

MONASH UNIVERSITY
FACULTY OF LAW
THE SEVENTH *FIAT JUSTICIA* LECTURE
AUSTRALIA'S GROWING DEBT TO THE EUROPEAN COURT OF
HUMAN RIGHTS*

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ABSTRACT

An interesting recent development in judicial reasoning in Australia has been the growing recourse by judges to decisions and reasons of the European Court of Human Rights. The author points to the use of a decision of that court by the High Court of Australia in the prisoners' voting rights case of 2007: Roach v AEC. He then examines the citation of reasons of the European Court of Human Rights in Australia from early days in the "free speech" cases up to the present time. The citations have ranged from cases on the right to a fair trial; migration law; family law; and a range of other topics. With the enactment of human rights statutes in Australia, this use by Australian courts of decisions of the European Court of Human Rights is bound to expand.

THE AUSTRALIAN DEBT

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The European Court of Human Rights has the primary responsibility for deciding the meaning and application of the *European Convention on Human Rights*. That *Convention* was adopted to confer rights upon individuals against the sovereign states parties¹. It grew out of the resolve of the European states in the Council of Europe, originally in the Western part of a then divided continent, to respond effectively to the post War revelations of the barbarous atrocities of the war, the Holocaust and the misuse of state power involving millions of individuals².

The birth pangs of the *European Convention* were not easy. At The Hague in May 1948 its proponents adopted a "message to Europeans" declaring a desire for "a Court of Justice with adequate sanctions for the implementation of this Charter"³. In the United Kingdom, the Attlee government showed, at most, a grudging support for the Convention. It sought to water down its provisions and to make the right of petition to the proposed Commission of Human Rights conditional and the jurisdiction of the proposed court optional⁴. Officials in the United Kingdom were sceptical, as English law long had been,

¹ A Lester and D Pannick, *Human Rights - Law and Practice* (2nd ed, 2004), LexisNexis, London ("Lester and Pannick"), 5 [1.13].

² *Ibid*, 4 [1.12], 5 [1.13].

³ *Ibid*, 6 [1.16] citing the *travaux préparatoires*.

⁴ *Ibid*, 6-7 [1.19].

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about statements of fundamental rights. When Lord Chancellor Jowitt consulted the senior judiciary about the Convention, they shared his hostility to the right of petition and to the jurisdiction of the European Court over British disputes⁵.

Nevertheless, the United Kingdom was the first State to ratify the Convention. Thus it did in March 1951. The Convention came into force on 23 September 1953. At first there was no acceptance of a right of individual petition or of the European Court's jurisdiction in individual cases. Nor was there any legislation to alter domestic law, still less to incorporate Convention rights into United Kingdom law⁶. Until the 1970s, the Convention was described as "a sleeping beauty"⁷, at least so far as the British constitutional and legal system was concerned. The first case in which the European Court found a breach of the Convention by the United Kingdom was *Golder v United Kingdom*⁸. The first case in which the Court held that a House of Lords decision had breached the Convention concerned an injunction which their Lordships upheld restraining the *Sunday Times* from publishing an article about the

⁵ *Ibid*, 7 [1.21].

⁶ *Ibid*, 7 [1.23].

⁷ *Ibid*, 9 [1.28].

⁸ (1975) 1 EHRR 524.

thalidomide tragedy on the basis that publication was prejudicial to the fair trial of pending civil proceedings⁹.

Gradually, the number of such cases rose. British lawyers and courts became accustomed to referring to them and to considering the Convention, where relevant, lest the case in hand be taken to the Commission, and later the Court, in Strasbourg. In his Hamlyn Lectures in 1974¹⁰, Lord Scarman called for incorporation of the Convention into the municipal law of the United Kingdom. His call, gradually attracted the support of leading lawyers and judges¹¹. Early attempts to achieve incorporation did not succeed. However, in a partial reflection of events that were later to occur in Australia, the Labour Government, elected in 1997, was committed to considering a Human Rights Bill. The measure attracted a measure of support from eminent Conservative back benchers. A formidable body of jurists on the cross-benches also lent their approval, including the Lord Chief Justice, Lord Bingham of Cornhill, Lord Scarman, Lord Wilberforce, Lord Ackner, Lord Cooke of Thorndon and (as a recent convert) Lord Donaldson of Lymington. However, the Bill was opposed by the Conservative leadership as well

⁹ *Sunday Times v United Kingdom* (1979) 2 EHRR 245. By a narrow majority, the Court favoured an interpretation consistent with the right of free expression.

¹⁰ L Scarman, *English Law - The New Dimension* (Hamlyn Lectures, Published 1976); cf M D Kirby, "Law Reform, Human Rights and Modern Governance: Australia's Debt to Lord Scarman" (2006) 80 ALJ 299 at 310-311.

¹¹ Lester and Pannick, 11-14 [1.34-1.40].

as by sections of the media¹². In November 1998, the *Human Rights Act* 1998 (UK) was enacted. Substantially, this incorporated the Convention into the law of the United Kingdom with effect from 2 October 2000.

Coinciding with these events, changes also occurred at Strasbourg in 1998 pursuant to Protocol No 11 to the Convention. This "effected a thorough-going reform of our system"¹³. The European Court of Human Rights is now a Court for forty-five states in a "continent of forty-one languages in which complaints can be brought to the Court"¹⁴. The number of applications to the Court now totals about 40,000 a year. At any time there are nearly 90,000 cases pending¹⁵.

New techniques and resources are being introduced to enhance the efficiency of the Court and the disposal of the backlog¹⁶. As with the

¹² *Ibid*, 14 [1.43].

¹³ Judge J-P Costa, President of the European Court of Human Rights, on the occasion of the opening of the judicial year 2007, 19 January 2007 in European Court of Human Rights, *Dialogue Between Judges* (Strasbourg, 2007), 103 at 104 ("Dialogue").

¹⁴ L Wildhaber, "The European Court of Human Rights: The Past, the Present, the Future" (2007) 20 *National Journal of Constitutional Law* 183 at 196.

¹⁵ Michael O'Boyle, "On Reforming the Operations of the European Court of Human Rights" [2008] EHRLR #1, 1.

¹⁶ *European Convention*, Protocol 14. A report by Lord Wolfe of Barnes on a management study of the court in 2005 recommended many organisational changes many of which have been implemented.

backlog of appeals and applications to the High Court of Australia, it seems clear that a simplified triage system will be necessary, whereby applications are dealt with on the papers¹⁷. The very nature of a jurisdiction established for the protection of basic human rights is that it often requires urgent attention to cases.

The European Court of Human Rights in Strasbourg is the world's largest and busiest human rights court with a jurisdiction extending over some 800 million people¹⁸. Unlike the European Court of Justice in Luxembourg, the Strasbourg court is more approachable to judges and lawyers of the common law tradition. Its reasons adopt a discursive style. They appear less dogmatic, more individual, less conclusory and more transparent. Dissenting opinions are inevitable in this field of jurisprudence. In this Court they exist and are relatively common.

By its reasons, the European Court of Human Rights pays attention to local law and thus engages in a "conversation" with the courts (especially final courts) of member states¹⁹. By its carefully

¹⁷ Australia, High Court Rules, Rule 41.10.5.

¹⁸ G Ress, "The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order" (2005) 40 *Texas International Law Journal* 359, at 363; M. E. Villiger, "The European Court of Human Rights" (2001) 91 *American Society of International Law Proceedings* 79, at 79.

¹⁹ J Rodríguez-Zapata Perez (Judge of the Spanish Constitutional Court), "The Dynamic Effect of the Case Law of the European Court of Human Rights and the Role of Constitutional Courts" in *Dialogue*, 45 at 57.

reasoned decisions over nearly half a century, the Court has "given shape and meaning to human rights ... in virtually every area" of the discipline²⁰. Australia is not a party to the *European Convention*. Nor is it subject to the jurisdiction of the European Court of Human Rights. Until recently²¹, no jurisdiction in Australia had adopted general provisions for the protection of fundamental human rights, though some relevant provisions exist in the federal Constitution²². The federal Attorney-General (Mr Robert McClelland) has reportedly announced that the new Australian Government intends to examine this issue in its first term²³.

The increasing number of references to the jurisprudence of the European Court in decisions of United Kingdom courts, especially since 2000 when the *Human Rights Act 1998* came into force, has inevitably been noticed by Australian courts. This is natural given the continuing significance for Australian law of analogies borrowed from Britain. The introduction in sub-national jurisdictions of Australian legislation for the general protection of human rights is likely to enhance still further the

²⁰ M. E. Villiger, "The European Court of Human Rights" (2001) 91 *American Society of International Law Proceedings* 79 at 80.

²¹ See now *Human Rights Act 2000* (ACT); *Charter of Human Rights and Responsibilities 2006* (Vic).

²² See esp Australian Constitution, ss 51(xxxi) (acquisition of property), 80 (jury trial), 92 (freedom of intercourse), 116 (religious tests) and 117 (non-discrimination).

²³ Reported *West Australian*, 21 December 2007, 1.

attention that is given to decisions of that Court. My purpose is to demonstrate the already substantial Australian debt to the reasoning of the European Court of Human Rights. I will illustrate the wide range of areas in which decisions of the Court have been cited in local judicial reasons. I will suggest that, in the present environment, this process is likely to continue and expand.

A RECENT ILLUSTRATION: PRISONERS' VOTING CASE

The most recent extended reference in the High Court of Australia to the reasoning of the European Court of Human Rights occurred in interesting, and hotly contested, circumstances.

In *Roach v Electoral Commissioner*²⁴, the High Court was concerned with an amendment to the *Commonwealth Electoral Act 1918* (Cth), enacted in 2006. The amendment had the effect of disenfranchising from voting in federal elections, electors who were serving sentences of imprisonment regardless of the duration of their sentences and whether for offences against federal, State or Territory law.

Previously, the disenfranchisement of prisoners in Australia had applied only to prisoners serving custodial sentences of three years or

²⁴ (2007) 81 ALJR 1820; 239 ALR 1.

longer. By majority, the High Court held that the 2006 amendments were invalid under the Constitution; that a substantial reason was required to disqualify an eligible elector from voting; and that the new provisions, in making no distinction between short and long term prisoners or relative culpability, was incompatible with the constitutional concept of universal suffrage as it had evolved in Australia. The amending provisions were thus struck down. In effect, the previous form of the legislation revived. It was held valid.

In each of the majority opinions in *Roach*, the judges of the High Court referred to the decision of the European Court in *Hirst v United Kingdom [No 2]*²⁵. There, the European Court of Human Rights, by majority, held that a blanket ban imposed on voting by *all* convicted prisoners in the United Kingdom, violated Article 3 of Protocol 1 to the European Convention²⁶. In his reasons in *Roach*, Chief Justice Gleeson explained how the majority in the European Court had concluded that the blanket ban "was arbitrary ... and lacked proportionality ... even allowing for the margin of appreciation to be extended to the legislature".

It was, of course, impossible to apply such jurisprudence "directly" to the meaning of the Australian Constitution. Yet, Chief Justice

²⁵ (2005) 42 EHRR 41 (the decision of the Grand Chamber of the European Court was delivered by a vote of twelve judges to seven. The reasons in *Hirst* were earlier referred to in *ABC v O'Neill* (2006) 227 CLR 27 at 112 [160].

²⁶ (2007) 81 ALJR 1820 at 1836 [16].

Gleeson pointed out: "Even so, aspects of the reasoning are instructive"²⁷. By analogy, the extension of prisoner disqualification, effected by the Australian Parliament in 2006, was seen as "abandoning any attempt to identify prisoners who have committed serious crime". It was thus viewed as "breaking the rational connection necessary to reconcile the disenfranchisement with the constitutional imperative of choice by the people"²⁸.

Hirst's case in the European Court of Human Rights was also referred to in the joint majority reasons of Justices Gummow and Crennan and myself. Those reasons likewise acknowledged the difference that existed in the legal questions respectively presented to the European Court of Human Rights and the High Court of Australia²⁹. But the joint reasons pointed to the way the decision of the European Court of Human Rights had impacted upon consideration of a like question in the Supreme Court of Canada, decided in accordance with the *Canadian Charter of Rights and Freedoms*³⁰. In justifying the acceptability of a disqualifications for prisoners serving three years of imprisonment or more, the joint reasons concluded that such provisions

²⁷ (2007) 81 ALJR 1820 at 1837 [17].

²⁸ (2007) 81 ALJR 1820 at 1839 [24].

²⁹ (2007) 81 ALJR 1820 at 1852 [101].

³⁰ (2007) 81 ALJR 1830 at 1852 [100]. The reference was to *Sauvé v Canada (Chief Electoral Officer)* [2002] 2 SCR 519 (SC Canada).

were not "necessarily inconsistent, incompatible or disproportionate in the relevant sense"³¹.

The dissenting judges in *Roach* (Justices Hayne and Heydon) rejected the relevance of the reasoning of the European Court in what, ultimately, was a question about the requirements of the Australian Constitution. Justice Hayne³² rejected the relevance in elucidating the demands of the Australian Constitution of any reference to "generally accepted international standards". Justice Heydon was even more emphatic on this point³³. He referred to the strong statements to like effect by Justice Michael McHugh in *Al-Kateb v Godwin*³⁴. Somewhat sharply, he stated that, in previous authority, twenty-one of the Justices of the High Court of Australia who had considered the matter had rejected the proposition that international law could affect or limit the meaning of the Australian Constitution. Only one Justice had decided otherwise³⁵. That other Justice was identified by Justice Heydon as myself.

³¹ (2007) 81 ALJR 1830 at 1852 [102].

³² (2007) 81 ALJR 1830 at 1862-1863 [163]-[167].

³³ (2007) 81 ALJR 1830 at 1864-1865.

³⁴ (2004) 219 CLR 562 at 589-593 [62]-[71].

³⁵ (2007) 31 ALJR 1830 at 1865 [181] referring to *Newcrest (WA) v The Commonwealth* (1997) 190 CLR 513 at 651-653; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 417-419 [166]-[167]; *Al-Kateb v Godwin* (2004) 219 CLR 562 at 622-623 [169]-[170].

The discursive form of reasoning followed by courts in Australia; the importance typically assigned to contextual developments deemed relevant; the process of judicial reasoning by analogy; and the habits of transparent revelation of intellectual stimuli, make it inevitable, even in constitutional cases, that Australian judges will draw upon international sources viewed as in some way relevant. Especially so where those sources are thoughtfully and persuasively reasoned as, typically, the decisions of the European Court of Human Rights are.

The recent use of the European Court's decision in *Hirst*, over the protests of the dissenters in the High Court of Australia, may therefore be significant. Especially so if, and when, Australian human rights legislation presents analogous questions for judicial decision. It seems inevitable³⁶ that busy Australian judges faced with a problem upon which the European Court has passed in elaborate reasons, will look to that court's reasons for the guidance that such reasons may sometimes afford in applying Australian law to the case in hand. Especially in identifying material considerations of legal principle and legal policy, such decisions may be (as *Hirst* proved) helpful although in no way binding or determinative for the Australian judges³⁷.

³⁶ The word used by Brennan J in analogous consideration of the impact of the *International Covenant on Civil and Political Rights* on Australian common law. See *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42.

³⁷ cf *William Smith v K D Scott (Electoral Registration Officer)* (2007) SC 345; [2007] CSIH 9 (Scottish Registration Appeal Court), applying *Hirst* to the electoral law of Scotland.

AN EARLY EXAMPLE: LAW OF ATTAINDER

One of the earliest significant references to the jurisprudence of the European Court occurred in the 1978 decision of the High Court of Australia in *Dugan v Mirror Newspapers Ltd*³⁸. At issue was whether Darcy Dugan, a prisoner serving a commuted death sentence, could sue the Sydney *Daily Mirror* for defamation. The *Daily Mirror* argued that Dugan had no civil right to sue in tort. It submitted that the ancient English law of attainder and “corruption of the blood” had been absorbed into Australian law when Great Britain acquired sovereignty over the Australian continent in 1788. This had stripped Darcy Dugan of his civil rights because of his status as a convicted capital felon.

In a majority decision, the High Court upheld this argument. It accepted that the law of attainder had been received from English law. It was therefore part of Australian law, at least until it was overridden by a law validly enacted by an Australian Parliament.

The lone dissenter in the High Court of Australia was Justice Lionel Murphy. In his reasons, Justice Murphy referred to international materials and opinions. He concluded that the civil death doctrine violated “universally accepted standards of human rights³⁹.” Specific

³⁸ (1978) 142 CLR 583.

³⁹ *Dugan* (1978) 142 CLR 583, per Murphy J at 607.

reference was made by him to the decision of the European Court of Human Rights in *Golder v United Kingdom*⁴⁰. That decision had concerned the interpretation of Article 6 of the *European Convention on Human Rights and Fundamental Freedoms* (“the *European Convention*”). Justice Murphy cited with approval the Strasbourg Court’s acknowledgement that:

“In civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts ... The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally ‘recognised’ fundamental principles of law: the same is true of the principle of international law which forbids the denial of justice. Article 6(1) must be read in the light of these principles.”⁴¹

After considering the “overwhelming weight of evidence against the doctrine” of attainder and corruption of the blood with removal of access to the courts to assert ordinary civil rights Justice Murphy ultimately concluded that it “does not accord with modern standards in Australia”. He found that attainder and corruption of the blood should not be recognised as part of the existing Australian common law.⁴² But his was a lone voice.

⁴⁰ (1975) E.H.R.R. 524 at 527.

⁴¹ *Ibid*, at 533.

⁴² *Dugan* (1978) 142 CLR 583, per Murphy J at 608.

Justice Murphy's reference in *Dugan v Mirror Newspapers Ltd* is characteristic of the way in which the High Court of Australia in more recent times has come to make use of the jurisprudence developed by the European Court. An examination of decisions referring to the jurisprudence of the European Court of Human Rights illustrates the progressive way that such materials have been cited by an increasing number of Australian judges to support attempts to develop and strengthen the protection of human rights and freedoms in Australia by reference to basic legal principles expounded in the decisions of the European Court.

Of course, such attempts have not always reflected the opinion of the majority of judges on the High Court of Australia. *Dugan v Mirror Newspapers Ltd* was an early example of this fact. Yet, gradually, the power of the exposition, and the persuasion of the reasoning, have encouraged Australian judges, and therefore Australian advocates, to look to Strasbourg and to invoke its holdings where they seem relevant.

A DEVELOPING PROTECTION FOR FREEDOM OF EXPRESSION

One of the most important human rights developments in Australian law over the past twenty years has been the recognition of a type of implied constitutional right to freedom of political communication. This implied "right" was initially explained as such, by the High Court, in

*Australian Capital Television Pty Ltd v Commonwealth*⁴³. In that case Chief Justice Mason acknowledged that, in modern systems of representative government, the fundamental importance of freedom of political communication had been recognised by overseas courts in various jurisdictions⁴⁴. He specifically referred, amongst other courts, to the European Court of Human Rights and to its pronouncements of the importance of the basic right of generally free political expression in cases such as *Handyside v United Kingdom*⁴⁵, *The Sunday Times Case*⁴⁶ and *Lingens v Austria*⁴⁷.

The influence of the *European Convention*, and of the European Court of Human Rights expounding it, on the development of the implied constitutional right to freedom of political communication in Australia is demonstrated in several of the leading Australian cases in this area⁴⁸. In Australia, the implied "right" has been held to derive textually as an

⁴³ (1992) 177 CLR 106.

⁴⁴ (1992) 177 CLR 106, per Mason CJ at 140.

⁴⁵ (1976) 1 E.H.R.R. 737, at 754.

⁴⁶ *The Sunday Times v United Kingdom* (1979) 2 E.H.R.R. 245.

⁴⁷ (1986) 8 E.H.R.R. 407, at 418.

⁴⁸ *Australian Capital Television Pty Ltd* (1992) 177 CLR 106, per Mason CJ at 140, Brennan J at 157-159; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, per Mason CJ at 29, Brennan J at 47; *Theophanous v Herald & Weekly Times* (1994) 182 CLR 104, per Mason CJ, Toohey and Gaudron JJ at 130; *Leask v Commonwealth* (1996) 187 CLR 579, per Brennan CJ at 593-595, Dawson J at 606, Toohey J at 615.

implication arising from sections 7 and 24 of the Australian Constitution. The requirement that parliamentary representatives be “directly chosen by the people”, as stated in the Australian Constitution, has been interpreted as carrying a necessary requirement that the constitutionally mandated choice by the electors must be an informed one. Accordingly, it should not be limited by impermissible restrictions on access to relevant political information. To emphasise the essential importance of free public discussion in sustaining a modern representative democracy, Justice Brennan, in *Nationwide News Pty Ltd v Wills*, referred to decisions of the European Court such as *The Observer and The Guardian v United Kingdom*⁴⁹. He said⁵⁰:

“... it would be a parody of democracy to confer on the people a power to choose their Parliament but to deny the freedom of public discussion from which the people derive their political judgments.”

In the High Court of Australia, it was accepted that this implied constitutional right to freedom of political communication was not an Australian equivalent to Article 10 of the *European Convention*. Article 10 expressly creates a general right to freedom of speech, as such. The

⁴⁹ (1991) 14 E.H.R.R. 153, at 178. In his reasons in *Lenah Game Meats* (2001) 208 CLR 199 at 305 [267] Callinan J contrasted the European Court's views and his own.

⁵⁰ (1992) 177 CLR 1.

European Court of Human Rights has taken a broad approach in interpreting that provision⁵¹.

This contrasts with the implied and more limited and particular, character of the guarantee upheld under Australian constitutional law. The interpretation of the latter is limited by the terms and structure of the Australian Constitution. Its operation has been confined to political communications necessary to ensure the efficacy of democratic parliamentary government. There are thus considerable differences between the scope of the protected rights to freedom of speech recognised in Europe and Australia.

In *Theophanous v The Herald & Weekly Times Ltd*, these differences led Justice Brennan in the High Court of Australia to suggest that the assistance to be gained from the 'Article 10 cases', in determining the scope and application of the Australian freedom of political communication, was extremely limited⁵². On the other hand, in the same case, Chief Justice Mason and Justices Toohey and Gaudron recognised that, whilst the Australian guarantee was not the precise equivalent of the *European Convention* broad guarantee provided under

⁵¹ As seen in decisions such as *Lingens* (1986) 8 E.H.R.R. 407 and *Oberschlick v Austria*, Series A, No. 204, 23 May 1991.

⁵² *Theophanous* (1994) 182 CLR 104, per Brennan J at 162-163.

either Article 10 or under the First Amendment of the United States Constitution⁵³:

“... that circumstance is not a reason for concluding that the United States and European approaches are irrelevant or inappropriate to our situation.”

PROPORTIONALITY IN AUSTRALIAN CONSTITUTIONAL LAW

The Australian “freedom of speech” cases have also been central to the development of the concept of proportionality and its application in Australian constitutional law. In this, the influence of the European Court of Human Rights is also directly evident.

The concept of proportionality has its origins in European, specifically German, constitutional law. This foundation was noted by Justice Gummow in the Federal Court of Australia, writing in *Minister for Resources v Dover Fisheries Pty Ltd*⁵⁴:

“The concept of ‘reasonable proportionality’ as a criterion for assessment of validity in constitutional and administrative law appears to have entered the stream of the common law from Europe and, in particular, from the jurisprudence of the

⁵³ *Theophanous* (1994) 182 CLR 104, per Mason CJ, Toohey and Gaudron JJ at 130. See also the application of the European Court's decision in *Golder v United Kingdom* (1975) 11 EHRR 524 at 535-536 in *APLA Ltd v Legal Services Commission (NSW)* (2005) 224 CLR 322 at 442 [353].

⁵⁴ (1993) 116 ALR 54, per Gummow J at 64.

Court of Justice of the European Communities and the European Court of Human Rights.”

The concept of proportionality essentially affords lawyers a formula for balancing competing principles and ensuring that measures adopted by governments are reasonably proportionate and harmonious to achieving the legitimate purpose for which such measures are introduced. The European Court has employed the concept appropriately in cases such as *Handyside*⁵⁵ and the *Sunday Times Case*⁵⁶. It has done so to determine whether breaches of the *European Convention* had been proved. To decide whether the restriction of a right guaranteed under the *European Convention* is valid, the European Court has considered whether the restriction is "proportionate" to a legitimate aim that is being pursued.

In Australia, the proportionality test was chiefly derived from the jurisprudence of the European Court of Justice and the European Court of Human Rights⁵⁷. The relationship between the Australian and European concepts of proportionality was expressly acknowledged by

⁵⁵ (1976) 1 E.H.R.R. 737.

⁵⁶ (1979) 2 E.H.R.R. 245.

⁵⁷ *Leask* (1996) 187 CLR 579, per Toohey J at 615; *Dover Fisheries* (1993) 116 ALR 54, per Gummow J at 64; Sir Anthony Mason, "Trends in Constitutional Interpretation" (1995) 18 *University of New South Wales Law Journal* 237, at 246; J. Kirk, "Constitutional Guarantees, Characterisation and the Concept of Proportionality" (1997) 21 *Melbourne University Law Review* 1, at 2; T. H. Jones, "Legal Protection for Fundamental Rights and Freedoms" (1994) 22 *Federal Law Review* 57, at 77.

the late Justice Selway, a greatly respected judge of the Federal Court of Australia⁵⁸:

“... [T]here are considerable differences between the test as applied in European law and the test applied in Australia, although the application of the proportionality test in Australia in respect of guarantees, immunities and limitations upon power does bear a striking similarity with the use of the test in European law.”

Justice Selway dated the first development of a "reasonable proportionality" test in Australia to cases in the 1930s. However, he noted that it was not until the 1980s that the notion of proportionality was explicitly discussed and its constitutional significance recognised.⁵⁹ He said that since that time⁶⁰:

"... in Australia the proportionality doctrine has taken root and, indeed, extended its reach into the heartland of federal constitutional law. "

Certainly, 'proportionality' is a concept more understandable and useful than the one conventionally used in Australian constitutional discourse: "appropriate and adapted" – a test so obscure that I try to

⁵⁸ (1996) 7 *Public Law Review* 212, at 212.

⁵⁹ B Selway, "The Rise and Rise of the Reasonable Proportionality Test in Public Law" (1996) 7 *Public Law Review* 212, at 213-214.

⁶⁰ *Dover Fisheries* (1993) 116 ALR 54, per Gummow J at 64.

avoid it⁶¹. The proportionality test has become part of the central test applied by the High Court for determining the validity of an alleged violation of an express or implied constitutional freedom or guarantee. The concept has been employed in this manner in cases considering, for example, the express guarantee of freedom of interstate trade under section 92 of the Australian Constitution⁶², the express prohibition on legislative discrimination against the residents of other States under section 117 of the Australian Constitution⁶³, and the implied constitutional protection of freedom of political communication just mentioned⁶⁴.

The use of the concept of proportionality in this way, being a test of legitimate restrictions upon guaranteed human rights, essentially mirrors the application of the proportionality concept by the European

⁶¹ *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 266-270 [247]-[261].

⁶² *Castlemaine Tooheys Ltd v State of South Australia* (1990) 169 CLR 436, per Mason CJ, Brennan, Deane, Dawson and Toohey JJ at 473; *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520.

⁶³ *Street v Queensland Bar Association* (1989) 168 CLR 461, per Brennan J at 510-512, per Gaudron J at 570-574.

⁶⁴ *Australian Capital Television Pty Ltd* (1997) 177 CLR 106, per Mason CJ at 142-144, Brennan at 157-160; *Theophanous* (1994) 182 CLR 104, per Brennan J at 150-152, Deane J at 178-179; *Cunliffe* (1994) 182 CLR 272, per Mason CJ at 300, Brennan J at 323-326, per Deane J at 339-340, Gaudron J at 387-388; *Leask* (1996) 187 CLR 579, per Brennan CJ at 593-595, Dawson J at 606, Toohey J at 614-616; *Mulholland v Australian Electoral Commission* (2005) 220 CLR 181 at 266-268 [247]-[268].

Court in cases such as *Handyside*⁶⁵ and the *Sunday Times Case*⁶⁶. This point was made by Chief Justice Brennan in *Leask v Commonwealth*⁶⁷.

The precise scope of the concept of proportionality in Australian constitutional law, particularly in terms of its use as a test of characterisation, has been the subject of considerable debate amongst Australian judges and lawyers⁶⁸. The use of proportionality as a test for the legitimacy of alleged violations of constitutional freedoms, immunities and guarantees – a use which mirrors the application of the concept by the European Court of Human Rights – is, however, now fairly well established. In developing the concept in this manner, the Australian courts have expressly drawn upon the jurisprudence of the European Court. This process is bound to continue in the coming years. As I have mentioned, the use of the concept of "proportionality" in constitutional decision-making, in place of the traditional but ungainly and opaque criterion ("appropriate and adapted") was evident in the High Court of

⁶⁵ (1976) 1 E.H.R.R. 737.

⁶⁶ (1979) 2 E.H.R.R. 245.

⁶⁷ (1996) 187 CLR 579, per Brennan CJ at 594.

⁶⁸ For an examination of the history and developments relating to this topic see eg Kirk, (1997) 21 *Melbourne University Law Review* 1; Selway, (1996) 7 *Public Law Review* 212; H. P. Lee, "Proportionality in Australian Adjudication", contained in G. Lindell (ed.) *Future Directions in Australian Constitutional Law* (1994), at 126-149.

Australia in *Roach v Electoral Commissioner*⁶⁹, as in many other decisions⁷⁰.

A related concept, derived from the European Court of Human Rights is that of the “margin of appreciation”. In cases such as *The Observer and The Guardian v United Kingdom*⁷¹, the European Court of Human Rights recognised that, when applying the proportionality test, it should allow a “margin of appreciation” to the lawmakers of a participating State in their decisions about the means that may be used to achieve a particular purpose that falls within a constitutional power but that also has the effect of inhibiting, to some degree, a constitutional guarantee or freedom. The “margin of appreciation” has been called a⁷²:

“foundational aspect of the jurisprudence of the Court of Human Rights.”

In cases such as *Leask*⁷³, *Cunliffe*⁷⁴ and *Australian Capital Television Pty Ltd*⁷⁵ Chief Justice Brennan drew directly from the

⁶⁹ (2007) 81 ALJR 1830 at 1852 [101].

⁷⁰ For example *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567, fn 272; *Mulholland v AEC* (2004) 220 CLR 181 at 266-270 [247]-[261].

⁷¹ *The Observer and the Guardian v United Kingdom* (1991) 14 E.H.R.R. 153, at 178.

⁷² Kirk, (1997) 21 *Melbourne University Law Review* 1, at 56.

⁷³ *Leask* (1996) 187 CLR 579, per Brennan CJ at 595

⁷⁴ (1994) 182 CLR 272, per Brennan J at 325.

European Court in suggesting that the concept of a parliamentary “margin of appreciation” was also applicable to Australia. Whilst this concept remains a “controversial importation” into Australian constitutional law⁷⁶, the influence of the European Court is obviously apparent in discussions about its application in Australia. The difficulties of the concept include that it is unclear in expression, somewhat vague in purpose and liable to allow departure from basic norms on grounds that are necessarily imprecise. On a continent as diverse as Europe, this may be an inescapable necessity. In a continental country with relatively few basic internal differences, such as Australia, the notion seems less attractive.

THE RIGHT TO A FAIR TRIAL

The European Court of Human Rights has also influenced developments in Australian criminal procedure, most notably in cases considering the content of the right to a fair trial. The Australian Constitution does not contain an expressly guaranteed right to a fair trial, in a form equivalent to the general guarantee provided by Article 6 of the *European Convention*. Indeed, the only express constitutional protection relating to trials (save for guarantees of judicial tenure in section 72(ii)) is afforded by section 80 of the Australian Constitution. This mandates a

⁷⁵ (1992) 177 CLR 106, per Brennan J at 159.

⁷⁶ *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at [204] of my own reasons.

right to trial by jury for all indictable federal offences. However, section 80 has been given a narrow interpretation by the High Court.⁷⁷ It has been repeatedly held that, if a criminal charge is not tried on indictment (a formal document initiating the trial process), s 80 of the Constitution has no application. Its guarantee of jury trial may then quite easily be by-passed.

There has been some judicial support for the concept of an implied constitutional right to a fair trial arising from the text, structure and purposes of Chapter III of the Australian Constitution dealing with the judicature and the vesting of the judicial power of the Commonwealth in the courts⁷⁸. The existence of a broad implied constitutional right to a fair trial, however, has not yet been accepted by a majority of the High Court of Australia⁷⁹. The content, scope and nature of any such implied right, contained in Chapter III of the Australian Constitution, remains a subject of considerable legal debate.

Despite the lack of an express constitutional guarantee of fair trial or due process, or an Australian equivalent to Article 6 of the *European*

⁷⁷ *R v Archdall and Roskrige; Ex parte Carrigan and Brown* (1928) 41 CLR 128; *Kingswell v The Queen* (1985) 159 CLR 264; *R v Cheng* (2000) 203 CLR 248.

⁷⁸ *Dietrich v The Queen* (1992) 177 CLR 292, per Deane J at 326, Gaudron J at 362;

⁷⁹ See, however, *Ebner v Official Trustee* (2001) 205 CLR 337 at 363 [82] per Gaudron J; 373 [116]-[117] of my own reasons.

Convention, the right of an accused person to have a fair trial according to law has been recognised as a fundamental element of Australian criminal law⁸⁰. The precise elements of such a right have never been exhaustively listed. In each case where an infraction is pleaded, it ultimately falls to the courts to develop, express and apply this concept. Justice Brennan once referred to this continual process of elaboration as being⁸¹:

“... the onward march to the unattainable end of perfect justice.”

However, at least the march is generally in a forward direction. In Australia, it is not a retreat.

There are obvious differences between Australian and European law in relation to the application of the right to a fair trial, particularly in terms of the context within which this guarantee must be considered. As a result, there are limits to the direct application within Australia of

⁸⁰ *Dietrich* (1992) 177 CLR 292, per Mason CJ and McHugh J at 299-300; *McKinney v The Queen* (1991) 171 CLR 468, at 478; *Jago v District Court (NSW)* (1989) 169 CLR 23, per Mason CJ at 29, Deane J at 56, Toohey J at 72, Gaudron J at 75; A. Mason, “Fair Trial” (1995) 19 *Criminal Law Journal* 7; K.P. Duggan, “Reform of the criminal law with fair trial as the guiding star” (1995) 19 *Criminal Law Journal* 258; J. J. Spigelman, “The truth can cost too much: The principle of a fair trial” (2004) 78 *Australian Law Journal* 29, at 30.

⁸¹ *Jago v District Court (NSW)* (1989) 168 CLR 23, per Brennan J at 54.

decisions of the European Court of Human Rights concerning Article 6 of the *European Convention*. Nevertheless, on many occasions, reference has been made by the High Court of Australia to the general approach of the European Court and to the development of specific elements of the right to (and elements of) a fair trial as explained by the Strasbourg Court. Recent decisions by the High Court such as *Mallard v The Queen*⁸², *Antoun v The Queen*⁸³; and *Strong v The Queen*⁸⁴ are cases in point.

One clear example of the influence of the European Court of Human Rights in this context may be seen in *Dietrich v The Queen*⁸⁵. That case concerned the extent of an indigent accused's entitlement to the provision of legal representation in a trial of a serious criminal offence. The High Court of Australia, by majority, allowed Mr Dietrich's appeal. It held that the right to a fair trial could be violated where an indigent person, accused of a serious crime, was not able to secure legal representation through no fault of his or her own.

⁸² (2005) 224 CLR 125 at 154-155 referring to *Edwards v United Kingdom* (1992) 15 EHRR 417 at *Fitt v United Kingdom* (2000) 30 EHRR 480.

⁸³ (2006) 80 ALJR 479 at 506 [40] on the right to trial before a manifestly impartial tribunal, referring to *Ferrantelli v Italy* (1996) 23 EHRR 266; *Incal v Turkey* (1998) 29 EHRR 221; *Stafford v United Kingdom* (2002) 35 EHRR 1121 at *Beaumartin v France* (1994) 19 EHRR 485.

⁸⁴ (2005) 224 CLR 1 at 33 [87] on limitations on preventive or additional detention, referring to *Winterwerp v Netherlands* (1979) 2 EHRR 387 and *Johnson v United Kingdom* (1997) 27 EHRR 296.

⁸⁵ (1992) 177 CLR 292.

A notable aspect of this decision was the High Court's willingness to consider international developments in this area. Thus, specific consideration was given in *Dietrich* to several decisions of the European Court of Human Rights. In their joint reasons in *Dietrich*, Chief Justice Mason and Justice McHugh expressly noted the approach of the European Court in cases such as *Monell and Morris v United Kingdom*⁸⁶ and *Granger v United Kingdom*⁸⁷. They stated that⁸⁸:

“... the European Court of Human Rights has approached the almost identical provision in the European Convention on Human Rights [Article 6(3)(c)] by emphasising the importance of the particular facts of the case to any interpretation of the phrase “when the interests of justice so require”. As will become clear, that approach is similar to the approach which, in our opinion, the Australian common law must now take.”

Many signs, therefore, point to Australian judges continuing to refer to decisions of the European Court to assist in the development of the concept of what is meant by a “fair trial” according to Australian common law notions expressed in contemporary Australian conditions. Those decisions help to render the elements of this fair trial right more precise. This continuing influence was expressly acknowledged by

⁸⁶ (1987) 10 E.H.R.R. 205, at 225.

⁸⁷ (1990) 12 E.H.R.R. 469, at [480]-[482].

⁸⁸ *Dietrich v The Queen* (1992) 177 CLR 292, per Mason CJ and McHugh J at 307.

Justice Duggan of the Supreme Court of South Australia in extra curial remarks. That experienced Australian judge said that⁸⁹:

“It is to be expected that the future content of a “fair trial” in Australia will be influenced at least to some extent by international conventions, the views of the European Court and the reactions to those views by the English courts.”

APPLYING INTERNATIONAL STANDARDS IN MIGRATION LAW

The approach taken by the European Court of Human Rights in protecting the fundamental rights of migrants, and particularly refugees, has also directly influenced the approach adopted in a number of Australian decisions in the context of migration law. This has most notably occurred in the context of considering the approach taken by the European Court to the *Refugees Convention and Protocol*; to which Australia is a signatory.

The policy of mandatory detention of alien arrivals in Australia where they have no entry visas, has been a controversial political issue, particularly in recent years. In considering legal issues relating to questions of detention, Australian courts have repeatedly referred to decisions of the European Court concerning Article 5(1) of the *European Convention*, being the right to liberty and security of the person. In

⁸⁹ K.P. Duggan, “Reform of the Criminal Law with Fair Trial as the Guiding Star” (1995) 19 *Criminal Law Journal* 258, at 271.

cases such as *Chahal v United Kingdom*⁹⁰ and *Amuur v France*⁹¹, the European Court of Human Rights has taken a broad approach to this guarantee. Article 5(1) has been held not only to require that no individual be deprived of their liberty unless this is done according to law but also that the law itself, and its application in the individual case, must not be arbitrary.

In *Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri*⁹² the Full Court of the Federal Court of Australia, including by the patron of the *Fiat Justitia* Lectures, Chief Justice Black, concluded, by analogy, that cases in the European Court of Human Rights about mandatory detention, such as *Chahal v United Kingdom*⁹³, provided support for the view that a similarly broad interpretation applied in relation to Article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR). This, in turn, was held to affect the interpretation of section 196 of the *Migration Act 1958* (Cth) relating to mandatory detention of aliens. The Full Court of the Federal Court concluded that the *Migration Act* should be read, as far as its language permitted, in conformity with Australia's international obligations under the ICCPR⁹⁴.

⁹⁰ (1996) 23 E.H.R.R. 413.

⁹¹ (1996) 22 E.H.R.R. 533.

⁹² (2003) 126 FCR 54; (2003) 197 ALR 241.

⁹³ (1997) 23 E.H.R.R. 413.

⁹⁴ Australia is a party to the *International Covenant on Civil and Political Rights*, having ratified the ICCPR on 13 August 1980. It is also a party to the First Optional Protocol, permitting individual

In relation to the specific issue of indefinite detention the conclusions reached in *Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri*⁹⁵ were effectively rejected by a majority of the High Court of Australia in the subsequent decisions in *Al-Kateb v Godwin*⁹⁶ and *Minister for Immigration and Multicultural Affairs v Al Khafaji*⁹⁷. In *Al-Kateb*, a 4:3 decision of the High Court, the legality of the indefinite detention of two unlawful non-citizen stateless persons under the *Migration Act 1958* (Cth), in circumstances where they were likely to be detained for the indefinite future, was upheld as within the Act and constitutionally valid. Three of the seven Justices (including myself) dissented. Nevertheless, the decision in *Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri*⁹⁸ still remains significant, as an illustration of an Australian court examining the decisions of an international human rights court and using such decisions to help reinforce human rights protection within Australia by interpreting Australian legislation in general conformity with the approach evident in such decisions.

communications to the Human Rights Committee for alleged breaches.

⁹⁵ (2003) 126 FCR 54; (2003) 197 ALR 241.

⁹⁶ (2004) 219 CLR 562. See also *Rehrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486 at 530 [127] referring to *Kurt v Turkey* (1998) 27 EHRR 373.

⁹⁷ (2004) 219 CLR 664.

⁹⁸ (2003) 126 FCR 54; (2003) 197 ALR 241.

Australian judges have also looked to the approach of the European Court of Human Rights when considering the obligation of a State to safeguard and protect applicants in the context of the *Refugees Convention* and *Protocol*. In cases such as *Minister for Immigration & Multicultural Affairs v Respondents S152/2003*⁹⁹, *Applicants M160/2003 v Minister for Immigration & Multicultural & Indigenous Affairs*¹⁰⁰ and *VRAW v Minister for Immigration & Multicultural & Indigenous Affairs*¹⁰¹ reference has been made to the standard applied by the European Court of Human Rights in *Osman v United Kingdom*¹⁰².

In *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs*¹⁰³, both Gummow J¹⁰⁴ and I¹⁰⁵ referred to the European Court's reasons in *König v Federal Republic of Germany*¹⁰⁶.

⁹⁹ (2004) 222 CLR 1 at 12 [27] per Gleeson CJ, Hayne and Heydon JJ at 495 and at 23 [61] per McHugh J.

¹⁰⁰ (2005) 219 ALR 140, per Finkelstein J at 151.

¹⁰¹ [2004] FCA 1133, per Finkelstein J at [18].

¹⁰² (1998) 29 E.H.R.R. 245.

¹⁰³ (2005) 228 CLR 470.

¹⁰⁴ (2005) 228 CLR 470 at 478-479 [20].

¹⁰⁵ (2005) 228 CLR 470 at 505 [115]. See also at 494-495 [80] referring to other decisions including *Silva Pontez v Portugal* (1994) 18 EHRR 156.

¹⁰⁶ (1978) 2 EHRR 170.

There are other recent cases of the same kind¹⁰⁷. Whilst the approach adopted in these cases has not suggested that the European Court's approach affords Australian courts with a definitive guide to what 'international standards' might be, they have been treated as identifying issues that are likely to be relevant to this area of common international law which Australian judges should consider.

THE IMPACT OF HUMAN RIGHTS LAW IN FAMILY LAW

The cases collectively referred to as the "*Re Kevin* decisions"¹⁰⁸ afford another example that illustrates the international character of human rights jurisprudence today and the positive contribution that has been made by the decisions of the European Court of Human Rights to such understandings in Australia.

The issue in the "*Re Kevin* decisions" was whether a marriage between a woman and a post-operative female to male transsexual person was valid under the statutory and constitutional provisions relating to "marriage" under Australian law. In granting a declaration of the validity of the marriage Justice Chisholm of the Family Court of

¹⁰⁷ See eg *Applicant NABD of 2002 v Minister for Immigration, Multicultural and Indigenous Affairs* (2005) 79 ALJR 1142 at 1162 [121]-[123] referring to *Kokkinas v Greece* (1993) 17 EHRR 397; *Murphy v Ireland* [2003] ECHR 352.

¹⁰⁸ *Attorney-General (Cth) v "Kevin and Jennifer"* (2003) 172 FLR 300; *Kevin v Attorney-General (Cth)* (2001) 165 FLR 404.

Australia, at first instance, conducted a comprehensive review of the legal position in other countries with respect to the recognition of a transsexual person's acquired gender and any subsequent marriage. This included a review of relevant decisions of the European Court of Human Rights. In relation to the decisions of the European Court of Human Rights, discussed in his decision, Justice Chisholm concluded¹⁰⁹:

“These decisions are not directly relevant to the present case. ... Nevertheless, the cases provide useful glimpses of developments and trends in thinking in Europe. There is a great deal of common ground among the various international human rights instruments. Overall, I think that these decisions indicate that failure to recognise the sex of post operative transsexuals raises serious issues of human rights, such that the question arises whether the failure can be permitted on the basis of the margin of appreciation allowed to States under the Convention. It is clear that a decision in favour of the applicants would be more in accord with international thinking on human rights than a refusal of the application.”

In affirming the decision of Justice Chisholm, on appeal, the Full Court of the Family Court of Australia also provided a detailed examination of relevant international case-law, referring extensively to the approach taken by the European Court of Human Rights on analogous questions. The Full Family Court stated that it agreed generally with the submission of the Australian Human Rights and Equal Opportunity Commission that Australian courts “should and do give

¹⁰⁹ *Kevin* (2001) 165 FLR 404 at 449-450.

weight to the views of specialist international courts and bodies such as ... the European Court of Human Rights.”¹¹⁰ Whilst it was acknowledged that the decisions of the European Court of Human Rights would not be determinative, because they are not binding as a matter of law on Australian courts, they were held to be “helpful” in considering the principal issues that were before the Court¹¹¹. There was no hesitation in examining them and giving them weight in reaching the local decision. This alone is an important advance in Australia on the position that obtained a decade earlier.

The Full Family Court recognised that differences between the legal fundamentals in Europe and Australia would necessarily limit the relevance of decisions of the European Court. In regard to this, that court stated¹¹²:

“We appreciate that these are decisions by a Court as to the interpretation of a Convention to which Australia is not a party and must be read with this in mind. Nevertheless, as Johnson J pointed out in *Bellinger*, it provides a startling confirmation of the degree of international isolation that this country would adopt if [the contrary position] is found to represent the law.”

¹¹⁰ (2003) 172 FLR 300, per Nicholson CJ, Ellis and Brown JJ at 349.

¹¹¹ (2003) 172 FLR 300 at 354.

¹¹² *Attorney-General v “Kevin and Jennifer”* (2003) 172 FLR 300, per Nicholson CJ, Ellis and Brown JJ at 353.

The Australian Government did not seek special leave to appeal to the High Court against the *Re Kevin* decision. In the end, the Government, which had strongly contested the transsexual's marriage right, accepted the Family Court's decision. Such cases also indicate the fact that the exchange of ideas and knowledge about legal developments between Australian courts and the European Court of Human Rights is not all in the one direction. The decision of Justice Chisholm in *Kevin v Attorney-General (Cth)*¹¹³ has been cited with approval by the Grand Chamber of the European Court in *I v United Kingdom*¹¹⁴ and *Christine Goodwin v United Kingdom*¹¹⁵. In these decisions, the European Court of Human Rights found that the legal status, and treatment, of transsexual persons in the United Kingdom had resulted in violations of articles 8, 12, 13 and 14 of the *European Convention*. The United Kingdom Parliament subsequently enacted the *Gender Recognition Act 2004* (UK) in response to these decisions. Ms Rachael Wallbank, who appeared as counsel in the “*Re Kevin*” decisions, has expressed the view that¹¹⁶:

“The legal nexus between the *Gender Recognition Act 2004* and the *Re Kevin* decisions really highlights the international

¹¹³ (2001) 165 FLR 404.

¹¹⁴ (2003) 36 E.H.R.R. 53.

¹¹⁵ (2002) 35 E.H.R.R. 18.

¹¹⁶ R. Wallbank, “*Re Kevin* in Perspective” (2004) 9 *Deakin Law Review* 461, at 480.

interdependence of reform efforts in respect of the human rights of people with transsexualism.”

FURTHER EXAMPLES OF THE INFLUENCE

There are many other examples of decisions by the European Court of Human Rights being cited in Australian decisions, and of the approach adopted by that Court in a particular area being considered by Australian judges with a view to informing themselves on the development of Australian law. Some examples of the range of references that have been made to decisions of the European Court of Human Rights by judges of the High Court of Australia in recent years include:

- In *Grollo v Palmer*¹¹⁷ the High Court noted that other countries had taken the same view about the desirability of judicial supervision of warrants to authorise the secret surveillance of suspects in criminal cases. The Court cited the decision of the European Court of Human Rights in *Klass v Federal Republic of Germany*¹¹⁸ as an illustration highlighting the human rights considerations that inform this view¹¹⁹.

¹¹⁷ (1995) 184 CLR 348.

¹¹⁸ (1978) 2 E.H.R.R. 214, at 235.

¹¹⁹ (1995) 184 CLR 348, per Brennan CJ, Deane, Dawson and Toohey JJ at 367-368.

- In *Applicant A v Minister for Immigration and Ethnic Affairs*¹²⁰, Justice McHugh accepted as correct the approach of Justice Zekia in the European Court of Human Rights in *Golder v United Kingdom*¹²¹ in interpreting Article 31 of the *Vienna Convention on the Law of Treaties*, stating that it is the approach that “should be followed in this country”.
- The relatively strict approach adopted by the European Court of Human Rights towards questions of apparent and actual judicial bias and the requirements of judicial impartiality and judicial independence has been referred to in decisions of the High Court such as *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka*¹²² and *Johnson v Johnson*¹²³. In those decisions, the approaches taken by the European Court of Human Rights have reinforced the principles recognised in Australian law.
- In *Applicant NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*¹²⁴, my dissenting reasons endorsed the approach of the European Court of Human Rights to the interpretation

¹²⁰ (1997) 190 CLR 225, per McHugh J at 253-254.

¹²¹ (1975) 1 E.H.R.R. 524.

¹²² (2001) 206 CLR 128 at 152 in my own reasons.

¹²³ (2000) 201 CLR 488, my own reasons at 501-502 [39].

¹²⁴ (2005) 79 ALJR 1142; (2005) 216 ALR 1, at [121]-[123] in my own reasons.

of Article 9 of the *European Convention* in decisions such as *Kokkinakis v Greece*¹²⁵ and *Metropolitan Church of Bessarabia v Moldova*¹²⁶. This was expressed in the context of considering the right to religious freedom in terms of the *Refugees Convention* and *Protocol* and its application in Australia.

- In *D'Orta-Ekenaike v Victoria Legal Aid*¹²⁷, a case concerned with whether advocates before Australian courts enjoyed immunity from suit for negligence, both the joint reasons of Chief Justice Gleeson and Justices Gummow, Hayne and Heydon¹²⁸, and my own to contrary effect¹²⁹ referred to the decision of the European Court of Human Rights in *Osman's Case*¹³⁰. Elsewhere I also made reference to other such decisions concerned with equality before, and accountability to, the law¹³¹. In *Baker v The Queen*¹³² and *Fardon v Attorney-General*¹³³, decisions concerned with post-sentence prolongation of

¹²⁵ (1993) 17 E.H.R.R. 397, at 418.

¹²⁶ (2002) 35 E.H.R.R. 13, at [118].

¹²⁷ (2005) 223 CLR 1.

¹²⁸ (2005) 223 CLR 1 at 26 [66].

¹²⁹ (2005) 223 CLR 1 at 98 [98], 105-106 [335].

¹³⁰ *Osman v United Kingdom* (1998) 29 EHRR 245.

¹³¹ (2005) 223 CLR 1 at 99 [317] referring to *Holy Monasteries v Greece* (1994) 20 EHRR 1; *Devlin v United Kingdom* (2001) 34 EHRR 1029; and *A v United Kingdom* (2002) 36 EHRR 917.

¹³² (2004) 223 CLR 513 at 551 [109].

¹³³ (2004) 223 CLR 575 at 645 [181].

incarceration for perceived *danger*, I made reference to decisions of the European Court¹³⁴. In *Forge v Australian Securities and Investments Commission*¹³⁵, an appeal concerned with the validity of the appointment of temporary State judges, I invoked several decisions of the European Court relevant to that issue¹³⁶, and in *Thomas v Mowbray*¹³⁷, proceedings concerned with the validity of federal counter-terrorism legislation, I returned to the authority of the European Court relevant to preventive orders¹³⁸. Although my references to that Court are more frequent than those of other Justices, the trend to citation by others has increased greatly in recent years.

Nor are judicial references of this kind confined to the High Court of Australia. Citations from the reasons of the European Court of Human Rights may also be found in many decisions of other Australian courts. Recent examples have included:

¹³⁴ Eg *Stafford v United Kingdom* (2002) 35 EHRR 32.

¹³⁵ (2006) 228 CLR 45 at 127-128 [209]-[211].

¹³⁶ Eg *Langborger v Sweden* (1989) 12 EHRR 416; *Finlay v United Kingdom* (1997) 34 EHRR 221.

¹³⁷ (2007) 81 ALJR 1414 at 1485 [334]; 237 ALR 194 at 286.

¹³⁸ *Hashman v United Kingdom* (2000) 30 EHRR 241 at [17].

- *R v Wei Tang*¹³⁹, in which the Court of Appeal of the Supreme Court of Victoria made reference to *Siliadin v France*¹⁴⁰ in attempting to determine the definition of slavery. *Siliadin* considered the definition of slavery as expressed originally in the 1926 International Convention to Suppress the Slave Trade and Slavery. In *Tang*, a brothel operator had been charged with slavery related offences under the *Criminal Code Act 1995* (Cth). The definition of slavery in that domestic statute was in terms similar to the definition within the 1926 Convention. The issue is now before the High Court of Australia.
- In *Ragg v Magistrates' Court of Victoria & Corcoris*¹⁴¹, Justice Bell, in the Supreme Court of Victoria, dealt with the principle of “equality of arms” in the context of the requirements of a fair trial. He credited the European Court of Human Rights as originally stating this principle¹⁴². He cited a list of relevant authorities from that Court, including *Foucher v France*¹⁴³ and *Jespers v Belgium*¹⁴⁴, in the course of exploring the origins of the principle and applying it to the case in hand.

¹³⁹ [2007] VSCA 134 at [34].

¹⁴⁰ (2006) 43 E.H.R.R. 16.

¹⁴¹ [2008] VSC 1 at [46]-[49] and [53]-[65].

¹⁴² [2008] VSC 1 at [48].

¹⁴³ (1998) 25 EHRR 234.

¹⁴⁴ (1983) 5 EHRR CD305.

- In *Ruddock v Vadarlis*¹⁴⁵ (the Tampa Case), Chief Justice Black, in dissent, cited the European Court of Human Rights in *Amuur v France*¹⁴⁶ to support his views that Australian law sustained the provision of relief to those rescued by the *Tampa* on the high seas.
- The Full Court of the Federal Court of Australia referring to the decision in *Handyside v United Kingdom*¹⁴⁷ to illustrate the general principle that freedom of expression protects not only inoffensive speech but also extends to the protection of speech that offends, shocks or disturbs¹⁴⁸.
- In *The Queen v Astill* a central issue for the New South Wales Court of Criminal Appeal was the reception of hearsay evidence in a manslaughter trial. The importance, in terms of procedural fairness, of the opportunity to cross-examine a witness was discussed by reference to *Unterpertinger v Austria*¹⁴⁹. This was a case in which the

¹⁴⁵ (2001) 110 FCR 491.

¹⁴⁶ (1992) 22 E.H.R.R. 533.

¹⁴⁷ (1976) 1 E.H.R.R. 737.

¹⁴⁸ *Bropho v Human Rights & Equal Opportunity Commission* (2004) 135 FCR 105; (2004) 204 ALR 761, per French, Lee and Carr JJ at [69].

¹⁴⁹ (1986) 13 E.H.R.R. 175.

European Court of Human Rights held the conviction to be in violation of Article 6 of the *European Convention*¹⁵⁰.

- Article 3 of the *European Convention* and related decisions of the European Court of Human Rights were considered in *Smith v The Queen*, together with other international materials, in an examination of the prohibition against cruel and unusual punishments and the prohibition of excessive fines as universal human rights¹⁵¹.
- In *Australian Meat Industry Employees' Union v Belandra Pty Ltd*¹⁵² Justice North, in the Federal Court of Australia considered, in some detail, the approach taken by the European Court of Human Rights to the interpretation of Article 11 of the *European Convention*. This was done in the context of interpreting the Australian federal *Workplace Relations Act 1996* (Cth) and, more specifically, the meaning of provisions intended to protect workers against discrimination on the basis of trade union membership.
- The decision of *Soering v United Kingdom*¹⁵³ was considered by Justice North in *McCrea v Minister for Customs & Justice*¹⁵⁴. That

¹⁵⁰ *R v Astill* (1992) 63 A Crim R 148, at 157 in my reasons in the New South Wales Court of Appeal.

¹⁵¹ *Smith v The Queen* (1991) 25 NSWLR 1, at 14 and 15 in my own reasons in the New South Wales Court of Appeal.

¹⁵² [2003] FCA 910, per North J at [192] – [197], [217].

¹⁵³ (1989) 11 E.H.R.R. 429.

case concerned the power of the Minister for Customs and Justice to surrender the applicant to Singapore in circumstances where he was charged with criminal offences punishable in Singapore by the death penalty. Although Justice North ultimately concluded that such comparative jurisprudence was of little assistance in determining the central question of the construction of section 22(3)(c) of the *Extradition Act 1988* (Cth), he accepted that such materials were relevant in so far as they were indicative of a recent international trend of opposition to imposition of the death penalty. There are many like decisions of intermediate courts and single judges in Australia.

AN ERA OF HUMAN RIGHTS

The use of international materials in the development of Australian law is still a matter of debate and controversy in some circles¹⁵⁵. In particular, the idea that the Australian Constitution should be read consistently with the rules of international law has been described as “heretical”¹⁵⁶. I do not accept that view. But it is one held in some legal circles in Australia, including by judges of the highest standing. There were resonances of these differing views in the High Court’s decision in

¹⁵⁴ [2004] FCA 1273.

¹⁵⁵ The opposing viewpoints in this debate were considered at some length in *Al-Kateb v Godwin* (2004) 219 CLR 562, per McHugh J at 589-595; and in my own reasons *ibid* at 622-630.

¹⁵⁶ *Al-Kateb v Godwin* (2004) 219 CLR 562, per McHugh J at 589 [13].

*Roach*¹⁵⁷. Thus, in that case, Justice Heydon took his colleagues in the majority to task in an important passage in his reasons:

“...these instruments can have nothing whatever to do with the construction of the Australian Constitution. These instruments did not influence the framers of the Constitution, for they all postdate it by many years...The language they employ is radically different. One of the instruments is a treaty to which Australia is not and could not be a party. Another of the instruments relied on by the plaintiff is a treaty to which Australia is a party, but the plaintiff relied for its construction on comments by the United Nations Human Rights Committee...[T]he fact is that our law does not permit recourse to these materials. The proposition that the legislative power of the Commonwealth is affected or limited by developments in international law since 1900 is denied by most, though not all, of the relevant authorities - that is, denied by 21 of the Justices of this Court who have considered the matter, and affirmed by only one.”¹⁵⁸

¹⁵⁷ See above [.....] [ms, references to *Roach*].

¹⁵⁸ (2007) 81 ALJR 1830 at 1805 [181] (Footnotes omitted).

Certainly, there are considerations that limit the application of unincorporated international law by domestic judges. A judge in a municipal court must be obedient to the national Constitution from which, ultimately, he or she derives jurisdiction, powers and legitimacy. Consistent with this obligation, such a judge cannot give priority to international law that has not been made part of the domestic legal system over and above the clear requirements of their national law¹⁵⁹. It is possible, however, to respect this limitation whilst acknowledging the useful and persuasive role that can be played by international materials. The decisions of tribunals such as the European Court of Human Rights can enhance judicial thinking by exposing judges to the way that other experienced lawyers have approached similar issues. At the very least, their reasoning may disclose relevant considerations of legal policy and legal principle that need to be considered and evaluated for their local relevance. Shutting ourselves off from the experiences and knowledge of others only serves to restrict us in the continued pursuit of justice. Efforts to isolate individual countries, such as Australia and the United States of America from the persuasive force of international law are “doomed to fail”¹⁶⁰.

¹⁵⁹ *Minister for Immigration & Multicultural & Indigenous Affairs v B* (2004) 219 CLR 365, in my own reasons at 425 [170]-[173].

¹⁶⁰ *Al-Kateb v Godwin* (2004) 219 CLR 562 at 629 [190], in my own reasons. See MD Kirby, "International Law - the Impact on National Constitutions" (The Seventh Annual Grotius Lecture) 21 *American University International Law Review* 327 (2006).

The jurisprudence of the European Court of Human Rights has had a very important impact within Australia. This is reflected most clearly in the references made by Australian courts to decisions of the Court. References to such decisions have been increasing in recent years. This is a trend that seems likely to continue and to expand as Australia moves towards enacting statutory charters of fundamental rights.

The influence of the European Court of Human Rights is not defined exclusively by the number of references found in Australian case law. It has also had a more intangible, and possibly more enduring, effect through the way that that court has guided and influenced our thinking about human rights. As Sir Anthony Mason pointed out in relation to international law and legal institutions:

“The influence of international legal developments travels far beyond the incorporation of rules of international law and convention provisions into Australian domestic law. The emphasis given by international law and legal scholars to the protection of fundamental rights, the elimination of racial discrimination, the protection of the environment and the rights of the child, have changed the way in which judges, lawyers and legal scholars think about these subjects.”¹⁶¹

This influence will be maintained, and indeed will grow, in the future. This is because Australia, like other modern nations and

¹⁶¹ A F Mason, “Cross Currents: Internationalism, National Identity & Law”, Paper presented to the 50th Anniversary Conference of the Australasian Law Teachers’ Association (1995), at 5.

economies, has become increasingly international in its outlook and culture, including its legal culture. As well, the Australian people are becoming more aware of the importance of human rights issues and jurisprudence. The effective protection of human rights has become a subject of interest and debate in Australia¹⁶².

In this environment, the role of the European Court of Human Rights will become even more significant. Reasoned, serious, balanced decisions are a powerful weapon against injustice and arbitrary or ill-conceived deprivation of fundamental rights. The Strasbourg Court will therefore continue to influence and guide the development of human rights law in Australia, as it has done in many non-signatory countries. The European Court of Human Rights is a court for the modern age. It takes a leading part in, and stimulates, the trans-national conversation about human rights. It gives intellectual leadership in a controversial field of the law's operation where wisdom and proportionality matter most¹⁶³. It is time that Australia's judges and lawyers acknowledged their indebtedness. That has been the purpose of this Seventh *Fiat Justicia* lecture.

¹⁶² G Williams, *The Case for an Australian Bill of Rights* (UNSW, 2004).

¹⁶³ M D Kirby, "Terrorism and the Democratic Response: A Tribute to the European Court of Human Rights" Robert Schuman Lecture, 11 November 2004. See (2005) 28 UNSWLJ 221.

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