The Globalisation of Public Law
— A Quilting of Legalities

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The theme of this conference is the unity of public law. The theme of this session is cross jurisdictional dialogue. I will refer to it as inter-jurisdictional dialogue. Inter-jurisdictional dialogue, occasionally verging on the vaguely cross, is something the United Kingdom and Australia have engaged in over many years. Recently, some members of the Supreme Court of the United Kingdom described a decision of the High Court of Australia, relating to contractual penalties, as 'a radical departure from the previous understanding of the law'.[1] We were not really in a position to complain about the terminology. We have given as good as we got. In 1966, Justice Menzies of the High Court described the decision of the House of Lords in *Rookes v Barnard*[2] as 'a radical departure from what has been regarded as established law.'[3] And in 1980 the Chief Justice, Sir Garfield Barwick, described the decision in *Director of Public Prosecutions v Majewski*[4] as 'a radical departure from those principles of the common law evolved over a period of time, but particularly elucidated in the last fifty or so years'.[5]

Inter-jurisdictional dialogue encompasses that kind of exchange, the more positive use of decisions and writings from each other's courts and academies and the personal exchanges between judges, academics and practitioners at conferences like this. In assessing such dialogue it is necessary to acknowledge with harsh modesty that there are limits to the effects it can have on participating jurisdictions. Unity is a mirage, and harmonisation is elusive. Convergence as a possibility is a matter of degree. The metaphor of 'a quilt of legalities', in the title of these remarks, is appropriate.

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1 *Cavendish Square Holding BV v Makdessi* [2015] 3 WLR 1373, 1396 citing *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205.
2 [1964] AC 1129.
3 *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 145.
4 [1977] AC 443.
5 *R v O'Connor* (1980) 146 CLR 64, 86.

In the field of commercial law, convergence across jurisdictions, common law and civilian, is supported by economic imperatives. It serves efficiency by reducing transaction costs and, from a domestic perspective, may make the convergent jurisdictions more attractive to each other as destinations for investment or sources of collaboration. Convergence in public law at some levels may serve similar ends particularly in its application to national regulatory regimes which affect the conduct of business within and between jurisdictions. Such convergence may be linked to the emergence of a body of international public law affecting domestic jurisdictions which are parties to trade agreements and investment treaties. Under a number of such agreements, non-State actors can seek review of State action, legislative, judicial and executive, through the mechanism of investor/State dispute settlement. Common standards for regulatory regimes affecting trade and commerce within domestic jurisdictions may inform the answers to questions about fair and equitable treatment, non-discrimination and expropriation under investment treaties.

That being said, it is necessary to focus on the reality of legal diversity generally, and particularly in the area of public law given its intimate connection with domestic constitutional frameworks, statutory regimes and local legal cultures.

Australia and the United Kingdom, in many respects sharing similar legal cultures and methodologies and a common legal heritage, nevertheless differ in important areas of the common law, differences not directly explicable by reference to constitutional arrangements although they sometimes reflect a particular view of the extent to which the Court should go in changing the law.

In the field of public law, they have included differing approaches to statutory interpretation mandated by interpretive human rights statutes: the United Kingdom approach authorising a remedial interpretation[6] and the Australian approach reflecting a more constrained view of the judicial function, limited to a selection of available constructional choices.[7] There have been differences in the approach to unreasonableness and irrationality in judicial review of administrative decisions.[8] Proportionality reasoning in the way in which it has been used in rights adjudication in the United Kingdom has not loomed large in

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6 *Ghaidan v Godin-Mendoze* [2004] 2 AC 557.

7 *Momcilovic v The Queen* (2011) 245 CLR 1, 48-50 [47]-[51].

8 Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook Co, 5th ed, 2013) 361–2.

Australian public law. There is however in Australia a long-standing use of a general proportionality formula which has provided a basis for the limited application of a more structured proportionality reasoning in recent times.[9] Australian courts have not accepted that the concept of legitimate expectation can underpin substantive entitlements as distinct from informing the content of procedural fairness.[10] Indeed, there are those who would use a noun, converted to an adjective currently fashionable in Australian political discourse, and call the legitimate expectation in our public law a 'zombie principle'. Jurisdictional error looms large in our judicial review jurisprudence partly for reasons linked to the character of the entrenched jurisdiction of the High Court.[11]

As I remarked recently in a sequel to the penalties case, in which we and the United Kingdom courts differed, and channelling a Game of Thrones saying, the differences between the United Kingdom and ourselves do not herald the coming of a winter of mutual exceptionalism.[12] Legal exceptionalism and its grim accompaniment 'judicial isolation' are frequently deployed by the critic of the Antipodean direction to describe it as pointing away from a jurisprudential vector in the critic's frame of reference. Mutual exceptionalism is a useful term because it accommodates multiple frames of reference in which everybody can regard everybody else as headed in the wrong direction. I do not wish to highlight differences unduly. However, they point to the truth that the extent to which inter-jurisdictional dialogue, through use of comparative law materials and engagement between judges, academics and practitioners, can play a part in the development of common approaches in public law, will be constrained. It will be constrained within each jurisdiction by its constitutional arrangements, the presence or absence of Bills of Rights, the general legal system, and the political and legal cultures of the day.

Of course, an important benefit of inter-jurisdictional dialogue is that legal principles, modes of reasoning and solutions to particular classes of problem applicable in one country may inform the development of principles, modes of reasoning and solutions in another. However, the extent of the benefit may be limited by factors similar to those affecting the

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9 *McCloy v New South Wales* (2015) 89 ALJR 857; 325 ALR 15.

10 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 12-13 [34] Gleeson CJ, 35–36 [111], 38 [121] (Hayne J); *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 658 [65] (Gummow, Hayne, Crennan and Bell JJ).

11 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

12 *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 90 ALJR 835, 842 [10]; 333 ALR 569, 574 [10].

migration or transplantation of laws from one country to another. Change in the laws of any country can be a complex function of history, culture, economy, social conditions and the nature and distribution of public and private power within the society. The adoption by one jurisdiction of apparently similar laws or common law principles from another may be followed by significant differences in their interpretation and application.[13] That is the concern of the culturist scepticism reflected in Montesquieu's observation in the *Spirit of Laws*:

> Laws should be so appropriate to the people for whom they are made that it is very unlikely that the laws of one nation can suit another.[14]

Bearing that in mind in relation to the use of comparative law materials, it may be prudent and useful to apply a kind of common law methodology to encourage case-by-case convergence in solutions to particular legal problems. Such solutions may be more portable across jurisdictional boundaries than large principles. Over time there may be a build-up, in the common law way, of an underlying body of common modes of reasoning of general application and even substantive principles.

Let me offer one example from personal experience. On 17 April 2003, in an interregnum between the uprising of 2000 and the military coup of 2006, the Supreme Court of Fiji delivered judgment in a case entitled *Matalulu v Director of Public Prosecutions*.[15] The case was the by-product of a long-running dispute over an election for the office of a paramount chief. Two protagonists on one side of the dispute filed private criminal complaints against an opposing party alleging that in the course of judicial review proceedings arising out of the election, he had sworn a false affidavit. The Director of Public Prosecutions, exercising a constitutional power, took over the proceedings and filed a *nolle prosequi*. The Court of Appeal of Fiji dismissed an application for judicial review of the DPP's decision. The Supreme Court dismissed an appeal from the decision of the Court of Appeal. I was then a sessional member of the Supreme Court which decided that appeal

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13 Katharina Pistor, 'The Standardization of Law and Its Effect on Developing Economies' (2002) 50 *The American Journal of Comparative Law* 97, 99; Peter K Yu, 'Clusters and Links in Asian Intellectual Property Law' in Christoph Antons (ed), *Routledge Handbook of Asian Law* (Routledge, forthcoming).

14 Montesquieu, *The Spirit of Laws* (Cambridge University Press, 1989) 8–9.

15 [2003] 4 LRC 712.

along with Sir Kenneth Keith of the Court of Appeal of New Zealand, later appointed to the Supreme Court of New Zealand and then to the International Court of Justice, and John von Doussa, who was one of my colleagues on the Federal Court of Australia.

Counsel for the Director of Public Prosecutions, Gerard McCoy QC, referred us to cases concerning the reviewability of prosecutorial discretions from a large number of jurisdictions including New Zealand, Australia, the United Kingdom, Canada, North Ireland, the United States, Hong Kong, Samoa, Guyana, Barbados and the European Court of Human Rights. In the event, we set out a list of grounds upon which such a discretion could be reviewable.

I expected that the judgment would disappear into the recesses of Fijian legal history which has been punctuated by many more dramatic events than contested decisions by its DPP. It was something of a surprise therefore to see the decision referred to, extensively quoted and approved by Lord Bingham in three Privy Council appeals from Mauritius,[16] Trinidad and Tobago,[17] and Jamaica[18] in 2006 and 2007. It was cited and applied in the High Court of Justice in Northern Ireland in 2008[19] and in 2008 and 2014 in decisions of the House of Lords in *R (Cornerhouse Research) v Director of the Serious Fraud Office*[20] and *R (Lord Carlile) v Secretary of State for the Home Department*.[21] It was also cited and applied by the Hong Kong Court of First Instance in 2008[22] and by the High Court of New Zealand in 2015.[23] What brought about its portability? Perhaps it was the relatively narrow focus of the problem and its common features across different jurisdictions.

There is nothing novel about the use of comparative materials in judicial decision-making in Australia in public law and generally. Australian courts may, and do, in interpreting statutes refer to foreign domestic and international judgments which have logical or analogical relevance. In statutes which give effect to international conventions it is quite routine for Australian courts to have regard to the decisions of courts of other jurisdictions in

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16 *Mohit v Director of Public Prosecutions of Mauritius* [2006] 1 WLR 3343.
17 *Sharma v Brown-Antoine* [2007] 1 WLR 780.
18 *Marshall v Director of Public Prosecutions* [2007] UKPC 4.
19 *Re Hamill* [2008] NIQB 73.
20 [2009] 1 AC 756.
21 [2015] AC 945.
22 *RV v Director of Immigration* [2008] 4 HKLRD 529.
23 *Osborne v Worksafe New Zealand* [2016] 2 NZLR 485.

which the conventions are applied, the writings of jurists and the opinions of authoritative international organisations.

In the public law field the constitutional and legal systems of the recipient jurisdiction will affect the extent to which inter-jurisdictional dialogue has a role to play in its decision-making. It is a point of difference between Australia on the one hand and the United Kingdom and New Zealand on the other that Australia has a written federal Constitution allocating enumerated legislative powers to the Commonwealth Parliament and providing for distinct legislative, executive and judicial branches of the Commonwealth Government. Much of the Constitution was based upon that of the United States, with responsible government imported from the United Kingdom. It provides the framework for Australian public law. Because the High Court exercises final appellate jurisdiction under s 73 of the Constitution, it is the final determiner of the common law of Australia[24] which informs administrative law and administrative justice at State and federal levels subject to particular and generally similar State and federal statutory regimes for judicial and administrative review.[25]

For most of the common law world the use of comparative law materials generally raises questions of a practical nature rather than questions of principle. They include relevance to the case at hand, the reputation of the source of the materials to be relied upon, and the extent to which merely ornamental resort to such materials can unduly affect costs and delay in litigation.

Lord Reed wrote, in an article in the *Law Quarterly Review* in 2008,[26] that foreign law and decisions of foreign courts can be a source of ideas and experience. Where new legal problems arise to which other systems have devised solutions, those solutions will enable the identification of options and possibly even an evaluation of their workability. I respectfully agree. The judge of the court considering foreign law materials can take them or leave them in the same way as he or she might take or leave academic writings. The selection of such

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24 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 563.

25 *Administrative Decisions (Judicial Review) Act 1977 (*Cth); *Administrative Decisions (Judicial Review) Act 1989* (ACT); *Judicial Review Act 1991* (Qld); *Judicial Review Act 2000* (Tas); cf *Administrative Law Act 1978* (Vic).

26 Robert Reed, 'Foreign Precedents and Judicial Reasoning: The American Debate and British Practice' (2008) 124 *Law Quarterly Review* 253.

materials does raise methodological questions not unlike those which fall for consideration under theories of the transplantation or migration of laws from one jurisdiction to another. It requires discriminating selection and the avoidance of acontextual readings.

The field of public law, perhaps more than other areas of the law, must be understood in each country in which the term is used, in its local context. If there be such a thing as public law lying across national boundaries, then it probably finds its place within Professor Boaventura de Sousa Santos' metaphor as a 'quilt of legalities'. It was a figure of speech he applied to legal pluralism in Brazil, reflected in the intersection of national law and locally generated rules.[27] The metaphor has been carried beyond national boundaries by others including Professor Thomas Poole who used it to describe the likely outcome of aspirations for the development of a 'common law of judicial review' grounded in human rights. His discussion appeared in an interesting essay, published in 2008, entitled 'Between the Devil and the Deep Blue Sea'.[28] Australia in that essay is described as 'the Devil' and the High Court as engaged in a self-referential and arcane Glass Bead Game. I will not hold that against Professor Poole because, as it happens, he said something with which I agree. He drew attention in his essay to the characteristic entanglement of administrative law, constitutional law and local conditions including the structure of politics and public administration and said:

> Normative heterogeneity within a shared but relatively loose judicial framework in part produced by transnational dialogues is a more plausible scenario than homogeneity of administrative law principle. If this is the case, then we should reject 'the common law of administrative law thesis', at least in its stronger formulations, and start thinking instead of the genesis of a 'quilt of legalities' in which functionally independent common law jurisdictions interact within a partly-shared language and normative framework.[29]

The point is illustrated sufficiently for present purposes by pointing to Australian and British approaches to statutory interpretation, which I have already mentioned, the use of

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[27] Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (Cambridge University Press, 2nd ed, 2002) 163. See also Gavin W Anderson, *Constitutional Rights after Globalization* (Hart Publishing, 2005) 54.

[28] Thomas Poole, 'Between the Devil and the Deep Blue Sea: Administrative Law in an Age of Rights' in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart Publishing, 2008) 15, 22.

[29] Ibid (footnote omitted).

proportionality reasoning, the concept of reasonableness in judicial review and the place of the legitimate expectation. The differences to which I refer can be linked, in the Australian context, to its written Constitution and the absence of a general Bill of Rights. There is no national legislation along the lines of the *Human Rights Act 1998* (UK). There are a number of express guarantees under the Constitution.[30] There is no guarantee of freedom of speech, but as already pointed out, the High Court has implied a freedom of political communication. The implied freedom limits legislative power at Commonwealth and State levels and affects the common law particularly in relation to defamation.[31]

The structural and textual features of the Constitution have been interpreted as supporting a separation of the judicial power of the Commonwealth from the legislative and executive powers.[32] In addition, s 75(v) of the Constitution entrenches judicial review of official decisions of Commonwealth officers for jurisdictional error.[33]

Chapter III of the Constitution provides for federal judicial power to be exercised not only by the High Court and federal courts created by the Parliament, but also by State courts invested with federal jurisdiction.[34] Implications drawn from that scheme by the High Court have led to a number of propositions affecting State law, which are of fundamental importance to public law in Australia:

- State legislatures cannot abolish State Supreme Courts[35] nor impose upon them functions incompatible with their essential characteristics as courts nor subject them in their judicial decision-making to direction by the executive.[36]

- A State legislature cannot enact a law conferring upon a judge of a State court a non-judicial function which is substantially incompatible with the functions of the court of which the judge is a member.[37]

- State legislatures cannot immunise decision-makers under State law from **judicial** review by the Supreme Court of the State for jurisdictional error.[38]

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30 Constitution ss 51(xxiiiA), 51(xxxi), 80, 92, 116 and 117.

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

32 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

33 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

34 Constitution ss 71 and 77(iii).

35 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501.

36 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319.

37 *Wainohu v New South Wales* (2011) 243 CLR 181.

The last proposition entrenches for State Supreme Courts their traditional supervisory function with respect to official decision-making in a way loosely analogous to that in which s 75(v) of the Constitution entrenches the judicial review jurisdiction of the High Court.

The constitutional entrenchment of judicial review appears to be a point of distinction between Australia on the one hand and the United Kingdom and New Zealand on the other. It follows that, unlike the United Kingdom and New Zealand, there has been very little reference in Australia to the concept of common law constitutionalism insofar as it might embrace a residual ability on the part of the courts to resist attempts to abolish judicial review.[39]

The approach of Australian courts to judicial review of administrative action has been constrained in a way spelt out by Justice Brennan in *Attorney-General (NSW) v Quin* in a frequently quoted passage:

> The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power.[40]

In that context it is possible to understand how, absent a Bill of Rights in the Constitution or a national Charter of Rights, there has been little impetus for the development of proportionality reasoning as that term is understood in Europe and the United Kingdom and other jurisdictions.

Australia's closest approach to a general notion of proportionality traditionally has been reflected in the term 'reasonably appropriate and adapted' which has been around in our law for a very long time. It is a criterion which has been applied to purposive powers, including constitutional legislative powers authorising the making of laws to serve a specified purpose[41], incidental powers[42] which must serve the purposes of the substantive powers to

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38 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

39 R French, 'Common Law Constitutionalism' (Robin Cooke Lecture, Victoria University of Wellington, 27 November 2014) <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj27nov2014.pdf>.

40 (1990) 170 CLR 1, 35–6.

41 *Commonwealth v Tasmania* (The Tasmanian Dam Case) (1983) 158 CLR 1; *Richardson v Forestry Commission* (1988) 164 CLR 261.

42 *Davis v Commonwealth* (1988) 166 CLR 79; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

which they are incidental and powers exercised for a purpose authorised by the Constitution or a statute which may limit or restrict the enjoyment of a constitutional guarantee, immunity or freedom, including the implied freedom of political communication.[43] Thus, if a law was said to burden the implied freedom of political communication and to do so for a legitimate purpose, the question asked would be whether it was reasonably appropriate and adapted to advance that legitimate purpose.[44] That language was used to mark the limits of legislative power and the borderlands of judicial power. Recently a more structured approach to its application to a law said to burden the implied freedom of political communication was set out in the joint judgment of four Justices of the High Court in *McCloy v New South Wales*.[45] The structured approach referred to three considerations drawn from European and, in particular, German courts:

1. Suitability — whether the law had a rational connection to the purpose of the provision.

2. Necessity — whether there was an obvious and compelling alternative, reasonably practicable means of achieving the same purpose with a less restrictive effect on the freedom.

3. Adequacy in its balance — whether the extent of the restriction imposed by the impugned law was outweighed by the importance of the purpose it served.

The approach thus adopted is treated as a mode of analysis applicable to some cases in the general proportionality criterion, but not necessarily all.

Whether proportionality reasoning finds a place as an aspect of judicial review relating to the reasonableness and rationality of administrative decisions remains to be seen. Undoubtedly, inter-jurisdictional dialogue will feed into any such development.

Inter-jurisdictional dialogue is of great value generally and in the field of public law. Its practical effects are constrained by global legal pluralism. I return to the metaphor of a 'quilt of legalities'. It took me through a Google search to an international movement called

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43 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418.

44 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567.

45 (2015) 89 ALJR 857; 325 ALR 15.

'Modern Quilting' and an international organisation called 'The Modern Quilt Guild'[46] which has about 170 member bodies. With an eerie relevance to our present topic, it sets out the objectives of modern quilting which include that it be:

1. Functional rather than decorative;

2. Interactive rather than repetitious; and

3. Embracing simplicity and minimalism and most importantly focussing on finishing quilts on a home sewing machine.

[46] The Modern Quilt Guild, 'About Us' <http://themodernquiltguild.wordpress.com/about-2>.