THE UNIVERSITY OF PENNSYLVANIA

THE HIGH COURT OF AUSTRALIA AND THE SUPREME COURT OF THE UNITED STATES - A CENTENARY REFLECTION

The Hon Justice Michael Kirby AC CMG

ABSTRACT

The High Court of Australia is Australia's highest court. In 2003 it is celebrating its centenary. Many aspects of its jurisdiction and functions were copied from Art III of the United States Constitution. The author compares the Australian court with the Supreme Court of the United States, identifying ten principal similarities and differences. He suggests that, where constitutional institutions are similar, one can learn much about one's own institution by studying others. Doing so holds up a mirror to oneself. Two items from Australian developments may be instanced. Originally, the Justices of the Australian court enjoyed life tenure. In one of the very rare changes to the Australian Constitution, approved in 1977, a compulsory retirement age of 70 years was introduced for new appointees. Is such a change warranted or achievable in the United States? More recently the author has suggested that ambiguous provisions in the Australian Constitution may be construed with the aid of international human rights norms. This is a new idea but was recently reflected in the majority's opinion in *Atkin v Virginia,* treating as relevant to the meaning of the 8th Amendment, developments in international human rights law concerning the imposition of capital punishment upon a mentally handicapped prisoner. Global forces are at last catching up with national constitutions and final courts. The influence of international developments seem certain to increase.

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INTRODUCTION

The year 2003 marks the centenary of the High Court of Australia. It is the "Federal Supreme Court" of the Australian Commonwealth, envisaged by the Constitution that created a nation out of the British colonies in Australia[1]. Although the Australian Constitution summoned the High Court into existence, the first sitting of the new court did not take place until the first three Justices were appointed and took their seats in a ceremony held in the Banco Court in the Supreme Court of Victoria in Melbourne on 4 October 1903.

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* Based on a lecture given to the Faculty of Law, University of Pennsylvania, Philadelphia, 25 September 2002.

** Justice of the High Court of Australia.

1 *Commonwealth of Australia Constitution Act* 1900 (UK); 63 & 64 Vict c 12. In form, the Australian Constitution was appended to the Imperial Act. In reality, it was virtually entirely drafted in Australia, adopted at Constitutional Conventions of elected representatives and approved by referenda conducted throughout the Australian colonies.

In the course of the ensuing century, the Justices of the High Court have maintained close attention to the decisions of the Supreme Court of the United States. It was inevitable that they should because of the similarities between the Australian Constitution and that of the United States from which many basic ideas were borrowed. For the Australian colonists, the United States Constitution was "an incomparable model"[2]

The Australian colonies, and the Commonwealth that eventually bound them together in a new nation, owed their existence, indirectly, to the American revolution and the work of the colonists who met at the Constitutional Convention in Philadelphia in 1787, there establishing a Constitution of shared powers, with a Supreme Court and federal judiciary to uphold the resulting federal compact. But for the loss of the American colonies, it is most unlikely that the government of King George III would have been sufficiently interested to establish the colony of New South Wales at Sydney Cove, out of which the modern Australian nation grew. That development is thus one of those accidents of history that presents the puzzle as to what would have been the fate of the Great South Land had it not been for the American Revolution of 1776.

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2 O Dixon, "The Law and the Constitution", in O Dixon, *Jesting Pilate* (2nd ed, 1997) (hereafter "*Jesting Pilate*"), 44.

The revolution was an unexpected event that had a dual consequence propitious for Australia's future. First, it necessitated the urgent investigation of alternative places to which Great Britain could send the overflowing population of convicts who had formerly been sent to the American colonies. Secondly, the British administration was sufficiently shocked by the loss of its American colonies to modify its colonial policy, at least with respect to the colonies settled by colonists deriving from the British Isles. After the American Revolution, the British administration, to some extent, learned the lessons that the American colonists had taught. These included the ultimate right of people to alter or to abolish the form of government imposed upon them and to institute a new government to correct intolerable wrongs; the need to avoid despotism lest those subject to it throw off such government and provide new protections for their security; and the necessity without delay, to establish (at least in settler societies) a form of government roughly equivalent to that enjoyed by the commons of England.

When, after 1776, the British Government lost the facility of depositing unwanted convicts in the American colonies, the necessity to find an alternative arose. Various possibilities in Africa were canvassed. Eventually, those with the responsibility of deciding these things remembered the report of the journey to the South Pacific by the great English navigator, Captain James Cook RN. He had been accompanied to the South Seas by Joseph Banks, a distinguished botanist and scientist. The reports of the unique

fauna and flora of what, until then, was called New Holland, had captured the imagination of the public in Britain. Out of the catastrophic loss of the American colonies, by a process of elimination, grew the idea of establishing a new colony in Australia[3]. It was to be a penal colony. In today's terms, it was roughly equivalent to banishing a group of citizens to outer space.

Australians are therefore also children of the American Revolution. From the start, their legal history was connected to that of the United States. In the back of the minds of the Australian colonists, as of their British colonial administrators, was the memory of what had happened because of mis-government and neglect in the American settlements. The resulting evolution of British colonial policy had the consequence of avoiding the need for revolution in Australia. From the beginning, the example of the legal and judicial system of the United States remained before the Australian colonists. When, eventually, self-government began to spread to the Australian colonies after the 1850s[4], part of the impetus for change was the ever-present example provided by the United States

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3. A Castles, *An Australian Legal History* (1982) 20-31.

4. *Ibid*, 165, 401-402. Responsible government was granted in New South Wales in 1855 by the establishment of an elected Lower House of Parliament (the Legislative Assembly). This followed an earlier partial grant of self-government in 1842 by an Imperial Act which provided for a Legislative Council, two-thirds of whose members would be elected on a franchise limited by a property qualification.

Constitution and the governmental and judicial systems that it established.

I will not attempt to identify all of the similarities and differences between the constitutional arrangements adopted in Australia and the United States. There have been earlier essays that have explored those similarities and differences[5]. Many United States citizens, including lawyers, are comparatively unfamiliar with the legal institutions of other countries. In Australia, we are acquainted with such indifference. In the heyday of the British Empire, and indeed until quite recently, there was a similar attitude to Australia on the part of the United Kingdom. At the zenith of its global political and economic power, its government and people were never so interested in their colonies as the people of the colonies were interested in Britain.

In recent years there has been a sea change in this regard in Britain, at least so far as the higher courts are concerned. Now, it is rare for that country's highest court, the House of Lords, to consider any issue of general legal principle without examining (and often

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5 O Dixon, "Two Constitutions Compared" in *Jesting Pilate* (1997) esp 100-112; F C Hutley, "The Legal Traditions of Australia as Contrasted with those of the United States" (1981) 55 *Australian Law Journal* 63.

following) the course of authority in countries of the Commonwealth of Nations and the United States[6].

One way of understanding ourselves is to endeavour to see ourselves as others see us. We do this not so much in tribute to others as to ourselves - holding up their experience as a mirror in which we see our own concerns reflected in slightly different shapes. The great advantage enjoyed by lawyers of the common law tradition is that they share the English language and a somewhat peculiar system for solving legal disputes, commonly utilising institutions that enjoy many common features. This shared linguistic and institutional history brings with it not only like approaches to the resolution of similar problems but, to a significant extent, shared values and a shared methodology for resolving conflict in society.

Quite early in their constitutional history the English realised that conflict could be very dangerous to human life, limb and property. Partly isolated from the ravages of Europe, they found means to channel conflict into constructive forms. Usually this meant an arrangement by which the people in conflict would meet, express their antagonism but do so according to certain rules and in

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6 A good recent example is the decision of the House of Lords in *Lister v Hensley Hall Ltd* [2002] 1 AC 215 to follow the Supreme Court of Canada in *Bazley v Curry* [1999] 2 SCR 534; (2000) 174 DLR (4th) 45 in a case relating to the liability of school authorities for sexual abuse of pupils by teachers.

a way leading to a form of resolution of their dispute, temporarily at least. It is no accident that most of the sports that are played in the world today originated in, or are adapted from, codes developed in Britain. Similarly, the early establishment of the Parliament at Westminster channelled political conflict into an institution whose power grew over time relative to that of the King and his court.

However, it was in the Royal Courts of Justice that the idea of orderly common law institutions took hold. Out of the work of those courts came not only the resolution of particular disputes but precedents which, recorded and followed by later judges, could help to resolve similar disputes. The power of the idea of the public trial, conducted before a judge and a jury, chosen from the country, was so overwhelming in the English imagination that when they had their own civil war and decided to rid themselves of an autocratic king, they followed a trial format, however flawed[7]. Even in such a matter, the idea of constitutionalism and the rule of law could not be ignored.

Because the United States and Australia share approximately the same language and a great part of the same legal tradition derived from England, there is utility in comparing judicial institutions

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7 cf M D Kirby, "The Trial of King Charles I: Defining Moment for our Constitutional Liberties" (1999) 73 *Australian Law Journal* 577, where the story is told.

and legal doctrine. This is especially so in the case of Australia and in respect of the judicial branch of government, because, save in certain particular matters, the founders of the Australian Commonwealth were so fascinated by Art III of the United States Constitution that they copied many of its ideas when they were drafting Ch III of the Australian Constitution[8]. Moreover, from the start of the life of the High Court of Australia, the Justices, appreciating these similarities, borrowed from United States precedents of which, especially in the early years, they were very well familiar[9].

It is the very high level of similarity of history, culture and law that may sometimes make it useful both to the United States and Australia to be aware of what is happening in the courts of the other country. The developments that occur there may occasionally be followed. Sometimes, even if not followed, a reflection on the experience of a similar but different constitutional system requires us to clarify our own thinking and to justify our points of departure, even if only to ourselves.

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[8] O Dixon, "Two Constitutions Compared" in *Jesting Pilate*, 100 at 101.

[9] They were specially acquainted with James Bryce's *The American Commonwealth*: see M N C Harvey, "James Bryce, 'The American Commonwealth', and the Australian Constitution" (2002) 76 *Australian Law Journal* 362.

II SIMILARITIES

1. The first similarity between the Australian High Court and the Supreme Court of the United States concerns the role of the two courts. In any written Constitution, but particularly a federal one which divides power between different units of a polity, it is essential to have an umpire. There must be an authoritative means of determining where power lies and, in the case of dispute, whether a particular law or official or judicial act, is valid. In both the Australian Constitution and the Constitution of the United States, the federal supreme court has the responsibility of being the decider in such matters[10].

At different times in the history of a federation, different views will prevail concerning the respective powers of the central (or federal) lawmakers and office-holders and those of the subnational polities, called in the case of Australia as in the United States, the States. In Australia, at the beginning of federation, drawing on United States cases of the late nineteenth century, the federal Constitution was seen as a contract between coordinate partners (the Commonwealth and the States) which, in accordance with the written text of the Constitution, enjoyed substantially equal

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[10] O Dixon, "Government Under the American Constitution" in *Jesting Pilate,* 106 at 107; O Dixon, "Aspects of Australian Federalism", *ibid*, 113 at 114.

responsibility for the good government of the people. The three original Justices of the High Court of Australia drew an inference from the federal structure of the Constitution, that certain powers were reserved to the State legislatures so that the Federal Parliament could not, by the use of the express grants of legislative power in the Constitution, use its powers so as to invade the lawmaking functions reserved to the States[11].

It did not take long for the new national Parliament to put this doctrine to the test by the exercise of federal lawmaking power in a way seen to intrude into anticipated State functions. The entry of Australia into the First World War in 1914 led to the early use of the defence power[12] in ways that challenged the previous assumptions about the reserved powers of the States. Under the defence power, the High Court upheld a broad ambit of lawmaking as claimed by the Federal Parliament to regulate the economy in ways that would otherwise have been unavailable, except during the war[13].

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11. *D'Emden v Pedder* (1904) 1 CLR 91; *Deakin v Webb* (1904) 1 CLR 585; *Webb v Outtrim* [1907] AC 81 (PC); *Baxter v Commissioners of Taxation* (1907) 4 CLR 1087.

12. Australian Constitution, s 51(vi).

13. *Farey v Burvett* (1916) 21 CLR 433; *South Australia v The Commonwealth* (1942) 65 CLR 373; O Dixon, "Aspects of Australian Federalism" in *Jesting Pilate*, 113 at 121-122.

New appointees to the High Court contested the notion of the reserved powers of the States. Eventually, in 1921, in the *Engineers' Case*[14], the majority of the Court rejected the doctrine of implied State immunities. The Court held that, if propounded federal legislation were within the ambit of a grant of power to the Federal Parliament, broadly construed as befitted a Constitution, no implication of the federal structure of the Constitution would, on its own, be sufficient to invalidate the federal law. Subsequently, this charter for largely untrammelled national lawmaking has been cut back somewhat by an elusive doctrine derived from the constitutional necessity that the States should continue to exist, to perform their envisaged constitutional functions, and should not be destroyed or significantly prevented from doing so by federal law[15]. The *Engineers' Case* was nonetheless a most significant charter for the lawmaking power of the Federal Parliament. As in the United States, the highest court has historically, on most occasions, upheld the validity of federal legislation against State constitutional challenges[16]. Only recently in Australia, and usually in relation to

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[14] *Amalgamated Society of Engineers v Adelaide Steamship Co* (1920) 28 CLR 129 ("the *Engineers' Case*"). For a contemporary, critical commentary see G de Q Walker, "The Seven Pillars of Centralism: Engineers' Case and Federalism" (2002) 76 *Australian Law Journal* 678.

[15] *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31.

[16] O Dixon, "Aspects of Australian Federalism" in *Jesting Pilate* 113 at 116-121.

implications derived from Chapter III (the Judicature), has the federal lawmaking power taken something of a battering[17].

2. There is no express grant of constitutional power to the High Court of Australia, or any other Australian court or body, to strike down federal or State law as unconstitutional. Systems of government exist which assign such ultimate responsibilities to the legislature. The Hong Kong Special Administrative Region discovered this when the People's Republic of China insisted that ultimate powers of supervision of at least certain "constitutional" decisions affecting Hong Kong after the British handover, belonged to the Standing Committee of the National People's Congress of China[18].

In a sense, the continued recognition of the House of Lords, as a kind of committee or board of the British Parliament, and of the Judicial Committee of the Privy Council as an expert legal body

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[17] *Re Wakim; Ex parte McNally* (1999) 198 CLR 511; *Bond v The Queen* (2000) 201 CLR 213; *Hughes v The Queen* (2000) 202 CLR 535; cf *Gould v Brown* (1998) 193 CLR 346.

[18] The power of the National People's Congress to make laws for Hong Kong, inconsistent with the *Basic Law* was upheld in *HKSAR and Ma and Ors* [1997] 2 HKC 315. The ultimate responsibility for the interpretation of the *Basic Law* lies under Art 158 with the Standing Committee of the National People's Congress: Y Ghai, "Sentinels of Liberty or Sheep in Woolf's Clothing? Judicial Politics and the Hong Kong Bill of Rights" (1997) 60 *Modern Law Review* 459; 459; Y Ghai, "Hong Kong and Macau in Transition I: Debating Democracy", *Democratisation*, Vol 2 No 3 [1995], 270.

advising the monarch, continue in the United Kingdom a model of ultimate resolution of legal questions in the legislature or the executive, not in a separate judiciary. Of course, this symbolism does not reflect the recent political or legal realities. Lately, most of the Law Lords have rarely taken part in political debates in the legislative chamber. Some never do[19]. Although Privy Council determinations are traditionally expressed in the terms of "humble advice" to the monarch, to allow or dismiss an appeal, there is no occasion in modern history where the monarch has not accepted that advice. As in so many features of the British Constitution, appearances commonly belie reality. However, the existence of alternative models for ultimate decision-making in important legal and constitutional contests, indicates that, without an express grant of judicial authority to have the last word, it was by no means inevitable that it would turn out that way.

The development of global constitutionalism owes a great debt to the decision of the United States Supreme Court in *Marbury v*

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19 J Steyn, "Human Rights: the Legacy of Mrs Roosevelt " [2002] *Public Law* 473 at 483. Lord Steyn's comments on the peculiar office of the Lord Chancellor were noted in (2002) 76 *Australian Law Journal* 216. Chief Justice Dixon pointed out that the strict application of the separation of powers was "artificial", "impractical" and "opposed to British practice": O Dixon, "The Law and the Constitution" in *Jesting Pilate* 52. However, as a judge he was to give it strong application: eg *The Queen v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

Madison[20]. By that decision, the Supreme Court, through the voice of Chief Justice Marshall, asserted its power to rule conclusively on the validity of the distribution of constitutional powers between the United States Congress and the States.

When the functions of the High Court of Australia were being provided in the Australian Constitution, it was assumed that the same power of authoritative disposition would devolve upon Australia's highest court in respect of those matters within its original and appellate jurisdiction that were not subject to further appeal. However, to cure perceived defects in the United States arrangements, two important provisions were added to the Australian Constitution in the definition of the matters in which the High Court would have original jurisdiction. Being constitutional grants of jurisdiction, they could not be taken from the High Court by any action of another branch of government. In s 75(iii) of the Australian Constitution it was provided that in all matters "in which the Commonwealth or a person suing or being sued on behalf of the Commonwealth is a party", the High Court would have original jurisdiction.

It has been argued that, inherent in the grant of such jurisdiction under s 75(iii) was necessarily contained the power to

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[20] 1 Cranch (5 US) 137 (1803) discussed O Dixon, "Aspects of Australian Federalism" in *Jesting Pilate* 113 at 115.

make the jurisdiction effective, as by the issue of a writ of certiorari designed to quash a constitutionally invalid action of the Commonwealth or of a person being sued on behalf of the Commonwealth[21]. In addition to this, to overcome a perceived gap of the United States Constitution identified in *Marbury v Madison*[22], express original jurisdiction was also granted to the High Court in all matters "in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth".

Although these paragraphs of the Australian Constitution, with their mention of remedies, including constitutional writs, represented an advance on the provisions of the United States Constitution, the fundamental idea concerning the role and power of the Judicature is one that has been adapted in Australia from the great United States precedent. Needless to say, the assertion of such a large power of ultimate authority, and its common acceptance by the people and government alike, provides a significant defence for constitutionalism, an important check upon excess or neglect of jurisdiction and potentially controversial functions for the highest court. In Australia, as in the United States, the final court is constantly called upon to arbitrate on the lawfulness of legislation as

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[21] Australian Constitution, s 75(iii).

[22] 1 Cranch (5 US) 137 (1803) where it was held that Congress had exceeded its constitutional power by authorising the Supreme Court in its original jurisdiction to grant a writ of mandamus.

well as of executive and judicial acts purportedly done under the Constitution.

3. The High Court of Australia, like its United States counterpart, is a common law court[23]. It uses common law techniques. It hears arguments in open court addressed to judges who pronounce judgment and publish reasons for their decisions in open court. Those reasons are stated in the discursive manner of the common law, as distinct from the abbreviated and seemingly dogmatic and undiscursive fashion of most courts of civil law countries.

Precedent and the principle of *stare decisis* are important to both legal systems. Both courts are increasingly concerned with the meaning of legislation, a feature of an age in which the significance of judge-made law is increasingly being replaced by written law enacted by legislatures accountable to the people. However, even in the task of interpretation of legislation, there are principles of the common law that are observed for the ascertainment of the meaning of the legislation and the exposition of the operation of the particular law. The common law system has the merit of avoiding any lacuna, or gap, in the governing law. If the Constitution is silent and there is no applicable law made by a legislature with power to do so, or by

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[23] O Dixon, "Two Constitutions Compared" in *Jesting Pilate* 100.

the executive or the judges under delegated legislative power, the judiciary has the responsibility and function to state a rule of the common law. This is derived, for the most part, from analogical reasoning applied to earlier decisions so as to express a new rule that will fill the identified gap.

In the United States, the common law was received from England by the original colonies upon the theory, applicable also in Australia, that it was carried to the new territories as part of the inheritance of the English settlers. At the same time the settlers brought with them the principles of equity. The persistence of these traditional streams of law was recognised in Article III of the United States Constitution by the reference to the jurisdiction of federal courts as including law (ie common law) equity and admiralty[24]. In Australia, the colonial courts were, like many of their predecessors in the American colonies, Royal Courts established by royal decree or order in council made in the name of the King. Specific legislation provided for the introduction of the common law into the several Australian colonies at a specified date[25]. It was recognised that

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[24] US Constitution, Art III, s 2.

[25] A "Charter of Justice" dated 2 April 1787 purported to create courts of civil and criminal jurisdiction for New South Wales. By a second set of Letters Patent on 4 February 1814, a "Supreme Court" and a "Governor's Court" were purportedly created. Because of doubts as to the validity of these instruments, the British Parliament enacted the *Supreme Court Act* 1823 (GB); 4 Geo IV c 96. This authorised new Letters Patent and the establishment of a Supreme Court as court of record providing the date for the introduction of English law. There were similar

Footnote continues

some rules of the common law might not be received into the new settlements, being unsuitable to the condition of those colonies. However, in Australia, that exception was not generally given a broad operation.

For example, the High Court of Australia held as recently as 1978 that the English rule that a convicted felon could not sue in the courts until he had served his sentence or received a pardon was suitable to the conditions of the Australian colonies. This was so although, at the outset of British settlement, a large proportion of the colonial population consisted of convicted felons who would thereby be excluded from legal remedies[26]. Similarly, the High Court held that the principle of law derived from England relieving owners of cattle and sheep from liability for damage occasioned from their trespassing onto public highways was not unsuitable to the very different condition of highways in Australia[27]. Although such borderline decisions might be controversial, attracting strong dissenting opinions in the High Court[28], it is essential in any common

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developments in the other Australian colonies: R P Meagher, W M C Gummow and J R F Lehane, *Equity Doctrines and Remedies* (3rd ed, 1992) 10-21.

[26] *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583; cf US Constitution, Art III, s 3 forbidding "corruption of blood".

[27] *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617; cf now *Brodie v Liverpool Shire Council* (2001) 206 CLR 512.

[28] In both *Dugan* and *Trigwell* Murphy J dissented: (1978) 142 CLR 583 at 606; (1979) 142 CLR 617 at 642.

law system to be able to identify the sources of the judge-made and statute law that later judges will be bound to apply. Where such law is inherited from another jurisdiction (as in the case of the United States and Australia) it is necessary to identify the date for the reception so that disputes about the content of the law will be diminished and may ultimately be resolved according to a settled principle.

4. Both the Supreme Court of the United States and the High Court of Australia are afforded constitutional guarantees of their independence from the other branches of government, as are the other federal courts referred to respectively in Art III and Ch III of the two Constitutions. The provision of s 71 of the Australian Constitution begins in language which is a direct copy of Art III sec 1 of the United States precedent, although there is an additional reference to the vesting of federal jurisdiction in "other courts". It will be necessary to make mention of this innovation[29]. The United States provision copies the statute of Great Britain expressly stating that the judges "shall hold their offices during good behaviour"[30]. There is no precise equivalent in the Australian Constitution, such tenure being implied from the express provision that Justices of the

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29 Australian Constitution, s 71. See also s 77(iii).

30 US Constitution, Art III, sec 1. The position in Great Britain was regulated by the *Act of Settlement* of 1701; 12 & 13 Will III, c 2 and by the *Commissions and Salaries of Judges* Act 1760 (UK); 1 Geo III c 23.

High Court and of other federal courts shall not be removed except "on an address from both Houses of the Parliament in the same session praying for such removal on the ground of proved misbehaviour or incapacity"[31]. In the first century of the Australian Constitution no federal judge has been removed from office under this power, although, in one notable case, the power was invoked but later the proceedings were abandoned[32].

5. Both Constitutions inherited from the common law tradition of England the mode of jury trial that was common in that country well into the twentieth century both in criminal and civil causes. In the United States and Australia jury trial continues to this day in serious criminal cases, both federal and State. The guarantee of jury trial contained in the United States Constitution[33] influenced the terms of s 80 of the Australian Constitution. The latter provision states that "The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the

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[31] Australian Constitution, s 72(ii); cf US Constitution, Art 1 s 3 regulating articles of impeachment. Only one United States Justice has been subject to the impeachment procedure, namely Samuel Chase (1808). However, there were campaigns for the impeachment of Chief Justice Earl Warren and Justice William O Douglas. Justice Abe Fortas resigned in 1969, possibly in consequence of a threat of impeachment.

[32] The story concerning Justice L K Murphy is told in E Campbell and H P Lee, *The Australian Judiciary* (2001) 102-115.

[33] US Constitution, Art III, s 2.

offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes". The similarity to the United States precedent is obvious.

The significance of the Australian guarantee has been diminished by the strict interpretation applied to its language. In effect, the High Court has held that a precondition to the attraction of the constitutional guarantee is the decision of the prosecutor, in accordance with law, to proceed with the criminal accusation against the accused federal offender "on indictment"[34]. If legislation authorises a summary procedure, and if that procedure is elected by the prosecutor, the result is that the constitutional entitlement to jury trial may be bypassed. Along with other judges of the past, I have dissented from this strict construction of the constitutional guarantee[35]. However, the line of authority indicates the traditionally narrow view that has been taken of such constitutional privileges in Australia. There is no Australian equivalent to the 7th Amendment to the United States Constitution. In consequence, jury trial of civil causes has greatly declined in Australia in recent years.

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[34] *The King v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556; *Kingswell v The Queen* (1985) 159 CLR 284; *Cheatle v the Queen* (1993) 177 CLR 541; *Cheng v The Queen* (2000) 203 CLR 248.

[35] eg *Cheng v The Queen* (2000) 203 CLR 248 at 322-328 [220]-[237]. In my reasons I examined United States authorities such as *Almendarez-Torres v United States* 523 US 224 (1998) and *Appendi v New Jersey* 68 USLW 4576 (2000). See *ibid*, 328-332 [238]-[351].

In most places that mode of trial, if it still exists, is now confined to particular proceedings, such as actions for defamation or actions alleging fraud[36].

6. A further important feature of the common law system is the right enjoyed by appellate judges in the United States and Australia to dissent if they disagree with the proposed orders of reasons of their colleagues. In both countries, this right is taken for granted. However, it is not common outside the common law world. On a recent visit to the *Conseil Constitutionnel* of France, I discovered not only that the right of dissent was not recognised but very few of the members of the Council favoured its introduction. In part, this attitude derives from a different view about the nature of law. Possibly, it is bound up in the culture of a less libertarian society than that in which the common law usually operates; or it might derive from the tradition of the codifiers whereby the law is ultimately to be traced to an explicit provision whose clarity is a source of its legitimacy. In such societies, judicial elaboration of the law usually has a confined role..

Originally, the Judicial Committee of the Privy Council, to which appeals lay from Australia until their final abolition in 1986[37],

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[36] Described in *Naxakis v Western General Hospital* (1999) 197 CLR 269 and *Gerlach v Clifton Bricks Pty Ltd* (2002) 76 ALJR 828.

allowed no dissent for the reason that that court's reasons were expressed in the form of advice to the monarch. Conflicting advice was thought to be an embarrassment in such a case. Possibly, a somewhat similar view lies behind civil law tradition that excludes dissents. They are thought to cast doubt on the authority of the court pronouncing its judgment and uncertainty about the content of the resulting law. As in the Privy Council, this attitude inevitably leads to judicial reasons that are sometimes the product of compromise, as attempts are made to include sometimes incompatible opinions in the one text. Some reasons of the European Court of Justice (which permits no dissents) appear to reflect this internal tension. The European Court of Human Rights (whose judges enjoy the right of dissent) avoids similar problems. So do the appellate courts of Australia and the United States where, from the start, after the English tradition, judges are always entitled to express their dissenting opinions either as to the outcome of a case or, if agreeing in the outcome, as to the reasons that support the order or judgment disposing of the matter.

Both in Australia and in the United States, only a minority of decisions of the highest court are unanimous. Dissenting and

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[37] *Privy Council (Limitation of Appeals) Act* 1968 (Aust); *Privy Council (Appeals from the High Court) Act* 1975 (Aust); *Australia Act* 1986 (Aust & UK), s 11; *Kirmani v Captain Cook Cruises Pty Ltd [No 2]; Ex parte Attorney-General (Qld)* (1985) 159 CLR 461 at 464.

separate concurring opinions are a regular aspect of the work of each final court. Their existence is accepted as reflecting the difficulty and controversy of the cases that come to such courts. They may also reflect the fairly stable philosophical or jurisprudential inclinations that emerge in the responses of individual judges, and groups of judges, to the resolution of legal contests. This is so in the United States Supreme Court and in my own Court.

In the early days of each court, in part because of the commanding influence respectively of Chief Justice Marshall and of Chief Justice Griffith, there were relatively few dissents. In Australia, each of the original Justices (Griffith, Barton and O'Connor) had played an active part in framing the new federal Constitution. They shared common views about its meaning and purpose. In the first four years of the High Court, there were only four dissenting opinions, all of them by Justice O'Connor and none on a constitutional question. But this unanimity broke down with the appointment in 1906 of Justices Isaacs and Higgins, the former especially being of a different opinion on constitutional and legal questions to that of the founding Justices. The unanimity of the first years has never been recaptured.

In Australia, as in the United States, dissenting opinions can sometimes influence later judicial decisions, occasionally after a

relatively short time[38]; sometimes after many decades[39]. Some judges dissent rarely. I dissent in about 30% of the matters decided by the Court. That is far the highest proportion in the history of the High Court. The previous highest rate of dissent was by Justice Lionel Murphy (23%)[40]. The next highest amongst the current Justices is that of Justice McHugh (15%), after which the level trickles away to insignificant numbers. But the right of dissent belongs to every Justice. Attitudes to its use differ.

7. The daily work of the Justices of both courts is undoubtedly quite similar. Much of the time is spent in reading written casebooks and argument. Some of the time is spent in reviewing the written material filed on behalf of those who are seeking to engage the jurisdiction of the Court. In the early days of each Court, after the English tradition, most of the work was performed by the judges sitting in open court, listening to argument and sometimes disposing of decisions by immediate *ex tempore* opinions and the pronouncement of orders and judgments at the end of the hearing . In more recent times, the oral trial tradition has

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38 eg *Dietrich v The Queen* (1992) 177 CLR 292 overruled *McInnes v The Queen* (1979) 143 CLR 575; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 overruled *Gould v Brown* (1998) 193 CLR 346.

39 *Tame v New South Wales* (2002) 191 ALR 449 overruled in part *Chester v Waverley Corporation* (1939) 62 CLR 1.

40 J Hocking, *Lionel Murphy - A Political Biography* (2nd ed, 2001), Foreword xi.

declined in both courts, although the continuation of it, particularly in the exercise of appellate jurisdiction, is maintained subject to time limits.

In the United States, the Supreme Court, serving a much larger and even more litigious society, has required written procedures for the admission of cases to the Court's docket. In Australia, the general provision governing rights of appeal to the High Court in civil matters, largely determined by reference to the value of the matter at stake, persisted until 1984. Then federal legislation empowered the High Court to control its appellate jurisdiction which now, virtually universally, is subject to the requirement of special leave to appeal granted by the Court[41].

Applicants for special leave are normally allowed twenty minutes in which to advance orally contentions the substance of which has already been considered by the Justices in the parties' written submissions. The workload imposed by such oral proceedings has occasioned suggestions either that a universal system of written application to engage the appellate jurisdiction should be substituted or that the Court should itself decide whether oral argument would be of help to it. However, the conduct of oral argument in great matters of constitutional and legal significance not

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41 *Judiciary Act* 1903 (Aust), s 35 upheld in *Carson v John Fairfax and Sons Ltd* (1991) 173 CLR 194.

only has utility for the Justices in allowing them to clarify key questions. It also has a strong symbolic significance, for if all argument were in writing the transparency of the judicial process would be diminished. The facility of oral hearings still has many supporters in Australia. The time for oral hearing of an appeal, once special leave is granted, or of a proceeding in the original jurisdiction of the High Court, is not limited to 20 minutes. The Court assigns the date for the hearing and mostly leaves it to the parties to allocate the available time between themselves.

8. The Justices today in both courts enjoy significant assistance not only from the written briefs and oral advocacy of the parties and interveners heard by the Court but also from young law graduates appointed for a short period to work in the Justices' chambers. In Australia, these clerks are called "associates". The Justices of the High Court each have two such associates and appointment to such positions is highly sought after. In my own case I notify vacancies each year to all law schools in the nation and receive hundreds of applications, interviewing (briefly) about fifty applicants before reducing the final appointees to one male and one female. I do not chose my staff from particular law schools and I observe strict equal opportunity principles in their recruitment. Each Justice has his or her own system of appointment. So far two former associates have been appointed Justices of the Court (Justice McTiernan (who was associate to Justice Rich) and Justice Aitkin (who was associate to Chief Justice Dixon)).

9. Justices in both countries are today expected to assume responsibilities outside the courtroom and to participate in professional, academic and other functions in keeping with the educative role of a judge of a final court. Not all Justices welcome such obligations; although some do. In the Commonwealth of Nations, there is an Association of Commonwealth Judges and Magistrates that holds regular conferences at which they can share judicial experiences. Commonwealth Law Conferences and specialist meetings of Commonwealth judges provide opportunities for comparing notes on the issues facing national final courts of appeal. Judges of such courts are also expected to take part in the meetings of judges of their own country where, necessarily, they play a leadership role beyond the pages of the authorised reports.

Beyond the nation and such Commonwealth meetings, there is an increased tendency in recent years to bring together judges of a wider range of countries, including those from other countries of the common law and civil law traditions. For example, a global constitutionalism seminar is held every year at the Yale Law School. I have been privileged to attend that series in which Justice Breyer takes part together with Lord Chief Justice Woolf of the United Kingdom, Justice Iacobucci of the Supreme Court of Canada and judges from the supreme courts of countries as diverse as Hong Kong, India, Japan, Peru, Poland, the European Court of Human Rights and the French *Conseil Constitutionnel*.

Judges of final courts can quickly recognise the commonality of questions that arise in different countries at about the same time. Acknowledging fully the duty of obedience to their domestic constitution and laws, knowledge about contemporaneous approaches to common problems can sometimes enhance the quality of local judicial solutions. At a number of international seminars attended by Justices of the Supreme Court of the United States, I have participated, as they have, in discussion of the growing influence of international human rights norms upon domestic judicial decision-making[42].

The recent reference in the majority's opinion in *Virginia v Atkins*[43] to international developments relevant to the carrying into effect of a sentence of death upon a mentally handicapped prisoner is the kind of accretion of knowledge that can come from judicial meetings of such a kind. Jurisdiction can occasionally be an intellectual prison for a judge. Some are content to dwell in that prison and regard it as their proper place. However, in the age of jumbo jets, the Internet and much greater transborder judicial dialogue it is now possible for judges of my Court, the Supreme

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[42] M D Kirby, "The Australian use of International Human Rights Norms: From Bangalore to Balliol - A View from the Antipodes" (1993) 16 *University of NSW Law Journal* 363.

[43] *Virginia v Atkins* to be reported 536 US 000 at 00 (2002), Opinion of the Court per Stevens J, fn.

Court of the United States and other final courts to meet quite regularly. Globalism is not only a phenomenon of the economy. It affects the development of ideas. Legal ideas are an important category that cannot, and should not, escape this development.

10. There are some minor and relatively trivial similarities between my office and that of a Justice of the United States court. The robes are now very similar. Until 1986, the Justices of the High Court of Australia wore the traditional robes of the English judiciary on the Chancery side. This meant that, when sitting in a hearing, they wore a wig, an accoutrement to which all of them had become accustomed when practising as barristers, the branch of the separated legal profession in Australia from which persons chosen as judges in Australia are usually derived. When President of the Court of Appeal of New South Wales, immediately before my appointment to the High Court of Australia, I wore the traditional wig, including the full bottom variety on ceremonial occasions. But now, in the High Court, my robes represent a still more austere copy of those worn in Washington.

A further similarity is the decline in the remuneration of Justices both in the United States and in Australia. Chief Justice Rehnquist and Justice Breyer recently drew this decline to the notice

of Congress and the American public[44]. Similar complaints have been made on behalf of the Australian judiciary. The remuneration of the Justices of each Court is protected by a compensation clause. The Australian provision was modelled directly on that of the United States[45]. As in the United States, the problem has not been one of actual diminution of remuneration (save for a suggestion during the Great Depression that the Justices of the High Court should accept a reduction in their emoluments in common with other federal office-holders)[46]. The real source of complaint is the comparative decline of judicial salaries when compared to those paid upon the foundation of the Court; the comparison with other officials and wage earners at that time; and the comparison with the incomes of the practising legal profession. As in the United States[47], the view has long been taken in Australia[48] that non-discriminatory taxation upon federal judges does not amount to a derogation from the prohibition upon the reduction of salaries and other benefits enjoyed by Justices already appointed to office.

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[44] Statement of W H Rehnquist, Chief Justice of the United States, before the National Commission on the Public Service, 15 July 2002.

[45] Australian Constitution, s 72(iii).

[46] J Bennett, *Keystone of the Federal Arch* (1980), 46.

[47] *United States v Hatter* 532 US 557 (2001).

[48] *Cooper v Commissioner of Income Tax (Q)* (1907) 4 CLR 1304.

Apart from these commonalities, daily life is distinctly similar. In a final court there is no relief from the personal obligations of reading, research, decision-writing, amendment of drafts, checking of proofs of opinions and discussion of the product with one's colleagues and staff. The business of running a court within an assigned budget falls heavily on the Justices, aided by skilled court staff. The work of both courts is mentally taxing, unremitting but intellectually exhilarating. Within the law, there are few posts that can offer the same responsibilities and cerebral rewards as a seat on the final court of one's nation. In the nature of things, few individuals can attain such an office. Many persons of great ability miss out, by chance or politics or because of factors over which they have no control. In the history of the United States, 105 persons have been appointed to the Supreme Court including the nine present incumbents. In Australia, over the course of a century, there have been 43 Justices. Each incumbent therefore realises the great privilege that comes with appointment. As is normally the case in life, to such privileges are attached equivalent burdens and duties. They are accepted freely with a cheerful heart because nobody is obliged to remain in such an office a moment longer than he or she wishes. Always waiting in the wings are aspirants, many of them worthy.

III DIFFERENCES

Despite the similarities, there are significant differences between the roles which the final courts play in the United States and Australia and the functions of the Justices within those courts.

1. The coming into office is quite different. By the United States Constitution, the President has the power to appoint judges of the Supreme Court and all other officers of the United States not otherwise provided for in the Constitution. The President may only do so with the advice and consent of the Senate[49]. There is no similar control upon the appointment of judges by the Executive Government in Australia.

No Australian judicial officer is elected. All are appointed with tenure and independence by the Executive Government of their jurisdiction - federal, State or Territory. Although the Australian Constitution provides for a Senate as one House of the Federal Parliament[50], that body, in Australia, has no part to play in the appointment of judges. Its only relevant power with respect to judges is to consider any prayer for removal and then only on the specified grounds and conditions[51]. In the matter of appointment,

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[49] US Constitution, Art I, s 2.

[50] Australian Constitution, s 7.

[51] Australian Constitution, s 72(ii).

the Executive is untrammelled. By the Constitution, appointments to the High Court are made by "the Governor-General in council"[52]. The Governor-General is the Queen's representative in Australia. The council referred to is the Federal Executive Council[53]. Historically, this is a copy of the Queen's Privy Council in the United Kingdom. But by the Australian Constitution, it is made up exclusively of Ministers of the Federal Government, together with the Governor-General. The Governor-General has powers - substantially to be consulted, to encourage and to warn but, like the Queen must, by convention, normally accept the advice of the Ministers expressed in the Executive Council.

There are legal requirements relating to the qualifications for office as a Justice of the High Court[54]. These hardly reflect the unwritten qualifications that are typical (usually long and high judicial service, service as a leading barrister or, more rarely, political service). More recently, provision has been made by which the federal Attorney-General, before an appointment of a new Chief Justice or Justice, is obliged to consult the States about appointments to the High Court. In Australia, unlike India[55], this

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52 Australian Constitution, s 72(i).

53 Australian Constitution, s 63.

54 *High Court of Australia Act* 1979 (Aust), s 6.

55 *Supreme Court Advocates' Association v Union of India* [1994] AIRSC 268; [1993] Supp 2 SCR 659; *Special Reference No 1 of 1998* JT 1998 (5) SC.

statutory obligation of consultation means no more than that. There is no obligation to appoint anyone whom the States nominate. The most that the statutory procedure of consultation achieves is to identify some leading candidates for appointment. The entire process takes place behind closed doors.

Inescapably, there is a high measure of political involvement on the part of the Federal Cabinet and Government of the day when a rare vacancy on the High Court of Australia falls to be filled. There are no confirmation hearings. Indeed, there is no public process at all. There is not even a process of advertisement and formal interview, as now commonly happens with the Australian magistracy. Suddenly, after the recommendation of the Federal Cabinet has been conveyed to the Governor-General (and sometimes even before) the announcement is made by the Prime Minister or the Federal Attorney-General. And that is it.

Despite the apparent success and general acceptance of the procedure for public interview for judicial appointments and promotions in South Africa, following the introduction of the post-apartheid Constitution, few judges or politicians in Australia could be found who would favour the introduction of a confirmation process similar to that of the United States. None could be found who would favour elected judges, a method of judicial appointment (and

removal) apparently antithetical to true judicial independence[56]. The theoretical imperfections of the present system of judicial appointments are raised each time an important appointment is made. And then, the institution closes around the new appointee, he or she gets on with the work and the political process turns to other things. It is rare that this system delivers an inadequate or incompetent appointee. Inevitably governments hope that their appointees will reflect in a general way their philosophical viewpoint; but they are often disappointed. This is so both in the United States and in Australia.

2. Once appointed, Justices of the High Court serve to the age of seventy years unless they earlier retire in office or die. Originally, the Australian Constitution contained no maximum term of appointment. It did not take long for the High Court, following the United States, to hold that such silence meant that appointees held office for life[57]. This is one of the reasons for the small number of office-holders in both courts. In the early 1970s, in the absence of Chief Justice Barwick, the Senior Justice, Sir Edward McTiernan, went to the Parliament to administer the oaths of office to the new members. Many were so shocked at his advanced age (he was then in his eighties) that moves arose to amend the Australian

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56 *International Covenant on Civil and Political Rights*, Art 14.1.

57 In *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434.

Constitution to provide for a compulsory retirement age. The *Constitutional Alteration (Retirement of Judges)* proposal was enacted by the Federal Parliament in 1977. The amendment was then approved by the electors attracting the dual majorities required to effect a change of the Australian Constitution[58]. The amendment did not affect serving Justices.

Although there is a handful of "lifers" on the federal Family Court of Australia, life tenure has now all but disappeared from the Australian judicial scene. In most Australian States, for many years, tenure was to age seventy or seventy-two. Few Australians, including few judges, are mourners for the passing of life tenure. Although some very distinguished judges of the past would have been lost in Australia by compulsory retirement at age seventy, the Constitution serves contemporary society. The regular appointment of younger people to a nation's supreme court is a means of injecting new approaches and new ideas, permitting regular change at the nomination of elected governments and avoiding the spectacle of very old judges serving on beyond their prime or in the hope of a change of political administration.

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[58] The Australian Constitution, s 128 requires that, to be effective, an amendment must be adopted by the Federal Parliament and approved by a majority of the electors nationwide and in a majority of the States. The proposal to introduce retirement ages for the federal judiciary was approved on 21 May 1977. The nationwide affirmative vote was 78.63%. The amendment was carried in every State.

3. The High Court of Australia is a general court of appeal from judgments and orders of virtually all Australian courts - State, Federal and Territory. In this sense, it brings together the entire Australian legal system. The work of its Justices is not confined to the application of federal law. They decide appeals on purely State law matters having nothing to do with the Constitution or federal legislation.

This feature of the High Court - which it shares with the Supreme Courts of Canada and India - has two important consequences. First, it places the High Court in the mainstream of the general judicial system and marks it out as a court of ordinary law. This means that constitutional and federal questions are typically viewed as an aspect of the general law, not as something divorced and very special. Secondly, this character affects the qualifications necessary to perform successfully the functions of a High Court Justice. It affects the appointees' self-image. It rubs off on their conception of their own function[59]. There is nothing like a few days deciding obtuse questions of State statutory law to bring a constitutional philosopher down to earth.

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[59] O Dixon, "Two Constitutions Compared" in *Jesting Pilate* 100 at 104.

Other Commonwealth countries (such as South Africa) have followed the European tradition and established a separate constitutional court, with judges appointed for fixed terms. However, the Australian court is a general court of law in the fullest sense. Its role in supervising decisions of State courts is assured by two constitutional provisions. The first is the entrenched power to hear appeals from judgments and orders of the Supreme Courts of the States and from any other State court from which, at the establishment of the Commonwealth, an appeal lay to the Privy Council[60]. As well, an original provision in the Australian Constitution permitted the Federal Parliament to invest any court of a State with federal jurisdiction[61]. This very important power was quickly utilised by the passage of the *Judiciary Act* 1903[62]. The growth of federal courts, other than the High Court itself, did not take place in Australia to any degree until the 1970s when the Family Court of Australia[63] and the Federal Court of Australia[64] were established. The investing of State courts with federal jurisdiction has been a very successful idea of Australian constitutionalism. It too has reinforced the integration of the nation's entire Judicature.

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60 Australian Constitution, s 73(ii).

61 Australian Constitution, s 77(iii).

62 *Judiciary Act* 1903 (Aust) ss 39, 39A, 64, 68, 79, 80.

63 *Family Law Act* 1975 (Aust), s 21.

64 *Federal Court of Australia Act* 1976 (Aust), s 5.

When a State Parliament endeavoured to impose duties on a State Supreme Court that were challenged as inimical to the exercise of judicial power, the High Court of Australia struck down the State law as invalid. It held that the Australian Constitution not only protected the independence of federal courts but, because of their inter-relationship with State courts, it also protected the independence of the latter. As it was put, the State courts had to be suitable receptacles for the exercise of the federal jurisdiction provided for in the Constitution[65]. This was a case of deriving inferences from the Constitution, a process that has gathered occasional support in recent decades[66].

At the time of federation in Australia, the colonial courts were already long established. There were well respected and subject to appeal to the Privy Council. The evenness of their quality was one of the reasons for the delay in the establishment in Australia of a substantial and separate federal judiciary[67]. When, eventually, significant federal courts were created to deal with particular aspects of federal jurisdiction deemed specially appropriate for national

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65 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

66 eg *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

67 *Re Wakim; ex parte McNally* (1999) 198 CLR 511 at 605 [200].

administration, those courts, in turn, became part of the integrated judiciary that comes together in the High Court. In a sense, the facilities of appeal and the vesting of jurisdiction have strengthened the unity and integration of the Australian Judicature and upheld the generally uniform standards of appointment and performance of judicial officers in all Australian courts.

4. In consequence of this judicial integration, Australia has rejected the notion of a separate federal common law or separate systems of common law for each of the polities making up the federation. Instead, the High Court has declared that there is a single, uniform common law applicable throughout the nation, ultimately susceptible to ascertainment and exposition by the High Court itself[68]. The notion of a single Australian common law, modified by local State and Territory legislation, involves some theoretical difficulties[69]. In the United States, each State has its own common law as expounded by its own courts[70]. The Australian insistence upon a single body of the common law has been strongly

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68 *R v Kidman* (1915) 20 CLR 425. *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. Indeed, earlier it was sometimes thought that there was but one common law applicable throughout the entire British Empire as pronounced by the courts of England: cf O Dixon, "Two Constitutions Compared" in *Jesting Pilate* 100 at 104-105.

69 L J Priestley, "A Federal Common Law in Australia?" (1995) 6 *Public Law Review* 221.

70 *Erie Railroad Coal v Tompkins* 304 US 64 (1938).

affirmed in recent decisions of the High Court[71]. The constitutional foundation for this doctrine lies in the unifying role of the High Court as the final general court of appeal of Australia.

5. That function of the High Court as the *final* appellate court is comparatively recent. At the outset of federation, appeals lay to the Privy Council both from the High Court itself and from State supreme courts. The larger facility for Privy Council appeals was one of the few amendments upon which the British Government insisted when it was presented with the Constitution drafted by the Australian Constitutional Conventions of the 1890s. There were two derogations envisaged by the Constitution. The first, demanded by the colonists, was that appeal would only lie to the Privy Council on constitutional questions as to the respective powers of the Commonwealth and the States if a certificate to allow the appeal to be brought was granted by the High Court[72]. In the history of federation, only one such certificate was ever granted[73] and many were refused.

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71 *Lipohar v The Queen* (1999) 200 CLR 485; *John Pfeiffer and Son Pty Ltd v Robertson* (2000) 203 CLR 503; *Regie Nationale des Usines Renault SA v Xhang* (2002) 76 ALJR 551.

72 Australian Constitution, s 74.

73 *Deacon v Webb* (1904) 1 CLR 585; *Baxter v The Commonwealth* (1907) 4 CLR 1178. The only certificate ever granted was in *Attorney General (Commonwealth) v Colonial Sugar Refining Co Ltd* [1914] AC 237; 17 CLR 644.

As well, provision was made for the Federal Parliament to make laws "limiting matters in which" leave to appeal to the Privy Council might be granted[74]. Eventually, appeals from the High Court and federal courts were "limited" under this provision to the extent of abolition[75]. The validity of such "limits" was upheld[76]. In due course, the direct appeals from the State supreme courts were also abolished[77] by concurrent legislation of the Australian federal and State Parliaments and the United Kingdom Parliament, symbolically signed into law by the Queen during a visit to Canberra.

There is now no external or higher court for Australian judicial decisions beyond the High Court of Australia. Inevitably, this change in the function of the High Court from one subordinate in most matters to the Privy Council to a court of final appeal has brought the High Court closer to a perception of its functions akin to that of the Supreme Court of the United States. Having myself sat both in a final appellate court and one subject to further appeal, I know the difference. The change in status of the High Court was quickly

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74 A R Blackshield, "The Abolition of Privy Council Appeals" in A R Blackshield and G Williams, *Australian Constitutional Law and Theory* (3rd ed, 2002), 570.

75 By legislation culminating in the *Australia Acts* 1986 (Aust)(UK), s 11.

76 *Kirmani v Captain Cook Cruises Pty Ltd [No 2]* (1985) 159 CLR 461 at 464.

77 *Australia Act* 1968 (Aust) (UK), s 11.

followed by a period of significant creativity on the part of the Court during the years in which Chief Justice Mason presided[78]. If, in more recent years, the creativity has declined, this is no more than a normal feature of the way common law courts operate in fits and starts rather than at a uniformly steady pace.

Given the character of other final appellate courts throughout the world, it seems unlikely that the High Court of Australia will, in the long term, revert to the rather limited view of its functions held by Australian judges and lawyers during the time that it was subject to Privy Council supervision. Whilst some lawyers in Australia still hanker for a return to those "good old days", the example of the Supreme Court of the United States indicates the necessary and inevitability of the creative function of an ultimate court of a nation having constitutional responsibilities[79]. Such creativity, harnessed to legal authority, is the essential characteristic of all common law courts. Those who dispute this must explain where the great body of the common law came from.

The link of the High Court of Australia to the Privy Council was not a serious burden on the High Court's judicial performance. On

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78 Sir Anthony Mason was Chief Justice of Australia from 1987 to 1995.

79 H Luntz, "Throwing off the Chains: English Precedent and the Law of Torts in Australia" in M P Ellinghaus & Ors *The Emergence of Australian Law* (1989), 70.

the contrary, the existence of that link saved the Australian legal system from parochialism that might otherwise have afflicted it[80]. By affording the facility of appeal in a small number of cases to the highly talented and experienced judges of England who sat in the Privy Council, that body provided a wealth of comparative law doctrine, largely drawn from English court decisions, that greatly enriched Australian law.

Now, Australian courts are not bound by any foreign judicial decision, although for the moment they still observe Privy Council decisions given in Australian appeals during the time when that Court was part of the Australian judicial hierarchy[81]. Yet the termination of this last formal link has brought an even greater flowering of comparative law material into the Australian courts. It is now extremely rare for the High Court of Australia to consider any major issue of constitutional or common law without examining the way in which similar issues have been dealt with in other like common law countries, particularly the United States and Canada.

On the other hand, an examination of United States decisions indicates the contrast that exists in the higher English, Canadian,

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80 F C Hutley, "The Legal Traditions of Australia Contrasted With Those of the United States" (1981) 55 *Australian Law Journal* 63 at 68.

81 *Cook v Cook* (1986) 162 CLR 376 at 390.

New Zealand, South African, Indian and other courts of the Commonwealth of Nations where there is a much greater inclination to look outwards for analogies and reasoning that proves of a great advantage to the performance of the judicial task. In the United States, there are more than fifty home jurisdictions. They serve a single nation. In the post-Imperial world of Commonwealth countries, it is a great strength of the common law technique as now practised that judges are accustomed to, and comfortable with, citation of judicial opinions, written in the same language, tackling similar questions in different countries. Parochialism is a common problem for lawyers. It is reinforced by jurisdictionalism which is an inescapable aspect of lawyering. The contemporary common law affords a treasure house of analogies. It is now available through the Internet. It greatly enriches the judicial performance in countries such as my own.

6. There is then the absence of a general bill of rights in the Australian Constitution. The founders of the Australian Commonwealth shared James Madison's initial opinion that it was imprudent or impossible to define the rights of the people. It is not true to say that the Australian Constitution contains no rights provisions. However, they are limited and (as in the case of the

right of jury trial) they are sometimes subject to restricted interpretations[82].

Most modern constitutions contain charters of fundamental rights. Where they do not, such statements of rights have frequently been added. Thus, the *Canadian Charter of Rights and Freedoms* was adopted in 1982[83]. Even in the United Kingdom, from which Australia inherited its scepticisms about fundamental rights, the law has long been subject to scrutiny under the *European Convention on Human Rights*[84]. Recently, the *Human Rights Act* 1998 (UK) has rendered many human rights issues justiciable in the courts of Britain. Australia is one of the last civilised nations not to have such provisions. The conventional source of the opposition, particularly amongst politicians, is that bills of rights introduce needless inflexibility into law-making and enhance judicial power at the expense of democratic accountability.

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82 There has been a similarly narrow reading of s 116 of the Australian Constitution concerning freedom of religion: *Attorney-General (Vict); Ex rel Black v The Commonwealth* (1981) 146 CLR 559.

83 The Canadian Charter was preceded by the *Canadian Bill of Rights* 1960. See M R Wilcox, *An Australian Charter of Rights?* (1993) 28-36.

84 See eg *Dudgeon v United Kingdom* (1981) 4 EHRR 149; (1983) 5 EHRR 573. For a description of the different ways in which issues of rights are addressed in the two legal systems see M D Kirby, "Law and Sexuality: The Contrasting Case of Australia" 12 *Stanford Law & Policy Review* 103 (2001).

The absence of a general bill of rights does not mean that the High Court is incapable of defending basic civil liberties when they are seen to be threatened by intrusive legislation or governmental action. Sometimes, express provisions of the Constitution can be enlisted to strike down federal legislation affecting the compulsory acquisition of private property[85]. Sometimes restrictive federal legislation is found invalid, as was the attempt to dissolve the Australian Communist Party in 1950. It failed for want of an appropriate foundation in federal legislative power[86]. This decision of the High Court of Australia in that case contrasts with a contemporary decision of the Supreme Court of the United States involving the constitutional validity of provisions of the *Smith Act*. Despite the express guarantee of freedom of speech and freedom of association in the United States Constitution[87], the Supreme Court of the United States, by majority, upheld the severe civil restrictions imposed by Congress on communists[88], demonstrating once again that liberty depends upon more than constitutional texts.

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85 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 ("*Bank Nationalisation Case*").

86 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1. Other illustrations might include *Ex parte Quirin* 317 US 1 (1942) upholding trial of alleged saboteurs in wartime by a military commission not the civilian courts. See G E White, "Felix Frankfurter's Soliloquy in *Ex parte Quirin*", 5 *Green Bag* (2nd Series), 423 (2002); cf *Lloyd v Wallach* (1915) 20 CLR 299.

87 US Constitution, First Amendment.

88 *Dennis v United States* 341 US 494 (1951).

In recent times, the High Court of Australia has found implications of rights in the constitutional text, including of an irreducible freedom to discuss matters of politics and government[89]. This last-mentioned freedom was found to be implied in the representative electoral democracy established by the Australian Constitution[90]. Other cases have suggested that the implication to be derived from the independent Judicature established by the Constitution supports an implied constitutional guarantee of due process of law[91] and of unbiased judges[92] - although these insights have not yet won a clear majority amongst the Justices.

Quite apart from the constitutional guarantees, liberty is protected in Australia by the strong presumption that legislation does

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89 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104.

90 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

91 *Polyukovich v The Queen* (1991) 172 CLR 501 at 607-612, 703, cf 532, 689; *Leith v The Commonwealth* (1992) 174 CLR 455 at 484-488, 501-502; cf at 466-469; see Parker, "Protection of Judicial Processes and Implied Constitutional Principles" (1994) 16 *Adelaide Law Review* 341.

92 *Ebner v Official Trustee* (2001) 205 CLR 337 at 363 [81]-[82]; 362-373 [114]-[117]; cf *Tumey v Ohio* 272 US 510 (1927).

not reduce fundamental civil rights, unless such a purpose is clearly and unmistakenly expressed in valid legislation[93].

Australia does not have the same constitutional protections for free expression as exist under the First Amendment, as interpreted by the Supreme Court of the United States[94]. However, this is, in part, due to a different balance that has been struck by legislation (and by the common law) between free speech values and values protective of such important attributes of human dignity, honour, reputation and privacy. These competing values are included in international human rights instruments[95]. They are human rights deserving of legal protection as much as the human right to free expression is. Most Australians, and most Australian judges (although not the Australian media) consider that the balance struck by United States judicial authority on this subject is somewhat extreme[96]. The interface between the United States approach and that of Australian law has come to the fore in recent litigation before

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93 *Bropho v Western Australia* (1990) 171 CLR 1 at 20; *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at 414-415 [27]-[31].

94 eg *New York Times Co v Sullivan* 376 US 254 (1964); *Rosfenbloom v Metromedia* 403 US 29 (1971); *Gertz v Robert Welch, Inc* 418 US 323 (1974).

95 eg *International Covenant on Civil and Political Rights*, Arts 17 (privacy, honour and reputation), 19 (freedom of opinion and expression).

96 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2002) 76 ALJR 1 at 43 [199]-[202].

the High Court of Australia concerning a publication about an Australian citizen uploaded on the Internet in the United States but downloaded to do its principal damage and hurt in Australia where the plaintiff lives[97].

The absence of a general bill of rights in the Australian Constitution has tended to reinforce the view that most of the High Court Justices have generally held about their role. It has tended to emphasise legalism and to diminish the creative and adaptive spirit that normally accompanies judicial interpretation of the sparse language of a constitutional bill of rights. Although there are sporadic suggestions that Australia should adopt a constitutional bill of rights[98], an attempt to include certain rights in the federal Constitution was overwhelmingly rejected in a constitutional referendum held in 1988[99]. Given the Australian record on achieving

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97 This issue is before the High Court and the decision is reserved in *Dow Jones Inc v Gutnick*, on appeal from the Court of Appeal of Victoria.

98 Discussed in D Harris, *A New Constitution for Australia* (2002); see also *Human Rights - the Australian Debate* (1987); M R Wilcox, *An Australian Charter of Rights?* (1993).

99 Pursuant to the Australian Constitution, s 128. A proposal to incorporate "one vote one value" was rejected by a majority of the electors in every State and secured a national affirmative vote of only 37.10%. A proposal to include guarantees of trial by jury, religious freedom and just terms for State Government acquisitions of property was rejected in every State and secured an aggregate national affirmative vote of only 30.33%; cf *McGinty v Western Australia* (1996) 186 CLR 140.

formal constitutional change[100] (which is as conservative in this respect as that of the United States), the prospect of a constitutional bill of rights for Australia in the short term seems remote. More likely is it that individual States and Territories, and eventually the Federal Parliament, will enact general human rights legislation out of which, in the long term, a successful constitutional amendment may emerge.

8. Partly as a consequence of the last-mentioned consideration, there has been some tendency in recent years to look to international human rights law to inform the development of Australia's domestic law. In 1988, I suggested that this was a development of large potential[101]. At the time my suggestion was generally regarded as heresy. Eventually, the High Court of Australia accepted the possibility that international human rights instruments, to which Australia was a party, might influence the development of the common law. This was done in an important decision, before my appointment, reversing more than a century of judicial decisions

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[100] In 102 years, 44 proposals have been put to the Australian electors for the amendment of the Australian Constitution. Only 8 have succeeded: A R Blackshield and G Williams, *Australian Constitutional Law and Theory* (3rd ed, 2002), 1301.

[101] M D Kirby, "The Australian Use of International Human rights Norms: From Bangalore to Balliol - A View from the Antipodes" (1993) 16 *University of NSW Law Journal* 363; M D Kirby, "Law, Like the Olympics, is Now International - But Will Australia Win Gold?" (2000) 7 *James Cook Uni L Rev* 4 at 13-15.

denying recognition to the claims of Australia's indigenous peoples to interests in their traditional lands[102].

More recently, I have suggested that the Australian Constitution itself should be read, in the event of ambiguity, so as to avoid departures from the fundamental norms of international law, specifically in the area of human rights[103]. This approach remains controversial[104]. However, there are reflections of it in the recent decision of the Supreme Court of the United States concerning the carrying into effect of a mentally handicapped person[105]. It is probably fair to say that, at the moment, the majority of Australian judges and lawyers would probably agree with the spirit of the dissenting opinion of Justice Scalia in that case[106]. However, the

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[102] *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42.

[103] *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 655-657 (acquisition of property); *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 417-419 [166]-[167] (racial discrimination). See also *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 40 (separation of judicial powers).

[104] K Walker, "International Law as a Tool of Constitutional Interpretation " (2002) 28 *Monash University Law Review* 83; L Johns, "Justice Kirby, Human rights and the Exercise of Judicial Choice" (2001) 27 *Monash University Law Review* 290.

[105] *Atkins v Virginia* 536 US 000 (2002) per Stevens J (fn); 122 SCt 2242 (2002).

[106] 536 US 000 (2002) at 000 per Scalia J, 122 SCt 2242 (2002). He had expressed like views in *Stanford v Kentucky* 492 US 361 at 369 fn 1 (1989); cf *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 383-386 [95]-[109]; *AMS v AIF* (1999) 199 CLR 160 at 180 [50]; cf 218 [168]-[169].

adjustment of municipal law to avoid disharmony with international law is a major challenge that final courts of appeal everywhere will have to face in the coming century. The last words on this subject have not yet been written - only the first.

9. There have been lively debates in Australia, as in the United States, concerning the extent to which the interpretation of the written text of the Constitution is governed by the original intent of the founders who wrote the document or whether the text is released from that approach, the task being one of finding the meaning of the Constitution, "set free" from the assumptions and purposes of those who wrote it[107].

In the United States, possibly because of the revolutionary origins of the Constitution, the diversity of the country, the size of the population and the disparity of legal organisation, many have felt, with Thomas Jefferson, that "the country's peculiar security is in the possession of a written Constitution". The United States constitutional text has attracted much greater reverence than the Australian document has done. One has a feeling that much more attention is given in the United States to the historical facts as they existed at the time between 1787 and 1788, when the Constitution

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[107] Andrew Inglis Clark, *Studies in Australian Constitution Law* (1901), 21 cited in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 600-601.

finally to put into settled form the beliefs and values of the citizens who had declared their independence from Britain[108]. Although, in Australia, it is not now uncommon for the High Court to examine the understanding of the language of the Constitution, as it existed at the time that document was drawn up[109], and specifically to scrutinize the debates in the Conventions that preceded the adoption of the Constitution (a course formerly regarded as impermissible)[110], it is generally recognised that the elucidation of constitutional meaning involves more than a purely historical exercise. In a sense, this recognition has been reinforced by the rigidities of the Constitution and the difficulty of obtaining its formal amendment.

A good illustration of the adaptation of the meaning of constitutional words in Australia may be found in the decision of the High Court in *Sue v Hill*[111]. There, the question was the meaning of a provision in the Constitution excluding from election to the Federal Parliament any person who was "a subject or a citizen ... of a

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[108] See eg *Dred Scott v Sandford* 60 US 393 at 407-408 (1857) per Taney CJ.

[109] *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 523 [111]. In that case much attention was paid to the provisions of the US Constitution Art I, s 8, cl 8 that sustain patents of invention, the expression in the Australian Constitution, s 51(xviii). See *ibid*, at 479-480 [28]-[32], 532 [134].

[110] *Cole v Whitfield* (1988) 165 CLR 360 at 385-390.

[111] (1999) 199 CLR 462.

foreign power". There could be no doubt that, in 1900 when the Australian Constitution was adopted, the United Kingdom would not have been regarded as a "foreign power". There are too many references in the Constitution to the United Kingdom, and the status of subjects of the Crown of that kingdom[112], to attribute such a meaning to the text. Nevertheless, at the end of the century, the High Court held that a person who was a citizen of the United Kingdom (and a subject of the Queen in her capacity as Queen of the United Kingdom) was disqualified from election to the Australian Federal Parliament whilst she retained that separate citizenship. In short, she was a "citizen of a foreign power". The result was one that would have struck the founders of the Australian Commonwealth as astonishing. The notion that the High Court should give meaning to the Constitution in terms of the original intent is not one that accords with the overall practice of the High Court of Australia[113]. Nor, in my view, is it one appropriate to the task of constitutional interpretation.

10. There are matters of detail that describe differences in the work of the two supreme courts. My Court has not adopted the style, followed in the United States Supreme Court, by which an

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[112] eg Australian Constitution, ss 34(i), 117.

[113] M D Kirby, "Constitutional Interpretation and Original Intent - A Form of Ancestor Worship?" (2001) 24 *Melbourne University Law Review* 1; J Kirk, "Constitutional Interpretation and a theory of Evolutionary Originalism" (1999) 27 *Federal Law Review* 323.

opinion of the Court is written by a single Justice assigned by the Chief Justice or, if he is in a minority, by the senior Associate Justice. Although unanimous opinions are sometimes achieved in the Australian High Court, including in important constitutional cases[114], ordinarily, the arrangements for the writing of opinions are much more informal. Although a system of consultation, after hearings, has lately been introduced, there continue to be large numbers of separate dissenting and concurring opinions. This has long been the tradition of the English courts, apart from the Judicial Committee of the Privy Council which for many years permitted but one opinion.

In Australia, the tendencies of judges to join in the opinions of their colleagues vary over time, depending, in part, on personal relations and shared legal and philosophical viewpoints. In effect, multiple opinions enhance the creative element in the law. They respect the independence of individual Justices. On the other hand, they can sometimes obscure the ascertainment of the binding rule for which a court's decision will stand. They sometimes create inefficiency and uncertainty in the judiciary and legal profession[115]. The United States practice, introduced by Chief Justice Marshall, has

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[114] eg *Cole v Whitfield* (1988) 165 CLR 360; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

[115] C Moisidis, "Achieving World's Best Practice in the Writing of Appellate Judgments" (2002) 76 *Law Institute Journal* (Victoria), 30 at 32.

much to commend it. There are similar practices in intermediate appellate courts in Australia. But, so far, the practice has not been copied in the High Court of Australia.

Another precedent that has not been copied is that of the reported practice of some Justices of the Supreme Court of the United States in delegating to clerks the writing of a first draft of judicial opinions. I am not aware that this has ever occurred in the case of a Justice of the High Court of Australia, although the associates are often asked to perform particular tasks of legal research and to provide comments and criticisms upon the first draft prepared by the Justice.

In the 1930s, Justice Brandeis remarked that the reason why the Justices of the Supreme Court enjoyed such a high reputation in Washington for their work was that "we are the only people who do our own work"[116]. Inflexibility in the adherence to the ways of the past is not necessarily a matter for pride. I have long thought that common law courts could study to advantage the procedures of some courts of the civil law tradition in which a greater part of the writing of the facts, analysis of the issues and the presentation of the synthesis of the arguments could be performed by officials

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[116] Justice Brandeis quoted C E Wyzanski, "The Law of Change", Lecture at University of Mexico School of Law (1968) cited in M D Kirby, *The Judges*, (1983), 41.

leaving to the Justices the truly difficult taste of decision-making. Traditionalists oppose such suggestions, pointing out, correctly, that the presentation of the facts and issues can sometimes influence profoundly the outcome of the case. However, as the workload of courts increases and substantial numbers of important cases must be remitted to other decision-makers for arbitration, mediation or assessment, it may eventually become necessary (even in a final court) to reconsider some of the settled ways of doing things. For the time being, in the Australian High Court, we remain resolutely tied to the traditional ways.

IV CONCLUSIONS

A reflection on the similarities and differences between the High Court of Australia and the Supreme Court of the United States will indicate that the similarities are profound and predominate. The differences are largely upon matters of detail. Both courts serve vibrant, democratic societies and advanced economies. Both share the inestimable benefit of the heritage of the common law. Both courts uphold federal constitutional arrangements in independent judicial institutions whose orders are accepted and obeyed without question and without, for the most part, any need of physical enforcement.

Of the five great legal ideas of the founders of the United States of America four, at least, have proved highly successful

exports. One, the separate executive presidency, has not been widely adopted. Australia, like a majority of countries, continues to follow the system of responsible, cabinet government. Virtually no one in Australia suggests a change in this respect. The American model would be regarded widely as a flawed system too much influenced by the personal monarchy of King George III in 1776[117] and too little reflective of the modern needs for collective government with general harmony between the legislature and the executive, often difficult to achieve under the United States Constitution[118]

The republican idea, on the other hand, has been highly successful. Although Australia remains a constitutional monarchy[119], since 1776 most other nations have abolished their monarchies. Even constitutional monarchies embrace the civic ideals of republicanism. They retain the symbols of monarchy as useful

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[117] O Dixon, "Government under the American Constitution", in *Jesting Pilate* 106 at 111.

[118] O Dixon, "Two Constitutions Compared" in *Jesting Pilate,* 100 at 101.

[119] A referendum for the alteration of the Constitution to create an Australian Republic was put to the electors on 6 November 1999. The affirmative national vote was 44.74% with 54.40% against. The referendum did not secure a majority in a single State: G Williams, "Why Australia Kept the Queen" (2000) 63 *Saskatchewan Law Review* 477.

further checks on the abuse of elected power[120]. But they are in their essential character republics.

The Bill of Rights idea, quickly incorporated into the United States Constitution, has also proved a powerful influence not only in national constitutions but in the growing body of international law that upholds fundamental rights - economic, social and cultural as well as civil and political. Australia, however, remains outside the systems of national and regional human rights charters.

The federal idea was the most complex of the innovations of the American founders. Some federal states, including some created after the end of British colonial rule, have collapsed[121]. Others have proved unstable. Yet the federations of the United States and Australia (and of Canada, India and elsewhere) have been, on the whole, successful examples of the division and decentralisation of legal and political power. There is an inherent tension between federalism and responsible government which is still being played out in Australia. But it is difficult to imagine how a nation of the huge

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[120] Cf O Dixon, "The Law and the Constitution" in *Jesting Pilate* 40-41.

[121] eg the original Pakistan; the Central African Federation and the original Malaysian Federation (including Singapore). The Soviet Union, Czechoslovakia and Yugoslavia were also federal states that broke up in recent years. Nigeria fought off the separation of Biafra to survive intact, as did the United States in the Civil War.

size of Australia could have been successfully, justly and efficiently governed without adopting a federal system - and for that Australians are indebted to the American model whose division of governing powers largely shaped their own.

Nevertheless, the greatest constitutional export following the American revolution of 1776, and the settlement that followed it, has been the establishment by a written constitution of an independent Judicature with defined powers as the supreme arbiter of constitutionalism and defender of rule of law. In Australia, this precedent was faithfully followed. The High Court of Australia was created, substantially, to play the part that the Supreme Court of the United States plays. In a sense, the High Court, like other courts of many later nations, has built upon the great traditions of the United States court and continues to do so.

In every country, but particularly every federal country, the ideas written by Chief Justice Marshall in 1803 in *Marbury v Madison*[122] continue to inform decisions about the concept of the judicial role in a modern state. The export of these ideas, and many others wrapped up with them, are abiding contributions of the judges and lawyers of the United States to constitutionalism as it develops in all parts of the world.

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[122] 1 Cranch (5 US) 137 (1803).

The end of this story is not yet written. Future chapters may reveal that some of the younger nations, that borrowed many of the governmental ideas nurtured in the United States, came in time to repay part of their debt. In today's world, more than before, we can, and should, learn from each other, even in matters of constitutional law. In a sense, this is another American idea - that the imperialism of power and money gives way, in the end, to the liberty of shared experience and the unstoppable influence of new ideas.