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DANGEROUS LIAISONS: GLOBALISATION AND AUSTRALIAN PUBLIC LAW

INTRODUCTION

TALK of globalisation and constitutional law may seem an oxymoron. Globalisation is all about the move to internationalism, interdependence and common links, the repudiation of national and local particularities, the meaninglessness of borders and the challenging of state sovereignty. Constitutional law is concerned with the structures of a national or local polity, specifying the institutions and doctrines that make up the framework of a country or state. It celebrates sovereignty, particularity, self-sufficiency and isolation. Globalisation could, thus, be seen to be the antithesis of constitutional law or, indeed, its nemesis, sounding the end of peculiar, entrenched systems of governance and bringing some type of global uniformity to the way we are ruled.

Today, constitutional law can no longer be thought of in isolation from international developments, however hard some wish this were the case. I have used the title of the eighteenth century novel of Laclos¹ (and the striking film by Stephen Frears) for this paper because it captures the idea of a series of dangers: the thrill of romance, the threat of seduction, the peril of rejection. There are connections between the corrupting figures of Valmont, the evil but charming seducer, and Mme de Merteuil, his sophisticated accomplice, and the way some critics of the increasing internationalisation of Australian public law present international law. Australian sovereignty is cast in the role of *Présidente de Tourvel*, the innocent and beautiful object of Valmont's seduction.

The dangerous aura that international law has acquired in Australia has produced in turn what I regard as a dangerous obsession with cutting Australia adrift from international law-making, particularly in the area of human rights. But I also want to suggest that the liaison between Australian public law and globalisation is dangerous in a more positive sense: it unsettles and challenges many of the rigidities and limitations of Australian law.

The Australian Minister for Foreign Affairs, Mr Downer, has said that "we all fall into one of two camps. You are either a globaphobe or a globophile."² I think that this dichotomy

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1 Laclos, *Les Liaisons Dangereuses* (Parmee, trans) (Oxford University Press, Oxford 1995).

2 "Globalisation or Globaphobia: Does Australia Have a Choice?" (1998) 2 *Foreign Affairs and Trade Record* 5.

is too stark to be accurate. In constitutional law, we see a complex and shifting attitude to globalisation, depending on the subject matter. In this paper, I explore some of the tensions in the relationship between globalisation and public law in an Australian context. I think that the tensions are becoming more and more acute and that much more attention should be devoted to this by both international and public lawyers. I illustrate these tensions by looking at some examples of the High Court's and the Commonwealth Parliament's responses to legal globalisation and the way they move between romantic and licentious images of the international legal order. I argue that we should neither embrace globalisation in a grand passion nor should we peremptorily spurn its advances. Rather we need to develop a mature and reflective relationship between the Australian legal system and the global and we must develop creative ways of responding to and harnessing the forces of globalisation. In other words, we must turn the liaison into a permanent and productive relationship.

The term globalisation is used in many different ways. It is most often used in an economic context, meaning that markets are sloughing off their attachment to national or regional boundaries. It is also often associated with technological advances in communications that make boundaries seem inconsequential.³ I am using it here in a different, narrower, sense to refer to the effects of international law on national legal systems, in particular Australia.

At Federation, of course, the relationship between international law and the Australian Constitution was not in issue. International law was then basically concerned with relations between countries in a fairly literal way: it dealt with principles of boundary drawing, of diplomatic relations, of war and peace. Moreover, at Federation Australia was not considered a full international citizen - in George Reid's words, it was a "colony within an empire"⁴ - and most of its engagement with international law was vicariously conducted through the United Kingdom. The only point of engagement between the international and national contemplated in the Constitution was s51(xxix), which gives the Commonwealth government legislative power with respect to "external affairs".

Over the last century there have been enormous changes in both Australian international status and in international law. Australia is now an active, independent member of the international community, and the focus of international law has been transformed from one on inter-state relations to one "penetrat[ing] formerly sacrosanct national borders and concern[ing] itself with domestic affairs and individual human rights within nation

3 See Rosenau, "The Complexities and Contradictions of Globalization" (1997) 96 *Current History* 360.

4 Quoted in Crawford, "International Law and Australian Federalism: Past, Present and Future" in Opeskin & Rothwell (eds), *International Law and Australian Federalism* (Melbourne University Press, Melbourne 1997) p327.

States.”⁵ These developments have forced an engagement between the national and international legal orders in Australia that has been full of suspense and drama. The liaison can be dated to the election of the Whitlam Labor Government in 1972 when the new government generated a flurry of treaty signing, particularly of human rights treaties.⁶ The interest in international law has continued ever since, with some waxing and waning.⁷

JUDICIAL RESPONSES TO GLOBALISATION

The domestic ramifications of this international activity became apparent when the Commonwealth government relied on the external affairs power in the Australian Constitution to translate the treaty obligations into law. In the early 1980s, the High Court had to deal in *Koowarta v Bjelke-Petersen*⁸ and *Commonwealth v Tasmania (Tasmanian Dam Case)*⁹ with challenges to the use of this power to implement international agreements. Its response, by narrow majorities, was to read the external affairs power in a broad way, to include international agreements and also principles of customary international law. How were images of the international constructed and employed in these cases? Members of the majorities typically painted international law in romantic terms. It was something every self-respecting nation would want to embrace. Fulfilling the matchmaker’s adage that “opposites attract”, international law was presented as making up for some of the deficiencies in the Australian legal system. Thus, in *Koowarta*, Justice Murphy referred to Australia’s tradition of discrimination against the Aboriginal people and viewed the implementation of the international prohibition on racial discrimination as a necessary step in Australia’s expiation of its history.¹⁰

There is also romance in the reference to international institutions engaging in a type of cosmopolitan democracy, identifying norms that have global legitimacy. For example, in *Koowarta* Justice Stephen quoted the stirring words of the preamble to the United Nations Charter, of “we the peoples’ ... faith in fundamental human rights, in the dignity and worth of the human person, in equal rights of men and women”.¹¹ Justice Mason talked of the community of nations’ opposition to racial discrimination on idealistic and humanitarian grounds as well as the threat it posed to friendly relations among nations.¹² Justice Murphy also presented the United Nations as a concerted international response to massive

5 Stephen, “Foreword” in Opeskin & Rothwell (eds), *International Law and Australian Federalism* pv.

6 See De Stoop, “Australia’s Approach to International Treaties on Human Rights” (1970-73) 5 *Aust YBIL* 27.

7 James Crawford gives a useful overview of the relationship in Crawford, “International Law and Australian Federalism: Past, Present and Future” in Opeskin & Rothwell (eds), *International Law and Australian Federalism* p325.

8 (1982) 153 CLR 168.

9 (1983) 158 CLR 1.

10 (1982) 153 CLR 168 at 239-240.

11 At 218.

12 At 235.

human rights violations: “there was an increasing consciousness ... that people had responsibility for the well-being of others everywhere, irrespective of national barriers which were unnaturally dividing humanity.”¹³ So, too, in *Tasmanian Dam*, Justice Murphy went into considerable detail about the establishment of UNESCO and its work,¹⁴ and he provided a select list of other world heritage properties around the world.¹⁵ To give a full context, he also listed the seven wonders of the ancient world!¹⁶ Overall, his view seemed to be that there was a natural marriage of international and domestic law which was being put asunder by an obsession with sovereignty.

Majority judges in High Court decisions on the external affairs power were also influenced by the need for Australia to be seen to be taking its international obligations seriously in order for it to be able to hold its head high on the international stage. Justice Murphy’s dramatic warning in *New South Wales v Commonwealth (Seas and Submerged Lands Case)*¹⁷ that Australia would be seen as an “international cripple” if it did not engage more at the international level was repeated and endorsed by Justice Deane in *Tasmanian Dam*.¹⁸ Similarly, Justice Mason said in *Koowarta*:

[i]t is important that the Commonwealth should retain its full capacity through the external affairs power to represent Australia, to commit it to participation in these developments when appropriate and to give effect to obligations thereby undertaken.¹⁹

The prospect of the Commonwealth being unable to legislate to implement its international obligations, said Justice Mason, was “altogether too disturbing to contemplate. [It would be] a certain recipe for indecision and confusion, seriously weakening Australia’s stance and standing in international affairs.”²⁰

The concern with the keeping of commitments and promises has echoes of the solemnity of marriage vows. The majority judges interpreted the Constitution to support Australia’s international obligations, ensuring that the national sphere did not undermine these international vows. Justice Dawson, a consistent dissenter on the scope given to the external affairs power, criticised this view. He shifted the focus away from the liaison

13 At 238-239.

14 (1983) 158 CLR 1 at 176-177.

15 At 172-173.

16 At 174.

17 (1975) 135 CLR 337 at 503.

18 “Australia would, in truth, be an ‘international cripple’ if it needed to explain to countries with different systems of law and completely different domestic rules governing the enforceability of agreements, that the ability of its national government to ensure performance of ‘obligations’ under an international convention would depend on whether those obligations were or were not held to be merely illusory”: (1983) 158 CLR 1 at 262.

19 (1982) 153 CLR 168 at 229.

20 At 225.

between the national and international and placed it squarely on the national arena. Thus, in *Victoria v Commonwealth*²¹ he said that the external affairs power was not “a power to make laws for the purpose of cementing international relations or achieving international goodwill or even for implementing treaties.”²² It was instead a limited power to legislate on activities that have a physically external aspect.

The minorities’ approach in *Koowarta* and *Tasmanian Dam* presented contradictory images of the international order. From one perspective, it was pale and wan, full of vague commitments that could have no punch in the Australian legal system. This is particularly evident in the discussion of whether the World Heritage Convention at issue in *Tasmanian Dam* contained binding obligations. Chief Justice Gibbs in particular dissected the provisions of the Convention to conclude that they imposed few such obligations.²³ From another minority perspective, international law was concerned with the big picture. It left “trivial” transgressions such as discrimination by the Queensland Government against John Koowarta to national systems and was concerned only with “gross violations or consistent patterns of violations” or human rights breaches that threatened international peace and security.²⁴ From yet another minority perspective, international law was a seductive influence that had the potential to corrupt the federal basis of the Australian polity. Thus Chief Justice Gibbs warned in *Koowarta* that if the protection of human rights qualified as an external affair:

[t]he distribution of powers made by the Constitution could in time be completely obliterated; there would be no field of power which the Commonwealth could not invade, and the federal balance achieved by the Constitution could be entirely destroyed.²⁵

The image is of international law as predator, ravishing the pure federal fabric of the Australian Constitution. By 1996, in *Victoria v Commonwealth*, six members of the High Court had firmly repudiated this image, depicting international law as an evolving concept.

It would be a serious error to construe para (xxix) as though the subject matter of those relations to which it applied in 1900 were not continually expanding. Rather, the external relations of the Australian colonies were in a condition of continuing evolution and, at that time, were regarded as such. Accordingly, it is difficult to see any justification for treating the content of the phrase “external affairs” as crystallised at the moment of federation, or denying it a particular application on the ground that the

21 *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416.

22 At 572 (quoting his own judgment in *Richardson v Forestry Commission* (1988) 164 CLR 261 at 326).

23 (1983) 158 CLR 1 at 79-96.

24 (1982) 153 CLR 168 at 206 per Gibbs CJ.

25 At 198.

application was not foreseen or could not have been foreseen a century ago.²⁶

The High Court has considered the liaison between the international and domestic legal orders in other contexts. Two examples of the encounter of international law with Australian law, which both generated predictions of great danger, are the development of the common law on native title in *Mabo v Queensland (No 2)*²⁷ and the interpretation of administrative law principles in *Minister of State for Immigration and Ethnic Affairs v Teoh*.²⁸

In a much-quoted passage in *Mabo*, Justice Brennan said that:

The expectations of the international community accord in this respect [opposing racial discrimination] with the contemporary values of the Australian people. ...

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 in unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule.²⁹

These statements described a very close relationship between international and domestic law. However Justice Brennan also said:

this Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency.³⁰

It was not entirely clear what principles form part of the skeleton of Australian law, but Justice Brennan's concern with its preservation is a potentially significant limitation on *Mabo's* embrace of international law. The *Mabo* view of international law is then a relatively coy one and, in any event, it was not determinative of the issue. In some

26 (1996) 187 CLR 416 at 482.

27 (1992) 175 CLR 1.

28 (1995) 183 CLR 273.

29 (1992) 175 CLR 1 at 42.

30 At 29.

contexts, particularly human rights, international law can influence the development of the common law. It cannot, however, alter the fundamental structure of Australian law.³¹

The *Teoh* case caused great controversy because of its account of the relationship between international and domestic law. At issue was the significance of Australia's ratification of the Convention on the Rights of the Child (CROC) for administrative decision-makers. Australia has not implemented CROC in Australian law. As in *Mabo*, the majority of the High Court held that a ratified, non-implemented treaty could be used as a guide to the development of the common law. Although the decision has been attacked as radical and improper, from an international legal perspective it is very modest. For example, Chief Justice Mason and Justice Deane said of the technique of relying on an unimplemented treaty to develop the common law:

A cautious approach to the development of the common law by reference to international conventions would be consistent with the approach which the courts have hitherto adopted to the development of the common law by reference to statutory policy and statutory materials. Much will depend upon the nature of the relevant provision, the extent to which it has been accepted by the international community, the purpose which it is intended to serve and its relationship to the existing principles.³²

Chief Justice Mason and Justice Deane emphasised that they were not developing a binding rule of law from the unimplemented treaty, but simply a legitimate expectation:

The existence of a legitimate expectation that a decision maker will act in a particular way does not necessarily compel him or her to act in that way. That is the difference between a legitimate expectation and a binding rule of law. To regard a legitimate expectation as requiring the decision maker to act in a particular way is tantamount to treating it as a rule of law. It incorporates the provisions of the unincorporated convention into our municipal law by the back door.³³

31 Compare *Dietrich v R* (1992) 177 CLR 292 at 306, 321 and 360, where members of the High Court (Mason CJ and McHugh J, Brennan J, and Toohey J, respectively) agreed in principle that a provision of the International Covenant on Civil and Political Rights, unimplemented in Australian law, could influence the development of the common law, if there was some ambiguity in the common law. Brian Opeskin and Don Rothwell have argued that the High Court was probably influenced by international law principles in its decision that there was a common law right to a fair trial, although the source of the right was traced to the common law alone: Opeskin & Rothwell, "The Impact of Treaties on Australian Federalism" (1995) 27 *Case W Res J Int'l L* 1 at 29.

32 (1995) 183 CLR 273 at 288.

33 At 291. Justice Gaudron also referred to limitations on the use of treaties. She argued that the provision of CROC in question (Article 3), expressing the "best interests of the child" principle, "gives expression to an important right valued by the Australian community" and

The leading judgment was also influenced by the inconsistency of the Commonwealth's approach to treaty obligations. The Commonwealth has energetically accepted international obligations, but has appeared reluctant to implement them domestically.³⁴ Since leaving the High Court, Sir Anthony Mason has commented that he sees a conservative approach to engaging with international law (as in *Teoh*) as the appropriate one.³⁵ This approach accepts international law, not to impose new, imported values on Australian law, but as an expression of existing common law principles or community values. This account reduces the dangers of the liaison of international and Australian law, by making the former subordinate to the latter.

The *Teoh* dissenter, Justice McHugh, presented international law as a demanding, nagging partner for Australian law. He predicted that endorsing a legitimate expectation that unimplemented treaties should be taken into account in administrative decision-making would cause domestic chaos.

It would follow that the convention would apply to every decision made by a federal official. ... If the expectation were held to apply to decisions made by State officials, it would mean that the executive government's action in ratifying a convention had also altered the duties of State government officials. The consequences for decision makers in this country would be enormous.³⁶

Justice McHugh's solution was to separate out the incompatible spheres of international and national law making:

The ratification of a treaty is not a statement to the national community. It is, by its very nature, a statement to the international community. The people of Australia may note the commitments of Australia in international law, but, by ratifying the Convention, the executive government does not give undertakings to its citizens or residents. The

thus that "it is reasonable to speak of an expectation that the Convention would be given effect. However, that may not be the case of a treaty or convention that is not in harmony with community values and expectations.": (1995) 183 CLR 273 at 304-305. This approach views international law as the subsidiary partner in the relationship. Its value is simply as a confirmation of a great Australian value. The Gaudron approach does not provide guidance on when a particular right could be said to be one "valued by the Australian community". Might not all the rights set out in the international human rights treaties so qualify?

34 *Teoh* (1995) 183 CLR 273 at 291. See also Justice Brennan in *Dietrich* (1992) 177 CLR 292 at 321.

35 Mason, "International Law as a Source of Domestic Law" in Opeskin & Rothwell (eds), *International Law and Australian Federalism* p210.

36 (1995) 183 CLR 273 at 316.

undertakings in the Convention are given to the other parties to the Convention.³⁷

The broadest judicial account of the relationship of international law to Australian law is then found in the cases on s51(xxix). This is unsurprising, perhaps, because this is the only clear constitutional recognition of the liaison. In other areas, the High Court has little romance about international law. International law is useful as an adjunct to the common law in some circumstances, but it is not an equal partner in the relationship. Indeed the majority of judges in the High Court decision in *Kartinyeri v Commonwealth (Hindmarsh Island Bridge Act Case)*³⁸ saw little scope for international law in interpreting constitutional provisions. An argument was made by Doreen Kartinyeri that s51(xxvi) of the Constitution³⁹ should be read in light of international standards of non-discrimination. Only Justice Kirby accepted this proposition. He referred to an interpretative principle that, where the Constitution is ambiguous, the High Court "should adopt that meaning which conforms to the principles of universal and fundamental rights rather than an interpretation which would involve a departure from such rights."⁴⁰ He went on to say:

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. ... The Australian Constitution ... 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.⁴¹

For this reason Justice Kirby held that s51(xxvi) of the Constitution cannot be interpreted to permit detrimental and adverse discrimination in Australian law on the basis of race. The majority judges acknowledged the principle but did not consider that the meaning of s51(xxvi) was ambiguous, allowing the application of the principle. There was no discussion of the substance of the international principles, nor the threshold requirement of ambiguity.

In his 1997 Deakin Lecture Greg Craven identified "internationalism" as a profound influence on a constitutionally and ethically bankrupt High Court.⁴² He noted human rights treaties in particular as dangerous, prompting the High Court to insert similar guarantees into the Australian Constitution. Internationalism is used, in Craven's view, as "an immensely powerful rhetorical and moral weapon with which to justify judicial

37 As above.

38 (1998) 152 ALR 540.

39 "The Parliament shall ... have power to make laws ... with respect to:- The people of any race for whom it is deemed necessary to make special laws."

40 (1998) 152 ALR 540 at 598.

41 At 598-599.

42 Craven, *The High Court of Australia: A Study in the Abuse of Power* (Alfred Deakin Lecture Trust, Melbourne 1997) p33.

incursions into the content of the Constitution by way of the creation of individual rights.”⁴³ The seductions of the international, according to Greg Craven, have swept the High Court into illegitimate law-making, indeed into “judicial imperialism in a constitutional context.”⁴⁴ This understanding is widely held also by politicians. For example, John Howard as Leader of the Opposition in 1995 referred to the “illicit” use of the external affairs power to implement international law into Australian law,⁴⁵ implying some form of wanton behaviour by the High Court.

I think that the threat of international law to the Australian legal system is much exaggerated. As we have seen, the High Court has been very cautious in its embrace of international law; it has kept its gloves and hat on at all times. Greg Craven’s criticisms of internationalism are linked to his particular “originalist” theory of constitutional interpretation: that the intentions of the founding fathers should be given primacy in interpreting the words they drafted almost a hundred years ago.⁴⁶ Whatever power this theory may have with respect to other aspects of the Constitution, it can have none with respect to the place of international law. The events of this century have totally altered the scope and relevance of international law to the Australian legal system. To ignore international developments because the founding fathers did not contemplate them would make our Constitution lose its practical and moral force.

The view that the international legal order introduces undesirable principles into the Australian system, wantonly corrupting Australian federalism, is perhaps a natural response to change, a nostalgia for a simple, limited world. It has overtones of the debate over the “Bricker amendment” to the United States Constitution in the early 1950s. Senator Bricker sought to amend the Constitution to make it impossible for the United States to adhere to human rights treaties, apparently to resist the civil rights movement’s campaign against racial segregation.⁴⁷ The approach is not useful or programmatic in that it offers no principle, except that of avoidance and abstention (just say “no”), to guide engagement with the international.

43 As above.

44 As above.

45 Howard, “Headland Speech 1: The Role of Government: A Modern Liberal Approach”, Menzies Research Centre 1995 National Lecture Series, 6 June 1995, p25.

46 Craven, *The High Court of Australia: A Study in the Abuse of Power* pp7-10.

47 The operative provision of the Bricker Amendment was “A treaty shall become effective in the United States only through legislation which would be valid in the absence of treaty.” This would have prevented federal legislation that was not otherwise within congressional power and overruled: *Missouri v Holland* 252 US 416 (1920). See Henkin, “US Ratification of Human Rights Conventions: The Ghost of Senator Bricker” (1995) 89 *American Journal of International Law* 341 at 348-349.

LEGISLATIVE AND EXECUTIVE RESPONSES TO GLOBALISATION OF LAW

If the Australian High Court has offered a range of emotions - embrace, coyness, spurning - in accepting international law as part of Australian law, what of the overtly political arms of government, unconstrained by the need to provide principled reasons for their actions? What images of the international are invoked in Australian political discourse? I will examine briefly two different aspects of the liaison between Australian and international law.

Anti-*Teoh* Bill

The *Teoh* decision was greeted with dismay by the then Labor Government, which quickly attempted to repudiate its effect. The Attorney-General and Minister for Foreign Affairs issued a joint statement which echoed Justice McHugh's dissent. They said:

Entering into an international treaty is not reason for raising any expectation that government decision-makers will act in accordance with the treaty if the relevant provisions of that treaty have not been enacted into domestic Australian law.⁴⁸

At international law, entry into a treaty raises precisely the expectation that it will be implemented and the 1995 Joint Statement seemed to announce a divorce of the international and the Australian legal order in a very curious way. It appeared to assume that international legal obligations were undertaken in an almost frivolous way, simply to impress the international community. Legislation was introduced to implement the message of the Joint Statement,⁴⁹ it was reported on favourably by the Senate Legal and Constitutional Committee,⁵⁰ but it was eventually allowed to lapse with the prorogation of Parliament in March 1996, partly because of a significant public outcry.

A statement similar to that made by Senator Evans and Mr Lavarch was made by their successors in office, Mr Downer and Mr Williams, in February 1997. A new version of draft legislation to undo *Teoh* was introduced, the Administrative Decisions (Effect of International Instruments) Bill 1997. It was referred to the Senate Legal and Constitutional Legislation Committee where it was supported by Coalition members. The anti-*Teoh* bill was presented as fulfilling an aspect of the 1996 Coalition Law and Justice Policy which had stated:

Australian laws, whether relating to human rights or other areas, should first and foremost be made by Australians, for Australians. ... [W]hen

48 Joint Statement of 10 May 1995.

49 Administrative Decisions (Effect of International Instruments) Bill 1995.

50 Aust, Parl, Senate, Legal and Constitutional Legislation Committee, *Report on the Administrative Decisions (Effect of International Instruments) Bill 1995* (1995).

Australian laws are to be changed, Australians and the Australian political process should be at the beginning of the process, not at the end.⁵¹

The Bill was claimed to provide administrative certainty in the face of the doubt engendered by the *Teoh* importation of international law. Its role was also to “maintain the proper role of parliament”, to allow it to act as the gatekeeper for the introduction of international legal principles.⁵² The substance of international law principles was not addressed. It seems that international law (particularly on human rights) has a suspect air - a rather threatening, dangerous flood of un-Australian values. By 1997, the Labor members of the Committee appeared to have lost their enthusiasm for the anti-*Teoh* bill, partly because the fears of administrative chaos post-*Teoh* had not been realised.⁵³

Direct Recourse to Human Rights Treaty Bodies

In 1991, Australia acceded to the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) and in 1993 parallel mechanisms for individual complaint under the Convention on the Elimination of All Forms of Racial Discrimination⁵⁴ and the Convention against Torture.⁵⁵ These procedures allow individuals within Australian jurisdiction to make a complaint to the relevant treaty-monitoring body that Australian law breaches the provisions of the relevant treaty, if they have exhausted all available domestic remedies.⁵⁶ The procedures allow the most direct potentially dangerous liaison between the Australian and international legal order. What has happened in practice?

Only two cases against Australia have yet survived to be decided on their merits, *Toonen* (1994)⁵⁷ and *A* (1997).⁵⁸ Australia’s response to the views of the United Nations Human Rights Committee in *Toonen* was quite limited⁵⁹ and in the *A* case Australia simply

51 Aust, Parl, Senate, Legal and Constitutional Legislation Committee, *Report on the Administrative Decisions (Effect of International Instruments) Bill 1997* (1997) p2.

52 At p25.

53 At pp33, 39-40.

54 Article 14.

55 Article 22.

56 See Charlesworth, “Australia’s Accession to the First Optional Protocol to the ICCPR” (1991) 18 *MULR* 428.

57 UN Doc CCPR/c/50/D/488/1992, 4 April 1994.

58 UN Doc CCPR/c/59/D/560/1993.

59 The Australian government’s response to the Human Rights Committee’s decision in *Toonen* that Tasmania’s criminalisation of homosexuality was a violation of Article 17 of the ICCPR was to enact the *Human Rights (Sexual Conduct) Act* 1994. The HRC had recommended repeal of the Tasmanian law, but, even when politely asked to do so, the Tasmanian government declined. The Commonwealth legislation is very limited. It singles out one aspect of Article 17 for protection, indeed the narrowest possible definition raised on the particular facts of *Toonen*.

Sexual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth, a State or a Territory, to

announced that it did not agree with the Human Rights Committee's views.⁶⁰ These reactions indicate the distance between the international and domestic legal order from the government's perspective. Indeed the very existence of a right of individual communication to international fora has been portrayed as an attack on Australian sovereignty. In a speech in 1993 to the Samuel Griffith Society, John Howard said of Australia's acceptance of the right of individual communication to a UN treaty monitoring committee:

There can be no argument with proper redress for human rights infringements. But surely it is within our own wit, competence, dignity and self-respect as a nation to provide for the resolution of those matters once and for all within the borders of our own country. Such examples of sovereignty thrown away make a mockery of calls for Australia to become a republic in the name of achieving national independence.⁶¹

Two aspects of this type of criticism are worth noting. First, it presents engagements with the international human rights treaty regime as dangerous in the sense of diminishing national dignity and self-respect. But this analysis does not take into account the fact that Australia has freely agreed to participate in the system, nor the fact that the right of individual communication is only available when national remedies are inadequate. Second, it is striking that those who are concerned about a diminution in Australian sovereignty by individuals having recourse to international human rights mechanisms are also those who are strongly opposed to Australia developing its own human rights mechanisms, such as a bill of rights. It seems that the real object of their anxieties may be more the implications of effective protection of human rights than the preservation of a pure Australian sovereignty.

any arbitrary interference with privacy within the meaning of Article 17 of the ICCPR (s4 (1)).

The legislation has also been criticised for not being directly inconsistent with the Tasmanian law: it would have required a court challenge to establish that the Tasmanian laws were "an arbitrary interference with privacy". In the event, of course, the Tasmanian Parliament eventually repealed its law.

60 Attorney-General and Minister for Immigration and Multicultural Affairs, Joint News Release, 17 December 1997.

61 Howard, "Mr Keating's Mirage on the Hill: How the Republic, Like the Cheshire Cat, Came and Went", *Proceedings of the Third Conference of the Samuel Griffith Society, Upholding the Australian Constitution* (Samuel Griffith Society, Melbourne 1993) vol 3, p133. See also the remarks of Senator Rod Kemp, quoted in Fray, "UN Rules, OK?" *The Bulletin*, 11 October 1994 p18.

CONCLUSION

I have argued that the liaison between international law and Australian law has been dangerous in a number of senses. First, even the quite modest embrace of international law by the Australian High Court has attracted considerable wrath. Second, this false perception of danger has in turn caused a more real danger of a rather half-baked Australian chauvinism with respect to international developments, illustrated by the anti-*Teoh* bill and the charges that use of human rights treaties threatens Australian sovereignty.

This argument may have some superficial appeal and plausibility, but it does not survive thoughtful reflection. At international law, states are sovereign in the sense that they determine their own political and economic systems. Yet the notion of absolute sovereignty has no purchase in a world of sovereign states. As Henry Burmester has written:

States do not exist in splendid isolation. Just as individuals in a society are not completely free to act in whatever way they like, so States as members of the international community of nations are constrained by international law in the way they can behave.⁶²

Burmester continued, quoting Hurst Hannum:

[T]he very concept of the equality of states at least implies that sovereign rights of each state are limited by the equally sovereign rights of others. ... [S]overeignty in its original sense of “supreme power” is not merely an absurdity but an impossibility in the world of states which pride themselves upon their independence from each other and concede to each other a status of equality before the law.⁶³

There is of course broad acceptance of international law in many areas, such as international postal and aviation conventions. It is striking that the international appears particularly dangerous and threatening in the context of human rights. Many commentators and politicians who criticise the imposition of “foreign” social and political rights through globalisation embrace its economic creeds and dogmas. It has been said that “national sovereignty has long been a thing of the past when it comes to many areas of business regulation.”⁶⁴ Anne Orford has noted that governments tend to be attracted to

62 Burmester, “National Sovereignty, Independence and the Impact of Treaties and International Standards” (1995) 17 *Syd LR* 127 at 131.

63 As above, quoting Hannum, *Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights* (University of Philadelphia Press, Philadelphia 1990) p15.

64 Braithwaite, “Sovereignty and Globalisation of Business Regulation” in Alston & Chiam (eds), *Treaty-Making and Australia: Globalisation Versus Sovereignty?* (Federation Press, Sydney 1995) p115.

internationalist discourse in the context of the world economy, indeed linking modernity to the international, but they often reject internationalist discourse in areas such as human rights which more radically challenge governmental power.⁶⁵ Indeed there is the paradox that, as the scope of international law increases, touching more aspects of our lives, the changes caused by globalisation within states, such as the move to privatisation of public functions, provide strong resistance to internationally based guarantees of rights.⁶⁶

Critics of globalisation have pointed to the problems globalisation poses for the protection of human rights. Human rights is low on the agenda of global capitalism. But, as John Braithwaite has pointed out, "there can be paradoxes of sovereignty where globalisation is associated with an increase rather than a decrease in sovereignty, properly conceived as the capacity of citizens to understand decisions that will affect their lives and to raise their voices in a way that influences those decisions."⁶⁷ He has encouraged civil society to enhance the voices of weaker players in the world system, for example by building international movements of citizens concerned with the environment, health and human rights to create an enhanced citizen sovereignty.

One way to discriminate among the many senses of globalisation is suggested by Richard Falk's distinction between "globalisation from above" and "globalisation from below".⁶⁸ "Globalisation from above" means the expansion of the international division of labour, the growing influence of multinational corporations and the influence of western-dominated financial institutions, such as the World Bank and the World Trade Organisation. The aim of "globalisation from below", by contrast, is the creation of a global civil society, giving priority to such values as human rights and environmental protection.

How can we make the dangerous liaison between international law and Australian law a more productive partnership? How can Australia usefully participate in "globalisation from below"? One way to achieve this is through a clear statement of the relationship between international and Australian law. The new South African Constitution provides an interesting example. Section 232 states that:

Customary international law is law in the Republic unless it is inconsistent with the Constitution or an act of Parliament.

And s233:

65 Orford, "Locating the International: Military and Monetary Interventions after the Cold War" (1997) 38 *Harv Int'l LJ* 443.

66 Alston, "The Myopia of the Handmaidens: International Lawyers and Globalization" (1997) 8 *Eur J Int'l L* 435.

67 Braithwaite, "Sovereignty and Globalisation of Business Regulation" in Alston & Chiam (eds), *Treaty-Making and Australia* p125.

68 Falk, "The Making of Global Citizenship" in Brecher et al (eds), *Global Visions: Beyond the New World Order* (South End Press, Boston 1993) p39.

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

Another way to participate in globalisation from below would be the introduction of some form of bill of rights in Australian law. In James Crawford's words, this would "take much of the heat out of the issue" of internationalisation "by providing a set of equivalent standards which are likely to pre-empt international scrutiny."⁶⁹ In Australia the strongest critics of legal internationalisation tend also to provide the greatest resistance to the introduction of Australian guarantees of rights. Perhaps the introduction of a Human Rights Bill into the United Kingdom Parliament in February 1998 (launched under the rubric of "Bringing Britain's Rights Home") will inspire Australian politicians.⁷⁰ Or perhaps Australia needs, as the United Kingdom, to be found in breach of an international human rights instrument fifty times (the European Convention on Human Rights in the case of the UK) before it will act.⁷¹

In Laclos' book, *Dangerous Liaisons*, the wicked seducer Valmont is killed in a duel and his accomplice, Mme de Merteuil, is condemned to a miserable life, her machinations exposed, disfigured by smallpox. One of the innocent objects of their machinations retires to a convent, the other dies of grief. The dangerous liaisons of international law and Australian law do not need to have such an unhappy fate. Close relationships always contain an element of danger. They make us vulnerable to one another and they expose our weaknesses. But at the same time, they can be a source of great strength and make us braver and wiser than we would otherwise be.

I am not suggesting that the relationship of international law and Australian law should be a takeover of the former by the latter. The substance of international standards needs to be debated - there may be those that, after discussion and reflection, we cannot accept. But we should not reject, through the smokescreen of sovereignty, the possibility of real engagement with global standards, particularly in the area of human rights. In the next century, the international legal order will become more and more significant in our lives. Our public and constitutional law will be impoverished and undermined by isolation from international developments. We should embark on the liaison with international law with decorum rather than indiscriminate or blind passion and be prepared for a demanding but potentially fulfilling relationship.

69 Crawford, "International Law and Australian Federalism: Past, Present and Future" in Opeskin & Rothwell (eds), *International Law and Australian Federalism* p335.

70 The United Kingdom bill can be found at <http://www.parliament.the-stationery-office.co.uk/pa/cm199798/cmbills/119/1998119.htm>.

71 In October 1997, the European Court of Human Rights found Britain in breach of the ECHR for the fiftieth time: Travis, "Historical Bill to Incorporate Human Rights" *Guardian Weekly*, 2 November 1997 p10.