

Judicial Engagement in the High Court of Australia

A High Court of Australia Public Lecture

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Introduction

The title of my lecture tonight is judicial engagement in the High Court of Australia. I use it as an umbrella, to examine the familiar practice whereby Justices of the High Court, together with many other apex courts around the world, draw on judicial decisions of the courts of other countries in their reasons for decision. This practice has been characterised in a variety of ways, which include migration,¹ importation,² borrowing³ and dialogue.⁴ In an effort to avoid the elements of prejudice associated with each of these I have adapted the deliberately anodyne notion of engagement, with due acknowledgement to Professor Vicki Jackson, who used it first in this context.⁵ I confine the lecture to references to foreign domestic rather than international legal sources, to the extent that they can be disentangled, if only because the approach taken by the High Court differs so markedly between the two. I confine it also to judicial engagement in constitutional cases, broadly understood, although the practice is much more widespread than this.

Whether courts should refer to decisions of courts of other countries in resolving domestic constitutional questions has been a hot topic around the world since it became controversial in the United States in the 1990s. In fact, however, for reasons that I will explore shortly, the legitimacy of judicial engagement *per se* has never been controversial in Australia, where the High Court has unselfconsciously referred to the constitutional decisions of courts of other countries since it commenced operation in 1903.⁶ Australia thus has long experience with the manner of use of foreign law. In many ways, this is the more interesting issue; and becoming more so in conditions of globalisation. My principal focus tonight, therefore, is how the High Court has engaged with

¹ Sujit Choudhry, 'Migration as a New Metaphor in Comparative Constitutional Law' in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2006) 1.

² Catherine Dupre, 'The Importation of Law: A New Comparative Perspective and the Hungarian Constitutional Court' in Andrew Harding and Esin Örcü (eds), *Comparative Law in the 21st Century* (The Hague: Kluwer, 2002) 267.

³ Barry Friedman and Cheryl Saunders, 'Symposium: Constitutional Borrowing - Editors' Introduction' (2003) 1 *International Journal of Constitutional Law* 177.

⁴ Sarah Harding, 'Comparative Reasoning and Judicial Review' (2003) 28 *Yale Journal of International Law* 409.

⁵ Vicki Jackson, *Constitutional Engagement in a Transnational Era* (Oxford: Oxford University Press, 2010).

⁶ For an early example, see *D'Emden v Pedder* (1904) 1 CLR 91.

decisions of other courts over time in resolving constitutional cases, what we can learn from this about ourselves and what can be drawn from our experience that may be of interest to others. As a subtext, I note that the Australian case is complicated by changes in both the internal and external context over this period of more than 100 years. I will trace some of these in the course of the lecture but they include, most obviously, the transition from colony to independence and the gradual fragmentation of the unity of the common law.

Engagement

I was in the United States in 2005 when controversy over judicial engagement was at its height. The immediate catalyst then was a reference to the 'overwhelming weight of international opinion' by the plurality of the Supreme Court in *Roper v Simmons*,⁷ in determining whether capital punishment for offenders between the ages of 16 and 18 amounted to 'cruel and unusual punishment' for the purposes of the Eighth Amendment. The controversy was fuelled, however, by a series of earlier cases in which one or more Supreme Court Justices had made a reference of some kind to foreign experience in other constitutional contexts, including federalism and due process.⁸ The issue divided the Court, polarised the academy and attracted critical attention from both the media and Congress. At various stages, the latter had before it both resolutions and proposed legislation to preclude consideration of foreign law, implicitly threatening impeachment.⁹ Chief Justice Roberts repudiated the practice of referring to foreign law in his confirmation hearings.¹⁰

At first glance, at least, these references to foreign experience were sparse and hesitant by Australian standards. I gave a public lecture in which I said so, politely, although possibly with a sense of superiority. This was reinforced during question time when a member of the audience spoke against references to foreign law on the grounds that decisions of the courts of other states were too difficult to read. Nevertheless, it was necessary to try to explain the apparent difference in approach between our two countries, which are similar in so many other respects. Then and now I took the view that, such as they are, they lie deep in our approach to law, in consequence of a range of historical, cultural and political factors.¹¹ There are competing hypotheses that might explain the Australian approach, however, to which I will return. One is that Australian practice is merely a

⁷ *Roper v Simmons* 543 US 551 (2005).

⁸ *Printz v United States* 521 US 898 (1997) (federalism); *Lawrence v Texas* 539 US 558 (2003) (due process); see also *Atkins v Virginia* 536 US 304 (2002) (8th Amendment).

⁹ Including Reaffirmation of American Independence Resolutions, H.Res 568, 108th Congress (2004); H Res 97, 109th Congress (2005), S Res 92 109th Congress (2005).

¹⁰ For details, see Cheryl Saunders, 'Comparative Constitutional Law in the Courts: Is there a problem?' in Jane Holder and Colm O'Conneide (eds), *Current Legal Problems*, vol 59 (Oxford: Oxford University Press, 2006), 91-2.

¹¹ In this respect I am in broad agreement with Patrick Glenn, 'Persuasive Authority' (1987) 32 *McGill Law Journal* 261.

continuing legacy of colonialism. Another is that it is explicable in terms of originalism, which for this purpose might work in several different ways.

As so often is the case, the debate in the United States sparked judicial and academic interest elsewhere in the world. There is now a considerable literature canvassing world experience on the point and more is on the way.¹² As the story has unfolded, it has become apparent that the approach taken by courts with a constitutional jurisdiction to the citation of foreign judgments is itself a subject for comparative study. As a generalisation, explicit engagement with foreign law in judicial reasoning is typical of common law states and relatively rare in civil law states for a complex range of reasons that include differences in legal and state theory, the role of courts, the format of judgements and judicial procedure.¹³

But the generalisation needs qualification on both sides. In common law legal systems both the United States and Singapore have been outriders, although there is room for doubt about whether the US is a true exception¹⁴ and Singapore seems now to have come back into the fold, as its 'four walls' doctrine weakened.¹⁵

In civil law states, practice is even more mixed. New Constitutional Courts in the civil law tradition may be less inhibited about citing other jurisdictions in their reasons.¹⁶ In the course of the debate that has taken place over the last few years, justices of several prominent long-established constitutional courts, including the Constitutional Court of Germany, have described how foreign experience may in fact be taken into account during the internal deliberative process or by a judge rapporteur, without explicit reference to it in published reasons.¹⁷ There have been isolated express references to foreign law in constitutional court decisions in many civil law states. And, anecdotally, the rate of express citation may be increasing across the civilian legal family as the reasons of

¹² Some of this is identified in Cheryl Saunders, 'Judicial Engagement with Comparative Law' in Tom Ginsburg and Rosalind Dixon (eds) *Comparative Constitutional Law* (Cheltenham: Edward Elgar Publishing, 2011) 571.

¹³ There is a more extended analysis in Saunders, 'Judicial Engagement with Comparative Law' op.cit.

¹⁴ Despite the current controversy, the practice has been long established: Steven G. Calabresi and Stephanie Dotson Zimdahl, 'The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Death Penalty Decision' (2005) 47 *William and Mary Law Review* 743. For an argument that the controversy is in fact a by-product of a wider political debate: Mark Tushnet, 'Referring to Foreign Law in Constitutional Interpretation: An Episode in the Culture Wars' (2006) 35 *University of Baltimore Law Review* 299.

¹⁵ On the four walls doctrine, see *Chan Hiang Leng Colin v Public Prosecutor* [1994] 3 SLR 662, 681. On Singaporean practice generally, however, see Victor V. Ramraj, 'Comparative Constitutional Law in Singapore' (2002) 6 *Singapore Journal of International and Comparative Law* 302.

¹⁶ Szente, for example, has calculated that 10.48% of decisions of the Constitutional Court of Hungary cited foreign law between 1999 and 2008: Zoltan Szente, 'The Impact of Foreign Precedents on the Jurisprudence of the Hungarian Constitutional Court', a preliminary report to the IACL research group (copy on file).

¹⁷ In relation to Germany, see Brun-Otto Bryde, 'The Constitutional Judge and the International Constitutionalist Dialogue' in Basil Markesinis and Jörg Fedtke (eds), *Judicial Recourse to Foreign Law* (New York: Routledge-Cavendish, 2006) 295.

constitutional courts become more discursive, in growing acceptance of the educative and expressivist function of constitutional adjudication, which has long been familiar in common law states.

The backdrop against which all this is happening is changing, with implications for the range of jurisdictions that may be cited and for the challenges that the practice presents. Since 1989, the number of constitutional states has increased and almost all accept constitutional review in some form. Thanks to technology, the constitutional reasons of the courts of many states are readily and almost instantly available. Language is becoming less of a barrier, at least for us, as leading non-English speaking jurisdictions translate their reasons into English, in significant cases. There is thus a wider range of constitutional experience to choose from; and it is easier to browse. These developments offer access to important new insights but also enhance the risk of misunderstanding. In at least two states of which I am aware, South Africa and Israel, the relevant apex court engages foreign clerks from leading jurisdictions, who are able to assist with questions that arise about the jurisprudence with which they are familiar.

The High Court of Australia is in the mainstream of common law courts in its willingness to consider the reasons of courts of other states in resolving constitutional questions. The practice began with the first High Court, as it struggled with the meaning and application of the new Constitution.¹⁸ There is a sense in which the *Engineers* case¹⁹ can be understood as dealing with the competing influences of the foreign legal perspectives of the United States Supreme Court and the Privy Council on questions that did not necessarily fall within the remit of the latter under section 74. References to foreign law for the purposes of determining ‘true principle or doctrine’ were consistent with Dixonian legalism, as Sir Owen himself made clear in his lecture on ‘Concerning Judicial Method’. He informed what no doubt was an appreciative American audience that ‘the United States Supreme Court reports are much in our hands’.²⁰ Sir Owen practised what he preached, as his use of United States authorities in many of the critical cases decided during his lengthy term on the High Court shows. The *Melbourne Corporation* case is amongst them.²¹

¹⁸ In *D’Emden v Pedder* Griffiths CJ, for the Court, referred to decisions of the Supreme Court of the United States as a ‘most welcome aid and assistance’: (1904) 1 CLR 91, 112. He referred also to Canadian decisions: at 117.

¹⁹ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

²⁰ Owen Dixon, ‘Concerning Judicial Method’ in the compilation by Judge Woinarski, *Jesting Pilate* (Melbourne: Law Book Co., 1965) 152, 155-6.

²¹ *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 81-83. There is no shortage of other examples, however.

Australia already was effectively independent when ‘Concerning Judicial Method’ was delivered and the fragmentation of the common law into distinct, if similar, national legal systems was already underway. In any event, however, as we know, the practice continued even after formal ties to the Privy Council finally were severed and the Australia Acts were passed. In a recent quantitative study of constitutional decisions of the High Court from 2000-2008, Adrienne Stone and I found references to foreign authority in almost half of the cases, with citations more or less evenly spread between majority and minority judgements.²² Of course, these figures do not tell us whether the foreign authority was accepted or rejected. Relevantly for present purposes, they also show a substantial although not steady decline in the citation of foreign authority over this nine year period. Earlier studies have shown that the incidents of citation of foreign law have fluctuated over time with the nature of the issues that come before the Court²³ and this may also be the explanation here. Other factors may also be at work, however, including the impact of the debate on use of foreign law in the United States. Even so, there were 93 citations of foreign authority in constitutional cases in the final year, 2008. And the limited qualitative work that we have done on this data so far shows strong evidence for the proposition that, whether foreign experience is accepted or rejected, reference to it is a normal aspect of constitutional adjudication in the High Court of Australia. This was recently confirmed, although in less sweeping terms, by Chief Justice French in *Momcilovic*. In considering the relevance of section 32(2) of the Victorian Charter, which authorises reference to the case law of foreign and international courts, he observed that ‘The use of comparative materials in judicial decision-making in Australia is not novel’.²⁴ South African Justices have similarly disavowed the need for express authorisation to consider foreign legal experience, inhibiting any implication to the contrary that might be drawn from section 39 of the South African Constitution, on which the Charter provision is based.²⁵

I will make three final points about the existence of this practice before examining more closely how foreign experience is used. First, it is often claimed in relation to other jurisdictions that citation of foreign law is more likely in cases dealing with constitutional rights and less likely – perhaps even too

²² Cheryl Saunders and Adrienne Stone, ‘The Citation of Foreign Law in Constitutional Judgements of the High Court of Australia’, forthcoming 2012. The study treats any case as ‘constitutional’ if a section of the *Constitution* is cited; admittedly a broad approach that makes it inevitable that some of the citations of foreign law are made in the context of non-constitutional points.

²³ Brian Opeskin, ‘Australian Constitutional Law in a Global Era’ in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (Annandale: The Federation Press, 2003) 171. Opeskin’s analysis suggested that references to foreign law decreased as Australia’s own constitutional jurisprudence became more settled and rose again from the 1980s as new types of questions came before the courts.

²⁴ *Momcilovic v The Queen* [2011] HCA 34, [18].

²⁵ Laurie W.H. Ackermann, ‘Constitutional Comparativism in South Africa: A Response to Sir Basil Markesinis and Jörg Fedtke’ (2005) 80 *Tulane Law Review* 169, 175,

hard – in constitutional cases of other kinds.²⁶ This is not the Australian experience; and if it was, there would be little, if any, reference to foreign case law at all. From the outset the High Court of Australia has referred to decisions of courts of other states in resolving a range of institutional questions affecting federalism, the separation of powers and, more recently, representative democracy. Foreign experience also has been useful in resolving a host of ancillary questions including, for example, problems about standing²⁷ and the effect of unconstitutional taxes.²⁸

Secondly, it is clear that the practice is more than a survival of colonialism, although Australia's settlement as a common law state undoubtedly is part of the story. The High Court was bound by decisions of the Privy Council until 1978 and it treated itself as effectively bound by the House of Lords until 1963. But the Privy Council had a relatively limited jurisdiction in constitutional matters and received no encouragement to expand its influence. As we have seen, the High Court drew freely on both United States and Canadian authority in developing its own constitutional jurisprudence. And the practice continued, consciously, after the authority of the Privy Council ended. Thus, following the passage of the Australia Acts, in *Cook v Cook*, a majority of the Court observed that: 'The history of this country and of the common law makes it inevitable and desirable that the courts of this country will continue to obtain assistance and guidance from the learning and reasoning of United Kingdom courts just as Australian courts benefit from the learning and reasoning of other great common law courts. ... [But] the precedents of other legal systems are not binding and are useful only to the degree of the persuasiveness of their reasoning.'²⁹

Finally, the practice is more than a prop to originalism, in the sense of authorising reference only to decisions of foreign courts made before the Constitution came into effect, which might have contributed to the original understanding of it.³⁰ This explanation of the practice was available in the early years of federation, as the High Court drew on 19th century United States decisions to resolve shared federalism problems. Occasional observations in more recent cases could also be understood as taking this position, although, equally, they may be a by-product of combining consideration of international and comparative law.³¹ In any event, however, in the face of actual practice, it is clear that references to foreign law are not so confined. Even as early as 1904, the High

²⁶ Vicki C. Jackson, 'Narratives of Federalism: Of Continuities and Comparative Constitutional Experience' (2001) 51 *Duke Law Journal* 223, 272-9.

²⁷ *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, [47].

²⁸ *Mutual Pools and Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155, 202-4.

²⁹ *Cook v Cook* (1986) 162 CLR 376, 390, Mason, Wilson, Deane and Dawson JJ.

³⁰ On the limitations of originalism more generally as a constraint on constitutional comparativism, see Adrienne Stone, 'Comparativism in Constitutional Interpretation' [2009] *New Zealand Law Review* 45, 52-4.

³¹ For example, *Forge v Australian Securities & Investments Commission* (2006) 228 CLR 45, [250], Heydon J; *Roach v Electoral Commissioner* (2007) 233 CLR 162, [181], Heydon J. Both are examined from the standpoint of comparativism in Stone, *op.cit.*, 51-2.

Court understood itself as having the authority to refer to foreign law more broadly.³² And as time went on, more recent decisions of the United States and other courts were cited freely, with benefit and without objection.

An originalist argument of another kind might claim, following Mark Tushnet,³³ that the cosmopolitan origins of the Australian Constitution, as evidenced in *Quick and Garran*³⁴ and by other historical sources, implicitly licensed the High Court to continue to draw on the intellectual resources of other countries in interpreting and applying its provisions. But even if this argument is theoretically available, it seems to me to be a specious basis on which to justify a practice that has been used without concern over a period of more than 100 years to meet the demands of constitutional adjudication and which other common law states share. I therefore assume both that the practice is established and that it is here to stay and turn instead to the manner of use.

Manner of Use

Earlier in this lecture, I said that I thought that how engagement occurs is a more interesting question than whether it does or should do so. Others may disagree and, in any event, the two issues can become intertwined. On any view, however, the manner of engagement is an important dimension of the practice, on which the long history of the High Court of Australia may shed some light. The multitude of ways in which foreign legal experience contributes to judicial reasoning notoriously complicates analysis, however. In what follows, I try to break it down by reference to some standard methodological problems: the weight accorded to foreign decisions; the selection of comparators; purpose; and the relevance of difference.

At one level, the question of weight is easily dealt with. Foreign case law never is binding and at best is persuasive. The fact that it 'attracts adherence as opposed to obliging it', to quote Patrick Glenn,³⁵ not only eases the problem of legitimacy but helps to explain its appeal in the first place. There was an odd exception in the experience of 19th century Argentina, where decisions of the Supreme Court of the United States apparently were regarded as binding for a time.³⁶ This has never been an issue

³² In *D'Emden v Pedder* Griffiths CJ referred to the 'inference to be drawn from the fact' that the framers 'had deliberately adopted ... a form of words which has already received authoritative interpretation' as merely 'another consideration which gives additional weight to the authority of the United States decisions with regard to matters in which the two Constitutions are similar': (1904) 1 CLR 91, 112-3.

³³ Mark Tushnet, 'The Possibilities of Comparative Constitutional Law', (1999) 108 *Yale Law Journal*, 1225.

³⁴ John Quick and Robert R. Garran, *Annotated Constitution of the Australian Commonwealth* (Sydney: Legal Books, reprint 1976, first published 1901).

³⁵ Glenn, *op.cit.*, 263.

³⁶ Carlos F. Rosenkrantz, 'Against Borrowings and Other Nonauthoritative Uses of Foreign Law', (2003) 1 *International Journal of Constitutional Law* 269, 273-6.

in Australia, where the obvious point made by the first High Court that it was ‘not, of course, bound’ by decisions of foreign courts has never been doubted.³⁷

Two less obvious points, however, can also be made in this connection. One is that, over time, an earlier tendency by the High Court to accord extra weight to decisions of particular courts has dropped away. Thus, while it may have been understandable for Griffiths CJ to claim in 1904 that it would take ‘some courage’ to decline to accept for Australia a long-standing interpretation by the Supreme Court of similar provisions in the Constitution of the United States,³⁸ it would never happen now. Similarly, the observation by Gibbs J in *Viro* that the High Court would continue to recognise the ‘peculiarly high persuasive value’ of decisions of the House of Lords is a thing of the distant past.³⁹

An issue of a different kind concerns the relationship between domestic and foreign law. The superior authority of the former is unchallenged. But several jurisdictions now have taken steps to try to clarify, through practice directions, the circumstances in which citation of foreign law is useful. Thus a 2001 practice direction for England and Wales refers to cases decided in other jurisdictions as ‘a valuable source of law’, which nevertheless should not be cited ‘without proper consideration of whether it does indeed add to the existing body of law’.⁴⁰ Another, in Singapore, requires counsel citing foreign authority to ensure that it ‘will be of assistance to the development of local jurisprudence’.⁴¹ This development almost certainly is a reaction to the volume of foreign law rather than the practice of citation, which, indeed, it tends to endorse.⁴² Relevantly for present purposes, it also has been criticised, with some justification, on the grounds that it paints ‘an unsophisticated picture of legal argument’.⁴³ Possibly for that reason, at least in England and Wales, it seems to have had little impact at all. It does not seem a useful model to follow.

A second common methodological question concerns the choice of jurisdictions from which insight is typically drawn. This is an occasional source of angst in debate over the use of foreign law. It was encapsulated in colourful language by Chief Justice Roberts in his confirmation hearings as ‘looking

³⁷ *D’Emden v Pedder* (1904) 1 CLR 91, 112.

³⁸ *D’Emden v Pedder* (1904) 1 CLR 91, 112.

³⁹ *Viro v The Queen* (1978) 141 CLR 88, 121, quoting *Skelton v Collins* (1966) 115 CLR 94, 104.

⁴⁰ Supreme Court of the United Kingdom. *Practice Direction (Citation of Authorities)* [2001] 1 WLR 1001, [9.1].

⁴¹ Supreme Court Singapore, *Supreme Court Practice Directions* (2010), [63].

⁴² The question of the volume of law and the cost of accessing it has been raised in this context by others including Sir Anthony Mason, ‘The Role of Counsel and Appellate Advocacy’ (1984) 58 *Australian Law Journal* 537, 539, quoted by the Hon Justice John Basten, ‘International Influence on Domestic Law: Neither Jingoistic Exceptionalism Nor Blind Servility’, in Justin T. Gleeson and Ruth C.A. Higgins (eds), *Constituting Law* (Annandale: The Federation Press, 2011) 202, 205.

⁴³ Roderick Munday, ‘Over-Citation: Stemming the Tide’ (2002) 166 *Justice of the Peace* 6, 8.

out over a crowd and picking out your friends'.⁴⁴ In fact, however, at least in relation to Australia, the difficulty seems to me to be overstated. The choice of foreign comparators is driven in the first instance by submissions from the parties. They may well be willing to choose whatever jurisdiction supports their case, but in practice they are constrained by resources, knowledge, the dynamics of the adversary system and apprehension of reception of their submissions by the Court.⁴⁵ The final decision about relevance of course rests with individual Justices. There is no set of principles that guides selection, as I am aware. But the usual constraints apply: the need to publish a reasoned justification for decision, which is available for scrutiny and criticism, in a legal culture that is accustomed to the methods of Australian legalism.

This combination of factors appears to be effective. The range of jurisdictions on which the High Court typically draws in constitutional cases is remarkably safe and narrow. The Stone/Saunders study of the nine year period of constitutional adjudication from 2000, to which I referred earlier, identified the United Kingdom, the United States, Canada and New Zealand, in that order, as the jurisdictions to which reference most frequently is made.⁴⁶ The inclusion of the United Kingdom and New Zealand reflects the extent to which questions about the substance, process and principle of the common law also arise in constitutional cases. These are the jurisdictions with which both counsel and the Court are most familiar. Reference to these minimises the risk of misunderstanding foreign law or the context in which it applies. In addition, however, our data shows a string of other jurisdictions that were occasionally referred to by one or more Justices during this period, accounting for around 5% of total citations. In order, these include the European Court of Human Rights, South Africa, Ireland, Germany, India, the European Court of Justice, Hong Kong and Israel. There are no particular surprises here, either, and while the degree of difficulty with comparison may be greater, it is far from insuperable. Despite the possibilities presented by globalisation, I do not expect this pattern of citation to change dramatically in the foreseeable future although the pool of likely comparators might widen a little, where that can assist with issues before the Court.

A third and more challenging question is the role that foreign constitutional experience plays in judicial reasoning. The challenge arises from the fact that in many common law states, including Australia, foreign experience typically is used in a myriad ways. One that is relatively rare here, however, can be dealt with at the outset. The kinds of universalist claims that seem to have

⁴⁴ Senate Committee on the Judiciary, 109th Congress 200 (2005).

⁴⁵ Query whether counsel owe particular obligations to the Court in referring it to foreign law that mirror those that apply in the citation of domestic law.

⁴⁶ Saunders and Stone, *op.cit.* In percentage terms, UK courts accounted for 42.6% of total foreign law citations, US courts 38.61%, Canadian courts 11.10% and New Zealand courts 2.63%.

exacerbated controversy in the United States in, for example, *Roper v Simmons*,⁴⁷ tend not to be made in the course of Australian judicial reasoning partly, but perhaps not solely, because of the nature of the issues that come before the courts.⁴⁸ As a result, the High Court has been shielded from accusations that its use of foreign law involves no more than ‘counting noses’ with all the connotations of poor comparative method that that implies.⁴⁹

Some approaches to the categorisation of use are obvious. Logically, foreign experience may be accepted or rejected although in reality there are plenty of variations in between and some form of adaptation is common. Alternatively, in this as in other branches of comparative law foreign experience may be analysed either as offering a guide to action or in the more reflective way that Justice Kiefel has described as assisting ‘to elucidate what concepts and values truly shape our own laws’.⁵⁰ In yet another variant, I once tried to trace the steps in the judicial reasoning process at which foreign law has been or could be useful, beginning with reference to judicial resolution of an issue in another country to assist to frame the question before the court and ending with recourse to foreign law to confirm a conclusion.⁵¹ Even here, however, I was driven to acknowledge that the list was not exhaustive and did not capture the complexity of the ways in which foreign law is used.

In a recent contribution to the subject, Justice John Basten quoted a three way classification by Lord Reed. On this analysis, foreign law may be used as a source of authority, as empirical fact or as a source of ideas.⁵² And there again is the rub. It is impossible to eliminate a residual category in this exercise. In this context, moreover, the residual category that once was described by Emeritus Justice Laurie Ackermann of South Africa as ‘keeping the judicial mind open to new ideas’ is a particularly useful one.⁵³ Some usages of foreign law fall within the first two of Lord Reed’s categories but in Australia at least my impression is that many fall within the third.

For the purposes of the lecture this evening, I thought that it might be helpful to try to break this category down further – although again, not exhaustively – to demonstrate the way in which ideas drawn from the constitutional experiences of others contribute to reasoning in the High Court.

⁴⁷ *Roper v Simmons* 543 US 551, 578 (2005), referring to ‘the overwhelming weight of international opinion’.

⁴⁸ There are exceptions, however; see for example the reference by Gaudron J to ‘other great democratic societies’ in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 211.

⁴⁹ Ernest A. Young, ‘Foreign Law and the Denominator Problem’ (2005) 119 *Harvard Law Review* 148, 150-1.

⁵⁰ Susan Kiefel, ‘English, European and Australian Law: Convergence or Divergence’ (2005) 79 *Australian Law Journal* 220, 227.

⁵¹ Saunders ‘Comparative Constitutional Law in the Courts’, op.cit., 99-100.

⁵² Robert Reed, ‘Foreign Precedents and Judicial Reasoning: The American Debate and British Practice’ (2008) 124 *Law Quarterly Review* 253, 254, cited in Basten, op.cit., 204.

⁵³ Ackermann, op.cit., 183.

First, foreign law is often used in a way that promotes self-understanding or, in the words of Aharon Barak, 'greater self-knowledge'.⁵⁴ Many examples might be given. One that I often use is Justice Gummow's reasoned preference for the Canadian over the United States approach to electoral apportionment in *McGinty*. In *McGinty*, citing Justice Beverley McLachlin, he associated the Australian tradition more closely with the pragmatic, evolutionary development of Canadian democracy rather than with the more absolute revolutionary course taken by the United States, founded on 'rationalist ideals'.⁵⁵ It followed for him that, like Canada, Australia accepts that 'effective representation' does not depend on voter parity alone.⁵⁶ Here, comparison serves to cast light on the Australian condition as well as to support a conclusion on a critical point. Without it, the point could not otherwise have been made so effectively and might not have been made in this way at all. And it is thought-provoking, whether one agrees with the conclusion or not.⁵⁷

A second example of ideas at work: to resolve a constitutional question in Australia that is shared with others elsewhere. There is a contemporary example of this in Justice Kiefel's careful unpicking of the principle of proportionality in Germany and elsewhere to better understand its relationship to related Australian tests in order to resolve questions about their application and development.⁵⁸ But there are plenty of other illustrations, including the incidents of freedom of interstate trade and movement in a system of democratic, multi-level government;⁵⁹ the nature of the relationship between orders of government in a federation;⁶⁰ the implications for judicial independence of changes in the traditional conditions enjoyed by judges;⁶¹ and the scope of executive vis-a-vis legislative power.⁶² So common are these problems and a host of others that might be included in the list, that it would seem bizarre to tackle them in isolation from readily accessible experience elsewhere, whether ultimately it is applied or not.

A somewhat more rare but also currently topical example involves recourse to foreign experience to assist with legal questions presented by a transplant. In the early years of federation the High Court had considerable experience of the value of ideas in this context, given the derivative nature of the Australian Constitution. More recently, the decision on the meaning and constitutionality of the

⁵⁴ Aharon Barak, 'Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy' (2002) 116 *Harvard Law Review* 16, 110.

⁵⁵ *McGinty v Western Australia* (1996) 186 CLR 140, 265-8.

⁵⁶ *McGinty v Western Australia* (1996) 186 CLR 140, 287-8.

⁵⁷ Justice Gummow returned to this theme again in *Roach v Electoral Commissioner* (2007) 233 CLR 162, 198-199, Gummow, Kirby and Crennan JJ.

⁵⁸ *Rowe v Electoral Commissioner* (2010) 243 CLR 1, [431]-[466]. The analysis was recently put to use in *Momcilovic v The Queen* [2011] HCA 34, [548] ff.

⁵⁹ *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, [33] ff.

⁶⁰ *Austin v Commonwealth* (2003) 215 CLR 185, 212, 219, 268-9.

⁶¹ *Austin v Commonwealth* (2003) 215 CLR 185, 261-2.

⁶² *Williams v Commonwealth* [2012] HCA 23, [135], Gummow and Bell JJ.

Victorian Charter, in *Momcilovic*, offers another illustration. Inspiration for the Charter obviously came from elsewhere, although it had plenty of Victorian characteristics and necessarily operated within a controlled constitutional framework that had been underestimated in its original design. Nevertheless, many of the problems that confronted the High Court in *Momcilovic* had been the subject of extensive deliberation by the courts of Canada, South Africa, New Zealand and the United Kingdom, on instruments that had influenced the Victorian Charter. Despite differences in text, constitutional status and constitutional setting it would have been inappropriate, by Australian standards, for the Court not to have engaged with this body of reasoning in resolving the questions before it.

My final example is more mundane, but no less useful for that. Common law judges sometimes quote the reasons of another court partly because they make a relevant point well, although the reference may also serve to support the judge's decision in other ways. Many illustrations might be given: let me take two from *Al-Kateb*. One is a stirring quotation by Justice Gummow from the reasons of Scalia J in *Hamdi v Rumsfeld* about the nature of the 'very core of liberty' in the Anglo-Saxon tradition of separation of powers.⁶³ The other is a memorable observation by Judge Learned Hand, quoted by Justice Hayne, which denies that courts are entitled to give a society 'derring-do' if it 'chooses to flinch when its principles are put to the test'.⁶⁴ No doubt both judgements could have been written without these references, had the respective Justices made the same point in their own words. But much would have been lost, not only in the evocative character of the reasons but also in the sense that they give that in grappling with sometimes extraordinarily difficult questions, the Court is drawing on a longer and wider range of experience and ideas.

Let me close by touching on one final methodological problem: the relevance of difference. For present purposes difference might come in many forms: text, doctrine, legal context and the host of other social, political, historical and attitudinal factors that are sometimes compendiously described as culture. Identifying and making appropriate allowance for relevant difference is the challenge at the heart of comparative law, which tends to polarise comparative lawyers between the extremes of universalism on the one hand and particularism on the other.

There are questions about when and to what extent difference matters for judicial reasons that draw on foreign law. Clearly it is relatively unimportant for some of the uses I have canvassed tonight although relevant for others, at least at the level of text and legal context. On the other hand, the justificatory function of judicial reasoning suggests that judges should be able convincingly

⁶³ *Al-Kateb v Godwin* (2004) 219 CLR 562, 612, Gummow J.

⁶⁴ *Al-Kateb v Godwin* (2004) 219 CLR 562, 652, Hayne J.

to explain the relevance of any foreign experience to which they refer in resolving an Australian legal question.

Emeritus Justice Kate O'Regan, formerly of the Constitutional Court of South Africa, once described the methodological dilemma that faces courts in this connection well. She accepted that courts should avoid 'shallow comparativism' but added that to 'forbid any comparative review because of [perceived risks associated with comparative method] would be to deprive our legal system of the benefits of the learning and wisdom to be found in other jurisdictions'.⁶⁵

I used to worry about the first of these: when comparativism is 'shallow' and whether courts engage in it. This may be a cause for concern elsewhere in the world, but it is not a major issue in Australia. Our judges generally are alert to difference, not particularly universalist in their understanding of law and highly skilled in the fine arts of construing and distinguishing all kinds of legal authority.

My concern now therefore is the opposite: that we might shy away unnecessarily from reference to comparative experience and thus deprive ourselves of its benefit.⁶⁶ There are at least three reasons for some apprehension on this score. One is that the United States debate has put judges everywhere on high alert; as we have seen, this has had no effect in stemming the tide of citation of foreign authority around the world but it has raised consciousness about method to a height that it has not reached before. This may be a good thing; but it requires more careful consideration of the relevance of comparative method to the ways in which judges actually use foreign law. A second reason is that Australian public and constitutional law is diverging from its traditional comparators elsewhere in the world, in areas where previously we took similarity for granted, thus presenting new types of difference to be taken into account. And the third is that the High Court increasingly is asked to evaluate the relevance of foreign experience in the context of rights, which are relative newcomers to Australian constitutional litigation and which typically present themselves in the highly unusual guise of a by-product of constitutionally protected institutional design. This confronts the Court with the difficult task of deriving beneficial insight from shared values, while adequately taking the structural context into account.

These factors, however real, should not be exaggerated. The High Court has had practice in making allowance for difference for over 100 years, without jeopardising the benefits that it has derived from active engagement with foreign law. Australia has always had an entrenched Constitution when the United Kingdom and New Zealand have not. The United States has always had a Bill of Rights when we have not. We have always managed to make allowance for Canada's different

⁶⁵ *NK v Minister of Safety and Security* 2005 (6) SA 419 (CC), [35].

⁶⁶ See also Stone, *op.cit.*

federal structure and can surely also do so for the Constitutional Charter now. The answer to the conundrum of difference lies in understanding the multitude of purposes for which foreign law is used, the level of generality at which insights are drawn and the clarity with which the connection between foreign experience and a local constitutional problem is justified and explained.

Conclusion

Part of my purpose tonight has been to highlight an aspect of constitutional adjudication in the High Court of Australia that we tend to take for granted. I have tried to show that it is a characteristic feature of the Court's approach to resolving many, although by no means all, difficult questions and to explaining the reasons for its decisions. It has contributed to the quality of our jurisprudence and continues to do so.

As it happens, Australian experience also is instructive, at a time when the practice is attracting attention elsewhere. The Court's long engagement with foreign law has been consistent with the development of a distinctive jurisprudence and the maintenance of robust independence. It strikes a balance between universalism and particularism that Australians seem to appreciate and accept. The Court has handled the demands of comparativism in relation to institutional questions with ease, despite the apprehension that this has aroused elsewhere. With some shifts, its technique has survived the great transformations of the 20th century: from new to established Constitution, from colony to independence, from the unity of the common law to its fragmentation, from the declaratory theory of law to wherever we are now, and from constitutional preoccupation with prerogatives of government to the centrality of the interests of people. It remains to be seen how it will accommodate that other great change, the interpenetration of constitutional and international law.

The subjectivity born of familiarity with one's own system is a notorious risk in comparative law. Let me take the risk and say that it has never seemed to me that the High Court has much to worry about from greater scrutiny of its engagement with foreign experience in resolving difficult Australian constitutional problems. There may be more of a danger that the Court will overestimate the methodological challenge in the face of the perception of Australia as different. That would be a pity, in my view.

Thank you for the opportunity to speak to you tonight.