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INTERNATIONAL LAW - THE IMPACT ON NATIONAL
CONSTITUTIONS*

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"The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."

Justice Kennedy, for the Court, in *Roper v Simmons* 583 US at 24 (2005)

"[W]e should not be surprised to find congruence between domestic and international values ... – expressed in international law or in the domestic laws of individual countries"

Justice O'Connor (diss) in *Roper v Simmons* 583 US at 61 (2005)

"[T]he basic premise of the Court's argument – that American law should conform to the laws of the rest of the world – ought to be rejected out of hand."

Justice Scalia (diss) in *Roper v Simmons* 583 US at 81(2005)

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ARRIVAL AT A "GROTIAN MOMENT"¹:

In the first Grotius Lecture in 1999, Judge Christopher Weeramantry reminded us of the special contribution that Hugo de Groot (Grotius) made to the discipline of international law when he wrote *De Jure Belli ac Pacis* in 1625²:

"It was an unprecedented situation that faced the newly emerging states of Grotius's time. Detached from their traditional moorings to church, empire and a higher law, they were groping for new principles of conduct and inter-relationship to provide a compass for the tempestuous waters that lay ahead. Grotius rose to the occasion - a towering intellect with a passionate vision of an ordered relationship among nations - a relationship based not on the dogma of religion or the sword of conquest, but on human reason and experience"³.

The transitions and perils, challenges and opportunities of the present age require of lawyers everywhere an equal freshness of thinking and a willingness to consider not only the economics and politics of globalisation but also the values and ethics "that shape

¹ R A Falk, "On the Recent Further Decline of International Law" in A R Blackshield (Ed) *Legal Change: Essays in Honour of Julius Stone* (1983) 264 at 272.

² *On the Law of War and Peace*.

³ C Weeramantry, "Opening Tribute to Hugo Grotius" (First Grotius Lecture, 1999) 14 Am Uni Int'l L Rev 1515 at 1516 (1999) ("Weeramantry"). This text was also quoted by Moisés Naim in the 4th Grotius Lecture, "Five Wars of Globalisation" 18 Am Uni Int'l L Rev 1 at 17-18 (2002) ("Naim").

our conception of the global world"⁴. In a time of cyberspace, genomics, satellites, jumbo jets and global perils such as AIDS and SARS, continuing to view international law and municipal law as almost wholly separate is as inappropriate to our era as was the notion that the law of nations was derived from God's will, defined by a global Church or by a King ordained by God, rather than by human rationality, as Grotius declared.

This is a time to acknowledge the role that international law plays, and will increasingly play, in the constitutional jurisprudence of nation states. If it is true that the courts of the international legal order have not yet sufficiently adapted to the challenges and opportunities to hold a dominant role in the application of international law⁵, the answer to this predicament is neither despair nor contempt about international law. It is not a retreat behind the exclusive walls of local jurisdiction. It is to put to work, in new and proper ways, the established courts of municipal jurisdiction. They will then realise, in cases where it is relevant and appropriate to do so, that they are sometimes exercising not only national, but also a

⁴ Amartya Sen cited by M Robinson "Shaping Globalisation: Role of Human Rights" (5th Grotius Lecture, 2003) 97 Am Soc'y Int'l L Proc 1 at 1 (2003) ("Robinson").

⁵ E A Posner, "All Justice, Too, is Local", *New York Times*, December 30, 2004, A23.

kind of international jurisdiction. This will require attention on their part to international law⁶.

Drawing upon sources found in international law, not as binding rules but as contextual principles, judges of municipal courts in this century will assume an important function in making the principles of international law a reality throughout the world. We cannot leave this function to international courts and tribunals alone. To survive, humanity must globalise and diversify. But we must do so, as Grotius taught, building on the jurisprudence of the past and adapting it to the world in which we now find ourselves.

This is the thesis that I have come to propound. In many countries it is uncontentious. In some of these, this may be because their national constitutions expressly require courts, in deciding local cases, to pay regard to the provisions of international law⁷. In some, the change has come about because of the adoption in the last fifty years of many constitutions, containing explicit provisions for the protection of human rights and fundamental freedoms. These invite direct attention to the growing body of international jurisprudence about those rights and freedoms. In

⁶ This was an idea expressed by Professor Ian Brownlie, *Principles of Public International Law*, 5th ed, 1998 at 584.

⁷ See eg Constitution of India, 1950, s 51(c); Constitution of Papua-New Guinea, 1975, s 39(3) and Constitution of the Republic of South Africa, 1996, ss 39(1)(b), 1996.

some, it has come about as a result of the adoption of regional statements of human rights and fundamental freedoms. The persuasive (and in some cases coercive) decisions of regional courts and other bodies, deciding complaints about national departures from the fundamental principles of human rights and freedoms, has had a increasing impact on the ordinary work of judges in countries subject to such legal regimes⁸. In some, it has also occurred because of the "inevitable" influence in common law nations of international law, operating through analogous reasoning and the candid disclosure of intellectual influences on decision-making. Although not incorporated in domestic law, international law may sometimes afford an individual the right to communicate complaints to international treaty bodies. This too subjects the national legal system and its rules to the critical influence of international scrutiny⁹.

All of these developments, happening in the space of a relatively short period, constitute a significant and interesting legal story. But it is not the subject of this Lecture. It may be taken as a

⁸ A recent example is *X (FC) and Ors v Secretary of State for the Home Department* [2004] UKHL 56 (HL). The decision upheld an appeal by a group of detainees under the *Antiterrorism, Crime and Security Act 2001* (UK). A declaration was made under s 4 of the *Human Rights Act 1998* (UK) that s 23 of the *Antiterrorism Act* was incompatible with Arts 5 and 14 of the *European Convention on Human Rights*.

⁹ *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 42.

given. It represents the context in which the topic that I will tackle has to be understood.

In two countries, at least, in constitutional elaboration, there is strong resistance and vigorous controversy, concerning the use that may be made of international law (and in particular the international law of human rights). Those countries are the United States of America and Australia. The world could probably survive resistance to a global trend in Australia: ascribing it to an antipodean self-satisfaction derived from general economic prosperity and geographical remoteness. However, this cannot be said of the United States and of the debates that have occurred in and outside its Supreme Court. Self-evidently, the resolution of these debates is of vital importance not just for the American legal system but also for the likely change, and pace of change, in the inter-relationship between international and municipal law everywhere.

In addressing this issue, I mean to make no impertinent comment upon domestic topics that are sensitive and that fall for resolution in a country other than my own. However, the issue at stake is an important one, occurring in intellectual discourse. As I shall show, it is a lively topic in my own Court. This is a fact that focuses my attention on the arguments and how they should be

resolved. In the United States, these issues are fought out not only in the pages of the reports of courts of high authority¹⁰ but also in countless academic articles and comments in the popular media. They have been the subject of a lively and entertaining public exchange between two Justices of the Supreme Court (Justices Scalia and Breyer) explaining to law students - and thus in simple language - the competing views that they hold¹¹. So far, in Australia, the debates have been more low key. However (as I will show) the temperature was recently raised by the publication of a decision of the High Court of Australia containing somewhat sharp exchanges between myself and one of my colleagues (Justice McHugh). Our words resonate with the American controversy¹².

The conflicting views of a few national judges about the proper approach to constitutional interpretation, could usually be allowed to pass without troubling a conference dedicated to the study of international law. However, the resolution of this conflict goes to the very heart of the relationship between international and municipal law in the current age. Because it is significant for the

¹⁰ eg *Atkins v Virginia* 536 US 304 (2002) and *Lawrence v Texas* 539 US 558 (2003); *Romer v Simmons* 543 US 1 (2005).

¹¹ Transcript of discussions between US Supreme Court Justices Antonin Scalia and Stephen Breyer, American University, Washington College of Law, January 13, 2005, US Association of Constitutional Law) ("Transcript"). The conversation was widely reported: see the *Washington Post* January 14, 2005, 1.

¹² *Al-Kateb v Godwin* (2004) 78 ALJR 1099.

likely future impact of international law in domestic jurisdiction in and beyond the countries of the controversy, it is timely to consider the issues and arguments and to reflect upon their probable outcome.

THE BANGALORE PRINCIPLES AND THEIR APPLICATION

Although it may be heretical to say so in this city, the American Revolution of 1776 had certain disadvantages for the development of legal doctrine in the United States, including in constitutional theory. In countries of the British Empire (later the Commonwealth of Nations) that theory continued to evolve in a way that was arrested in America by the adoption of the revolutionary Constitution. The evolution in Britain and its Empire affected the respective functions of the head of state, the head of government, the parliamentary system¹³, the cabinet and the judiciary. For many countries of the Commonwealth, the evolution is continuing, including in the United Kingdom itself, with its belated adoption of the *Human Rights Act* 1998 (UK) linking its law to that of the *European Convention of Human Rights*. That Convention, in turn, parallels many of the principles of international human rights law.

¹³ For comments critical of the evolution see S Ratnapala, "Sri Lanka at the Constitutional Crossroads: Gaullist Presidentialism, Westminster Democracy or Tripartite Separation of Powers?" (2004) *Lawasia Journal*, 33 at 41 ff.

The dark side of British imperial history was described by Judge Weeramantry in the first Grotius Lecture¹⁴. He did this in the course of criticising the failure of traditional Grotian law to recognise, and give an appropriate respect for, the laws of the traditional societies conquered by the Western empires. It was an appeal to avoid similar errors today - and to overcome the "poverty of the international order"¹⁵ - that was the main point of that Lecture. There have been similar reflections in several of the Grotius Lectures since¹⁶.

The sunny side of the imperial experience was, as Judge Weeramantry explained, the establishment of independent courts comprising "an excellent judicial system modelled on the British tradition"¹⁷. Until recent decades, the link to the Judicial Committee of the Privy Council helped to infuse in judges of Commonwealth countries a global outlook about the basic principles of the law, an interest in comparative law and a conviction that wisdom was not

¹⁴ Weeramantry, 14 Am Uni Int'l L Rev 1515 at 1520, 1558f (1999).

¹⁵ Referring to the writings of Judges Kéba M'baye and Bedjaoui. See generally Kéba M'baye, *Le Droit du Développement Comme un Droit de L'Homme* 5 *Revue des droits de l'homme* 505 (1972).

¹⁶ See eg Naim, 18 Am U Int'l L Rev 1 at 17 (2002); Robinson 97 Am Soc'y Int'l Proc 1 at 7 (2003).

¹⁷ Weeramantry, 14 Am Uni Int'l L Rev 1515 at 1555 (1999).

necessarily local but that sometimes help could be found in difficult problems by looking beyond one's own borders¹⁸. The contrast with the intellectual insularity of most United States judges and lawyers, when compared to their counterparts in Commonwealth countries, is striking. It can be seen even in a superficial glance at the citations in the authorised reports of the final courts in the United Kingdom, Canada, Australia, South Africa, India, Singapore, New Zealand and elsewhere. They are full of references to transnational and even international law.

Another feature of law in the Commonwealth is the global network of professional bodies that continue to exchange ideas and experiences through meetings organised by the Commonwealth Secretariat. One such meeting, relevant to this Lecture, was convened in Bangalore, India, in February 1988. It was chaired by Justice P N Bhagwati, former Chief Justice of India, later chairman of the United Nations Human Rights Committee.

I attended that meeting, as did Commonwealth judges from India, Malaysia, Mauritius, Pakistan, Papua New-Guinea, Sri Lanka, the United Kingdom and Zimbabwe. Although my education in international law, at the University of Sydney under Professor

¹⁸ A point noted by O'Connor J in a keynote address to the American Society of International Law Proceedings, March 16, 2002, 96 Am Soc'y Int'l L Proc 348 at 350 (2002) ("O'Connor").

Julius Stone, had been of the highest order, my views about that body of law, and its relationship with municipal law, were wholly orthodox. As I can now see, they were trapped, as is the case with so many middle aged judges and lawyers, in the ideas of their law school lecture notes, written decades earlier.

The Bangalore meeting helped to rescue my mind from the rigid dualism developed by the English common law. This was that, save for the statutory incorporation of a rule of international law into municipal law, international law was a subject between nation states. It was not, as such, part of municipal law. It could therefore usually be ignored by national courts¹⁹. This viewpoint over-simplified a complex subject²⁰. But it was the opinion conventionally held by most common law practitioners at the time. I was one of them.

In the course of the Bangalore meeting, the scales were lifted from my eyes by the discovery of the growing role that international law was playing, and could play, in the municipal legal

¹⁹ *Koowarta v Bjelke-Petersen* (1992) 153 CLR 168 at 224; *Kioa v West and Ors* (1985) 159 CLR 550 at 570, 604; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 286, 298, 304.

²⁰ cf *I Congresso del Partido* [1983] 1 AC 244 at 265 (HL); cf T Bingham, "There is a World Elsewhere: Changing Perspectives of English Law" (1992) 41 *International Comparative Law Quarterly* 513.

systems of the Commonwealth of Nations, including Australia. At the end of the meeting, the participating judges accepted the so-called *Bangalore Principles on the Domestic Application of International Human Rights Norms*²¹.

For what was to happen subsequently, it is relevant to this occasion that at Bangalore, almost uniquely, one non-Commonwealth judge was participating in our meeting. This was the Hon Ruth Bader Ginsburg. Like me, she had not, at that stage, been appointed to the final court. She was a member of an intermediate appellate court. She was a practical working judge, used to discharging a heavy caseload, acting under pressure and bound in the exercise of her jurisdiction by the rulings of the apex court of the nation. Nonetheless, it is part of the genius of the common law that it addresses, and resolves, the "central problem" of modern Anglo-American constitutional theory and does so in a multitude of individual decisions²². That problem consists "in devising means for the protection and enhancement of individual

²¹ The *Bangalore Principles* are reproduced in (1988) 62 *Australian Law Journal* 531 and (1988) 14 *Commonwealth Law Bulletin* 1196. The Bangalore meeting was followed by seven later meetings of Commonwealth judges. Human rights decisions of Commonwealth courts are now shared widely through the work of Interights, an international centre based in London and the publication of the *Law Reports of the Commonwealth* series. See <www.interights.org>.

²² M D Kirby, "The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms" (1988) 62 *Australian Law Journal* 514.

human rights in a manner consistent with the democratic basis of our institutions"²³.

The crucial idea of the *Bangalore Principles* was that international human rights law might sometimes provide guidance to judges in cases concerning human rights and fundamental freedoms. The *Principles* noted the "growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law - whether, constitutional, statute or common law - is uncertain or incomplete". They welcomed this tendency, whilst acknowledging the need to take fully into account "local laws, traditions, circumstances and needs". They accepted that, where national law was clear and inconsistent with the international obligations of the State concerned, national courts in common law countries were obliged to give effect to their local laws, although they might call the disparity to notice. Nevertheless, the *Bangalore Principles* called for redress of the situation where "by reason of traditional legal training which has tended to ignore the international dimension, judges and practising lawyers are often unaware of the remarkable and comprehensive

²³ T R S Allen, "Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism" (1985) 44 *Cambridge Law Journal* 111.

developments of statements of international human rights norms" and of the jurisprudence gathering about them²⁴.

This international declaration of judges, each one of them imbued with practical realities and alert to the limited functions of the judiciary in the common law tradition, accompanied me on my return to my then office of President of the New South Wales Court of Appeal. This was, and still is, the busiest general appellate court in Australia. Australia's Constitution, then as now, had no general Bill of Rights entrenched in a document that otherwise copied many of the features of its American predecessor. The protection of human rights was largely left to ordinary legislation, administrative action and judicial decision.

As cases came before me in my Court, I began to see the way in which a reference to international law, specifically as that law concerned fundamental human rights, could sometimes cast light on the workaday problems that confronted me in my role as a judge. Eventually, other Australian judges shared this insight, although it must be said that most of the early cases concerned common law elaboration or statutory construction, short of the exposition of the national Constitution.

²⁴ See *Bangalore Principles* (above n 21), esp paras 2, 3, 5 and 6; cf M D Kirby, "The Impact of Human Rights Norms: A 'Law Undergoing Evolution'" (1996) 22 *Commonwealth Law Bulletin* 1181 at 1183-1184, 1189-1191.

THE INCORPORATION CONTROVERSY IN AUSTRALIA

Soon after returning from Bangalore, cases arose for decision by me for which there was no constitutional rule. Any legislation was ambiguous and the common law was expressed in unilluminating terms. In such cases I began to reach for, and to find useful, the developments of international law concerning human rights. These were developments that had occurred in courts or other bodies concerned with a principle germane to the problem in hand. The earlier work sometimes afforded practical help in resolving the controversy before me in a normative way.

An early instance was *Gradidge v Grace Bros Pty Ltd*²⁵. There, the applicant before a Compensation Court was a deaf mute. A member of the government panel of interpreters had been provided for the hearing of her evidence. During that hearing, an argument arose between the lawyers. It concerned a point of law. The insurers' lawyer indicated that the exchange did not need to be interpreted. The applicant's legal representative raised no objection. The trial judge told the interpreter that he did not require interpretation. When the interpreter persisted in her translation, the judge directed her to desist. She refused, saying that she would

²⁵ (1988) 93 FLR 414 (NSWCA).

continue to interpret for the applicant so long as she was in open court. The judge declined to continue the proceedings. He insisted on his control of the hearing. There was no statutory or common law *right* to interpretation. There was a discretion in the trial judge to permit it where necessary in the interests of justice²⁶. There were strong common law principles defensive of a trial judge's control of the proceedings.

On an urgent motion for relief in the Court of Appeal, the resolution of the case took me, in default of a clear local rule, to the *International Covenant on Civil and Political Rights*²⁷ (ICCPR). Australia had ratified that treaty and, in any case, it probably stated customary international law in this respect. I held that, in developing the Australian common law in a novel case, it was desirable that such law should, so far as possible, be in harmony with the ICCPR provisions, including Art 14²⁸ and the jurisprudence

²⁶ *Dairy Farmers' Cooperative Milk Co Ltd v Acquilina* (1963) 109 CLR 418 at 464.

²⁷ Arts 14.1, 14.3(a) and 14.3(f).

²⁸ Art 14.1 provides that "all persons shall be equal before the courts and tribunals". It also provides for a "fair and public hearing" and requires that the decision-makers be "competent, independent and impartial". Art 14.3, whilst specifically related to criminal process, includes a specific requirement that the party be "informed promptly and in detail in a language which he understands" the nature and cause of the matter.

gathered around it²⁹. The two other judges sitting with me agreed. One of them pointed to the fact that, although not expressly incorporated into Australian law, the ICCPR was scheduled to a federal statute defining the powers and duties of the national Human Rights and Equal Opportunity Commission³⁰.

Thereafter, in later cases, where I reached a point of decision upon which any local statute or subordinate statutory rule were ambiguous³¹ or the common law was obscure and unilluminating, I reached for the statement of basic principles about universal human rights and fundamental freedoms expressed in the ICCPR and like instruments. And as a busy working judge, I quite often found these sources to be extremely helpful. After all, until shortly before that time, Australian courts, bound by the Privy Council, were not unused to looking to the elucidations of general legal principle by the judges of England upon matters such as procedural fairness, natural justice and the protection of basic common law rights. Now, in a new era, a fresh and different source of exposition of fundamentals and stimulus to consistency was available.

²⁹ Applying an earlier consideration of the *Bangalore Principles* in *Jago v District Court of New South Wales* (1988) 12 NSWLR 558 at 570 (NSWCA).

³⁰ (1988) 93 FLR 414 at 416 (NSWCA), per Samuels JA.

³¹ eg *Young v Registrar, Court of Appeal (NSW) [No 3]* (1993) 32 NSWLR 262 (NSWCA).

Unsurprisingly, that source commonly proved quite helpful³². Occasionally, other judges would content themselves with references to the old Australian, English and other cases as a more traditional source of legal authority. For me, the particular advantage of the international jurisprudence was often, as I discovered, that it addressed more precisely the exact issue before my Court. That issue was of a kind that was occurring in many contemporary societies. It involved conflicts between competing fundamental principles upon which international legal developments were often very useful.

Whereas, at first, my approach seemed quite heretical to many Australian lawyers, the tide turned in 1992 when the High Court of Australia decided *Mabo v Queensland*³³. That case related to the question whether the common law of Australia gave any recognition to the title to land of indigenous people, derived from a time prior to the British acquisition of Australia. The conventional view to that time, supported by nineteenth century court decisions, was that it did not. The key that unlocked the door that permitted the Court to overcome these decisions was a recognition that they were fundamentally incompatible with universal principles,

³² M D Kirby, "The Australian Use of International Human Rights Norms: From Bangalore to Balliol - A View from the Antipodes" (1993) 16 *Uni of NSW Law Journal* 363 at 377 ff.

³³ (1992) 175 CLR 1. The significance was noted at the time: (1992) 66 *Australian Law Journal* 551 at 552.

accepted by international law, denying prejudicial deprivation of basic rights on the grounds of race or ethnic origin.

Between *Bangalore* and *Mabo*, Australia had acceded to the First Optional Protocol to the ICCPR. That instrument gives individuals the right to communicate with the United Nations Human Rights Committee about alleged non-conformity between Australia's domestic law and the principles accepted in the ICCPR. It was this legal development that caused Justice F G Brennan (with the concurrence of Chief Justice Mason and Justice McHugh) in the leading opinion in *Mabo*, to say of the ICCPR so enhanced:

"[It] brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration".

This was a crucial legal development in harmony with the essential idea of the *Bangalore Principles*. Adaptation of the common law in Australia, by having regard to principles of international law, is now generally uncontroversial³⁴. So, at least in

³⁴ (1992) 175 CLR 1 at 42. See eg *Dietrich v The Queen* (1992) 177 CLR 292 at 360-361, 372-373.

many cases, is the interpretation of legislation which is ambiguous and which, interpreted one way, will conform to international law and avoid needless disharmony³⁵. Of course, there remain controversies about the extent to which this interpretative technique will be used where the statute in question was enacted before the adoption and general acceptance of the norm of international law³⁶. It is unnecessary to explore that matter of detail. The international law of human rights is undoubtedly seeping into Australian judicial elaborations of statute and common law. Indeed, this is something that is now happening in courts throughout the Commonwealth of Nations.

I now reach the question whether, in some way, constitutional law is disjoined for this purpose from this evolution of the common law and statute law. The *Bangalore Principles* asserted that every part of law, including constitutional law, is open to the propounded use of international law in shaping basic legal principles. After my appointment to Australia's highest court in 1996, this question was soon posed for me.

³⁵ *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at 479; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 492 [29]; *Coleman v Power* (2004) 78 ALJR 1166 at 1171-1172 [17]-[23]; 1209-1212 [240]-[249].

³⁶ cf *Morris v KLM Royal Dutch Airlines* [2002] 2 AC 628 at 657 [82], 679 [149] (HL).

In 1997, in a closely divided decision, a question arose concerning the resolution of an ambiguity in the Australian Constitution about whether one of the few express rights, dealing with the necessity to pay just terms for federal acquisitions of property³⁷, extended to public acquisitions by the government of a federal territory. The Australian Constitution could be read either way. There were conflicting holdings over the century of its existence. In expounding the way that I came to my conclusion as part of the majority in the Court, favourable to the right to just terms, I invoked the *Bangalore Principles* in the resolution of the constitutional ambiguity³⁸.

I later repeated the same approach in resolving what seemed to me to be an ambiguity in the "races" power in the Australian Constitution³⁹. Doing so avoided an interpretation of the Constitution which, if adopted, would permit the enactment by the Australian Parliament of laws not for the *benefit* and *protection* of persons of particular "races" but also laws to the *disadvantage* of those of a particular race. The Nuremburg laws of Nazi Germany

³⁷ Australian Constitution, s 51(xxxi).

³⁸ *Newcrest Mining (WA) Pty Ltd v The Commonwealth* (1997) 190 CLR 513 at 657 at 661.

³⁹ Australian Constitution, s 51(xxvi) [to make laws with respect to ... the people of any race for whom it is deemed necessary to make special laws"].

and the apartheid laws of unreformed South Africa stood as a warning against such an interpretation. I said:

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

None of the six current members of the High Court of Australia has so far accepted this principle of constitutional interpretation⁴⁰. Observations exist in cases before the Second War that reject the notion that the national Constitution contains an implication that it should be construed to conform with the rules of international law⁴¹. Antipathetic views have been stated in more

⁴⁰ See eg *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 417-418.

⁴¹ See eg *Polites v The Commonwealth* (1945) 70 CLR 60 at 69, 74, 75, 79, 82-83.

recent times⁴², including (as I shall show) in response to my own remarks in recent cases⁴³.

In many decisions over the past decade, I have referred to the relevant principles of the international law of human rights in expounding the meaning and operation of the Australian Constitution⁴⁴. In most such cases the other members of my Court have not found such considerations to be of assistance. For the most part, they have ignored them. Sometimes, as in a recent case involving the long term detention of alien children in secure facilities in remote areas of Australia, I have concluded that the challenged conduct may be inconsistent with binding obligations of international law but that there was nothing that the Court can do about it. This was because an express head of constitutional power was unambiguous and the legislation was within that power, without uncertainty and hence valid⁴⁵. On such matters, my Court has been unanimous.

⁴² eg *Horta v The Commonwealth* (1994) 181 CLR 183 at 195.

⁴³ *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 386 [101].

⁴⁴ See eg *Austin v The Commonwealth* (2003) 215 CLR 185 at 291-293 [252]-[257].

⁴⁵ See eg *Minister for Immigration and Multicultural Affairs v B* (2204) 78 ALJR 737 at 768-769 [169]-[173]; *Re Woolley; Ex parte Applicant M 276/2003* (2004) 79 ALJR 43 at 79 [173].

The *Bangalore Principles* themselves confirm the duty of the municipal judge to give effect to domestic law in such a case⁴⁶. In this respect, they adopt a principle different from the rule of international law that holds that a "state cannot plead provisions of its own law or deficiencies in that law in answer to a claim against it for an alleged breach of the obligations under international law"⁴⁷. The authority of a municipal judge derives from the national Constitution. He or she must therefore uphold its rules, although it is always permissible to call attention (as I have done) to any discordancy between the two legal systems. If the judge cannot, in conscience, act in this way, the only proper course is resignation. It is not disobedience to, or manipulation of, a constitutionally valid law, challenged within its own system⁴⁸.

⁴⁶ *Bangalore Principles* (above n 21) para 8. See (1988) 62 *Australian Law Journal* 531 at 532.

⁴⁷ *Free Zones Case* (1932) PCIJ, Ser A/B No 46 at 167 (PCIJ); *Treatment of Polish Nationals in Danzig* (1932) PCIJ Ser A/B No 44 at 24; *Anglo-Norwegian Fisheries Case* (1951) *ICJ Reports* 181, per Lord McNair; cf I Brownlie, *Principles of International Law* (6th ed, 2003), 34; A Fitzmaurice, "The General Principles of International Law Considered from the Standpoint of the Rule of Law", *Recueil des Cours* 92 (1957 II), 1 at 68.

⁴⁸ D Luban, "Nazis in the Courtroom: Lessons from the Conduct of Judges and Lawyers Under the Laws of the Third Reich and Vichy France" 61 *Brook L Rev* 1121 at 1141-1144 (1995); M Lippman, "Law, Lawyers and Equality in the Third Reich: The Perversion of Principle and Professionalism", 11 *Temp Int'l & Comp LJ* 199 at 233 (1997); V Curran, "Fear of Formalism: Indications from the Fascist Period in France and Germany of Judicial Methodology's Impact on Substantive Law" 35 *Cornell Int'l LJ* 101 at 169-171 (2002). I am indebted to Justice B M Selway of the Federal Court of Australia for his unpublished paper, "The Role of Judges in Protecting Human Rights" (2005) where there is discussion of this topic.

The non-dialogue between judges of different persuasions on this subject might have continued in Australia but for developments in the United States discourse on the same topic. According to a commentator⁴⁹, the *Bangalore Principles* are "immensely popular in the law schools, and with many barristers. Nothing is more predictable than that [they] will have many future outings"⁵⁰. However, getting them adopted by the current generation of judges is another matter.

In *Al-Kateb v Godwin*⁵¹, late in 2004, one of my colleagues, Justice McHugh, responded to this question. In language reminiscent of that voiced by Justice Scalia for the dissenters in the United States Supreme Court in *Atkins v Virginia*⁵², *Lawrence v Texas*⁵³ and most recently in *Roper v Simmons*⁵⁴, Justice McHugh entered the debate. He rejected the suggestion that the Constitution could be read by reference to the provisions of

⁴⁹ G Craven, "Judicial Activism: The Beginning of the End of the Beginning" in *Upholding the Australian Constitution* (Proceedings of the 16th Conference of the Samuel Griffith Society) (March 2004, 16), 153 at 169.

⁵⁰ *Ibid*, at 169.

⁵¹ (2004) 78 ALJR 1099.

⁵² 536 US 304 at 347-348 (2002).

⁵³ 539 US 558 at 586 (2003).

⁵⁴ 543 US 1 (2005); 73 USLW 4153.

international law, adopted after the Australian Constitution came into force in 1900⁵⁵. He declared that this was heresy so far as past Australian authority was concerned⁵⁶. He expressed concern at the possibility of the huge body of treaty and other law being used to introduce "general principles of law recognised by civilised nations" into Australian constitutional elaboration⁵⁷. He acknowledged that the Constitution could sometimes have meanings different from those accepted in earlier times⁵⁸. However, it was one thing to take into account "political, social and economic developments in the intervening period" and quite another to accept the authority of *rules* of international law⁵⁹. He said that it was arguable that the Australian Constitution *should* contain a Bill of Rights; but stated that it was not the function of judges to adopt a "loose leaf" approach to the Constitution, inserting basic rights in the text without the authority of the people expressed in a formal constitutional change at referendum⁶⁰.

⁵⁵ (2004) 78 ALJR 1099 at 1112 [62].

⁵⁶ (2004) 78 ALJR 1099 at 1112 [63].

⁵⁷ (2004) 78 ALJR 1099 at 1113 [64]-[65].

⁵⁸ (2004) 78 ALJR 1099 at 1114 [69].

⁵⁹ (2004) 78 ALJR 1099 at 1115 [71]. (Emphasis added)

⁶⁰ (2004) 78 ALJR 1099 at 1115 [73]. The Australian Constitution, s 128, provides for formal amendments. It mandates passage of the proposal through the Federal Parliament and an affirmative vote nationally and in a majority of the States.

The case of *Al-Kateb* concerned the power of the Australian Parliament, and Executive, to detain indefinitely a stateless person who, as an alien, had entered the country unlawfully. The issue was whether the federal *Migration Act* 1988 should be read down to avoid such a consequence or whether the Constitution itself reserved prolonged detention to the cases of those whose imprisonment was ordered by a court, in application of the law. My Court divided on the outcome. The lawfulness of the detention was upheld by the narrowest margin⁶¹. In my reasons, I sought to respond to Justice McHugh's criticisms. In doing so, I invoked the way in which, successive majorities in the Supreme Court of the United States, in recent times, have used the universal principles of human rights and fundamental freedoms to confirm the judges' understandings of the meaning of the United States Constitution. They have done so, as we know, using the light thrown by what Justice Kennedy, for the Court, in *Lawrence* has described as "a wider civilisation"⁶². In *Al-Kateb*, I said⁶³:

"[T]he willingness of national constitutional courts to look outside their own domestic legal traditions to the elaboration of international, regional and other bodies represents a paradigm shift that has happened in municipal law in recent years. There are many

⁶¹ McHugh, Hayne, Callinan and Heydon JJ; Gleeson CJ, Gummow J and myself dissenting.

⁶² 539 US 558 at 576 (2003).

⁶³ (2004) 78 ALJR 1134 [citations omitted].

illustrations in the decisions of the courts of, for example, Canada, Germany, India, New Zealand, the United Kingdom and the United States"⁶⁴.

With reference to the dissents of Justices McLean⁶⁵ and Curtis⁶⁶ in *Dred Scott v Sandford*⁶⁷, both of whom had strongly invoked international law to support the conclusion that the appellant was not a slave but a free man, I observed⁶⁸:

"The fact is that it is often helpful for national judges to check their own constitutional thinking against principles expressing the rules of a 'wider civilisation'".

What is being attempted by this form of reasoning is not an amendment of the Constitution but an elaboration and enforcement of it, properly understood in the context of the world of today in which any national constitutional text must now operate⁶⁹:

"We should not declare interpretations impermissible just because we do not agree with them".

⁶⁴ With reference to the extracurial remarks of Ginsburg J in R B Ginsburg and D J Merritt, "Fifty-First Cardozo Memorial Lecture - Affirmative Action: An International Human Rights Dialogue" 21 *Cardozo Law Review* 253 at 282 (1999).

⁶⁵ 60 US 393 at 534, 556-557 (1856).

⁶⁶ 60 US 393 at 594-597, 601 (1856).

⁶⁷ 60 US 393 (1856).

⁶⁸ (2004) 78 ALJR 1099 at 1136 [190].

⁶⁹ (2004) 78 ALJR 1099 at 1136 [191].

Those who tire of the vigorous debates in the United States over this subject - including in the recent exchanges in *Roper* - or have read it all before and want still more to stimulate their conflicting opinions, are invited to plunge into the Australian discourse. The issues are much the same. They are equally important for the future of the law. The only difference is that, in the United States Supreme Court the majority presently favours the general approach of the *Bangalore Principles*. Enlightenment in Australia has been slower in coming.

THE ARGUMENT AGAINST INTERPRETATIVE INCORPORATION

Any large development in legal thinking and judicial technique will be controversial in some circles. Lawyers tend to be cautious people. They are often resistant to new ideas. Moreover, at least to varying extents, the jurisdiction-bound way of thinking has tended, in the past, to make most lawyers satisfied with the law as found within their own system, if not sometimes positively xenophobic.

In the days of the British Empire, it was not at all unusual for British subjects, including those appointed to judicial office, to view foreign systems of law (including, dare I say it, that of the United

States) as necessarily inferior to the common law of England, at the time applicable throughout its imperial domain⁷⁰. In practice, there might be grave inequalities, such as Judge Weeramantry witnessed. But in theory, there was a strong sense of superiority, self-satisfaction and sharing within this imperial hegemony. Whilst in Commonwealth countries where "provincialism in the development of the common law is no longer an option"⁷¹, these views now seem outdated, and even embarrassing, ever so often, one detects in contemporary rhetoric about international human rights law, written by foreigners, remnants of the same imperial attitude of superiority. As a child of the last decades of the British Empire, I am alert to these signals. I recognise them instantly when I see them⁷².

Setting aside such considerations (and the view that would confine all constitutional elaboration to the original intentions of the Founders - an American theory regarded in most countries as a form of ancestor worship⁷³ - there remain serious arguments that

⁷⁰ See eg *Riley v Attorney-General of Jamaica* [1983] AC 719 at 729 (PC).

⁷¹ A M Gleeson, "Centenary of the High Court: Lessons from History", *13th Australian Institute for Judicial Administration Oration*, October 3, 2003, p 8.

⁷² cf J Stoner, *Common Law and Liberal Theory: Coke, Hobbes and the Origins of American Constitutionalism* (1992) pp 48-68.

⁷³ M D Kirby, "Constitutional Interpretation and Original Intent - A Form of Ancestor Worship?" (2000) 24 *Melbourne University L*

need to be considered in pursuing the course of having regard to international law, and other foreign sources of ideas, when elaborating the meaning of a national constitution, particularly as they concern human rights.

First, there is the view espoused by opponents of the idea in the United States, that of its nature, a national constitution is a unique document, designed specifically for the governance of the people of the nation to which it applies and only them. Thus, Judge Posner has argued that "the judicial systems of the rest of the world are immensely varied"⁷⁴. They give rise to foreign judicial decisions that "emerge from a complex socio-historico-politico-institutional background of which our judges ... are almost entirely ignorant"⁷⁵. This view has led such writers as Michael Wells⁷⁶ to argue that it is "better for courts ... to focus on resolving conflicts by paying close attention to the history and culture of the society in which they act, rather than to try to identify and apply trans-cultural principles of morality".

Rev 1 at 2. The description derives from a comment of Binnie J of the Supreme Court of Canada.

⁷⁴ R Posner, "Could I interest You in Some Foreign Law? No Thanks, We Already Have Our Own Laws" *Aug Legal Affairs* 40 at 41-42 (2004) ("Posner").

⁷⁵ Posner, *ibid* at 42.

⁷⁶ M Wells, "International Norms in Constitutional Law" 32 *Georgia Journal of International and Comparative Law* 429 at 436 (2004) ("Wells").

Taken at face value, there is force in these arguments. If constitutional provisions are different and if societies are distinguishable, the utility of international law sources will frequently be confined. But this does not mean that they need be ignored⁷⁷. The United States, Australia and other countries share the common law heritage, tradition and history with many foreign constitutional systems⁷⁸. Furthermore, the United States Constitution, including the Bill of Rights, has itself greatly influenced foreign constitutional texts. Courts around the world use American judicial elaborations all the time. In the current era of globalism, why should the process not be reciprocal⁷⁹?

Secondly, concern is sometimes expressed that international law is used selectively, merely to support the subjective opinions of the judges invoking it. Thus, Justice Scalia takes his colleagues to task for failing to utter "a whisper about foreign law in the series of abortion cases"⁸⁰. He suggests that reference to foreign judges and

⁷⁷ G L Neuman, "The Uses of International Law in Constitutional Interpretation" 98 *American Journal of International Law* 82 at 87 (2004) ("Neuman").

⁷⁸ H H Koh, "International Law as Part of our Law" 98 *American Journal of International Law* 43 at 47 (2004) ("Koh").

⁷⁹ Wells, 32 *Georgia Journal of International and Comparative Law* 429 at 429-430 (2004).

⁸⁰ Breyer and Scalia JJ, Transcript at pp 8, 14. This is also a point mentioned by Scalia J in *Olympic Airways Ltd v Husain* 540 US

their opinions "looks lawyerly" but "invites manipulation"⁸¹. Judge Posner argues that the free citation of such law "would mean that any judge wanting a supporting citation has only to troll deeply enough in the world's *Corpus Juris* to find it"⁸². He declares that it is a form of "judicial fig-leaving"⁸³.

This criticism is rightly targeted at any unbalanced use of international law. However, the answer to this argument is that a proper use of this source can sometimes actually help to reduce subjectivity. In his recent public "conversation", Justice Breyer answered this concern⁸⁴:

"[T]hat kind of problem arises in any sort of citation. A judge can do what he's supposed to do, or not. ... Would I try to refer to both sides? Of course I would".

To similar effect, Dean Harold Koh of the Yale Law School points out that the use of international law and foreign

633 (2004); 124 S Ct 1221 at 1231 and in *Roper v Simmons* 543 US 1 at 83 (2005).

⁸¹ Breyer and Scalia JJ, Transcript at p 22.

⁸² Posner, *Aug Legal Affairs* 40 at 41-42 (2004).

⁸³ Posner, *Aug Legal Affairs* 40 at 42 (2004) . See to similar effect Roger Alford, "Misusing International Sources to Interpret the Constitution" 98 *American Journal of International Law* 57 at 67 (2004).

⁸⁴ Breyer and Scalia JJ, Transcript, p 40.

constitutional law does not involve a global "nose count". Still less does it involve direct application of foreign rules, as such, or deference to foreign and international judges. What is at stake is a wider pool of source material, where the new sources are directly relevant and may be helpful⁸⁵.

Thirdly, opponents have suggested that reference to international law may involve, or lead to, a loss of national sovereignty. Thus, Justice Scalia has denied emphatically that "we want to be governed by the views of foreigners"⁸⁶. In some of his judicial opinions he is dismissive of the writings on common constitutional questions of other courts and scholars ("thankfully" different)⁸⁷.

There are many answers to this attitude. I will confine myself to four. If one accepts a precondition of constitutional ambiguity, the invocation of international law is self limiting⁸⁸. In any case, as technology and the economy are internationalised, it is both inevitable and desirable that the same development should happen

⁸⁵ Koh, 98 *American Journal of International Law* 43 at 56 (2004).

⁸⁶ Breyer and Scalia JJ, Transcript, p 7.

⁸⁷ *Atkins v Virginia* 536 US 304 at 347-348 (2002).

⁸⁸ A Simpson and G Williams, "International Law and Constitutional Interpretation" (2000) 11 *Public Law Review* 205 at 225. ("Simpson and Williams").

in the law. By the act of municipal judges utilising and explaining applicable principles of international and comparative law, the process derives its municipal legitimacy⁸⁹. Moreover, it involves participation within one's own constitutional discourse in an interactive dialogue now occurring between the constitutional courts of many countries⁹⁰. It is from such a dialogue that a transnational law is emerging, especially on common issues about human rights. Over time, such a law may help to merge the national and the international, in some areas at least⁹¹.

Fourthly, opponents point to the fact that the making of international law is substantially in the hands of the Executive Government, which ordinarily initiates involvement in the process of treaty negotiation and commences or controls the procedures of ratification. It was this concern that led Justice Iacobucci in the Supreme Court of Canada to express reservations about incorporating international law by the "back door" without parliamentary endorsement⁹². Similar views have been expressed

⁸⁹ K Knop, "Here and There: International Law in Domestic Courts" 32 *NYU Journal of International Law and Policy* 501 at 505-506 (2000) ("Knop").

⁹⁰ A Chayes and A Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* 27 (1995).

⁹¹ Koh, 98 *American Journal of International Law* 43 at 53 (2004).

⁹² cf *Capital Cities Communication Inc v Canadian Radio-Television Commission* [1978] 2 SCR 141.

in Australia, defensive of the legislature's veto over incorporation into municipal law of treaty provisions ratified by the Executive⁹³. Particularly in countries which, unlike the United States, have no constitutional provision for a legislative veto over treaties, this can be a very practical consideration⁹⁴.

In part, the answer to this concern is the improvement in national procedures for the ratification of treaties. In any case, courts are aware that it is not their role to incorporate an entire treaty, or body of international law, into municipal law, still less into constitutional interpretation, "by the back door"⁹⁵. However, to deny courts any role in having regard to evolving treaty standards represents a negation of the legitimate, but limited, lawmaking role of the courts, certainly in common law countries; the accepted utilisation of these sources in developing the common law; and the assumption that the nation means what it says when it ratifies a treaty. If it does not, a judicial practice of taking the country's practice at its word may have the beneficial effect of putting a brake on ill-considered ratifications.

⁹³ R Piotrowicz, "Unincorporated Treaties in Australian Law" [1996] PL 190 at 195; G Evans, "The Impact of Internationalisation on Australian Law: A Commentary" in C Saunders (ed) *Courts of Final Jurisdiction* (1996) at 240. See also the dissent of McHugh J in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 313.

⁹⁴ M Chiam, "Comment: Evaluating Australia's Treaty-Making Process" (2004) 15 *Public Law Review* 265.

⁹⁵ *Teoh* (1995) 183 CLR 273 at 288.

Fifthly, it is argued by critics that international law is usually ambiguous and therefore unhelpful⁹⁶. Whilst this is sometimes true, in many cases the applicable principles of international law are detailed, clear and well reasoned. This is particularly so in many areas the subject of decisions of the European Court of Human Rights and the Inter-American Court of Human Rights. The "judicial dialogue" that is already occurring between such courts and national constitutional courts is one from which the hold-outs should not cut themselves off.

Sixthly, it is certainly the case that interpreting a constitution in the light of the developing principles of international law may sometimes involve conflict with other interpretative principles⁹⁷. Yet all interpretative principles are simply guides to the decision-maker. They are not, as such, binding rules that solve every problem. Most, if not all, interpretative principles have a counterpart, in recognition of the elements of evaluation and judgment that are inescapable in the interpretation of contested language. Thus, an approach of deference to originalism conflicts with the perception of a constitution as a "living tree", whose meaning necessarily varies from age to age. Conflicts of principles

⁹⁶ Simpson and Williams, *ibid* (2000) 11 *Public Law Review* 205 at 218.

⁹⁷ Simpson and Williams (2000) 11 *Public Law Review* 205 at 222.

in this area are normal. The function of courts is to choose or to bring all of the relevant principles into reconciliation in a judgment.

Seventhly, a more weighty criticism concerns the so-called "democratic deficit". In part, this involves acknowledgment of the typical lack of legislative participation in the treaty-making process in most countries⁹⁸. But in part, this objection rests on a broader footing.

Judge Posner complains that "the judges of foreign countries, however democratic those countries may be, have no democratic legitimacy here [in the United States]"⁹⁹. Similarly, Michael Weld points out that "international courts, committees and other groups are not at all accountable to the American electorate for the norms they generate"¹⁰⁰. Jed Rubenfeld describes international law as "undemocratic" and its organs as "famous for their ... opacity, remoteness from popular or representative politics, elitism and unaccountability"¹⁰¹.

⁹⁸ M D Kirby, "The Role of International Standards in Australian Courts" in Alston and Chiam (eds), *Treaty-making and Australia: Globalisation versus Sovereignty?* (1995) at 87.

⁹⁹ Posner, *Aug Legal Affairs* 40 at 42 (2004).

¹⁰⁰ Wells, 32 *Georgia Journal of International and Comparative Law* 429 at 433 (2004).

¹⁰¹ J Rubenfeld, "Unilateralism and Constitutionalism" 79 *NYU Law Review* 1971 at 2017-2018 (2004); cf A Bianchi, "International Law and US Courts: The Myth of Lohengrin Revisited" (2004) 15 *European Journal of Int'l Law* 751 at 775.

Whilst few, if any, countries have gone to the lengths of Jacksonian democracy evident in the election and recall of many judges in the United States (commonly viewed as extreme elsewhere), the force of this consideration in America, at least as a matter of rhetoric, cannot be denied¹⁰². Constitutions are typically difficult to amend. Giving any constitutional status to the rules of international law may remove the product from legislative lawmaking and thus from democratic influence¹⁰³. This is a serious objection. It is necessary to respond to it.

There are many answers to these anxieties. The function of a judiciary is inescapably elitist, at least to some extent. Like it or not, judges' values are shaped and influenced by a huge range of information, bombarding them from many sources. Thus, Justice Breyer, not wholly in jest, gave this answer during his recent "conversation"¹⁰⁴:

"You're always referring to materials, even if its Blackstone or whoever. The material doesn't have to

¹⁰² As for Australia, see Simpson and Williams, "International Law and Constitution Interpretation" (2000) 11 *Public Law Review* 205 at 223.

¹⁰³ Wells, 32 *Georgia Journal of International and Cooperative Law* 429 at 432 (2004).

¹⁰⁴ Breyer and Scalia JJ, Transcript, p 40.

have a democratic base. You reason all the time. You read law professors. They're not elected".

More fundamentally, Dean Koh denies the role of judges as imputed oracles for the majoritarian will¹⁰⁵:

"[T]heir long-settled role (which of course gives rise to domestic counter-majoritarian difficulty) has been to apply enduring principles of law to evolving circumstances without regard to the will of shifting democratic majorities".

Citing Justice Breyer, Dean Koh describes the messy way in which, in a representative democracy, law is typically made. It is a "dialogic process" and the judicial decision-making part of it is informed and improved by contributions and debates from many sources. It is not, as such, democratic although the independent judiciary is an essential, often counter-majoritarian, element in a modern democratic state whose members are usually selected by elected politicians. The transnational legal dialogue that links rules of democratic national and international law is simply the latest element in this process of reconciling popular will and enduring values. It is stimulated and carried further by new information technology.

¹⁰⁵ Koh, 98 *American Journal of International Law* 43 (2004).

It is inevitable that contemporary and future judges will be more aware of developments of international law and of international and foreign courts and other bodies of high authority explaining and applying that law. If this is so, the real issue is not whether such sources will inform municipal judges in their decision-making. Of course, they will. It is whether such judges should disclose - and be ready to debate - this operation on their thinking or keep it secret. In the conversation between the Justices, Justice Scalia gave the game away when he said that, so far as he was concerned, it was all right for Justice Breyer to inform himself on international legal developments; but he should just keep it out of his opinions¹⁰⁶. For many judges, such a course is both inconsistent with the commitment to intellectual honesty and to transparent processes for argument, reasoning and decision-making.

Eighthly, some critics deny that human rights are universal or founded on a higher principle, such as human dignity or natural law. They see this as a discredited theory, incompatible with national sovereignty. They view it as an impermissible check on democratic accountability¹⁰⁷.

¹⁰⁶ Bryer and Scalia JJ, Transcript, p 27.

¹⁰⁷ Wells, 32 *Georgia Journal of International and Cooperative Law* 429 at 434 (2004).

It is true that there are many debates about the ultimate foundations of the moral values expressed in international law. It is ironic that this objection should be expressed in the United States, given the developed jurisprudence of this country and the profound impact that it had on the role of the United Nations in declaring human rights and fundamental freedoms. From Mrs Roosevelt's *Universal Declaration on Human Rights*, to the present day, American law and values have been profoundly influential in these developments.

Nevertheless, there are other responses to this complaint. It always remains for the municipal judge to evaluate the utility that will be derived from the jurisprudence of international courts and treaty bodies. Even if the character of human rights as "natural" or "innate" is disputable, the international law of human rights is already having a large impact on the values and ideals of judges, lawyers and other citizens in many countries. As Justice Breyer has said¹⁰⁸:

"[There is a] 'globalisation' of human rights, a phrase that refers to the ever-stronger consensus (now nearly world-wide) on the importance of protecting basic human rights, the embodiment of that consensus in legal documents, such as national constitutions and international treaties, and the related decisions to enlist

¹⁰⁸ S Breyer, "Keynote Address" 97 *American Society of International Law Proceedings* 265 (2003).

independent judiciaries as instruments to help make that protection effective in practice".

Given especially the contributions of the United States and Australia to these global developments, it is somewhat surprising to read a judicial view urging judges to apply "blinkers" to the outcomes of legal doctrine, reject them as irrelevant to our own national tasks of analysis and problem solving and above all to keep these influences ourselves.

Ninthly, critics point to the lack of knowledge of international law amongst the personnel of domestic courts and thus to the risk of mistakes and misunderstandings, or selective and incomplete presentations of the "true state of international and foreign affairs"¹⁰⁹.

An institutional incapacity to engage in scrutiny of such materials does indeed present risks. However, an increasing number of judges are embarking on the task. Given the extensive use of international and transnational law in most courts of the world, it could not be maintained persuasively that judges are unable to learn how to find applicable sources of international law on a given matter where those sources are deemed relevant and

¹⁰⁹ R P Alford, "Misusing International Sources to Interpret the Constitution" 98 *American Journal of International Law* 57 at 64 (2004).

helpful. Succinct texts are available to help in this task so far as the international law of human rights is concerned¹¹⁰.

Tenthly, there is a counterpoint argument that needs to be noticed. Some commentators, generally sympathetic to the use of sources founded in international human rights law, have expressed concern at the risks of arming an increasingly conservative judiciary with broadly stated principles of international human rights law with which they may inflict on the Constitution wounds that may be difficult to repair¹¹¹.

Whilst this argument introduces an element of *Realpolitik* into the debate, it founders on its assumption of judicial dishonesty. Judges, if they like, can use *any* source materials dishonestly. We assume that they will not do so. The overwhelming force of the judicial and other discourse in the elaboration of the international law of human rights has been one sensitive to minorities and protective of the basic rights and fundamental freedoms of the individual. The discourse has often been helpful in its elaboration

¹¹⁰ Such as Lord Lester of Herne Hill QC and D Pannick, *Human Rights Law and Practice* (2nd ed, 2004); H Steiner and P Alston, *International Human Rights in Context* (2nd ed, 2000); S Joseph, J Scultz and M Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd ed, 2004).

¹¹¹ cf R Hasen, "The Supreme Court and Election Law: Judging Equality from *Baker v Carr* to *Bush v Gore*, 164 (2003).

of the freedoms that human beings hold in common, simply because they are human. The contemporary body of international human rights law has grown out of Anglo-American jurisprudence which dominated the United Nations in the years in which the basic instruments were drafted and adopted. It is there to be used. Courts in many lands are now using it. They are doing so in reasoning in constitutional cases. The resulting question is whether some courts should continue to hold out and to treat such materials as irrelevant *per se*?

ARGUMENTS FOR THE INTERPRETATIVE PRINCIPLE

So far, I have responded to the critics. Now let me say, in conclusion, some affirmative things. There are strong reasons why courts, interpreting municipal constitutions, should inform themselves of the content of any relevant international law, and especially as that law relates to human rights and fundamental freedoms. It does not usually bind them, as such¹¹². But it will often "provide respected and significant confirmation for [their] our conclusions"¹¹³.

¹¹² I leave aside serious crimes of universal jurisdiction. See M D Kirby, "Universal Jurisdiction and Judicial Reluctance" in S Macedo (ed) *Universal Jurisdiction - National Courts and the Prosecution of Serious Crimes under International Law* (2004) 240 at 259.

¹¹³ *Roper v Simmons* 543 US 1 at 24 (2005) per Kennedy J.

First, it has now been accepted by courts in many countries that, where their constitutional text itself refers to fundamental rights and freedoms, it is proper, and useful, to have access to expert elaborations of the same, or like, provisions in other national constitutions and in international courts and tribunals.

That great judge, Chief Justice Dickson, in the Supreme Court of Canada, in the early years of the *Canadian Charter of Rights and Freedoms*, said that such access would provide "relevant and persuasive sources for interpretation"¹¹⁴. So it has been ever since¹¹⁵.

An identical approach has been taken to the elucidation of human rights provisions in the national constitutions (or equivalent documents) by the Judicial Committee of the Privy Council, for example, in respect of Trinidad and Tobago¹¹⁶ and by the final

¹¹⁴ *Reference re Public Service Employees Relations Act* (Alberta) [1987] 1 SCR 313 at 348 [57].

¹¹⁵ A Lamer, "Address at the International Conference on Enforcing International Human Rights Law: The Treaty System in the 21st Century" (22 June 1997), quoted in K Knop, 32 NYU Journal of International Law and Policy 501 at 518 (2000); C L'Heureux-Dube, "The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court" 32 *ULSA Law Journal* 15 at 24 (1998).

¹¹⁶ *Mathew v The State (Trinidad and Tobago)* [2004] 3 WLR 812 at [13].

appellate courts of Germany¹¹⁷; India¹¹⁸; Papua-New Guinea¹¹⁹; Hong Kong¹²⁰; Namibia¹²¹; Zimbabwe¹²² and doubtless many other countries.

In constitutional interpretation, especially, the courts of most countries have accepted, in the words of Justice Aharon Barak, President of the Supreme Court of Israel, that "the Constitution is intended to solve the problems of the contemporary person, to protect his or her freedom"¹²³. To ignore international developments because the constitutional Founders of one's own country did not know of them, or contemplate their precise form,

¹¹⁷ Presumption of Innocence and the European Convention on Human Rights (1987) B ver f GE 74, 358, translated into English in decisions of the Bundesverfassungsgericht - Federal Constitutional Court - Federal Republic of Germany, Vol 1/ii(1992) at 637-638.

¹¹⁸ *Vishaka v State of Rajasthan* AIR 1997 AIR SC 3011 at 3015. See G P Singh, *Principles of Statutory Interpretation* (9th ed, 2004), 529ff.

¹¹⁹ *Hiiveta, Leader of Opposition v Wingti, Prime Minister* [1994] BNGLR 197.

¹²⁰ *Schum Kwok Sher v H K SAR* [2002] 2 HK LKRD 793 at [59] per Mason NPJ.

¹²¹ *Ex parte Attorney-General (Namibia): In re Corporal Punishment* 1991 (3) SA 76 at 86.

¹²² *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General, Zimbabwe* 1993 (4) SA 239 at 247-248 per Gubbay CJ.

¹²³ A Barak, "Foreword: A Judge on Judging: The Role of a Supreme Court in Democracy, 116 *Harvard Law Review* 16 at 69 (2002) ("Barak").

would be to deny to a national constitution important contemporary sources for the constitution's practical and moral force¹²⁴.

Final courts, like the other branches of government of the nation state today, operate in a world of close inter-relationships. As Dean Koh has put it¹²⁵ "consciously to ignore global standards not only would ensure constant frictions with the rest of the world, but would also diminish the nation's ability to invoke those international rules that served its own national purposes"¹²⁶.

In constitutional elaboration, international law, like the law of foreign states, does not control the decisions of municipal judges. It is left to them to decide whether they can derive assistance from its exposition and reasoning. Many fine judges in many countries have found such assistance useful. Thus, Chief Justice Dickson in Canada declared that "international law provides a fertile source of insight"¹²⁷. Chief Justice Chaskalson in South Africa has said that "international and foreign authorities are of value because they

¹²⁴ H Charlesworth, "Dangerous Liaisons: Globalisation and Australian Public Law" (1998) 20 *Adelaide Law Review* 57 at 66.

¹²⁵ Koh, 98 *American Journal of International Law* 43 at 44 (2004).

¹²⁶ D Bodansky, "The Use of International Sources in Constitutional Opinion" *Georgia Journal of International and Comparative Law* 421 at 427 (2004) ("Bodansky").

¹²⁷ *Ref Re Public Service Employee Relations Act* (Alberta) [1987] 1 SCR 313 at 348.

analyse arguments ... and show how courts of other jurisdictions have dealt with this vexed issue"¹²⁸. To like effect, President Barak has written¹²⁹:

"[C]omparing oneself to others allows for greater self-knowledge ... Examining a foreign solution may help a judge choose the best local solution ... The benefits of comparative law is in expanding judicial thinking about the possible arguments, legal trends, and decision-making structures available".

When the opinions of other courts on international and transnational law are read, it can be seen that the approach to this subject, taken by a growing number of Justices of the Supreme Court of the United States¹³⁰, and by other distinguished American judges¹³¹, is far from idiosyncratic. Even some critics of the use of international law in constitutional interpretation are forced to concede¹³² that American judges should not "deprive themselves of reasons, arguments, distinctions, rhetoric and other helpful tools

¹²⁸ *S v Makwanyane* 1995 (3) SA 391 at 413 [34] (a case on the death penalty).

¹²⁹ Barak, 116 *Harvard Law Review* 16 at 110 (2002).

¹³⁰ eg *Printz v United States* 521 US 898 at 921, 977 (1997) per Breyer J.

¹³¹ eg M H Marshall, "'Wise Parents do not Hesitate to Learn from Their Children': Interpreting State Constitutions in an Age of Global Jurisprudence" 79 *NYU Law Review* 1633 at 1647 (2004).

¹³² Wells, 32 *Georgia Journal of International and Comparative Law* 429 at 429-430 (2004).

just because they find them in international materials". If they "illuminate common concepts and challenge us to think more clearly about our own legal questions"¹³³, they can be useful tools of analysis. To forbid their use is revealed as founded in insular self-satisfaction and national or imperial hubris or an unintellectual demand that a potentially useful source be suppressed, simply because it is written by foreigners.

A lot of very clever people, in many lands and sometimes in international courts and tribunals, are now engaged in elucidating the meaning and application of common or identical principles in the case of social problems that have a tendency to present themselves, in different countries, at the same time. So far as international and regional human rights law are declared by such people, in principled decisions supported by detailed reasons, it is unconvincing to suggest that they should be ignored in an unworthy self-denying ordinance of intellectual restriction¹³⁴.

Far from enhancing idiosyncratic decision-making, the reference to such sources in international law is a check against

¹³³ V Jackson, "Could I Interest You in Some Foreign Law? Yes, Please, I'd Love to talk with You" *Aug Legal Affairs* 43 at 43 (2004).

¹³⁴ G A Christenson, "Using Human Rights Law to Inform Due Process and Equal Protection Analyses" 52 *University of Cincinnati Law Review* 3 at 17 (1983).

"strong passion or momentary interest"¹³⁵. It is surely preferable that judges should have regard to such sources where they are relevant than that they should rely solely upon their own personal preferences and beliefs or on expositions written decades before by judges having no understanding of the society in which the law must operate¹³⁶. The use of such materials, far from undermining the legitimacy of municipal constitutional jurisprudence, contributes to "greater legitimacy by virtue of having paid due respect to the decisions of others" and this is so even if those others happen to be foreigners and the conclusion is different¹³⁷.

It follows that engaging, in the analysis of analogous points, with the opinions of judges and other writers in many countries, helps ensure a national supreme court against intellectual isolation and, consequentially, a diminished influence of its own in the world of ideas¹³⁸. Of course, this objective may be of no interest to those who are satisfied to live within their own national intellectual

¹³⁵ Bodansky, 32 *Georgia Journal of International and Comparative Law* 421 at 421 (2004).

¹³⁶ Simpson and Williams, 11 *Public Law Review* 205 at 217 (2000).

¹³⁷ D M Amann, "'Raise the Flag and Let it Talk': On the use of External Norms in Constitutional Decision Making" 2 *International Journal of Constitutional Law* 597 at 606 (2004).

¹³⁸ L'Heureux-Dube, "Realizing Equality in the Twentieth Century: The Role of the Supreme Court of Canada in Comparative Perspective" 1 *International Journal of Constitutional Law* 35 at 36 (2003).

cocoon. But it hardly accords with the world trends of globalism in economics, transport and communications (largely American interventions) that have contributed so significantly to the advance of freedom in every corner of the planet¹³⁹.

Because national constitutional courts are state organs, and because States are themselves (often by specific treaty) obliged to conform with international law, the failure of courts to give meaning to the law and the Constitution that accord, so far as possible, with international law, may itself contribute needlessly to state failures in that regard¹⁴⁰. Occasionally, disconformity will be unavoidable and under domestic law lawful. Municipal courts must then give effect to it. But in the contemporary world, it may be hoped that this will be relatively rare and that courts will play a part in avoiding unnecessary instances. The adaptation of their judicial techniques to this end is no more than a rational contemporary response to the accommodation of the nation, and its laws, to the environment of international law in which every nation now operates¹⁴¹..

¹³⁹ cf J C Clifford, "Globalization and Judicial Education" 28 *Yale Journal of International Law* 355 at 360 (2003).

¹⁴⁰ E Benvenisti, "Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts" (1993) 4 *EJIL* 159 at 160.

¹⁴¹ G La Forest, "The Expanding Role of the Supreme Court of Canada in International Law Issues" (1996) 34 *Canadian Yearbook of International Law* 89 at 100-101.

It is impossible to expect the relatively small numbers of international and regional courts and tribunals to carry the entire burden of upholding the rapidly developing corpus of international law. That is why national courts have an increasing role to play in this regard¹⁴². In the United States Supreme Court, Justice Blackman put it well when he explained how, in the contemporary world, American courts must look beyond narrow national interests to the "mutual interests of all in a smoothly functioning international legal regime". "Whenever possible they should", he said, "consider if there is a course that furthers, rather than impedes, the development of an ordered international system"¹⁴³. Even Justice Scalia has favoured this approach in respect of the domestic application of international law having no constitutional or human rights content¹⁴⁴

One of the few real innovations in the Australian Constitution's treatment of the judicial branch was a provision

¹⁴² Knop, 32 *NYU Journal of International Law and Policy* 501 at 517 (2000); A M Slaughter, "Judicial Globalization" 40 *Virginia Journal of International Law* 1103 at 1103 (2000).

¹⁴³ *Société Nationale Industrielle Aérospatiale v United States District Court* 482 US 522 at 555, 567 (1987).

¹⁴⁴ See eg *Olympic Airways v Husain* 540 US 644; 124 S Ct 1221 at 1231 (2004).

permitting State courts to exercise federal jurisdiction¹⁴⁵. Australian lawyers are thus familiar with the express sharing of jurisdiction and power between courts within the one polity, federal, State and territory. Professor Ian Brownlie¹⁴⁶ has suggested that, in determining matters upon which international law speaks, municipal courts are now to be seen as exercising a kind of international jurisdiction. In the end, they must normally resolve any conflict between international and municipal law in favour of valid and binding domestic laws. But international law would be grievously injured if national courts, out of a sense of their own superiority or proclaimed ignorance, were to reject the rules and influence of the international legal order.

To the greatest extent possible, in constitutional as in other branches of the law, domestic courts should seek a reconciliation of the international and municipal legal regimes. After all, as Daniel Bodansky put it: "Even the United States ... is part of the globe, connected to other countries in myriad ways"¹⁴⁷. The same is

¹⁴⁵ Australian Constitution, s 77(iii) ["... investing any court of a State with federal jurisdiction."]

¹⁴⁶ I Brownlie, *Principles of Public International Law* (5th ed, 1998) at p 584. See also *Reference re Secession of Québec* [1998] 2 SCR 217 at 234-235 [20]-[22] and D Turp and G van Ert, "International Recognition in the Supreme Court of Canada's Québec Reference" (1998) *Canadian Yearbook of International Law* 335 and G van Ert, *Using International Law in Canadian Courts* (2002) at pp 44-45.

¹⁴⁷ Bodansky, 32 *Georgia Journal of International and Comparative Law* 421 at 421 (2004); Charlesworth, (1998) 20 *Adelaide Law*

certainly true of Australia. Increasingly, it is true for the courts of every nation. And a great part of the explanation for this originates in the United States itself and in the ideas and inventions that have propelled us into the era of globalisation, where we are at once freer but more inter-dependent.

A TIMELY ACQUAINTANCE

The outcome of the controversy that I have outlined, concerning the relationship between international law and municipal courts, is still to be written. At least, it is still to be written in countries such as my own and in the United States. This is an important debate because, as the international legal order is enlarged, as its subject matter comes increasingly to concern individuals, as it increasingly provides machinery for scrutiny of complaints and findings, the expectations of an accommodation with international law are increased.

The dangers to the planet render more urgent the building of the international rule of law. No country, however wealthy and powerful in arms and economics, can shoulder, single handedly, the burdens of being the effective world policeman. The diversity of humanity demands diversification of our responses to the

Review 57; Neuman, 98 American Journal of International Law 82 at 87 (2004).

opportunities and perils of the time. It also demands utilisation of established national courts in spreading, where appropriate, any emerging consensus of humanity, that international law expresses and reinforces.

It is possible, in the end, that the rhetorical contests over these questions display less real division about utilisation of international law in domestic jurisdiction than might sometimes appear on the surface of the competing judicial and academic opinions¹⁴⁸. For some, the debate is a battle over transparency in judicial reasons. For others, it involves clarification of the limited function of international borrowings. Still others, require reassurance that domestic law, with its longer history and its democratic foundations, will ultimately prevail within its own country. But, particularly in the world of human rights and fundamental freedoms, there is a need to engage in a global dialogue. Increasingly, such a dialogue is happening amongst judges of final courts. They meet in person. Their minds meet in the internet. They read each other's opinions. Their discourse about international law is no longer an indulgence or an esoteric legal specialty. As Justice O'Connor has said, it is now "becoming a duty"¹⁴⁹.

¹⁴⁸ *Al-Kateb v Godwin* (2004) 78 ALJR 1099 at 1132 [173].

¹⁴⁹ O'Connor, above n 18, 96 *Am Soc'y Int'l Proc* 348 at 351 (2002).

What I have described in this Lecture is an intellectual movement. It is a source of analysis and ideas. It is a font of shared wisdom. It is irreversible, as human reason itself is¹⁵⁰. Its momentum is unstoppable. It identifies the next phase in the advancement of international law and the international rule of law.

What carries us forward is the memory of the terrible wrongs to human rights and knowledge of the dangers for the world we live in, absent international law. It is not too much to say that the interaction of international and national law constitutes one of the largest challenges for the law in the century ahead. Its outcome is critical for the future of international law¹⁵¹. That future is, in turn, critical for the future of human life. It is vital that national judges should be aware of this challenge and alert to the need, individually and institutionally, to respond. We will not in our lifetimes resolve these questions finally. Indeed, it is not our duty to finish the task. But neither are we free of the moral obligation to try¹⁵².

¹⁵⁰ O Fiss, "The Irrepressibility of Reason in *The Law as It Could Be* (2003) 221 at 228.

¹⁵¹ D Kennedy, "The Twentieth-Century Discipline of International Law in the United States" in Austin Sarat et al *Looking Back at Law's Century* (2002) 386 at 410.

¹⁵² Rabbinical Instruction, *Pirkei Avot (Ethics of the Fathers)* attributed to Rabbi Tarphon, 2nd Century AD, quoted in L Star, *Julius Stone* (1992) at xii.

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