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MUNICIPAL COURTS AND THE INTERNATIONAL INTERPRETIVE PRINCIPLE: AL-KATEB v GODWIN (2004)

The Hon. Michael Kirby AC CMG

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ABSTRACT

This article examines the 4:3 decision of the High Court of Australia in Al-Kateb v Godwin (2004). It revisits the suggested "heresy" of holding that international human rights law constitutes a consideration that may influence the interpretation of the Australian Constitution and other legal texts. Accessing universal human rights law, including in constitutional adjudication, was endorsed in the Bangalore Principles 1988. *The author suggests that interpreting statutory language to hold that indefinite detention of a visa-less refugee applicant would be a breach of universal human rights is not dissimilar to the common law principle of interpreting statutes so as to uphold basic rights. But is an analogous approach permissible in deciding the meaning of constitutional language? The author invokes legal principle and judicial opinions to support the application of his suggested 'interpretive principle'. Although arguably invoked by the majority of the High Court in* Mabo [No.2] 1992*, in the context of declaring the common law, so far this approach has not been accepted for constitutional elaboration in Australia. But should this be so in the age of global problems, multilateralism and internationalism?*

[*] Justice of the High Court of Australia (1996-2009).

THE CHARTER AND THE UDHR

Often when I visit Australian law schools students will ask me: "What is your favourite decision?" Or it might be: "What is the decision you would change if you could?" Normally, I avoid an answer by declaring my love for all of my decisions, just as my father would answer a similar question about his favourite child. Work in the High Court of Australia is so intense, so frequently contestable and significant that it is difficult to single out one case, or even a cluster of cases, for special affection. However, for the purposes of the present article I will concede that a decision delivered on 6 August 2004, *Al-Kateb v Godwin and Ors,*[1] stands out from others. This is because of its importance for Australian law in its relationship with international law. But also for the perspective that it provides as to how international law applies to our own people under the law that governs them, not excluding the *Australian Constitution*.

When the Second World War was coming to a close fearsome events were unfolding revealing the impact of the war, not only on military personnel but globally on civilian populations and especially minorities. The *Covenant* of the League of Nations[2] had largely proved a failure, suggesting the need, for human survival, of the establishment of a new body, the United Nations Organisation, and a new world legal order. In August 1941, President Franklin D. Roosevelt and Prime Minister Winston Churchill identified important principles of universal human rights that they

[1] (2004) 219 CLR 562; [2004] HCA 37. See also *Minister for Immigration, Multicultural and Indigenous Affairs v Al Khafaji* (2004) 219 CLR 464 [2004] HCA 38.
[2] *The Covenant of the League of Nations with Commentary Thereon*. United Kingdom, Parliamentary Papers, 1919 Cmd. 151; Sir Frederick Pollock, *The League of Nations*, Stevens and Sons Ltd, London, 1920, 86.

saw as being at stake in the war. They adopted the *Atlantic Charter.*[3] In the United Nations Declaration of January 1942,[4] they included amongst the Allied war aims the attainment of universal human rights.

As the Second World War edged towards its conclusion, two particular developments occurred that indicated the urgency of the moment. These were the discoveries of widespread genocide, including the Holocaust and crimes against humanity and the detonation of atomic bombs over Hiroshima and Nagasaki in Japan. These events encouraged the victorious Allies to create a new, and stronger world body with its foundations in the principles of universal human rights; international peace and security; justice; and economic equity between nations.

Originally, it was intended to include a statement of fundamental rights in the *Charter* of the United Nations itself.[5] However, time ran out for achieving that objective.[6] A major factor in the new world order was to be the demand for the liberation of colonial peoples and an end to racial discrimination. Ironically, years earlier, at Versailles in 1919, Japan had made a demand for the reform of the "white world". Australia, through the voice of its Prime Minister, W.M. Hughes, opposed any such initiative. In securing the adoption of article 15(8) of the League *Covenant,* Australia helped enshrine a prohibition on the League from interfering in the internal affairs of member states. By the same token in 1945, it was recognised,

[3] *Atlantic Charter*, 14 August 1941 (There was no formal document). J.P. Lash, *Roosevelt and Churchill 1939-1941*, Norton, New York, 1976, 447-8.
[4] *Declaration by the United Nations with Related Documents*, signed 1 January 1942; 204 LNTS 381.
[5] *Charter* of the United Nations, 26 June 1945. Entered into force 24 October 1945. J.H. Burgers, "The Road to San Francisco: the Revival of the Human Rights Idea in the Twentieth Century" (1992) 14(4) *Human Rights Quarterly* 471; P.G. Lawson, "First Principles of Racial Equality: History and the Politics and Diplomacy of Human Rights Provisions in the United Nations Charter" (1983) 5(1) *Human Rights Quarterly* 8, 9.
[6] Anne-Marie Devereux, *Australia and the Birth of the International Bill of Human Rights, 1946-1996* (Federation Press, Sydney, 2005). H.V. Evatt, *The Task of Nations*, Duell, Sloan and Pearce, Sydney, 1949, 209, 235.

that unless the human rights accepted by civilised nations were included in the fundamental principles of the United Nations, and in consequent global practice, wars and destruction would be likely to continue and even to escalate having regard to the new weapons. Thus, a drafting committee of the United Nations Commission on Human Rights, acting under the UN Economic and Social Council (ECSOC), chaired by Eleanor Roosevelt, widow of President F.D. Roosevelt, was established to prepare the *Universal Declaration of Human Rights* (UDHR).

The UDHR was adopted at the 3rd session of the General Assembly of the United Nations, convened in Paris on 10 December 1948. At that time Australia's Minister for External Affairs, H.V. Evatt, was the Assembly's President. Dr Evatt had been a past Justice of the High Court of Australia. He had resigned from the Court in 1940 and was elected to the Federal Parliament to play a part in the prosecution of the war and as a leader in the Curtin wartime government of Australia. Dr Evatt welcomed the *Universal Declaration* as a step forward in a large evolutionary process. As he put it, it was "the first occasion on which the organised community of nations had made a declaration of human rights and fundamental freedoms. Millions of people, men, women and children all over the world would turn to it for help, guidance and inspiration."[7] So it has proved. The UDHR became the most famous and most frequently translated statement of fundamental values ever issued by the United Nations or any other body. Its impact on the world has been profound.

Eventually, the UDHR was elaborated and supplemented by a body of detailed United Nations treaty law. Countries such as Australia

[7] UNGAOR, 3rd Sess, 183rd Plen Mtg, UNDOCA/pv (10 December 1948) 934.

participated in, and supported, the development of such law. Although no international court was established with jurisdiction to define and enforce these statements of universal human rights, three developments occurred that spread widely and deeply the principles contained in the UDHR. These were the contemporaneous attainment of freedom from historical imperial rule, secured by many countries of the world following the post-war collapse of imperial power; the adoption of machinery by the United Nations to investigate breaches and to secure compliance with universal human rights; and the creation of regional treaties, institutions and courts for the enforcement of human rights in Europe, the Americas and Africa, analogous, in terms and effect, with the developing UN treaty law.

The only significant part of the world's surface lacking a court with regional human rights jurisdiction was Asia and the Pacific, including Australasia. However, that did not leave those countries completely untouched by these developments. Most of them were parties to the majority of the enforceable UN human rights treaties expressed in largely common form. Many were also subject to human rights protections expressed in their own newly adopted post-independence constitutions, likewise adopting language that was substantially in common form.

Towards the close of the 20th Century an initiative was taken designed to persuade countries, mainly Anglophone countries, to address the gap that was developing between the terms of municipal law and the growing body of the international law of human rights. As Professor T.R.S. Allen put it in 1985:[8]

[8] D.R.S. Allen, *Legislative Supremacy and the Rule of Law: Democracy and the Constitution* (1985), 44 CLJ 111.

> "Modern Anglo-American constitutional theory is preoccupied with one central problem. The problem consists of devising means for the protection and enhancement of individual human rights in a manner consistent with the democratic basis of our institutions."

This article is about a practical and principled means for resolving this preoccupation in the context of the global moves towards universal human rights.

BANGALORE PRINCIPLES ON HUMAN RIGHTS LAW

To address the disharmony in law and practice between universal principles and local legal rules and to bring municipal courts into greater harmony with the growing body of international human rights law, a conference was called in Bangalore (now Bengaluru) in India. The conference took place between 24-26 February 1988. The convenor of the conference was Justice P.N. Bhagwati, a former Chief Justice of India. The participants included chief justices or other senior judges from Australia, Pakistan, Papua New Guinea, Mauritius, Britain, Sri Lanka, Malaysia, India, Zimbabwe and United States of America.

Two judges in attendance at Bangalore who were not members of the final national court of their countries. They were Judge Ruth Bader Ginsberg (later and still a Justice of the Supreme Court of the United States) and myself (later a Justice of the High Court of Australia).

At the conclusion of the meeting, the participants accepted a summary of the conference outcome proposed by the convenor based on the participants' discussions. Their conclusion became known as the

Bangalore Principles on the Domestic Application of International Human Rights Norms, 1988. Amongst the conclusions stated by the participants were the following:[9]

> "1. Fundamental human rights and freedoms are inherent in all humankind and find expression in constitutions and legal systems throughout the world and in the international human rights instruments;
>
> 2. These international human rights instruments provide important guidance in cases concerning fundamental human rights and freedoms;
>
> 3. There is an impressive body of jurisprudence, both international and national, concerning the interpretation of particular human rights and freedoms and their application. This body of jurisprudence is of practical relevance and value to judges and lawyers generally;
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> 4. In most countries where legal systems are based upon the common law, international conventions are not directly enforceable in national courts unless their provisions have been incorporated by legislation into domestic law. However, there is a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law – whether constitutional, statute or common law – is uncertain or incomplete.
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> 5. This tendency is entirely welcome because it respects the universality of fundamental human rights and freedoms and the vital

[9] M.D. Kirby, "The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms" (1988) 62 *Australian Law Journal*, 514. The *Bangalore Principles*, report of Judicial Colloquium on the Domestic Application of International Human Rights Norms, Bangalore, India. Chairman's Concluding Statement, 20 February 1988 is an Appendix to that Article. See also (1988) 14 *Commonwealth Law Bulletin*, 1196; and Justice P.N. Bhagwati, *My Tryst with Justice*, Universal Law Publishing, New Delhi 2013, 172-182.

role of an independent judiciary in reconciling the competing claims of individuals and groups of persons with the general interests of the community.

6. It is in the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes – whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law…"

At the time of the meeting in Bangalore I was the President of the Court of Appeal of the Supreme Court of New South Wales. When I returned from Bangalore to my judicial duties in Australia I discovered many circumstances where, to resolve ambiguity or to fill a gap in the common or statute law, resort could usefully be had to the growing body of international jurisprudence on human rights. In small and large cases I found that it was sometimes useful to turn to the basic principles of universal human rights. I collected a number of these cases, as illustrations, in articles describing how useful the *Bangalore Principles* could sometimes be for a working judge.[10]

Two years after Bangalore, and in a context where the *Bangalore Principles* were gaining attention in Australia, the High Court of Australia decided a most important case, *Mabo v Queensland [No.2].* The case concerning the entitlement of Indigenous peoples to recognition of native

[10] M.D. Kirby, "The Impact of International Human Rights Norms, Law Undergoing Evolution" (1996) 22 *Commonwealth Law Bulletin* 1181 at 1189-91. See also M.D. Kirby, "The Australian Use of International Human Rights Norms – From Bangalore to Balliol – a View from the Antipodes" (1993) 16(2) *University of New South Wales Law Journal*, 363. For a good example of its use see *Gradidge v Grace Bros. Pty Ltd* (1988) 93 FLR 414 (NSWCA), 415-423.

title to their traditional lands. Such recognition had been denied for 150 years both in Australian judicial decisions and in decisions of the Judicial Committee of the Privy Council when it was part of the Australian judicial hierarchy. There was no federal constitutional principle to which the Aboriginal people could appeal in advancing their claims. However, their counsel argued that the Court could, and should, re-express the common law of Australia, including by reference to applicable principles of international human rights law.

Counsel's submission, expressed soon after the adoption of the *Bangalore Principles*, was accepted by the majority of Australians, including judges and lawyers following the decision of Australia's highest court. In the *Mabo* decision, express reference was made by the High Court of Australia to UN treaty law and to the entitlement, then recently conferred on Australians, to communicate individual complaints to the UN Human Rights Committee concerning any alleged non-compliance of Australian law with the *International Covenant on Civil and Political Rights* (ICCPR). This caused Justice F.G. Brennan (with the concurrence on this point of Chief Justice Mason and Justice McHugh), in the leading opinion in *Mabo*, to say of the ICCPR so enhanced:[11]

> [It] brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of international human rights. A common law

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

doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration."

In many countries, at least common law countries, there was no particular problem in paying attention to in legal reasoning expressed in courts outside the country in question. International law has come to influence domestic legal disputes in Australia in many ways.[12] This has occurred, in part at least, because of traditions of analogous and contextual reasoning adopted by the judiciary in common law countries. Those traditions were nurtured in the era of interjurisdictional comparisons in Privy Council appeals. Even in the United States of America, after the *Bangalore Principles,* particular Justices of the Supreme Court reached out to analogous principles that could be derived from international human rights law and the discussions of overseas courts, including in constitutional litigation, on analogous problems. The relevant United States cases included *Atkins v Virginia;*[13] *Lawrence v Texas;*[14] and *Roper v Simmons*.[15] Justice Scalia, joined by some other Justices, disapproved strongly of this use of international jurisprudence, including so far as it was derived from international human rights law and cited in the context of municipal constitutional reasoning.[16] In the *Bangalore Principles* no relevant differentiation was drawn between constitutional and other branches of the law. They were all part of the body of law binding in the national jurisdiction. They were thus apt to a common approach and to like processes of reasoning, whether the law in question was common law, statutory law or constitutional law.

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[12] A recent illustration is *Australian Competition and Consumer Commission v PT Garuda Indonesia [No.9]* (2013) 212 FCR 406; [2013] FAC 323 at [36]-[37], per Perram J.
[13] 536 US 304 (2002).
[14] 539 US 556 (2003).
[15] 543 US 551 (2005).
[16] See Scalia J in *Atkins* at 347-8; *Lawrence* at 586; and *Roper* at 1226.

In 1997, by which time I had been appointed to the High Court of Australia, that court came to consider the interpretation of the "races" power in the *Australian Constitution*. This power permitted the making of "special laws" by the Federal Parliament *with respect to* "the people of any race *for whom* it is deemed necessary to make special laws".[17] The question arose, in relation to the legislation whose validity was challenged in that case as to whether this power was confined to the making of laws only *for the benefit and protection* of persons of a particular race. Or whether it extended to laws that should be characterised as being for the disadvantage or detriment of persons of a particular race on the grounds of their race.

In *Newcrest Mining (WA) Ltd v The Commonwealth of Australia,*[18] I said:

> "Where the Constitution is ambiguous, this court should adopt a meaning that conforms to the principles of universal and fundamental rights rather than an interpretation that would involve a departure from such rights… There is no doubt that if the constitutional provision is clear and if a law is clearly within power, no rule of international law, and no treaty (including one to which Australia is a party) may override the Constitution or any law validly made under it… Where there is an ambiguity, there is a strong presumption that the Constitution, adopted and accepted by the people of Australia for their government, is not intended to violate fundamental human rights and human dignity… Likewise, the Australian Constitution which is a special statute, does not operate in a vacuum. It speaks to the people of Australia. But it also speaks

[17] *Australian Constitution* s.51 (xxvi) (emphasis added).
[18] (1997) 190 CLR 513 at 657-658, 661.

to the international community as the basic law of the Australian nation which is a member of that community."

This approach to constitutional interpretation was not endorsed by the majority in the High Court. Indeed it was this application of the *Bangalore Principles* that led to one of the controversies that presented for decision of the High Court of Australia in *Al-Kateb v Godwin*. That case concerned the power of the Australian Executive Government to detain indefinitely a stateless person who, as an alien, had entered the country unlawfully. More specifically, the issue was whether the *Migration Act 1988* (Cth) should be read down so as to avoid such a consequence or whether the Constitution itself reserved indefinite detention, contended for in the case, to those offences for conviction of which imprisonment was ordered by a court, in the application of the constitutional judicial power. The High Court of Australia divided on the outcome. Although the reasoning differed amongst the minority, the lawfulness of the detention was narrowly upheld 4:3.[19]

A NARROW HOLDING BECOMES BROADER

Come forward twenty years after *Newcrest* was decided. In 2019, on a visit to Columbia University in New York a decade after my resignation from the High Court of Australia, I met a former associate (law clerk) who had worked with me on the *Al-Kateb* case, Sarah Knuckey. She is now an associate professor teaching law at Columbia University. She remembered working on my drafts as they were produced in *Al-Kateb*. We talked of the days on which the opinions of the other Justices came

[19] McHugh, Hayne, Callinan and Heydon JJ; Gleeson CJ, Gummow J and Kirby J dissenting.

in, following distribution from other judicial chambers; and how sharp differences emerged in successive drafts.

Amongst the first draft reasons to arrive were the separate reasons of Chief Justice Gleeson and of Justice Gummow. They each insisted that, because the power of the Executive to detain a person was subject to a statutory obligation to release that person and restore their liberty after that person elected to return to their place of nationality,[20] the Act should not be interpreted to permit indefinite detention.

In Mr Al-Kateb's case, his country of birth was Kuwait. However, that country would not grant him citizenship nor would it take him back. His place of nationality, through his parents, was Palestine where he had lived before travelling to Australia. However, Israel would not permit him to enter and transit Israel so that he could secure access to Palestine. There was no other foreseeable way by which Mr Al-Kateb could be returned to Palestine. There was no suggestion that Israel might alter this approach

Chief Justice Gleeson and Justice Gummow concluded that the assumption adopted in the applicable legislation was that, at most, a short-term detention would follow an election, by a person in the position of Mr Al-Kateb, to return to the place of nationality. Such an interpretation was one supportive of individual liberty. It was thus the interpretation that it was natural and appropriate for an Australian court to adopt or to prefer if there were an doubt. Where as in Mr Al-Kateb's case, such return was effectively impossible in the foreseeable future, the statutory assumption of the legislative scheme was not fulfilled. The Act could not therefore

[20] *Migration Act* 1958 (Cth), 198(1) and (2).

operate as the Parliament had intended. Any wider interpretation of the *Migration Act* to overcome this difficulty would breach fundamental interpretive principles. It would do this by permitting indefinite detention by the Executive without specific authorisation and scrutiny by the judiciary.[21]

At that point, Justice McHugh distributed his reasons. They were likewise originally very brief. In interpreting the power of detention, in a way that would be consistent with implications derived from Ch.III of the *Australian Constitution*, Justice Gummow[22] had quoted Blackstone as stating "[t]he confinement of the person, in any wise, is an imprisonment" and one which, subject to certain exceptions, is usually only permissible if consequent upon some form of judicial process. [23] It is primarily with the deprivation of liberty that the law is concerned, not with whether the deprivation is for a punitive purpose. This point was also encapsulated in the statement in the Supreme Court of the United States in *Hamdi v Rumsfeld* by Scalia J (with the concurrence of Stevens J). Justice Scalia also made reference to Alexander Hamilton writing in the *Federation Papers*[24] when he said:

> "The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive."

This line of argument was not embraced by Justice McHugh or later the plurality of the Australian High Court in Mr Al-Kateb's case, to treat as

[21] Al-Kateb (2004) 219 CLR 562 at 574 [10] per Gleeson CJ; and at 606-607 [116] per Gummow J.
[22] *Al-Kateb* (2004) 219 CLR 562 at 612-3 [137] citing *Hamdi v Rumsfeld* 542 US 507 (2004).
[23] *Commentaries* (17th Ed) 1830; Book 1 paras 136-137.
[24] *The Federalist*, No. 80 reproduced in Wright (ed) *The Federalist* 1996, 523.

inapplicable the provisions of the *Migration Act* relied on by the Commonwealth. That left the question, that interested me, whether the majority's preferred interpretation would be conformable with the basic assumptions and requirements of the *Australian Constitution*.

It was at this stage that I embarked upon writing my own reasons in *Al-Kateb*. Those who read those reasons today will see that I started out[25] substantially agreeing with the reasons given by Gummow J. On that basis, the provisions permitting detention of Mr Al-Kateb on an assumption of the availability of removal did not apply, in terms, to the appellant's case. Accordingly, it did not sustain Mr Al-Kateb's continued indefinite detention.[26]

Following the receipt of Justice McHugh's reasons I turned more directly to whether a constitutional basis existed to deal with the offending law: not only on the basis of the interpretation of the statute but also, more fundamentally, on the basis of the ambit of the constitutional power relied upon to support its validity. This reasoning led me to the *Bangalore Principles* and to the need to interpret the *Australian Constitution*, so far as would be appropriate and proper, to conform with any identified basic norms of international law expressing universal human rights.[27] I offered this reasoning as an additional, and more fundamental, ground for supporting the conclusion and orders that I favoured. So far my reasons were still extremely brief. Expressed in such terms, the decision would have been short and relatively unmemorable.

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[25] (2004) 219 CLR 562 at 614 [144].
[26] Ibid at 615 [145] – [146].
[27] Id at 617 [152] – [154].

No sooner were my reasons containing this additional proposition circulated to the other judicial chambers but they stimulated a strong response from Justice McHugh. He declared that my reasoning was "heresy". This was because the international law, to which I had referred, was inadmissible for the task of constitutional interpretation. The relevant principles of international human rights law and the ICCPR were not adopted, let alone ratified by Australia or enacted by it, at the time of the adoption of the *Australian Constitution.* The ICCPR was therefore wholly immaterial to the constitutional analysis of the case. Specifically, McHugh J. asserted that: [28]

> "The Court has never accepted that the Constitution contains an implication to the effect that it should be construed to conform with the rules of international law."

He accepted that: [29]

> "Many constitutional lawyers – probably the great majority of them – now accept that developments inside and outside Australia since 1900 may result in insights concerning the meaning of the Constitution that were not present to earlier generations. … and because of political, social or economic developments inside and outside Australia, later generations may deduce propositions from the words of the Constitution that earlier generations did not perceive…"

[28] Id 591 [66].
[29] Id at 592 [69].

But he criticized my line of reasoning as heretical. If it were accepted: [30]

> "Judges would have to have a "lose leaf" copy of the Constitution. If Australia is to have a bill of rights it must be done in the constitutional way – hard although its achievement may be – by persuading the people to amend the Constitution by inserting such a Bill."

Justice Hayne and Justice Heydon substantially supported what Justice McHugh had written. The reasons of Justice Callinan were to like effect.[31] Justice Heydon, in a later decision was to criticise my use of the *Bangalore Principles* in constitutional reasoning in the most robust terms of any Justice in *Roach v Electoral Commissioner*. [32]

IMPORTANT CRITICISM & FRESH THINKING

Source in constitutional text: I concede that important points have been raised in criticism of my 'interpretive principle' so far as it attempted to introduce the *Bangalore Principles* into Australian judicial practice. Insofar as that attempt involved the use of reasoning by analogy from principles of international law in a case involving elaboration of declarations of the common law, I accept that the task is easier.[33] The latter was the challenge presented to the High Court of Australia in *Mabo v Queensland*

[30] (2004) 219 CLR 562 at 594 at 595 [73]; at 662.
[31] (2004 219 CLR 562 at 630 (Hayne J); at 662-3 [303] (Heydon J); at 652 [271] (Callinan J).
[32] (2007) 233 CLR 162 at 225 [181] fnn 81 and 82.
[33] *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 138; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 171; G Lindell, "Why is Australia's Constitution Binding? The Reasons in 1900 and Now, and Effective Independence?" (1986) 16 *Federal Law Review* 29

[No.2].[34] It is also easier to utilise international human rights in a case attempting to resolve ambiguities in a statute.

The same might also be said for cases involving consideration of the practice and procedure in a court.[35] There, statutory provisions such as Rules of Court might apply alongside principles of the common law. But those would generally be expressed in broad, facultative language. Court decisions about the use of judicial powers could readily adapt to large principles of international law dealing with universal human rights. I accept that it is more difficult, at least in Australia, to apply the approach of analogous reasoning where the language in question is found in the *Australian Constitution*. That language is notoriously very succinct; general in expression; subject to 120 years of judicial elaboration and application; and extremely difficult to change by the process of parliamentary vote and referendum.

The difficulties of applying the *Bangalore Principles* to the text of the *Australian Constitution* were the focus of much of the critical language in which Justice McHugh and other members of the majority expressed their responses to my reasons in their opinions in *Al-Kateb*. Justice McHugh insisted that the starting point of all interpretation of the Constitution must be the text of the document. Certainly, there is nothing specific in that text that permits, encourages or authorises a mode of reasoning similar to that expressed in the *Bangalore Principles*. On the contrary, insofar as the *Australian Constitution* makes any express reference to international law, it does so in the grant of legislative power to the Federal Parliament to

[34] (1992) 175 CLR 1 at 42.
[35] *Gradige v Grace Bros. Pty Ltd* (1988) 95 FLR 414 at 422 (NSWCA).

make laws with respect to "external affairs".[36] Assuming that it would be legitimate for the Federal Parliament to authorise (as other constitutions and statutes have done) reference to using international law in ascertaining its meaning,[37] the Australian Parliament has so far held back. Moreover, it has done so in a legal context that, for centuries, has applied a "dualist" approach to that status of international law. That approach has traditionally held that rules of international law do not take effect of their own force. They require the action of a lawmaker with power (usually a legislature) to bring the principles of international law into the municipal legal system.

Because this was the principle against the background of which the *Australian Constitution* was created and expressed in the 1890s and brought into force in 1901, it must be conceded that to adopt a different approach, would require persuasive reasons. Such a different approach should not be taken lightly. Justice McHugh, and other Justices of the High Court of Australia clearly regard these arguments as fatal to applying the *Bangalore Principles* to constitutional elaboration. I do not. However, I concede that they control and limit the use that may be made of international law in ascertaining any universal principles that can be invoked as a contextual consideration to influence the task of interpretation.

Contrary doctrine of the Court: The arguments advanced by Justice McHugh (and in other cases other Justices[38]) rely, in part, on expressed "doctrine" of the court in earlier decisions. In part, they also rely on

[36] *Australian Constitution* s51 (xxix).
[37] *Indian Constitution*, 1950, Art 51 (c) [The State shall endeavour to: "(c) Foster respect for international law …"
[38] *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 224 – 225 [162], fn 181; [2007] HCA 43 at [181].

arguments deriving from the respective content and character of constitutional law and international law. So far as "doctrine" is concerned, it must be accepted that many holdings and *obiter dicta* appear in earlier decisions of the High Court of Australia hostile to the invocation of international law to cast light on the meaning and operation of the *Australian Constitution*. This is a reason for exercising care and hesitation in invoking this aspect of the *Bangalore Principles*. However, it is not necessarily fatal to arguments suggesting that the High Court of Australia should adopt a new, different and fresh approach to constitutional reasoning.

In giving meaning to the Constitution, the High Court of Australia has not treated itself as bound forever to the earlier decisions of previous Justices. Whilst the Court will strive for consistency in approach, as an attribute of judicial integrity, new times will occasionally provide new insights, even on fundamental matters. The clearest instance of such a radical change occurring was in 1920, when the Court overthrew the "implied immunities" and "reserved State powers" doctrines and substituted a completely new approach to elucidating the meaning of grants of legislative power to the Federal Parliament.[39] This was a far more radical change to constitutional interpretation than any that I have advocated. Yet is was made. It has endured. It affects virtually every decision about the meaning of legislative power under the *Constitution* over the past 100 years. It was influenced by contextual considerations somewhat similar in character to those that now support regard being had to the international context in which the constitution must today be interpreted and applied.

[39] *Amalgamated Society of Engineers' v Adelaide Steamship Co. Ltd* (Engineers' case) (1920) 28 CLR 129 at 141, per Knox CJ, Isaacs, Rich and Starke JJ.

If one looks beyond the judicial reasons advanced in the *Engineers' case*, (criticised for defects of argument and logic at the time and ever since,[40]) the reasons beyond the constitutional text for the change adopted were derived from the rapidly changing context of the world in which the Commonwealth had to function and flourish. These considerations were connected with a view held by the participating. Justices that the ambit of federal legislative power should be enlarged at a necessary cost to residual State legislative powers. Fundamentally, this was because of the needs of the newly emerging nation. Those needs had been reinforced, not long before the *Engineers* decision, by the huge demands and dangers of the Great War and the necessities that it hold revealed. They were obviously most felt keenly by Justice Isaacs, the principal author of the *Engineers'* approach. That was so probably because of his family's migrant background as immigrant refugees from Poland. The new Commonwealth had to take its place in a world of a growing number of new nations and acute perils. These extra-textual ("contextual") considerations were seen to be of grater significance to the interpretation of the text of the Constitution that the textual considerations of context, concerning the pre-Federation collection of colonies with their direct historical links to the United Kingdom. These reasons were not spelt out by the Justices. But they could scarcely have failed to influence the approach to interpretation taken by the second generation of High Court Justices.

A parallel series of national and international forces applied after 1945 to call for a similar change to constitutional interpretation in Australia by reference to the developing context of international law. Suggesting that

[40] G. Sawyer, *Australian Federalism in the Courts*, Melbourne University Press, Melbourne 1967, pp 129-130.

such a change was forbidden because of the "intentions" of the original founders of the *Australian Constitution* is an unpersuasive argument given the very many instances where new interpretations have been adopted. Indeed, this was precisely how the constitutional document was bound to be understood over time by virtue of its character as a national constitution.[41]

Multiplicity of international law: Another argument, specific to the invocation of international law emphasised by Justice McHugh in *Al-Kateb* was the historical fact that most of the contents of international law, and certainly as that law concerns universal human rights, did not exist when the *Australian Constitution* was adopted.[42] How, then, the critics of the *Bangalore Principles* ask, could the provisions of international law, later adopted, affect the meaning of the language of a constitutional provision adopted years earlier?

This approach to limiting constitutional meaning to the "intentions" of the founders is one that I would reject. Moreover, it is not one that has generally been adopted by the High Court of Australia, certainly in recent decades. The very nature of the *Constitution,* as a law under which other laws are made decades later, demands an ambulatory capability of the text to expand to apply to new political, social, technological and global phenomena.

There are countless illustrations of this flexibility. They include, recently, the willingness of the High Court to give new meaning to the word

[41] *Brownlee v The Queen* (2001) 207 CLR 278 at 305 (79); [2001] HCA 36 at [79].
[42] *Al-Kateb* (2004) 219 CLR 562 at 589 [62]; [2004] HCA 37 at [62].

"marriage" in the *Australian Constitution*.[43] Permitting the concept of "marriage" to expand to include the marriage of same-sex partners was certainly not an understanding or intention that the founders of the Australian Commonwealth would have held in 1901. Expanding the meaning, as was decided in 2012, does not require adoption of a "lose-leaf" constitution.[44] It simply requires analysis of, and resort where necessary to, contextual considerations that help to elaborate the application of the meaning of the text beyond what would have been the understanding or intention of the founders at the time it was first written.

A variant of the last argument has, perhaps, more force. This is the fact that international law today, including the international law of universal human rights, is a large and very complex body of treaties, protocols, declarations, rulings, guidelines and other expositions. It includes about 900 treaties to which Australia and other countries are parties.[45] However, the *Bangalore Principles*, and my own 'interpretive principle' do not require, relevantly, that the text of the *Australian Constitution* must be read as subject to the *minutiae* of specific international rules. All that is required is that "principles" and "values" of universal human rights, as upheld by civilised nations, may where appropriate influence interpretation of the *Australian Constitution*, at least where this does not contradict the clear meaning of the text but leaves an ambiguity or uncertainty to be resolved.

The latter was the approach explained in the context of common law elaboration by the reasoning of Justice Brennan in *Mabo [No.2]*. Likewise, only in this way would international law play any part in the interpretation

[43] *Australian Constitution*, s52 (xxi). See *The Commonwealth v Australian Capital Territory* (2010) 250 CLR 441; [2013] HCA 55.
[44] *Al-Kateb* (2004) 219 CLR 562 at 595 per McHugh J [73]; [2004] HCA 37 at [73].
[45] *Ibid* at 590 [65].

of our Constitution. The principles and values can only be invoked as a legitimate influence on the development of the common law and constitutional law "when international law declares the existence of universal and fundamental rights" and where invoking it is "compatible with the constitutional text".[46] Viewed in this way, the 'interpretive principle' is a much more modest proposal than the target of Justice McHugh's criticism in *Al-Kateb* took it to be. This is also why the so-called 'democratic deficit' does not forbid access to the principles and values of universal human rights. Any more than this consideration would prohibit reference to basic rights upheld by the common law when construing provisions of the Constitution expressed in general terms.

Varied versions of principle: I accept the criticism that, in judicial and extrajudicial expression of the principle, I have not always used the same language, nor always been entirely consistent in explaining the 'interpretive principles'.[47] No doubt a similar criticism was voiced in relation to the evolving arguments of Justice Isaacs (and Justice Higgins) explaining the competing principle of constitutional interpretation which they advocated between 1907-1919, ultimately with success, in the *Engineers Case* of 1920.[48] The arguments advanced by Isaac Isaacs and H.B. Higgins as counsel in the *Railway Servants' case,* shortly before their appointments to the High Court,[49] perceived their approaches that were later to evolve into the one that has prevailed since 1920.[50] Justice

[46] *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 627; *Forge v Australian Securities and Investment Commission* (2016) 228 CLR 43 at 127-180; [2006] HCA 44 at 127 [208]-[214]; *Kartinyeri v The Commonwealth* (1998) 198 CLR 337 at 417-418.
[47] Luke Beck, "What is Kirby's Interpretive Principle Really About?" (2013) 87 ALJ 200 at 201, suggesting three different meanings.
[48] See e.g. *Baxter v Commissioner of Taxation (NSW)* (1907) 4 CLR 1087 at 1161.
[49] *Federal Amalgamated Government Railway and Tramway Services Association v NSW Railway Traffic Employees Association* (1905) 4 CLR 488.
[50] Cf. *Baxter v Commissioner of Taxation (NSW)* (1907) 4 CLR 1087; *Deakin v Webb* (1904) 29 VLR 748 at 750 (arguments of Mr Isaacs KC).

Isaacs enjoyed life tenure as a Justice of the High Court. He served from 1906-1931 when he resigned as Chief Justice to become Governor-General. He thus enjoyed a total term of office of 25 years service on the Court. Perhaps if I had been so fortunate, I might have had the time and opportunity over many cases to clarify and sharpen the 'interpretive principle' mentioned in my decisions. The fundamental concept I have advocated by reference to the phenomenon of international law and globalism is as relevant to interpretation of the Australian Constitution today (by reference to the international world today) as was the 'interpretive principle' of Justice Isaacs and Higgins in the early decades of the twentieth century (nation building and enhancement of the new nation's legislative powers – something different in kind from an amalgam of British colonies with a few shared powers).

Sovereign of people and democracy: The *Bangalore Principles* require fresh thinking on the part of lawyers, especially those educated in Australia in the era of the positivist, common law tradition. For many years, including my own youthful encounters with the law, it was commonly asserted that the reason why the *Australian Constitution* was binding on the people of Australia because it had been enacted, during the British Empire, by the Imperial Parliament at Westminster. The writ of that Parliament was sovereign and supreme throughout the Empire. *Ergo* it was binding on all Australians and all British subjects affected.

Subsequently, looking afresh at the *Australian Constitution* it came to be was viewed by later generations of citizens, lawyers, constitutional scholars and High Court Justices as an expression of the will of the electors of Australia who initially adopted it at referendums conducted in

the last years of the 19th Century.[51] The people of Australia were thus the "sovereign", the ultimate source of constitutional power, even though, at the time, most of them and the lawyers and judges who served them, did not realise that this was so.

The insight that re-expressed in this way the basic foundation of the *Australian Constitution* combined constitutional language, historical facts and modern political values. Those considerations afforded a substantially different context for the interpretation and meaning of the *Australian Constitution*. That process was further accelerated by successive statutes that terminated appeals from the Australian courts to the Judicial Committee of the Privy Council, including in most constitutional cases. [52]

Contemporary context of international law: When Australian judges and lawyers were released from the thinking that had earlier controlled Australia's constitutional interpretation from colonial times, one can begin to appreciate the wisdom and common sense of Justice Brennan's reasoning in *Mabo [No.2]*. International law, especially the international law of "fundamental human rights" and "human dignity" is bound in today's world to have an impact on contemporary Australian law, including constitutional law. To the contemporary Australian lawyer, it will seem absurd to reach without questioning into English judicial opinions dating back to the 12th Century to help determine what the law of Australia says

[51] Cf. *Kirmani v Captain Cook Cruises Pty Ltd [No.1]* (1985) 159 CLR 351 at 441-2; *Breavington v Godleman* (1988) 169 CLR 41 at 123; *Leeth v The Commonwealth* (1992) 174 CLR 455 at 486; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106, 38; *McGinty v Western Australia* (1996) 186 CLR 140 at 230.

[52] Ultimately by the *Australia Act* 1986 (Cth) s11; *Australia Act* 1986 (UK) and *Australia Request Act* 1985 (NSW). See also *Sue v Hill* (1999) 199 CLR 462 at 491-493. But see *Attorney-General (A) v Marquet* (2003) 217 CLR 545 at 602 [172]; [2003] HCA 67 of [172], [196] – [203].

and means today; but not to permit reference to be made of the values inherent in the growing body of international law, particularly as that law expresses universal principles of human rights and human dignity that are basic to the phenomenon of today.

No other intellectual discipline would limit its reasoning to mediaeval and imperial thinking; or reject the powerful impact of modern realities concerning the content of the discipline. Including where the law extends to universal human rights law affecting human beings, wherever they may be in the world. Computer scientists; biochemists; bridge builders; nuclear physicists; political scientists, all regularly examine their discipline in the context of the world as it is today; not as it was long ago. So it should also be in the context of law – especially constitutional law which is inevitably a mixture of legal texts, evolving values and social and political realities.

So far, my view that the *Bangalore Principles* apply to Australian judicial reasoning on the meaning of the *Australian Constitution* has not been accepted by Australia's highest court.[53] One day I am confident that it will be accepted as embracing the unremarkable notion that the *Australian Constitution* should be read in the emerging context of the principles of international law. *Australia's Constitution* operates today in the context of the world as it is; not as it was in the colonial era of James Cook or Arthur Phillip or the very different imperial age when the Constitution was drafted and accepted by the Australian people as their basic law.

[53] *Roach v Electoral Commissioner* 92007) 233 clr 162 at 225 [181]. Compare however, K. Walker, "International Law as a Tool of Constitutional Interpretation' (2002) 28 *MonashLRev* 85 at 95; R.S. French, "Oil and Water? International Law and Domestic Law in Australia", Brennan Lecture delivered at Bond University, 26 June 2009 (www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj26June09.pdf.) p9, Discussed L. Beck (2013) 87 ALJ 200.

Municipal courts & international jurisdiction: A special way of thinking about this conundrum was suggested by the late Professor Ian Brownlie of Oxford University, a leading expert in international law. Because the judges of the common law tradition have always enjoyed, in Radbruch's phrase, 'leeways for choice' in construing constitutions, statutes and other positive law and in elaborating and updating the common law, it is open to them to reach beyond their own municipal law to international law, at least, this is permissible as that law expresses the universal values of civilised nations. Just as the *Bangalore Principles* asserted.

This is not so as to override clear and binding rules of municipal law to the contrary. But so that the judges will perform the tasks of elaborating the common law; of construing municipal legislation; and of interpreting a national constitution in the context afforded by the entire body of law of today. That context includes the language and values of universal human rights law. This is not a "backdoor" way of allowing courts impermissibly to ratify treaties or other sources of international law or to permit them to apply such treaties to influence contemporaneous constitutional interpretation.[54] It is simply a way of recognising the importance of this aspect of the legal *context* for the meaning and operation of municipal law. That context now includes that of international law expressing universal values of human rights and human dignity.

[54] Hugh Kindred, "The Use and Abuse of International Legal Sources by Canadian Courts: Searching for a Principled Approach" in *Oonaghe Fitzgerald, The Globalised Rule of Law Relationships Between International and Domestic Law* (2006), 5 at 17. Stephen Donaghue, "Balancing Sovereignty and International Law: The Domestic Aspect of International Law in Australia" (1995) 17 *Adelaide Law Review*, 213 at 214 ("lack of rigour").

Of course, municipal jurisdiction might be sufficient to authorise the use of the "interpretive principle" in the sense of exercising the power or the municipal court to decide the case. However, if the development of a new form of international jurisdiction were acknowledged as one consequence of the rapid expansion of international law in recent times (especially the international law of human rights) that development could attract attention to any "deeper truths"[55] revealed by international law. Such an enlargement in legal thinking might come about as a consequence of the domestic court's new role conferred as a result of the growing engagement of Australian law with international law.

THE ATTEMPT TO REARGUE AL-KATEB

By 2013, the composition of the High Court of Australia had changed completely from the membership of the Court at the time of the decision in *Al-Kateb*. None of the Justices who participated in *Al-Kateb* remained as members of the Court by that time. Only one Justice (Kiefel CJ) was still a member of the Court as it existed at the time of my retirement in 2009. It is therefore unsurprising that attempts should have been made to reargue the correctness of the decision in *Al-Kateb* before a Court now differently constituted, where the issue decided was still relevant for cases of prolonged and indefinite detention of arrivals in Australia asserting refugee status.

[55] *Love v The Commonwealth* (2020 94 ALJR 198, 257 [289], per Gordon J referring to the large leap in reasoning evident in *Mabo[No.2]* and in that case.

There have been several attempts at re-argument of the correctness of *Al-Kateb*. The most direct attempt was *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship*.[56] In that case a challenge was made on the purported power of unlimited executive detention granted in the *Migration Act,* as interpreted in *Al-Kateb*. French CJ, Kiefel and Keane JJ held that the detention of a Sri Lankan national, seeking refugee status, on the basis of an adverse security assessment might be invalid as no country other than Sri Lanka would agree to receive the detainee and the Minister did not propose to remove her to Sri Lanka against her will. It was in this context that arguments were advanced that the provisions of the *Migration Act,* permitting potentially indefinite detention until removal, did not apply in terms or were otherwise constitutionally invalid.

Three Justices, Crennan, Bell and Gageler JJ, found a way through the arguments of the Plaintiff to avoid a necessity to overrule the *ratio decidendi* of *Al-Kateb.*[57] Additionally, French CJ held that the case was not an occasion "which warrants consideration of the correctness of the decision of this court in *Al-Kateb v Godwin*".[58] Justice Hayne repeated his reasoning in *Al-Kateb*, and was hostile to any change. He concluded that nothing in Chapter III of the *Australian Constitution* limits "the powers given [to make laws with respect to aliens and migrants] in a way that precludes the enactment of the [detention provisions] … and their continued valid application to the Plaintiff." He added:[59]

[56] (2013) 251 CLR 322; [2013] HCA 53.
[57] *Ibid* (2013) 251 CLR 322 at 370-371 [142]-[145].
[58] *Id* (2013) 251 CLR 322 at 344 [31].
[59] Id (2013) 251 CLR 322 at 367 [130].

> "Whether it is thought to be a good law or a bad law, a fair law or an unfair law, or a law that is consistent with basic tenets of common humanity is a matter for the Parliament and "the people of the Commonwealth" not for the courts."

This reasoning effectively excludes the courts in Australia from constitutional assessments that are occurring in the judiciary of virtually every other civilised country.[60] It is not one that should be embraced by the courts of Australia. If such a rule exists it is not desirable and should be reconsidered.

INTERNATIONAL PERSPECTIVES ON AL-KATEB

Following my retirement from the High Court of Australia, the Australian National University established a lecture series in international law, named after me. The series has attracted distinguished lecturers, some of whom have referred to my applications of the *Bangalore Principles* and to my "interpretive principle".

[60] Many courts have accepted that international law may influence municipal law. See the thousand page text by Professor Nihal Jayawickrama, *The Judicial Application of Human Rights Law – National, Regional and International Jurisprudence,* Cambridge Uni Press Cambridge, 2002, 102, 112, 163. Cf. *Environmental Protection Authority v Caltex Refining Co. Pty Ltd* (1992) 177 CLR 292 at 360-361; *Tavita v Minister of Immigration* [1994] NZLR 257; *Baker v Canada (Minister of Citizenship and Immigration)* [1992] 2 SCR 817. See also A.F. Mason, "The Influence of International and Transnational Law on Australian Municipal Law (1997) 7 *Public Law Review* 20 at 23; and A.F. Mason, "International Law as a Source of Domestic Law" in Brian R. Opeskin and Donald R. Rothwell, *International Law and Australian Federalism* (1997) 210 at 214. C.f. *Gloucester Resources Limited v Minister for Planning* [2017] NSWLEC 7 at [530]-[548], per Preston CJ.

The first lecture in the series was given in the year of my retirement, 2009, by Professor (now Judge) James Crawford.[61] He described the years of my service on that court. He contrasted the approaches taken by the Justices of the High Court concerned with international law in their decisions with those of the House of Lords in the United Kingdom. James Crawford observed: [62]

> "With the notable exception of Kirby J, the judges of the High Court have been more reluctant than their contemporaries in the House of Lords to deal with international law issues. In a few cases their reluctance looks like recalcitrance."

In 2019, Sir Kenneth Keith, then recently retired from his post as a Judge of the International Court of Justice, delivered the lecture. He was more forthcoming, perhaps because already enjoying freedom from the constraints applicable to serving judges. In his lecture,[63] he disclaimed an "overall assessment" of Australian attitudes to international human rights law since 2009. However, he said: [64]

> "If I may express a view on [*Al-Kateb*], I do prefer our honorand's position on the place of international law in the interpretation of

[61] James Crawford, "International Law in the House of Lords and High Court of Australia 1996-2008: A Comparison" (2009) 28(1) *Australian Year Book of International Law*, 1, 5. C.f. J. Crawford and W.R. Edeson, "International Law and Australian Law" in K.W. Ryan (Ed) *International Law in Australia* (1984), 71 at 78.
[62] Ibid (2009), 5. See also, Hilary Charlesworth, "Deep Anxieties: Australia and the International Legal Order" (2003) 25 *Sydney Law Review* 413.
[63] K.J. Keith, "New Zealand, Australia and International Human Rights 1919-2019", [2020] *Australian Year Book of International Law*, forthcoming.
[64] Ibid at 8.

legislation and indeed of constitutions. Support for its constitutional role is to be found, for instance, in early Australian and New Zealand cases relating to the power to make law for the mandated territories they were administering or in a New Zealand case relating to trans-Tasman shipping.[65] Consider too the US experience – a constitution in Cardozo's words, states principles for an expanding future, not rules for the passing hour.[66] With respect, I do not see that position as heretical, as one of his colleagues charged.[67] It is orthodox. Nor should I attempt to address the recent *Economist* article referring to Australia's surprising disregard for free speech;[68] nor to the disadvantageous treatment of New Zealand citizens resident in Australia; nor to attitudes to, and actions taken in relation to, refugees. I would however like to mention that one of the *Tampa*[69] detainees, welcomed to New Zealand in 2001 under an agreement rapidly reached between John Howard and Helen Clark, has just received a Fullbright Award to attend Columbia University to study diplomacy…"

Sir Kenneth Keith went on to reflect on the reaction to international human rights law amongst most Australian judges:[70]

[65] *Re Award of Wellington Cooks and Stewards Union* (1906) 26 NZLR 194.
[66] B.N. Cardozo, *The Nature of the Judicial Process* (Yale University Press, New Haven, 1921) 23.
[67] *Al-Kateb* (2004) 219 CLR 562 at 589 [63] per McHugh J.
[68] *The Economist* (online edition) 15 June 2019.
[69] This is a reference to the *Tampa* case: *Ruddock v Vadarlis* (2001) 183 CLR 1; [2001] FCA 1829. Special leave was refused by the High Court of Australia [2001] HCA Trans 625. The decision of the Federal Court (with Black CJ dissenting) held that the Australian Government could not unlawfully detain persons who were rescued on the high seas by *M.V. Tampa* (a Norwegian vessel).
[70] Keith above n.59, 9.

> "Our honorand in the foreword to a major 2012 volume on *Contemporary Perspectives* on *Human Rights Law in Australia* praises [the book] for the remarkable image it gives of the enjoyment of human rights in Australia at that time. [71] But, he continues, it is a land that is seriously ambivalent about the desirable means of protecting those rights notwithstanding its earlier notable contributions. The ambivalence, even hostility, can, he says, be well understood by those born in Australia before the Second World War. He sets out sources of that hostility. Those attitudes, he continues, were taught at law schools from the 1950s to the 1980s. Many still adhere to those beliefs as, he acknowledges, he once did. The lack of, or limited legislative and judicial action in, Australia evidences that continuing position, as does the government's largely negative reaction to the 2009 national human rights consultation committee's *National Human Rights Consultation Report*. [72]

In drawing lessons from his lecture, Sir Kenneth Keith urged greater flexibility of mind and willingness on the part of Australian judges and lawyers to acknowledge earlier narrow inclinations than is now generally apparent: [73]

> "One [should] be willing to acknowledge errors in one's thinking. I have mentioned the honorand, Sir Owen Woodhouse and Sir

[71] Peter H. Bailey, *The Human Rights Enterprise in Australia and Internationally* (LexisNexis, Sydney, 2001).
[72] National Human Rights Consultation Committee, *Report*, (final report September 2009). See also Paula Gerber and Melissa Casten, *Contemporary Perspectives of Australian Human Rights Law in Australia* (Thomson Reuters, 2012, Melbourne) vx.
[73] Keith above n. 59, 10.

> Geoffrey Palmer. To them may be added senior judges and lawyers in the UK. I too had changed my mind by the mid-1970s. As a result, thinking of that young *Tampa* man, of receiving a Fullbright and other awards and studying great judgments of the United States Supreme Court of the 1960s at an outstanding law school.

The second point made was: [74]

> 'In law context is everything', said Lord Steyn in 2011.[75] In this country judges may be helped, when interpreting legislation, by the inclusion of references to 'context' in Interpretation Acts… Chief Justice French in 2011 said of the provisions in the Victorian Charter, allowing the courts interpreting it to consider international law and related decisions, that the proposition did not authorise a Court to do something that they could not already do. [76]

In support of that proposition Sir Kenneth Keith cited a paper by the present Chief Justice of the High Court, Kiefel CJ, and a book by Professor Cheryl Saunders, *The Constitution of Australia: a Contextual Analysis:*[77]

> "[She includes] an important sub-title, I would have thought, although she does include a note of caution… The New Zealand courts have used international law in resolving constitutional issues. They use it as part of the common law for instance when interpreting treaties which have been incorporated into international law or resolving disputes about foreign state immunity. They do that by

[74] Keith, ibid, 10.
[75] *R (Daly) v Secretary of State at the Home Department* [2011] 2AC 532 at 545 [28].
[76] *Momcilovic v The Queen* (2011) 245 CLR 1 at 36; [2011] HCA 34 at [18] per French CJ.
[77] Keith, above n 59. *Ibid.*

reading the legislation or common rule in its international context. Nothing here of the legislative intention, of implication, of ambiguity, of timing of the statute and the international rule. In my experience as a judge, those constructs are not useful."

A last lesson, derived from the topic of his lecture, led Sir Kenneth Keith to refer to the importance of legal education and legal practice. In the constant battle to broaden young, and not so young, legal minds, I can confirm this point. For practitioners and litigants before a court suddenly to face invocation by a judge or advocate or party of an unincorporated treaty or principle of international law could occasion surprise. Potentially, this could be seriously unfair as a matter of procedure if this were done without due notice to the court and other parties. However, the citation of an old, even long forgotten, English judicial authority does not cause anything like the same resentment or protest from traditional lawyers in Australia. What is more important for the future of the Australian legal system today? [78] Is it analogous reasoning from the writings of ancient English jurists in days long gone by?[79] Or is it more likely to be the reasoning of contemporary, judges in busy international and regional courts or tribunals giving life and meaning to the values and broad principles of universal human rights law?

[78] T.H. Bingham, "There is a World Elsewhere: The Changing Perpsectives of English Law" (1992) 41 *International and Comparative Law Quarterly* 513 at 519 ff.; Shane Monks, "In Defence of the Use of Public and International Law in Australian Courts" (2002) 22 *Australian Year Book of International Law* 201 at 222-223.

[79] Cf *Jago v District Court of NSW* (1988) 12 NSWLR 558 at 569 (CA) ["… A more relevant source of guidance (than English precedents of hundreds of years ago] may be the modern statements of human rights in international instruments prepared by experts, adopted by organs of the United Nations, ratified by Australia and now part of international law." Per Kirby P.; Penelope Mathew, "International Law and the Protection of Human Rights in Australia: Recent Trends" (1995) 17 *Sydney Law Review* 177 at 192.

Of course, the High Court of Australia and any other national court, is not bound in law to apply such reasoning as if it were already a normative part of the nation's municipal law. It only becomes part of municipal law when a legislature enacts it or an Australian judge incorporates it for assistance by the well-worn common law technique of analogous reasoning. We need to remind contemporary Australian judges and lawyers about the precious utility of these techniques of reasoning. And of the lessons of context for the understanding of the meaning of contemporary laws, common law, statute law and constitutional law alike.[80]

COURTS EXERCISING INTERNATIONAL JURISDICTION

This is where a novel point made by the late Professor Ian Brownlie, one of the foremost writers on international law, mentioned earlier in this article, may be specially relevant to Australian judges and lawyers.[81] Ian Brownlie pointed to the fact that no international court was created by the United Nations for the explicit task of providing authoritative interpretations and enforcement of international human rights law.

Of course, the International Court of Justice was created by the *UN Charter*. However, it has a limited and precisely defined jurisdiction. Other international courts (including the International Criminal Court and the International Criminal Tribunals) and human rights bodies (including the

[80] In issue in *Al-Kateb* was long-term personal loss of liberty. The presumption that the legislature would not intend to abrogate or curtail human rights and freedoms (of which personal liberty is the most basic) was conceded by French CJ and Keifel and Keane JJ in *Plaintiff M76 ibid* (2013) 251 CLR 322 at 381 [189]..

[81] Ian Browlie, *Principles of Public International Law*, OUP (5th Ed, 1998), 584. See M.D. Kirby, "International Law - the Impact on National Constitutions" (Grotius Lecture 2006) 21 *American Uni Int LRev*, 327 at 362 (2006). Malcolm N. Shaw, *International Law* (5th Ed., 2003) at 149.

UN Human Rights Committee under the ICCPR) have been created by the United Nations. The UN has also established "special procedures" to assist member countries to investigate and conform to the human rights treaty obligations that most of them have accepted.

It is extremely unlikely that the nation states today would agree to create a new, large and expensive bureaucracy of international courts and tribunals for the authoritative elucidation of national human rights questions. Instead, international law continues to utilise municipal courts and judges in the elaboration of international human rights law. Over time, this practice will increasingly build up a body of international jurisprudence. It will do so by analogous reasoning in a way specially familiar to Australian lawyers because this is what has long happened in the municipal courts of the common law tradition.

There is a further point. At the time of Australia's federation, one of the relatively few novel ideas of the *Australian Constitution* was that of permitting State courts to exercise federal jurisdiction.[82] If we think of Australian courts, say in *Al-Kateb v Godwin*, as an instance of a municipal court exercising a kind of international jurisdiction, this is not such an unusual idea, at least for Australian lawyers. If we were to wait until the nation states of the world erect a large global bureaucracy of courts for human rights cases, we will wait until the *Greek Kalends.* The needs of clarifying and utilizing international human rights law are important for the attainment of the first stated objective of the United Nations Organisation

[82] *Australian Constitution*, s73(ii).

under the *Charter* (the achievement of universal human rights). This truly is a "deeper truth" of Australian law today. Our courts have the power and opportunity to give it substance.

It is instructive to notice the extent to which the *Bangalore Principles* are being applied in decisions worldwide, in constitutional and non-constitutional litigation, and in countries large[83] and small.[84]

Reference to international human rights law on topics analogous to those before the High Court of Australia in *Al-Kateb* continue to occur in many countries. It sometimes occurs in unexpected places.

In 2020 two prisoners in Zambia succeed in an appeal against a decision of the High Court of Zambia declining relief on a complaint about serious overcrowding and poor food in the Lusaka Central Prison.[85] The prisoners complained that the conditions adversely affected their status of HIV infection. That status was known to the prison authorities and was not unusual in Zambia. The 'right to health', mentioned in the Zambian Constitution was only a directive principle of state policy. It was not expressly declared to confer individual rights, directly operative in law.

[83] One area where universal human rights has been regularly invoked is in judicial proceedings in validating criminal laws against homosexual conduct. See *Naz Foundation v Delhi* [2009] 4 LRC 838 at 873 [75ff] (HC(D)]. Cf. *Johar v Union of India* [2019] 1 LRC 1 (SCI) at 43ff [125] per Misra CJI and 52 [158].

[84] Further cases on homosexual offences making international human rights law: *Jason Jones v Attorney-General of Trinidad and Tobago* (2018) High Court, Claim No. CV2017-00720; *Letsweletse Motshidlemang v Attorney-General of Botswana* [2019] High Court MAHGB-000521-16; *Attorney-General of Belize v Caleb Orozco and Ors* [2019] Court of Appeal of Belize, Civil Appeal No. 32 of 2016.

[85] *Mwanza and Anor v Attorney-General* (Appeal No. 153/2006 [2019] ZMSC 33. In this case, Mambulima CJ upheld the right to health which was a "directive state principle" by concluding that there was a "growing trend of indirect judicial protection of the right to food… by connecting that right with other rights. Reference was made to decisions in other jurisdictions.

However, Chief Justice of Zambia Irene Mambulima, reversed a High Court of Zambia's decision refusing relief to the prisoners. She granted relief for reasons that were joined by her two colleagues. In doing so, she observed that there was "a growing trend of indirect judicial protection of the right to food, for example, by connecting that right with other rights". She held that the 'right to life' expressed in the Zambian Constitution should be given a wider interpretation so that it included 'a right to a dignified life'. She held that the access by the prisoners to suitable food was necessary to sustain a 'dignified human life'.[86] So she ordered the Zambian Government to make that food available to the appellants. The "growing trend" to which the Zambian judges referred, was the trend set in motion by the *Bangalore Principles*.

The Zambian court decision is by no means an isolated one. It was rendered in a country whose legal system is based on the same positivist, common law, dualist system as that of Australia. True, the Zambian Constitution provides a general charter of basic rights whereas the Australian Constitution does not. However, the provisions in the Zambian Constitutions were not directly and explicitly applicable to the case in hand. They were only rendered so by the process of judicial reasoning. That reasoning was consistent with the *Bangalore Principles* and the process of judicial reasoning that the *Bangalore Principles* endorsed. In doing so the Supreme Court of Zambia was helping to give effect to international human rights law as the High Court of Australia did in *Mabo*. But as was refused in *Al-Kateb*.

[86] C. Rickard, "Prisoners' victory paves way for rights-based suits. *Legal Brief*, Zambia, 21 January 2020, p1.

The resistance of some Australian judges towards similar reasoning will one day be overcome. It is increasingly a less common approach amongst of the judiciary worldwide. The essential idea propounded at Bangalore has already been expressed by the High Court of Australia in *Mabo.*[87] Few, if any, modern cases in the High Court of Australia have been as important and influential as *Mabo [No.2]*. In all but a purely formal sense, *Mabo* was an important constitutional case for Australia. New and different ideas are sometimes essential for the readjustment of the legal system to fresh thinking and universal rules of justice.[88] The present is such a time.

One day the interpretive principle, applied by me in *Al-Kateb* and in other cases (or some variation of it), will be accepted in Australia. It will then be regarded as unremarkable and orthodox. Future judges and lawyers looking back, will be surprised by the heat that my reasoning in *Al-Kateb* created at the time. As well as by the lengthy interval that Australian judges and lawyers took to catch up with the rest of the civilized world.

As a matter of Australian legal doctrine, the holding of the majority in the High Court of Australia in *Al-Kateb* must still be applied by Australian judges and lawyers until overruled and reversed. They must do so for the legal principle for which the majority reasoning stands.[89] However, there

[87](1992) 175 CLR 1 at 42; *Coleman v Power* (2004) 220 CLR 1 at 27-30 [17]-[24] (per Gleeson CJ); see 91-96 [240]-[242] per Kirby J.
[88] Cf. Luke Beck, "What is Kirby's Interpretative Principle Really About?" (2013) 87 ALJ 200. See also e.g. *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 657-661; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 417-418; *Re East; Ex Parte Nguyen* (1998) 215 CLR 185 at 293. For a fuller list see Heydon J in *Roach*, above n.24.
[89] Explained in *Garcia v National Australia Bank* (1996) 186 CLR 49; [1996] HCA at [56].

are other holdings of the High Court of Australia.[90] And there is much persuasive reasoning from elsewhere that beckon us to a different conclusion. Their call will eventually be heeded by the Australian courts. This article seeks to explain why.

[90] Such as *Mabo v Queensland [No.2]* (1992) 175 CLR 1 at 44.