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INDIA INTERNATIONAL CENTRE

GOLDEN JUBILEE CELEBRATIONS 2012

NEW DELHI, INDIA, 5 OCTOBER 2012

TOWARDS GROWING LINKS: INDIA & AUSTRALIA

The Honourable Michael Kirby AC CMG

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TOWARDS GROWING LINKS BETWEEN THE SUPREME COURT OF INDIA AND THE HIGH COURT OF AUSTRALIA

THE HONOURABLE MICHAEL KIRBY AC CMG[*]

A GOLDEN JUBILEE FELICITATION

We celebrate the Golden Jubilee of the India International Centre (IIC). The invitation me is particularly sweet. It was received under the hand of my honoured friend, Soli J. Sorabjee, Padma Vibhushan of India and Honorary Member of the Order of Australia (a very rare honour which he shares with very few others who include Judge Christopher Weeramantry and the doyen of cricket, Brian Lara). Soli Sorabjee was recognised for services to Australia-India bilateral legal relations. President of the IIC in this propitious year, he has been a Senior Advocate at the Supreme Court of India for more than 40 years: almost the entire life of the IIC. He served as Solicitor-General of India (1997-80) and as Attorney-General (1998-04). He is celebrated in his own land, in mine and far beyond.

The IIC was created out of an idea which the then Vice-President of India, Dr S. Radhakrishnan, conceived in conversation with Mr John D. Rockefeller III. Its objective is truly global. It is to quicken and deepen "true and thoughtful

[*] Justice of the High Court of Australia (1996-2009); President of the New South Wales Court of Appeal (1984-96); Hon. LLD (Ntl. Law School Uni. Of India, Bangalore).

understanding between peoples and nations"[1]. Its gorgeous site, close to the beautiful Lodi Gardens, was selected by the foundation Prime Minister of India, Jawaharlal Nehru.

The IIC has brought together some of the best minds of India and the world. Its object is to create a space that extols simplicity and human relationships rather than mere things. Its initial sponsors were universities and people of the world of intellect. Its visitors have included leaders from many countries. It is one of India's premier cultural institutions. It is thus a jewel of this nation and of the world. Many a time when I have been in Delhi, as an official guest or as a private citizen, I have returned to this place for contemplation and quiet reflection. In a bustling city of marvellous history and marvelous public buildings, the IIC has been a tranquil sanctuary. As a friend, a Hindophile and an Australian, I am proud to join in the words of thanks and praise for the IIC on this golden anniversary.

My own love affair with India began at about the time of your national independence in 1947. Then a pupil at public schools in Sydney, Australia, I wrote to the new Indian High Commission in Canberra, seeking brochures and pamphlets about India's cultural and historical wonders and its political advancement. My wishes were fulfilled. They planted in my mind a life-long fascination with your country. It has been re-enforced by many visits in the intervening years.

In 1970, and in 1974, with my partner (Johan van Vloten), I travelled in a *Kombi* van throughout the sub-continent[2]. I ventured from for west to south, from east to north, and I did this twice. Although my partner's birth, in the Netherlands, involved no special link with India and its story, he soon joined me in what is now our shared passion for India. He too was smitten by love and fascination for this country.

By the hand of fate, in January 1975, soon after our second tour in 1973-4, I was appointed to the judiciary of Australia. I then took many opportunities to come to

[1] Dr C.D. Deshmukh (Chairman), in the history of the Centre, 1958.
[2] A.J. Brown, *Michael Kirby: Paradoxes/Principles* (Federation, Sydney, 2011), 84, 96, 193, 190.

India, first as President of the New South Wales Court of Appeal[3] and later, after 1996, as a Justice of the High Court of Australia. In the later capacity, I have taken part in many conferences, not a few involving the President, Soli Sorabjee, and other friends from the Indian Bench, Bar, academic and public life[4].

In 2000 I enjoyed the special privilege of contributing to a Golden Jubilee book celebrating the 50th Anniversary of the founding of the Supreme Court of India. My article "The High Court of Australia and Indian Law"[5] recounted the story of the connection between the Indian and Australian apex courts, and their jurisprudence, up to that time. It has been suggested to me that I should bring this chronicle up to date. This is what I will do.

Let me first avail myself of this occasion to pay a tribute to the Supreme Court of India for its ongoing service to the rule of law, to the common law and to the institutions and people of India. Its example, as one of the great common law and constitutional courts of the world, is a mighty symbol of excellence and integrity. This is especially precious in a region that has sometimes witnessed serious failures amongst lawyers, judges and judicial institutions. The greatest success stories of Indian constitutionalism lie in the repeated demonstration of electoral integrity in the world's largest democracy; in the repeated manifestation of military integrity and non-interference, and in the repeated showing of judicial integrity, upholding the rule of law and the peaceful resolution of great controversies in accordance with law.

In the decade since my essay for the Supreme Court's celebration in 2000, a new and precious link has been created between the personnel of India's and Australia's highest courts. In alternative years, a delegation of Justices travels to the others' country, to learn and to share insights and experiences; to foster personal networks; and to enhance awareness of the judicial approaches, decisions and methodologies of each other. The last such exchange took place in 2011 when a delegation

[3] In 1988 the author took part in the meeting that adopted the *Bangalore Principles* on *Domestic Application of International Human Rights Norms*. See M.D. Kirby, "The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms" (1988) 62 *Australian Law Journal*, 51 where the *Bangalore Principles* are set out. See also A.J. Brown, above n.2, 223-4.
[4] M.D. Kirby, "H.M. Seervai – his Life, Book and Legacy" (2007) 27 *Legal Studies* 361 (Seervai Lecture 2006).
[5] Supreme Court of India, *Golden Jubilee Book* , New Delhi (2000); B.N. Kirpal et al. *Supreme But Not Infallible*, Oxford U.P., New Delhi, 2000, 66ff.

headed by Australia's Chief Justice, Robert French, and including Justices Dyson Heydon and Virginia Bell, came to New Delhi for a most successful encounter. Amongst the participants in the Australian delegation at that time was the then Solicitor-General of Australia, Mr Stephen Gageler. In a few days he will be sworn as the 49th Justice of the High Court of Australia at a ceremony in Canberra.[6] Before I left Australia, Justice Heydon (who first came to this city as a youth when his father was Australia's High Commissioner) expressed the hope that such exchanges would continue and flourish and expand in utility. That would also be my ardent desire.

Soli Sorabjee has anticipated that, in these remarks, I would expand upon my earlier observations about the links between these two great Commonwealth courts. I propose to do this. But first I must say something about the constitutional origins of each court and the setting within which each performs its functions.

THE CONSTITUTIONAL SETTING

The High Court of Australia was envisaged by s71 of the Australian Constitution. An enactment of the Federal Parliament provided for its creation in October 1903. The Constitution of India was adopted by a Constituent Assembly in November 1949. The Constitution came into force on 26 January 1950, creating thereby a new final court for the whole of India. The first sitting of the Supreme Court of India occurred on 29 January 1950. What momentous days they were.

There are many similarities between the Indian and Australian Constitutions. Each provides for a secular, federal and parliamentary national government. Each rejects presidential rule. Each provides for a bicameral national parliament. Each creates independent courts whose members are appointed by the elected government. Each has sub-national states; an independent bureaucracy and a military of neutrality and subordination to the civilian power. Each boasts a common economic market, guaranteed by constitutional freedom of trade expressed in almost identical terms[7]. In each county the military respects and protects civilian government. Our

[6] Justice Stephen Gageler will be sworn as a Justice of the High Court of Australia on 9 October 2012, following the retirement of Justice W.M.C. Gummow.
[7] *Australian Constitution*, s92; *Indian Constitution*, Art.301.

countries share the use of the English language and membership of the Commonwealth of Nations. We each accept Queen Elizabeth II as the symbolic head of this world-wide family of nations. The present secretary-general of the Commonwealth is an Indian national: Mr Kamalesh Sharma.

For all these similarities, there are important constitutional differences. India is a republic. Australia remains a constitutional monarchy. A referendum on change to this feature was rejected in every Australian state in 1999. India's Constitution includes extensive provisions guaranteeing fundamental human rights and obligating an engagement with international law[8]. Australia's does not. Amendment of the Indian Constitution is comparatively easy to attain. It is effected by a national legislative procedure[9]. In Australia, that is required, but no formal amendment, so procured, can have effect without a vote of all the electors and the achievement of affirmative majorities in the total national vote and in the votes cast in a majority of States.[10] These provisions have made it much easier to amend the Indian Constitution than that of Australia[11].

India has developed a principle of limitation upon the parliamentary amendment power, based on constitutional implications derived by the Supreme Court of India from the basic structure of the Constitution[12]. Australia does not so far have that doctrine although the basic separation of powers has given use to significant case law. Lately, the High Court of Australia has derived a number of implications from the Constitutional text. These have included:

- A limitation on the legislative power to inhibit free expression which would impede the proper conduct of parliamentary elections;[13]

[8] *Indian Constitution*, Art.51(c). Contrast *Al-Kateb v Godwin* (2004) 219 CLR 562 at 586ff [50-73]; contrast at 617ff [152] – [193].
[9] *Indian Constitution*, Art 368..
[10] *Australian Constitution*, s128.
[11] In 110 years, there have been 44 proposals to amend the Australian Constitution. Only six have been carried by the requisite majorities, the last in 1977.
[12] The basic structure cases include *Kesarandra Bharati v State of Kerala* AIR 1973 SC 1461 at 1462.
[13] See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, where the earlier decisions are collected and clarified.

- An inhibition on the power of State Parliaments, provided for in the Constitution, to enact laws conferring or imposing jurisdiction on State courts that would be incompatible with their exercise of Federal jurisdiction[14]; and
- A prohibition on laws purporting to impose restrictions on access to State courts for the provision of judicial review, designed to uphold constitutionalism and the rule of law[15].

When the differences and similarities between the basic laws of our two respective countries are considered, it must be accepted that the similarities far outweigh the differences. In this sense, we are each influenced not only by British constitutionalism, derived from the colonial period, but by the evolution and modernisation of that tradition, following the British loss of its American colonies in 1776. As H.M. Seervai, the great Indian advocate and scholar, explained:[16]

> "To remove a common misconception, it ought to be stated that the machinery of Govt. set up by our Constitution follows in essentials the British, and not the American, model. The doctrine of the separation of powers and the doctrine that legislatures are the delegates of the people which are basic doctrines of the U.S. Constitution do not form part of the constitution of Great Britain or the Constitution of India. Our Constitution has rejected the Presidential form of Govt., that is of an Executive independent of and not responsible to, the legislature and adopted the British model of government by a Cabinet, that is, of an Executive responsible to, and removable by, the legislature."

Similarly, with respect to the functions and powers of the Supreme Court of India, Mr Seervai remarked: [17]

> "The position occupied by our Sup. Ct. more closely resembles that of the Sup. Ct. of Australia than of the US Sup. Ct. The US Sup. Ct. is not the final court of appeal in Civil and Criminal cases throughout the United States. It has appellate jurisdiction to

[14] *Kable v Director of Public Prosecutions (NSW)* (1997) 189 CLR 51.
[15] *Kirk v Industrial Court (NSW)* (2010), 239 CLR 531.
[16] H.M. Seervai *Constitutional Law of India* (4th Ed., 1991) Vol. 1 159 referring to *Shamsher Singh v Punjab* [1975] 1 SCR 814; (74) ASC 2192.
[17] H.M. Seervai, *Constitutional Law of India* (4th Ed. 1991), vol 1, 263.

> control inferior Courts, but it principal work is as a Constitutional Court. Our Sup. Ct. is a final Court of Appeal in all matters from all courts in India and not merely on Constitutional matters. It has a limited original jurisdiction... and an exclusive original jurisdiction in disputes between the Union and the States. The Sup. Ct. of Australia is a final court of appeal in Australia in all matters, civil, criminal and constitutional.[18]

Led by the Supreme Court of India, the judiciary of India is the "guardian angel" [19] of the Constitution which brings the rule of law to one of the most populous, diverse and challenging societies in the world. The crippling case loads of the courts of India far exceed those of Australia, heavy though these sometimes appear to the duty bearers. Poverty and ancient prejudices and disadvantages have imposed on the Indian judiciary pressing obligations to adapt constitutional and other laws so as to secure, and uphold, an essential social and economic revolution. These are obligations that judges in Australia do not have to face, at least to anything like the same degree. In part, this phenomenon explains why the jurisprudence of the Supreme Court of India has enlarged the *locus standi* of those who would engage the court[20], in a way that has not yet been copied in Australia[21] or in other countries of the common law[22].

SUPREME COURT USE OF AUSTRALIAN LAW

In my earlier review in 2000, I traced the way in which, virtually from the start, the Supreme Court of India has called upon the reasoning in the High Court of Australia, in aid of its decisions in constitutional and other cases. Thus, in an early decision, in

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[18] He refers to the theoretical exception of an appeal by certificate of the High Court of Australia to the Judicial Committee of the Privy Council in accordance with Australian Constitution, s 74. That possibility is now a dead letter. See *State of Western Australia v Hammersley Iron Pty Ltd [No.2]* (1969) 120 CLR 74. See also *Kiramani v Captain Cook Cruises Pty Ltd [No.2]; Ex parte Attorney-General (Qld)* (1985) 159 CLR 461 at 463-465.

[19] M. Kachwaha, *The Judiciary of India,* Leiden, 1998, 5.

[20] *Fertilizer Corporation Kamagar Union v Union of India* [1981] AIR(SC) 344; *S.P. Gupta v President of India and Ors* AIR [1982] AIR(SC) 149 at 186; cf V Sripati, "Human Rights in India – Fifty Years after Independence"(1997) 26 *Denver J. Intl L and Policy* 93 at 119.

[21] See eg *Oshlack v Richmond River Council* (1998) 193 CLR 72.

[22] M.D. Kirby, "Deconstructing the Law's Hostility to Public Interest Litigation" (2011) 127 *Law Quarterly Review*, 537.

1954, in *Commissioner, Hindu Religious Endowments, Madras v Sri Lakshmindera,*[23] Mukherjea J. explained the protection of religious freedoms, as guaranteed in the Indian Constitution, with the assistance of a decision of Latham CJ. in the Australian case of *Adelaide Company of Jehovah's Witnesses v The Commonwealth*[24]*.* There was similar resort to the same Australian analysis soon afterwards in *Ratilal Panachand Ghandi v State of Bombay* [25].

Sadly, in my humble view, the constitutional guarantee of freedom of religion in s116 of the Australian Constitution has, in more recent decades, been given an excessively narrow interpretation by the High Court of Australia[26]. It would not be a bad thing, in my opinion, in this age when the secular principle is of increasing importance and is under increasing threat, if Australian judges were to inform themselves about the Indian decisions, so as to make the sharing mutual and truly reciprocal.

One great Indian judge, whom I had the honour to meet in Australia in 1975, Khanna J. gave a decision in *St Xavier's College v Gujarat*[27] referring to Latham CJ's views about the need to protect unpopular minority religions. This can sometimes be a challenge in both of our countries. But such protection is vital to a modern and secular approach to governance and the law. And to the peaceful achievement of the rule of law in countries with citizens and residents adhering to multiple faiths.

Many decisions in the early years of the Indian Constitution demonstrate the use of Australian decisions in other matters of constitutional controversy. Thus, this was done on the meaning of "property" for constitutional powers of compulsory acquisition[28]; of free trade[29]; on constitutional interpretation[30]; on the supremacy of

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[23] [1954] SCR 1005 at 1024.
[24] (1943) 67 CLR 116 at 127.
[25] [1954] SCR 1055 at 1066, citing Art 25 (2) (a) and (b).
[26] *Attorney-General (Victoria); ex rel Black v The Commonwealth* (1981) 146 CLR 559.
[27] [1975] 1 SCR 173.
[28] *Dwarkadas v Sholapur* [1954] AIR (SC), 119
[29] *Automobile Transport (Rajasthan) Limited v State of Rajasthan* [1963] SCR, 491. See also *State of Bombay v RMD Chamarbaugwala* [1957] SCR 874 at 906-907.
[30] See eg *Supreme Court Advocates-on-Record Association v Union of India*, [1993] Supp 2 SCR 659. Kuldip Singh J referred to *Ryder v Foley* (1906) 4 CLR 422 and *Copyright Owners Reproduction Society Ltd v EMI (Aust) Pty Ltd* (1958) 100 CLR 597.

federal laws[31]; on taxation law[32]; administrative law, labour law and human rights law[33].

One of the matters which I mentioned in my earlier examination was the extent to which Executive ratification of an international treaty, whilst not expressly, of itself, incorporating the treaty into domestic law, could sometimes raise a "legitimate expectation" that a law, subsequently enacted by Parliament, was intended to conform to such international law[34].

In recent years, the notion of "legitimate expectations" of compliance with international law has quite frequently been explored in the Supreme Court of India. It has been done so with references to the Australian High Court decision in *Minister for Immigration and Ethnic Affairs v Teoh*[35]. Thus, this was done by Dr Arijit Pasayat J. in *Destruction of Public and Private Properties v State of AP and Ors*[36]. There, that judge, with a reference to the *Teoh* decision, observed:

> "It is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law. The High Court of Australia in [*Teoh*] has recognised the concept of legitimate expectation of its observance, in the absence of a contrary legislative provision, even in the absence of a Bill of Rights in the Constitution of Australia."

The collection of other categories where Australian law has been cited in the Supreme Court of India is substantial. Sometimes, it has involved constitutional questions such as:

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[31] *N.K. Sharma v State of Karnataka* [1990] 1 SCR 614, applying *Ex parte McLean* (1930) 43 CLR 472 at 483.
[32] *Alembic Chemical v Commissioner for Income Tax* [1989] 2 SCR 302; *Controller of a State Duty v Godavari Bai* [1986] 1 SCR 349.
[33] See e.g. *S.R. Bommai v Union of India* [1994] 2 SCR 644.
[34] [1977] 6 SCC 215-216.
[35] (1995) 183 CLR 273
[36] W.P (Crl) No. 73 of 2007.

- The capacity of the Executive to disable itself from performing a statutory duty or exercising a statutory discretion[37];
- The limits and boundaries of the notion of "legitimate expectation" [38] ;
- The derivation of implied rights and duties from a constitutional text; and
- The application of the principles of proportionality, adapted from European courts[39].

In non-constitutional cases, there has been ample borrowing from Australian High Court authority in matters of statutory construction and the meaning of statutory language:

- On the proper approach to the task of statutory interpretation[40];
- On the meaning of "collaterally" [41];
- On the meaning of "except" or "save" [42]; and
- On the interpretive rule concerning the operation of statutes retrospectively[43].

Moreover, in many interesting points of private law, one can sometimes see the Indian judges reaching for Australian High Court authority:

- On the operation of the law of contempt of court[44];
- On the ambit of "manufacture" for making "commodities" [45];
- On the scope of contributory negligence[46];
- On the criteria for disqualification for judicial bias[47]; and

[37] *M/s Sethi Auto Service v Delhi Corp* (No. 6143 of 2008), per D.K. Jain J.
[38] *Union of India v Naveen Jindal* (SLP (C), No. 15849 of 1994).
[39] *Chanchal Goyal v State of Rajasthan*, Appeal CRIM 7744 of 1987.
[40] *Mary Adit v State of Maharashtra,* judgment 22 March 2001 per Banerjee J. at p.11 citing extensively from Brennan CJ. in *Newcastle City Council v Bankstown Football Club* (1997) 187 CLR 284.
[41] *Sajjadanashin Sayed v Mousa Dadabhai Ummer,* judgment 23 February 2000 per Rao J.
[42] *Lalu Prasad Yadav v Data Bihar* SLP (Crl), No. 6821 of 2007, per R.M. Lodha J.
[43] *N.K. Bajapai v Union of India,* SLP (C), No. 8482 of 2010, per Swatater Kumar J., applying *Maxwell v Murphy* (1957) 96 CLR 261.
[44] *Maninderjit Singh Balta v Union of India* (IN No. 10 of 2010), para.[13] applying *Australasian Meat Industry Employee Union v Mudginberri Station* (1986) 161 CLR 98.
[45] *Commissioner of Central Excise v M/s Tarpaulin International,* Civil appeal 5341 of 2008, para.[20] citing *Adams v Rau* (1931) 46 CLR 572.
[46] *Usha Rajkhowa v Paramount Institutes,* SLP (C) 16647 of 2008 per V.S. Sirpurkar J. citing *Astley v Austrust Ltd* (1999) 73 ALJR 961.
[47] *LIC of India v Sushil,* judgment 23 January 2006, per Arijit Pasayat J. applying re *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.

- On the doctrine of election between remedies[48].

The range, variety, depth and utility of these citations amount to a very significant compliment to my former court. It is important that its Justices, advocates and ordinary citizens in Australia should know of this feature of sharing that comes from a similar constitutional and legal background, the use of the same language and participation in the facilities now made available through the internet, including by the instantaneous uploading of Australian decisions on the Australian Legal Information Institute website (AustLII). With the aid of an Australian originated internet platform known as the Legal Information Institute of India (LII India), the same borrowing is now possible on a reciprocal footing – with much more ready Australian access to Indian judicial authority.

AUSTRALIAN USE OF INDIAN LAW

In my earlier discussion of this subject, I recounted the first use that I found for the decisions of the Supreme Court of India as an appellate judge in *Osmond v Public Service Board of NSW*[49].

> The clearest instance of this utility to me arose in the very first week of my service as President of the Court of Appeal of New South Wales, Australia's busiest full time appeal court. Within days of my arrival, I was sitting in a test case concerned with the ambit of the obligation of officials, acting under legislation, to provide reasons to a party disappointed by their decision, as an implication drawn from the nature of such legislative duties or as an obligation imposed by the common law. The decision in question was *Pettitt v Dunkley*[50]. The case stood for judgment when Justice P.N. Bhagwati, by chance, arrived in Sydney leading a delegation of Indian judges. I mentioned my case to him and he told me of two leading decisions of the Supreme Court of India on the subject in which he himself had been involved: *Siemens*

[48] *M/s Tata Industries v M/s Grasson Industries* (arbitration petition 2007) per V.S. Sirpurkar J. applying *Sargent v ASL Development* (1974) 4 ALR 257.
[49] [1984] 1 NSWLR 376 (CA). This was reversed in *PSB v Osmond* (1986) 159 CLR 656
[50] [1971] 1 NSWLR 376 (CA).

> *Engineering and Manufacturing Co of India Ltd v Union of India*[51] and *Maneka Gandhi v Union of India*[52]. In the course of my reasons for decision, which became part of the majority in the Court of Appeal, I paid tribute to the Indian decisions and to Bhagwati J's holding that the obligation to give reasons was "like the principle of *audi alteram partem*, a basic principle of natural justice."

Unfortunately, the decision was appealed to the High Court of Australia and the majority's orders were reversed. Some soothing balm for my disappointment was to be afforded by watching the course of Indian authority on this topic and by noticing how, since 1984, the Indian courts have continued to insist upon standards of effective legal accountability by public officials[53]. In his reasons in the Supreme Court of India, Aggarwal J. correctly discerned that the opinions of the judges in the High Court of Australia in *Osmond's Case* had not entirely closed the door to a non statutory obligation to give reasons. Thus, Gibbs CJ. had acknowledged the possibility of "special circumstances" requiring reasons and Deane J. the possibility of "exceptional circumstances" obliging reasons. This notwithstanding, *Osmond's* case shows that there is value in looking beyond local sources for inspiration. Sometimes local authorities can lack the insight, on vexed, shared, questions, which overseas judges can bring into consideration.

I will not repeat the many decisions collected in my earlier paper where judges in the High Court of Australia have looked to the authority of the Supreme Court of India in matters of basic doctrine:

- On the immunity of the Crown/State, in default of a clear waiver of the traditional exemption[54];
- On the presumption of the validity of enacted legislation[55];

[51] [1976] AIR (SC) 1785.
[52] [1978] AIR (SC) 597.
[53] *S.N. Mukherjee v Union of India* [Supp.1] SCR44.
[54] *Bropho v Western Australia* (1990) 171 CLR 1 at 20, considering *State of West Bangal v Corporation of Calcutta* [1967] AIR (SC) 997 at 998.
[55] *Tasmanian Dam Case; The Commonwealth v Tasmania* (1983) 158 CLR 1 at 168 referring to *Chiranjil v Union of India* [1950] 1 SCR 869 at 879.

- On the principle of equality before the law[56]; and
- On the right of individuals to challenge governmental activity, measured against the standards of the law[57].

In more recent times other references have been made in cases before the High Court of Australia to aspects of the law developed in the Supreme Court of India:

- *MZXOT v Minister for Immigration*[58]*;*
- *Milat v The Queen*[59]*;*
- *ICM Agriculture Pty Ltd v The Commonwealth*[60]*;* and
- *SGH Ltd v Commissioner of Taxation*[61]*.*

These decisions are indicative of the way in which Indian case law may be utilised in Australia. As in so many things, it is necessary to encourage advocates to reach beyond their comfort zone into new and wider sources of wisdom. In Australia, this will more likely to happen in the future than it has been in the past. However, it will require encouragement from the High Court of Australia and from other appellate courts. They must show curiosity about the happenings in the law in India and other countries outside the more traditional sources of analogous judicial reasoning.

With the coming generations, who are familiar, and comfortable with, the new digital technology and more engaged with the world outside the traditional legal sources of the United Kingdom, Canada, New Zealand the United States, this will surely be possible.

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[56] *Dietrich v The Queen* (1992) 177 CLR 292 at 334, citing *Hoskot vMaharashtra* [1979] 1 SCR 192 at 204-208 and *Maneka Gandhi v Union of India* [1979] 3 SCR 760 at 769; *Mabo v Queensland* (1988) 166 CLR 186 at 206 referring to *Kerala v Thomas* [1970] 1 SCR 906 at 951 per Mathew J.

[57] *I.W. v City of Perth* (1997) 191 CLR 1 at 60 applying *S.P. Gupta v President of India* [1982] AIR (SC) 149 at 195.

[58] [2008] HCA at 28.

[59] (2004) 78 ALJR 28 at [17].

[60] [2009] HCA 51 footnote 202.

[61] (2007) 81 ALJR 201, 208, 211.

A CLOSING TRIBUTE TO THE BOMBAY HIGH COURT

I cannot leave my topic without paying a special tribute to the Bombay High Court, whose sesquicentenary was celebrated on 14 August 2012. This was the original Bar of Soli Sorabjee, and of so many other great Indian jurists. They include H.M. Seervai and many of the finest senior advocates whose friendship I have been privileged to enjoy over the past decades, including Fali Nariman, Anil Divan, Tehmtan Andhyarujina (past Solicitor-General), Indira Jaisingh (Additional Solicitor-General) and Anand Grover. For Justice Dhananjaya Chandrachud, I wrote an Australian tribute to the Bombay High Court for its recent celebration. In this, I drew attention to the almost exact coincidence between the foundation of the Bombay High Court and the coming into law of the *Indian Penal Code*, with its important unifying impact across the sub-continent and its influence in the vital area of the criminal law, now operating across India and indeed beyond.

In the Bombay High Court building there are famous and well-known gargoyles, with deliberately flawed features. So also with the IPC. Like any law made by human hand it, has flaws and gargoyle like impediments. Another doyen of the Bombay Court, Chief Justice A.P. Shah, formerly Chief Justice of the Madras High Court and of the Delhi High Court, wrote of one of these in his decision on the constitutional validity of section 377 of the *Indian Penal Code* in the important case of *Naz Foundation v Union of India*[62]*.*

That decision, written with Justice Muralidhar, found the partial invalidity of that section of the *Indian Penal Code,* when measured against the standard of the Constitution of India and the jurisprudence of the Supreme Court on the high constitutional values of equality and privacy. An appeal to the Supreme Court in *Naz* currently stands for judgment[63]. So I will say no more about it. Still it should be noted that the opinion of the Delhi Court has been noticed and cited in several decisions of fraternal courts in Commonwealth countries. In this respect it is similar to a decision in an Australian case, made by the United Nations Human Rights

[62] (2009) 4 LRC 838 at 866.
[63] The decision was reserved on 11 April 2012 before Singhvi and Mukhopadhyaya JJ.

Committee, established under the *International Covenant of Civil and Political Rights*[64].

The decision in *Naz* concerns a law (the criminalisation of homosexual acts) which can serve to oppress adult, private, consensual sexual conduct. In the past month, the Court of Appeal of Singapore in *Tan Eng Hong v Attorney-General*[65] delivered an important judgment upholding an appeal in that case against an order of a trial judge dismissing a challenge to section 377A of the *Singapore Penal Code.* That section derived originally from the *Indian Penal Code*. The primary judge in Singapore had held that the applicant lacked legal standing (although arrested under that law) to challenge the constitutional validity of the law. Invoking the *Naz Foundation* case, a strong bench of the Singapore Court of Appeal gave reasons and concluded that standing had been established to contest a legally arguable point. It set the matter down for substantive argument. In the world of the common law, these are the ways that India and Australia and other countries as well, we can share in the wisdom, insights and the learning of overseas brothers and sisters of our great tradition. In the end, our loyalty must always be to our own national constitutions and laws. However, that fidelity does not blind us to the analysis and perceptions that come from distinguished lawyers, who share in the same high tradition. The lesson which our tradition and the internet continue to teach us, every day, is that all legal wisdom is not necessarily home grown. It is sometimes a great blessing to share the wisdom of those who have and work beyond our own gates.

I part from these remarks and this discourse with the tributes with which I began. A golden bouquet of praise for President Soli Sorabjee. A golden tribute to the Indian International Centre on its 50th Anniversary. And profound respects and golden felicitations to the Supreme Court of India, and the Judges and advocates of India, who are the guardians of constitutionalism and the rule of law: without fear or favour, affection or ill will.

[64] *Toonen v Australia,* UNHCR, doc. CCPR/C/50/D/488/992.
[65] Decision of A.P.B. Leong JA, V.K. Rajah JA and Judith Prakash J., Singapore, 21 August 2012.