Protocol*; to which Australia is a signatory.

The policy of mandatory detention of alien arrivals in Australia where they have no entry visas, has been a controversial political issue, particularly in recent years. In considering legal issues relating to questions of detention, Australian courts have repeatedly referred to decisions of the European Court concerning Article 5(1) of the *European Convention*, being the right to liberty and security of the person. In cases such as *Chahal v United Kingdom*⁹³ and *Amuur v France*⁹⁴, the European Court of Human Rights has taken a broad approach to this guarantee. Article 5(1) has been held not only to require that no individual be deprived of their liberty unless this is done according to law but also that the law itself, and its application in the individual case, must not be arbitrary.

In *Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri*⁹⁵ the Full Court of the Federal Court of Australia, including by the patron of the *Fiat Justitia* Lectures, Chief Justice Black, concluded, by analogy, that cases in the European Court of Human Rights about mandatory detention, such as *Chahal v United Kingdom*⁹⁶, provided support for the view that a similarly broad interpretation applied in relation to Article 9(1) of the *International Covenant on Civil and*

⁹³ (1996) 23 E.H.R.R. 413.

⁹⁴ (1996) 22 E.H.R.R. 533.

⁹⁵ (2003) 126 FCR 54; (2003) 197 ALR 241.

⁹⁶ (1997) 23 E.H.R.R. 413.

Political Rights (ICCPR). This, in turn, was held to affect the interpretation of section 196 of the *Migration Act 1958* (Cth) relating to mandatory detention of aliens. The Full Court of the Federal Court concluded that the *Migration Act* should be read, as far as its language permitted, in conformity with Australia's international obligations under the ICCPR⁹⁷.

In relation to the specific issue of indefinite detention the conclusions reached in *Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri*⁹⁸ were effectively rejected by a majority of the High Court of Australia in the subsequent decisions in *Al-Kateb v Godwin*⁹⁹ and *Minister for Immigration and Multicultural Affairs v Al Khafaji*¹⁰⁰. In *Al-Kateb*, a 4:3 decision of the High Court, the legality of the indefinite detention of two unlawful non-citizen stateless persons under the *Migration Act 1958* (Cth), in circumstances where they were likely to be detained for the indefinite future, was upheld as within the Act and constitutionally valid. Three of the seven Justices (including myself) dissented. Nevertheless, the decision in *Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri*¹⁰¹ still remains significant, as an illustration of an Australian court examining the decisions of an international human rights court and using such decisions to help reinforce human rights protection within Australia by interpreting

⁹⁷ Australia is a party to the *International Covenant on Civil and Political Rights*, having ratified the ICCPR on 13 August 1980. It is also a party to the First Optional Protocol, permitting individual communications to the Human Rights Committee for alleged breaches.

⁹⁸ (2003) 126 FCR 54; (2003) 197 ALR 241.

⁹⁹ (2004) 219 CLR 562. See also *Rehrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486 at 530 [127] referring to *Kurt v Turkey* (1998) 27 EHRR 373.

¹⁰⁰ (2004) 219 CLR 664.

¹⁰¹ (2003) 126 FCR 54; (2003) 197 ALR 241.

Australian legislation in general conformity with the approach evident in such decisions.

Australian judges have also looked to the approach of the European Court of Human Rights when considering the obligation of a State to safeguard and protect applicants in the context of the *Refugees Convention and Protocol*. In cases such as *Minister for Immigration & Multicultural Affairs v Respondents S152/2003*¹⁰², *Applicants M160/2003 v Minister for Immigration & Multicultural & Indigenous Affairs*¹⁰³ and *VRAW v Minister for Immigration & Multicultural & Indigenous Affairs*¹⁰⁴ reference has been made to the standard applied by the European Court of Human Rights in *Osman v United Kingdom*¹⁰⁵.

In *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs*¹⁰⁶, both Gummow J¹⁰⁷ and I¹⁰⁸ referred to the European Court's reasons in *König v Federal Republic of Germany*¹⁰⁹. There are other recent cases of the same kind¹¹⁰. Whilst the approach adopted in these cases has not suggested that the European Court's approach affords Australian courts with a definitive guide to what 'international standards' might be, they have been treated as identifying issues that are likely to

¹⁰² (2004) 222 CLR 1 at 12 [27] per Gleeson CJ, Hayne and Heydon JJ at 495 and at 23 [61] per McHugh J.

¹⁰³ (2005) 219 ALR 140, per Finkelstein J at 151.

¹⁰⁴ [2004] FCA 1133, per Finkelstein J at [18].

¹⁰⁵ (1998) 29 E.H.R.R. 245.

¹⁰⁶ (2005) 228 CLR 470.

¹⁰⁷ (2005) 228 CLR 470 at 478-479 [20].

¹⁰⁸ (2005) 228 CLR 470 at 505 [115]. See also at 494-495 [80] referring to other decisions including *Silva Pontez v Portugal* (1994) 18 EHRR 156.

¹⁰⁹ (1978) 2 EHRR 170.

¹¹⁰ See eg *Applicant NABD of 2002 v Minister for Immigration, Multicultural and Indigenous Affairs* (2005) 79 ALJR 1142 at 1162 [121]-[123] referring to *Kokkinas v Greece* (1993) 17 EHRR 397; *Murphy v Ireland* [2003] ECHR 352.

be relevant to this area of common international law which Australian judges should consider.

THE IMPACT OF HUMAN RIGHTS LAW IN FAMILY LAW

The cases collectively referred to as the “*Re Kevin* decisions”¹¹¹ afford another example that illustrates the international character of human rights jurisprudence today and the positive contribution that has been made by the decisions of the European Court of Human Rights to such understandings in Australia.

The issue in the “*Re Kevin* decisions” was whether a marriage between a woman and a post-operative female to male transsexual person was valid under the statutory and constitutional provisions relating to “marriage” under Australian law. In granting a declaration of the validity of the marriage Justice Chisholm of the Family Court of Australia, at first instance, conducted a comprehensive review of the legal position in other countries with respect to the recognition of a transsexual person’s acquired gender and any subsequent marriage. This included a review of relevant decisions of the European Court of Human Rights. In relation to the decisions of the European Court of Human Rights, discussed in his decision, Justice Chisholm concluded¹¹²:

“These decisions are not directly relevant to the present case. ... Nevertheless, the cases provide useful glimpses of developments and trends in thinking in Europe. There is a great deal of common ground among the various international human rights instruments. Overall, I think that these decisions indicate that failure to recognise the sex of post operative transsexuals raises serious issues of human rights, such that the question arises whether the failure can be permitted on the basis of the margin of appreciation

¹¹¹ *Attorney-General (Cth) v “Kevin and Jennifer”* (2003) 172 FLR 300; *Kevin v Attorney-General (Cth)* (2001) 165 FLR 404.

¹¹² *Kevin* (2001) 165 FLR 404 at 449-450.

allowed to States under the Convention. It is clear that a decision in favour of the applicants would be more in accord with international thinking on human rights than a refusal of the application.”

In affirming the decision of Justice Chisholm, on appeal, the Full Court of the Family Court of Australia also provided a detailed examination of relevant international case-law, referring extensively to the approach taken by the European Court of Human Rights on analogous questions. The Full Family Court stated that it agreed generally with the submission of the Australian Human Rights and Equal Opportunity Commission that Australian courts “should and do give weight to the views of specialist international courts and bodies such as ... the European Court of Human Rights.”¹¹³ Whilst it was acknowledged that the decisions of the European Court of Human Rights would not be determinative, because they are not binding as a matter of law on Australian courts, they were held to be “helpful” in considering the principal issues that were before the Court¹¹⁴. There was no hesitation in examining them and giving them weight in reaching the local decision. This alone is an important advance in Australia on the position that obtained a decade earlier.

The Full Family Court recognised that differences between the legal fundamentals in Europe and Australia would necessarily limit the relevance of decisions of the European Court. In regard to this, that court stated¹¹⁵:

“We appreciate that these are decisions by a Court as to the interpretation of a Convention to which Australia is not a

¹¹³ (2003) 172 FLR 300, per Nicholson CJ, Ellis and Brown JJ at 349.

¹¹⁴ (2003) 172 FLR 300 at 354.

¹¹⁵ *Attorney-General v “Kevin and Jennifer”* (2003) 172 FLR 300, per Nicholson CJ, Ellis and Brown JJ at 353.

party and must be read with this in mind. Nevertheless, as Johnson J pointed out in *Bellinger*, it provides a startling confirmation of the degree of international isolation that this country would adopt if [the contrary position] is found to represent the law.”

The Australian Government did not seek special leave to appeal to the High Court against the *Re Kevin* decision. In the end, the Government, which had strongly contested the transsexual's marriage right, accepted the Family Court's decision. Such cases also indicate the fact that the exchange of ideas and knowledge about legal developments between Australian courts and the European Court of Human Rights is not all in the one direction. The decision of Justice Chisholm in *Kevin v Attorney-General (Cth)*¹¹⁶ has been cited with approval by the Grand Chamber of the European Court in *I v United Kingdom*¹¹⁷ and *Christine Goodwin v United Kingdom*¹¹⁸. In these decisions, the European Court of Human Rights found that the legal status, and treatment, of transsexual persons in the United Kingdom had resulted in violations of articles 8, 12, 13 and 14 of the *European Convention*. The United Kingdom Parliament subsequently enacted the *Gender Recognition Act 2004* (UK) in response to these decisions. Ms Rachael Wallbank, who appeared as counsel in the “*Re Kevin*” decisions, has expressed the view that¹¹⁹:

“The legal nexus between the *Gender Recognition Act 2004* and the *Re Kevin* decisions really highlights the international interdependence of reform efforts in respect of the human rights of people with transsexualism.”

¹¹⁶ (2001) 165 FLR 404.

¹¹⁷ (2003) 36 E.H.R.R. 53.

¹¹⁸ (2002) 35 E.H.R.R. 18.

¹¹⁹ R. Wallbank, “*Re Kevin* in Perspective” (2004) 9 *Deakin Law Review* 461, at 480.

FURTHER EXAMPLES OF THE INFLUENCE

There are many other examples of decisions by the European Court of Human Rights being cited in Australian decisions, and of the approach adopted by that Court in a particular area being considered by Australian judges with a view to informing themselves on the development of Australian law. Some examples of the range of references that have been made to decisions of the European Court of Human Rights by judges of the High Court of Australia in recent years include:

- In *Grollo v Palmer*¹²⁰ the High Court noted that other countries had taken the same view about the desirability of judicial supervision of warrants to authorise the secret surveillance of suspects in criminal cases. The Court cited the decision of the European Court of Human Rights in *Klass v Federal Republic of Germany*¹²¹ as an illustration highlighting the human rights considerations that inform this view¹²².
- In *Applicant A v Minister for Immigration and Ethnic Affairs*¹²³, Justice McHugh accepted as correct the approach of Justice Zekia in the European Court of Human Rights in *Golder v United Kingdom*¹²⁴ in interpreting Article 31 of the *Vienna Convention on the Law of Treaties*, stating that it is the approach that “should be followed in this country”.
- The relatively strict approach adopted by the European Court of Human Rights towards questions of apparent and actual judicial bias and the requirements of judicial impartiality and judicial independence has been referred to in decisions of the High Court such as *Re*

¹²⁰ (1995) 184 CLR 348.

¹²¹ (1978) 2 E.H.R.R. 214, at 235.

¹²² (1995) 184 CLR 348, per Brennan CJ, Deane, Dawson and Toohey JJ at 367-368.

¹²³ (1997) 190 CLR 225, per McHugh J at 253-254.

¹²⁴ (1975) 1 E.H.R.R. 524.

*Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka*¹²⁵ and *Johnson v Johnson*¹²⁶. In those decisions, the approaches taken by the European Court of Human Rights have reinforced the principles recognised in Australian law.

- In *Applicant NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*¹²⁷, my dissenting reasons endorsed the approach of the European Court of Human Rights to the interpretation of Article 9 of the *European Convention* in decisions such as *Kokkinakis v Greece*¹²⁸ and *Metropolitan Church of Bessarabia v Moldova*¹²⁹. This was expressed in the context of considering the right to religious freedom in terms of the *Refugees Convention* and *Protocol* and its application in Australia.
- In *D'Orta-Ekenaike v Victoria Legal Aid*¹³⁰, a case concerned with whether advocates before Australian courts enjoyed immunity from suit for negligence, both the joint reasons of Chief Justice Gleeson and Justices Gummow, Hayne and Heydon¹³¹, and my own to contrary effect¹³² referred to the decision of the European Court of Human Rights in *Osman's Case*¹³³. Elsewhere I also made reference to other such decisions concerned with equality before, and accountability to, the law¹³⁴. In *Baker v The Queen*¹³⁵ and *Fardon v Attorney-General*¹³⁶, decisions concerned with post-sentence

¹²⁵ (2001) 206 CLR 128 at 152 in my own reasons.

¹²⁶ (2000) 201 CLR 488, my own reasons at 501-502 [39].

¹²⁷ (2005) 79 ALJR 1142; (2005) 216 ALR 1, at [121]-[123] in my own reasons.

¹²⁸ (1993) 17 E.H.R.R. 397, at 418.

¹²⁹ (2002) 35 E.H.R.R. 13, at [118].

¹³⁰ (2005) 223 CLR 1.

¹³¹ (2005) 223 CLR 1 at 26 [66].

¹³² (2005) 223 CLR 1 at 98 [98], 105-106 [335].

¹³³ *Osman v United Kingdom* (1998) 29 EHRR 245.

¹³⁴ (2005) 223 CLR 1 at 99 [317] referring to *Holy Monasteries v Greece* (1994) 20 EHRR 1; *Devlin v United Kingdom* (2001) 34 EHRR 1029; and *A v United Kingdom* (2002) 36 EHRR 917.

¹³⁵ (2004) 223 CLR 513 at 551 [109].

¹³⁶ (2004) 223 CLR 575 at 645 [181].

prolongation of incarceration for perceived *danger*, I made reference to decisions of the European Court¹³⁷. In *Forge v Australian Securities and Investments Commission*¹³⁸, an appeal concerned with the validity of the appointment of temporary State judges, I invoked several decisions of the European Court relevant to that issue¹³⁹, and in *Thomas v Mowbray*¹⁴⁰, proceedings concerned with the validity of federal counter-terrorism legislation, I returned to the authority of the European Court relevant to preventive orders¹⁴¹. Although my references to that Court are more frequent than those of other Justices, the trend to citation by others has increased greatly in recent years.

Nor are judicial references of this kind confined to the High Court of Australia. Citations from the reasons of the European Court of Human Rights may also be found in many decisions of other Australian courts. Recent examples have included:

- *R v Wei Tang*¹⁴², in which the Court of Appeal of the Supreme Court of Victoria made reference to *Siliadin v France*¹⁴³ in attempting to determine the definition of slavery. *Siliadin* considered the definition of slavery as expressed originally in the 1926 International Convention to Suppress the Slave Trade and Slavery. In *Tang*, a brothel operator had been charged with slavery related offences under the *Criminal Code Act 1995* (Cth). The definition of slavery in that domestic statute was in terms similar to the definition within the

¹³⁷ Eg *Stafford v United Kingdom* (2002) 35 EHRR 32.

¹³⁸ (2006) 228 CLR 45 at 127-128 [209]-[211].

¹³⁹ Eg *Langborger v Sweden* (1989) 12 EHRR 416; *Finlay v United Kingdom* (1997) 34 EHRR 221.

¹⁴⁰ (2007) 233 CLR 307 at 423 [334]; 237 ALR 194 at 286.

¹⁴¹ *Hashman v United Kingdom* (2000) 30 EHRR 241 at [17].

¹⁴² [2007] VSCA 134 at [34].

¹⁴³ (2006) 43 E.H.R.R. 16.

1926 Convention. The issue is now before the High Court of Australia.

- In *Ragg v Magistrates' Court of Victoria & Corcoris*¹⁴⁴, Justice Bell, in the Supreme Court of Victoria, dealt with the principle of “equality of arms” in the context of the requirements of a fair trial. He credited the European Court of Human Rights as originally stating this principle¹⁴⁵. He cited a list of relevant authorities from that Court, including *Foucher v France*¹⁴⁶ and *Jespers v Belgium*¹⁴⁷, in the course of exploring the origins of the principle and applying it to the case in hand.
- In *Ruddock v Vadarlis*¹⁴⁸ (the *Tampa* Case), Chief Justice Black, in dissent, cited the European Court of Human Rights in *Amuur v France*¹⁴⁹ to support his views that Australian law sustained the provision of relief to those rescued by the *Tampa* on the high seas.
- The Full Court of the Federal Court of Australia referring to the decision in *Handyside v United Kingdom*¹⁵⁰ to illustrate the general principle that freedom of expression protects not only inoffensive speech but also extends to the protection of speech that offends, shocks or disturbs¹⁵¹.
- In *The Queen v Astill* a central issue for the New South Wales Court of Criminal Appeal was the reception of hearsay evidence in a manslaughter trial. The importance, in terms of procedural fairness, of the opportunity to cross-examine a witness was discussed by

¹⁴⁴ [2008] VSC 1 at [46]-[49] and [53]-[65].

¹⁴⁵ [2008] VSC 1 at [48].

¹⁴⁶ (1998) 25 EHRR 234.

¹⁴⁷ (1983) 5 EHRR CD305.

¹⁴⁸ (2001) 110 FCR 491.

¹⁴⁹ (1992) 22 E.H.R.R. 533.

¹⁵⁰ (1976) 1 E.H.R.R. 737.

¹⁵¹ *Bropho v Human Rights & Equal Opportunity Commission* (2004) 135 FCR 105; (2004) 204 ALR 761, per French, Lee and Carr JJ at [69].

reference to *Unterpertinger v Austria*¹⁵². This was a case in which the European Court of Human Rights held the conviction to be in violation of Article 6 of the *European Convention*¹⁵³.

- Article 3 of the *European Convention* and related decisions of the European Court of Human Rights were considered in *Smith v The Queen*, together with other international materials, in an examination of the prohibition against cruel and unusual punishments and the prohibition of excessive fines as universal human rights¹⁵⁴.
- In *Australian Meat Industry Employees' Union v Belandra Pty Ltd*¹⁵⁵ Justice North, in the Federal Court of Australia considered, in some detail, the approach taken by the European Court of Human Rights to the interpretation of Article 11 of the *European Convention*. This was done in the context of interpreting the Australian federal *Workplace Relations Act 1996* (Cth) and, more specifically, the meaning of provisions intended to protect workers against discrimination on the basis of trade union membership.
- The decision of *Soering v United Kingdom*¹⁵⁶ was considered by Justice North in *McCrea v Minister for Customs & Justice*¹⁵⁷. That case concerned the power of the Minister for Customs and Justice to surrender the applicant to Singapore in circumstances where he was charged with criminal offences punishable in Singapore by the death penalty. Although Justice North ultimately concluded that such comparative jurisprudence was of little assistance in determining the central question of the construction of section 22(3)(c) of the

¹⁵² (1986) 13 E.H.R.R. 175.

¹⁵³ *R v Astill* (1992) 63 A Crim R 148, at 157 in my reasons in the New South Wales Court of Appeal.

¹⁵⁴ *Smith v The Queen* (1991) 25 NSWLR 1, at 14 and 15 in my own reasons in the New South Wales Court of Appeal.

¹⁵⁵ [2003] FCA 910, per North J at [192] – [197], [217].

¹⁵⁶ (1989) 11 E.H.R.R. 429.

¹⁵⁷ [2004] FCA 1273.

Extradition Act 1988 (Cth), he accepted that such materials were relevant in so far as they were indicative of a recent international trend of opposition to imposition of the death penalty. There are many like decisions of intermediate courts and single judges in Australia.

AN ERA OF HUMAN RIGHTS

The use of international materials in the development of Australian law is still a matter of debate and controversy in some circles¹⁵⁸. In particular, the idea that the Australian Constitution should be read consistently with the rules of international law has been described as “heretical”¹⁵⁹. I do not accept that view. But it is one held in some legal circles in Australia, including by judges of the highest standing. There were resonances of these differing views in the High Court’s decision in *Roach*¹⁶⁰. Thus, in that case, Justice Heydon took his colleagues in the majority to task in an important passage in his reasons:

“...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 postdate it by many 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 relied on by the plaintiff 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...[T]he 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

¹⁵⁸ The opposing viewpoints in this debate were considered at some length in *Al-Kateb v Godwin* (2004) 219 CLR 562, per McHugh J at 589-595; and in my own reasons *ibid* at 622-630.

¹⁵⁹ *Al-Kateb v Godwin* (2004) 219 CLR 562, per McHugh J at 589 [13].

¹⁶⁰ See above.

of this Court who have considered the matter, and affirmed by only one.”¹⁶¹

Certainly, there are considerations that limit the application of unincorporated international law by domestic judges. A judge in a municipal court must be obedient to the national Constitution from which, ultimately, he or she derives jurisdiction, powers and legitimacy. Consistent with this obligation, such a judge cannot give priority to international law that has not been made part of the domestic legal system over and above the clear requirements of their national law¹⁶². It is possible, however, to respect this limitation whilst acknowledging the useful and persuasive role that can be played by international materials. The decisions of tribunals such as the European Court of Human Rights can enhance judicial thinking by exposing judges to the way that other experienced lawyers have approached similar issues. At the very least, their reasoning may disclose relevant considerations of legal policy and legal principle that need to be considered and evaluated for their local relevance. Shutting ourselves off from the experiences and knowledge of others only serves to restrict us in the continued pursuit of justice. Efforts to isolate individual countries, such as Australia and the United States of America from the persuasive force of international law are “doomed to fail”¹⁶³.

The jurisprudence of the European Court of Human Rights has had a very important impact within Australia. This is reflected most clearly in

¹⁶¹ (2007) 81 ALJR 1830 at 1805 [181] (Footnotes omitted).

¹⁶² *Minister for Immigration & Multicultural & Indigenous Affairs v B* (2004) 219 CLR 365, in my own reasons at 425 [170]-[173].

¹⁶³ *Al-Kateb v Godwin* (2004) 219 CLR 562 at 629 [190], in my own reasons. See MD Kirby, "International Law - the Impact on National Constitutions" (The Seventh Annual Grotius Lecture) 21 *American University International Law Review* 327 (2006).

the references made by Australian courts to decisions of the Court. References to such decisions have been increasing in recent years. This is a trend that seems likely to continue and to expand as Australia moves towards enacting statutory charters of fundamental rights.

The influence of the European Court of Human Rights is not defined exclusively by the number of references found in Australian case law. It has also had a more intangible, and possibly more enduring, effect through the way that that court has guided and influenced our thinking about human rights. As Sir Anthony Mason pointed out in relation to international law and legal institutions:

“The influence of international legal developments travels far beyond the incorporation of rules of international law and convention provisions into Australian domestic law. The emphasis given by international law and legal scholars to the protection of fundamental rights, the elimination of racial discrimination, the protection of the environment and the rights of the child, have changed the way in which judges, lawyers and legal scholars think about these subjects.”¹⁶⁴

This influence will be maintained, and indeed will grow, in the future. This is because Australia, like other modern nations and economies, has become increasingly international in its outlook and culture, including its legal culture. As well, the Australian people are becoming more aware of the importance of human rights issues and jurisprudence. The effective protection of human rights has become a subject of interest and debate in Australia¹⁶⁵. It may, possibly, be conceivable that the people of Oklahoma, abetted by the views of

¹⁶⁴ A F Mason, “Cross Currents: Internationalism, National Identity & Law”, Paper presented to the 50th Anniversary Conference of the Australasian Law Teachers’ Association (1995), at 5.

¹⁶⁵ G Williams, *The Case for an Australian Bill of Rights* (UNSW, 2004).

Justice Scalia, will be capable of being hidden from international legal thinking by a legal *fiat*. Against the background of our history and Constitution, this cannot and will not happen in Australia.

In this environment, the role of the European Court of Human Rights will become even more significant. Reasoned, serious, balanced decisions are a powerful weapon against injustice and arbitrary or ill-conceived deprivation of fundamental rights. The Strasbourg Court will continue to influence and guide the development of human rights law in Australia, as it has done in many non-signatory countries. In my view, the European Court of Human Rights is a court for the modern age. It takes a leading part in, and stimulates, the trans-national conversation about human rights. It gives intellectual leadership in a controversial field of the law's operation where wisdom and proportionality matter most¹⁶⁶. Australia's judges and lawyers should acknowledge their indebtedness. This is my attempt to do so.

¹⁶⁶ M D Kirby, "Terrorism and the Democratic Response: A Tribute to the European Court of Human Rights" Robert Schuman Lecture, 11 November 2004. See (2005) 28 UNSWLJ 221.