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TRAVERSING THE DIVIDE: INTERNATIONAL LAW AND AUSTRALIAN CONSTITUTIONAL LAW

POPULAR wisdom about the Chinese language has it that the Chinese pictogram for "crisis" contains within it the image for "opportunity". Professor Hilary Charlesworth calls the relationship between international law and public law in Australia a "dangerous liaison". This paper will argue that the danger, even the "crisis" which characterises this relationship presents significant opportunities for traversing the divide between the two disciplines, thereby creatively developing Australian constitutional law.

Some of these opportunities match the description of what Professor Charlesworth calls the "positive" aspects associated with the liaison. These are the first type of opportunities discussed under the heading "The Embrace of International and Comparative Law". But the opportunities mentioned arise not only from these positive aspects. In the second category, headed "The Spurning of International and Comparative Law", opportunities arise not only from what she calls the "embrace" of international law by Australian public law, but also from the process of excluding comparative principles. Here I argue that the liaison is productive not only when principles are incorporated into Australian law. The liaison has already enriched Australian constitutional law through an interesting combination of Australian judicial identification with, and rejection of, external sources of law. In the third section, "Reform of the Treaty-Making Process", I examine the way the challenge made by judicial interpretation of the relationship between international law and domestic law created a further opportunity to reform the treaty-making process and thereby revitalise federalism and the separation of powers. Finally, in "Treaty Implementation" the paper concludes with a brief critical comment about the High Court's approach to interpreting Commonwealth power over treaties.

It is not the point of this paper to canvass the complex issue of when treaties or international custom are incorporated into Australian law, a matter that has been dealt with at length elsewhere[1]. Rather this paper explores the manner of that incorporation process and the way Australian judges perceive the incorporation of laws, of foreign derivation.

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1 Walker, "Treaties and the Internationalisation of Australian Law" in Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (Federation Press, Sydney 1996) p204.

First however, a preliminary point about the so-called globalisation of law. To a certain extent Australian jurisprudence has, more than most, always involved legal woodpecking. Australian judges have long borrowed from other systems of law, especially from the English legal system including common law, equity and foundational constitutional principles. Where necessary, these principles and doctrines have been modified to suit Australian conditions. There are two differences between the way this has occurred in the past and in the present. First, the current hybridisation of law now regularly invokes international, as well as comparative, standards. Second, in the past, Australian adoption of English legal precepts was seen as judges from within the same system of law borrowing from each other. Australian and English law was part of the same family of law. Nowadays, however, when Australian judges follow English precedent it is more likely to be seen as borrowing from another, closely related but still different, system of law. A subtle yet significant change in perspective has occurred. Nevertheless the use of the term "the globalisation of law", to describe the relationship between English and Australian law, describes a change only in the extent of usage of other law, not a qualitative change in the way Australian law is made.

However the relationship between the legal systems of Australia and the United Kingdom is characterised, it is clear that Australian constitutional law has benefited from its liaison with comparative law in a number of productive ways. The globalisation of legal knowledge has enabled the High Court of Australia to draw upon a wealth of comparative jurisprudence. This opportunity has produced two outcomes. First, it has led to clarifications or extensions of Australian law through the embrace, either total or partial, of foreign doctrine. Second, the liaison has facilitated the delimitation of Australian law, sometimes through a spurning of other sources. In both senses the definitions of Australian law are sharpened.

THE EMBRACE OF INTERNATIONAL AND COMPARATIVE LAW

First, some examples of the embrace, either partial or total, of foreign case law. In the implied freedom of political communication cases, the Australian High Court considered United Kingdom, Canadian, United States Supreme Court, and European Court of Human Rights authorities when considering whether defamation law inhibits freedom of communication.[2] After discussing these sources, in a joint judgment, three members of the majority concluded that "the common law defences which protect the reputation of persons who are the subject of defamatory publications do so at the price of significantly inhibiting free communication".[3] Similarly, the test of qualified privilege articulated by the Court

2 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 129-130 per Mason CJ, Toohey and Gaudron JJ, at 157-163 per Brennan J (limiting the application of the overseas authorities), at 182-183 per Deane J.

3 At 133 per Mason CJ, Toohey and Gaudron JJ.

was developed, at least in part, by drawing upon the immense resource of English, Canadian, European and US authorities.[4]

The advantages of this comparative approach for the implied freedom and for defamation law generally are twofold. First, the Australian legal system was able to avoid the pitfalls of the public official test used in United States defamation law, pitfalls which have been well documented both in *Theophanous*[5] and elsewhere.[6] Second, the test of qualified privilege which was produced was more appropriate to Australian publishing conditions which share more in common with British attitudes to privacy and reputation than the more robust publishing environment of the United States.

Other productive opportunities for the use of comparative jurisprudence to develop Australian law were reflected in *Levy v Victoria*[7] where the Court found that Victorian State regulations prohibiting the entry of duck-shooting protesters onto public land where shooting was to occur did not infringe any implied right of political communication because the regulations were reasonably and appropriately adapted to a legitimate goal, namely public safety. In the course of deciding the matter, one judge referred extensively to United States First Amendment case law. Justice Kirby adopted the US distinction between the level of protection afforded to speech based on different categories of public property.[8] Property which is quintessentially public, such as Hyde Park, would attract greater protection than less public areas such as schools, and indeed non-public areas.

The potential for progressive development of the law was also apparent in the majority's acceptance of the proposition that activity, rather than speech, can constitute communication for the purposes of the implied freedom.[9] In *Levy* the Court recognised that the action of holding up ducks for the benefit of obtaining media coverage could fall within the protection of the implied freedom.

Hence another advantage of this comparative approach is that it allows courts to adopt and adapt pre-existing doctrines without the necessity of developing the case law over time on a case by case basis. At the same time, however, Australian courts retain control over parameters of Australian common and constitutional law.

On this first point, it is worth noting that individual judges may adopt different degrees of embrace according to the matter under dispute, and according to whether they believe that the Constitution warrants reference to external sources of law. For example, in relation to fundamental rights, former Justice Dawson argued that, due to the different natures of the

4 At 129ff per Mason CJ, Toohey and Gaudron JJ.
5 At 134-137 per Mason CJ, Toohey and Gaudron JJ.
6 See, for example, Walker, *The Law of Journalism in Australia* (LBC, Sydney 1989).
7 (1997) 189 CLR 579.
8 At 638-642 per Kirby J.
9 At 594-595 per Brennan CJ, 622-623 per McHugh J, 637-638 per Kirby J.

Australian and United States constitutions, the Australian Constitution did not contain any such rights other than those for which express provision had been made.[10] By contrast, Justice Lionel Murphy referred extensively to United States jurisprudence to underline his belief that the Constitution was protective of certain fundamental rights.[11] Moreover, judicial attitudes on comparative jurisprudence may vary from issue to issue. In discussing the nature of economic federalism under the Australian Constitution, Justice Dawson referred to the Canadian legal and political system to highlight the tensions which were common to both Australia and Canada between complete economic integration and a federal system.[12]

Other judges have suggested that, at least in the case of human rights, where there is an ambiguity in the text of the Constitution, the interpretation should be made in the light of principles of international human rights law (including customary international law),[13] a position, in the short term, which is unlikely to be followed by other members of the Court.

The cases noted thus far are potent illustrations of Professor Charlesworth's notion of the "embrace" by the High Court of comparative law principles and the extent to which Australian constitutional law can be developed and extended by the selective adoption or wholesale adaptation of decisions of foreign courts.

THE SPURNING OF INTERNATIONAL AND COMPARATIVE LAW

The second set of examples are also illustrative of the various uses that can arise from the liaison between foreign law and Australian law. But in these examples Australian constitutional law has developed in opposition to comparative trends. In Professor Charlesworth's typology the Australian courts have spurned rather than embraced comparative doctrine. Nevertheless the resulting admixture has been fruitful. Two issues, proportionality and the nature of causes of action which follow from a breach of implied constitutional rights, illustrate the point.

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10 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 180-182.

11 He included amongst these: freedom of movement, of speech and of other communication: *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54 at 88; *Buck v Bavone* (1976) 135 CLR 110 at 137; *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633 at 670; *Uebergang v Australian Wheat Board* (1980) 145 CLR 266 at 312; *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 581-582; freedom from slavery: *R v Director-General of Social Welfare (Vic); Ex parte Henry* (1975) 133 CLR 369 at 388; and freedom to not be arbitrarily discriminated against on the basis of sex: *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237 at 267.

12 *Capital Duplicators v Australian Capital Territory (No 2)* (1993) 178 CLR 561 at 613 n25.

13 *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 147 ALR 42 at 147-151 per Kirby J; *Kartinyeri v Commonwealth* (1998) 152 ALR 540 at 577, 598-600 per Kirby J.

In *Leask v Commonwealth*[14] a majority of the Court seems to suggest that the principle of "proportionality" has only a limited role in the characterisation process, although it remains relevant in at least two, but probably three, situations.[15] First, it is relevant to the characterisation of purposive powers, and, second, it is relevant where a law falls within a specific head of power (defined in terms of subject matter) but purports to breach a constitutional limit on legislative power. In this latter context proportionality is a device to determine whether the law is reasonably and appropriately adapted to a legitimate legislative object. The third situation in which proportionality may still be relied upon when determining whether a law on a subject matter is sufficiently connected to that subject matter occurs when the law falls within the incidental range of a power. Here the purpose of the law will assist in determining whether it is sufficiently connected to the power, and in this context proportionality may be useful in ascertaining that connection.

One reason that proportionality is not ordinarily relevant to the characterisation of laws about particular subjects (rather than purposes) relates to the particular nature of the Australian constitutional system. In order to explain this distinction between the Australian and other legal systems judges rely on examples from comparative law. One judge relied on the different nature of the constitutions. After referring to the origins of proportionality in the jurisprudence of the European Court of Justice, former Justice Daryl Dawson said the concept was "inappropriat[e] ... in Australian constitutional law where legislative power is ... conferred by reference to subject matter rather than aims and objectives".[16] To further explain the distinction between the uses of proportionality in Australia and in Europe, Justice Dawson noted that, whereas the European Court regularly considered political issues, the Australian Court conventionally did not.[17] Moreover, the Australian Court does not see itself as having the power to assess the desirability of legislation.[18] He implies that it would be inappropriate for Australian judges to adopt foreign principles of law without careful consideration of the different character of the respective constitutions and the nature of the judicial process in those other jurisdictions. In so doing His Honour strengthens and clarifies our understanding of the aims and

14 (1996) 187 CLR 579.

15 Members of the Court are not entirely clear on this point. Dawson J and Gummow J suggest that it is not relevant when characterising non-purposive powers, except there the court is assessing a head of power and a constitutional limit upon power: (1996) 187 CLR 579 at 605-606 per Dawson J, 624 per Gummow J. Toohey J appears to agree, saying that "reasonable proportionality" is likely to arise in the latter context only: at 613-614. Brennan CJ said that it may be used "to ascertain whether an Act achieves an effect or purpose within power" to the extent that there is a sufficient connection between the law and the power, even in relation to non-purposive laws: at 593. McHugh J was equivocal at 616-617 and Kirby J at 635 suggested it may be "helpful" in characterisation.

16 (1996) 187 CLR 579 at 600.

17 At 601-602.

18 Brennan CJ stated that the "reasonable proportionality" concept did not involve any inquiry into the law's necessity or desirability: (1996) 187 CLR 579 at 593. See also Kirby J at 636.

methods of Australian constitutionalism. Again Australian law is enriched by its interaction with another legal system. The *Leask* case is an example of Australian constitutional law developing, in part, by rejecting or, as Professor Charlesworth calls it, "spurning" comparative principles.

Similarly in the recent cases of *Theophanous*,[19] *Lange*,[20] and *Levy*,[21] drawing upon distinctions between Australia and the United States, the High Court clarified the differences between rights protected under the Australian Constitution and rights protected under other constitutions. In those cases their Honours decided that the implied freedom of political communication was in the nature of a limit upon governmental authority rather than an personal right. Reasons given were the lack of similarity between the United States and Australian constitutions,[22] and the different systems of common law of the two countries.[23] Accordingly, in *Kruger v Commonwealth* the High Court affirmed that the breach of an implied constitutional right does not give rise to a cause of action in damages other than that ordinarily arising in general law.[24] Again, even in "spurning" the liaison can be productive.

REFORM OF THE TREATY MAKING PROCESS[25]

The third opportunity from the relationship between international and constitutional law has arisen, paradoxically, out of political concerns about the reach of international law in the domestic context. This is international law as the "wicked seducer", the threatening creature of Professor Charlesworth's imagery. Unexpectedly, however, some of the changes made to the treaty making process in response to the perceived threat of the reach of international law have strengthened the accountability, transparency and division of powers of the Australian constitutional system.

The parameters of the relationship between international law and domestic law, including constitutional law, have been dramatically altered by a process consisting of discussion and agreement between the Commonwealth and the States, reports of the Senate, and the use of executive statements and legislation. First, there is no longer a clear division of responsibilities between the executive in making treaties and the legislature in implementing them. The new picture is much more nuanced and complex with various legislative committees (in particular, the Joint Parliamentary Committee on Treaties) taking a much more active role in determining the nature of Australia's international treaty

19 (1994) 182 CLR 104 at 125 per Mason, Toohey and Gaudron JJ, 147-148 per Brennan J.
20 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562-564.
21 (1997) 189 CLR 579 at 606 per Dawson J, 622-623 per McHugh J, 638 per Kirby J.
22 (1997) 189 CLR 520 at 563.
23 At 563-564.
24 (1997) 190 CLR 1 at 46-47 per Brennan J, 125-126 per Gaudron J.
25 This section is based in part on the author's Chapter 3 "The International Dimension" in Hanks & Cass, *Australian Constitutional Law: Materials and Commentary* (Butterworths, Sydney, 6th ed forthcoming).

commitments;[26] and with the additional oversight that treaties be tabled in Parliament prior to ratification.[27] Second, the States and Territories now have a more prominent role in those processes as well through the Treaties Council and the COAG Principles and Procedures on Treaty Making.[28] Third, by a combination of executive statement[29] and legislative action,[30] the executive and the legislature have asserted their dominance over judicial articulation of the relationship between international and domestic law following *Teoh's Case*.[31] In that case the High Court decided that ratification of a treaty by Australia may give rise to a legitimate expectation that administrative decisions would conform with the treaty, and hence decision makers should take account of Australia's international treaty obligations.

These changes arising from the liaison, in *Teoh's Case* in particular, have had enormous ramifications for two foundational doctrines of Australian constitutional law, namely federalism and the separation of powers. The liaison has thus led to a reassessment of State and Commonwealth power in relation to the negotiation of Australia's international commitments, and the respective roles of the executive, legislature and judiciary in relation to these commitments have also been reformed. Once again the encounter between international and Australian law has been a fruitful one.

TREATY IMPLEMENTATION

Fourth, and finally, the international-Australian liaison still leaves a number of issues undecided. One of these is the question of whether all treaties give rise to the Commonwealth's power to legislate to implement the treaty. In *Victoria v Commonwealth (Industrial Relations Case)*[32] the majority made the slightly elusive comment that "[t]here may be some treaties which do not enliven the legislative power conferred by s 51(xxix) even though their subject matter is of international concern".[33] It seems here the majority

26 Statement of Minister of Foreign Affairs to Parliament announcing Treaty Making Reforms, 2 May 1996 in Aust, Parl, Department of Foreign Affairs and Trade, *Australia and International Treaty Making Information Kit* (1997) p53, and Joint Statement of Minister for Foreign Affairs and Attorney General Announcing Reforms to Treaty Making Process, 2 May 1996 in *Australia and International Treaty Making Information Kit* p49.

27 As above.

28 Revised Principles and Procedures for Commonwealth State Consultations on Treaties in *Australia and International Treaty Making Information Kit* p79 and COAG Communique, 14 June 1996 at p75.

29 Joint Statement of Minister for Foreign Affairs and Attorney and Minister for Justice on the Effect of Treaties in Administrative Decision Making, 25 February 1997 in *Australia and International Treaty Making Information Kit* p91.

30 Administrative Decisions (Effect of International Instruments) Bill 1997 (Cth). The Bill was referred to the Senate Legal and Constitutional Legislation Committee on 26 July 1997, which reported on 20 October 1997.

31 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

32 (1996) 187 CLR 416.

33 At 486 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

is following a distinction, made by Professor Leslie Zines in his book *The High Court and the Constitution*,[34] between an agreement to take common action and an agreement to do something less, or a treaty which is not "aspirational" and one that is. Treaties expressed in terms of aspiration may not trigger Commonwealth power. Their Honours quoted Professor Zines where he says,

> Accepting ... that the agreement by nations to take common action in pursuit of a common objective amounts to a matter of external affairs, the objective must, nonetheless, be one in relation to which *common* action can be taken. Admittedly, this raises questions of degree; but a broad objective with little precise content and permitting widely divergent policies by parties does not meet the description.[35]

Moreover, their Honours seem to suggest that a law which implements an aspirational treaty may not be valid even if it adopts one of a variety of means of implementing that aspiration.

> When a treaty is relied on under s 51(xxix) to support a law, it is not sufficient that the law prescribes one of a variety of means that might be thought appropriate and adapted to the achievement of an ideal. The law must prescribe a regime that the treaty has itself defined with sufficient specificity to direct the general course to be taken by the signatory states.[36]

The danger with this approach, apart from the obvious difficulty in identifying when a subject is a matter over which common action can be taken and when it is not, is that it may reincarnate, in different guise, the now discarded distinction between the narrow and broad approaches to treaty implementation.[37] It is now settled that the Commonwealth has broad powers to implement matters over which the Commonwealth has treated and does not rely upon any judicial assessment of whether or not the matter is one of "international concern" or "international character."[38] The mere fact of entry into a treaty upon the

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34 Zines, *The High Court and the Constitution* (Butterworths, Sydney, 3rd ed 1992).

35 (1996) 187 CLR 416 at 486 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ, quoting Zines, *The High Court and the Constitution* p250 (emphasis original).

36 As above.

37 For the narrow view that the treaty-making power was restricted to matters which the Court assessed to be within power see, for example, the views in *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 192, 198-200 per Gibbs CJ and, more broadly, at 217 per Stephen J. For an example of the broad view of treaty implementation see, for example, Mason J in *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1 at 124-126.

38 The different terms were generally held to reflect a narrow approach to Commonwealth power and were attributed, respectively, to Stephen J in *Koowarta Bjelke-Petersen* (1982) 153 CLR 168 at 217, and Dixon J in *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 669.

matter indicates that it is a matter of international concern or international character.[39] Judicial emphasis has instead shifted to making an assessment of whether or not the particular law purporting to implement the treaty does, in fact, conform with the treaty provisions.[40] The position in the *Industrial Relations Case* threatens a return to the former view which involved the judiciary, rather than the executive or legislature, in a process of assessing whether or not the matter under consideration warranted legislative action.

These uncertainties are compounded by definitional problems in international law itself. In international law scholarship the distinction between what commentators call hard law and soft law is notoriously difficult to define.[41] This difficulty is quite apart from the fact that in international law, as in common law, doctrines may take some time to become law, to crystallise, so to speak. The distinction in international law between a doctrine which is lex ferenda and lex lata[42] is recognition of the gradual evolutionary process of legal development. But, before Australian constitutional lawyers adopt the same interpretive uncertainty, perhaps consideration should be given to the evidential questions of how to assess when an international law is "an agreement to take common action" such that it entails a treaty obligation for Australia. Will the Australian High Court become involved in a search for the characteristic of common action in the plain text of the instrument; will it consider other judicial interpretations, perhaps even of other States; will it excavate the meaning in the travaux preparatoires; or will it look at the practice of other States?

Moreover, one needs to consider if it is necessarily the case that an obligation to "promote" common action is less precise than an obligation to "take steps" towards common action? It may be possible to conceive of situations where the matters to be promoted under one treaty are far more precisely defined than those under another where the latter requires a State to take steps to implement such matters. It then may be arguable that a promotional treaty places a clearer obligation upon the treaty party than another treaty. One way around these interpretive difficulties would be to simply recognise that all treaties or conventions which pass the appropriate Australian procedure embody an obligation upon Australia to implement its provisions. The question for the Court then becomes whether or

39 *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1 at 124-126 per Mason J.

40 See, for example, Deane J in *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1 at 259-268, and Deane J in *Richardson v Forestry Commission* (1988) 164 CLR 261 at 311-312.

41 For an argument against the recognition of so-called soft law as international law see Weil, "Towards Relative Normativity in International Law" (1983) 77 *AJIL* 413. For the counter view in relation to recognition of human rights standards see Reisman, "A Hard Look at Soft Law: Remarks" (1988) 82 *Proc Am Soc Int'l L* 371 at 374-75. For an argument advocating stricter procedures in developing human rights law see Simma & Alston, "The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles" (1988-1989) 12 *Aust YBIL* 82.

42 Henkin, Pugh, Schachter & Smit, *International Law: Cases and Materials* (West Publishing, St Paul, Minn, 3rd ed 1993) pp153-154.

not the implementing legislation faithfully implements the particular obligation entailed in the treaty, not whether the treaty entails an obligation or not. Some may argue that this broadens the scope of the treaty power, but it need not be so if the High Court attaches the same rigour to the question of the character of the implementation as to the question of obligation. The advantage of the approach raised here is that it recognises Australia's international obligations, whether they be in the nature of promotion or taking steps towards common action, and does not import the serious terminological difficulties of interpreting such a distinction. Finally, it would have the added benefit of being consistent with the High Court's accepted, albeit controversial, approach to treaty implementation since the *Tasmanian Dam Case*.

So, in conclusion, this comment has argued that the opportunities arising from the dangerous liaison between international law and Australian law are, and have already been proven to be, many. Moreover, it is not a question of simply incorporating international and comparative doctrine into Australian doctrine. Rather the relationship has engendered a complex process of acceptance, rejection and discussion. And the relationship has still left open a number of interesting questions about the way in which international law becomes part of the Australian system of law. Like all healthy and developing constitutional systems, Australian constitutional law defines itself both by its identification with, and rejection of, "the other", namely international and comparative law. Australian constitutional law seems perfectly capable and mature enough to do both.