

CONSTITUTIONAL LAW AND INTERNATIONAL LAW: NATIONAL EXCEPTIONALISM AND THE DEMOCRATIC DEFICIT?

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INTRODUCTION

We live in a time of globalisation. It is stimulated by technology, reinforced by international trade and advanced by the growth of international law and global institutions that have developed since the Second World War. These remarks will address one consequence of this global context for our legal systems. I refer to the use of foreign law in domestic judicial reasoning. Particularly as such reasoning concerns the elucidation of the meaning of the national constitution.

Many of the controversies upon my chosen topic that have recently emerged in the United States of America are also present in Australia. Indeed, when I recount some of the judicial interchanges about these trends that have occurred between colleagues in the High Court of Australia, an American audience, momentarily closing their eyes, will feel completely at home. The sharp and conflicting opinions will be familiar. Whilst most of the rest of the world looks on in bemusement at our passionate debates, Australian and American judges and lawyers are participants in, and beneficiaries of, common contests.

In a sense, these contests are natural and predictable for two countries that share so many legal links. Most especially, we share the link of the English language and a constitutional tradition—the common law and a written constitution, federal in character, continental in reach, whose

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application is, of necessity, determined authoritatively by the independent judicial branch of government, which has been playing this inescapably political role in our democratic politics for far longer than has happened in most other countries on earth.

Historically, Australia's modern existence was a direct outcome of the American Revolution of 1776. Within twelve years of that struggle, the penal settlement in Sydney was established. And, a century later, the free settlers of the Australian colony worked together on a constitution that, in its judicial branch, derived many of its central ideas from the Constitution of the United States. Above all, like the United States, Australia is a land in which it is accepted that, in great constitutional conflicts touching the meaning and operation of the Constitution, the last word belongs not to a legislature elected by the people (as was the political theory and practice of the United Kingdom), but to a constitutional court fulfilling the responsibility of a national umpire. In Australia, as in the United States, constitutional and judicial review are accepted as axiomatic features of the legal system. Thus, in Australia, *Marbury v Madison*¹ states the established law. In the theory of the Constitution, the people and their representatives made and may change the document. But in the meantime, all laws derive their validity and binding force from the Constitution, subject to the power of the courts to determine that an apparent law is not a law at all but is null and void.

This, it must be noted, is a democratic conception of constitutionalism but with distinctly elitist and nondemocratic elements to it. The subject of this lecture is how we are reconciling the democratic features of our constitutionalism with one of the most powerful forces for change in the law today. I refer to the rapid advance of international law and especially of the international law of human rights. Necessarily, this latter development derives from institutions and processes that answer to a constituency beyond the democracy of the nation-state. One of the challenges before every legal system in the current age is how to accommodate the continuing role of the nation-state with the international order as it is emerging, and how to reconcile the functions, powers, and dignity of national courts with international law, including as that law is declared by international and regional courts and other relevant decision-making bodies.

I INCORPORATED TREATIES, CONSTITUTIONAL RULES, AND COMMON LAW

My immediate purpose is to examine the extent to which judges of our legal traditions may refer to, and use in their reasoning, opinions

1 5 U.S. (1 Cranch) 137 (1803).

written in foreign courts and tribunals when discharging their municipal responsibilities to the local constitution and the laws made under it.

Posed in that way, the question is overbroad. At least in most countries, there is no particular problem where a local statute expressly (or with sufficiently clear implication) imports into municipal law obligations assumed by the nation-state under a treaty. Reference to the jurisprudence that has developed around the treaty will then be a legitimate tool of analysis for the municipal judge. In Australia, for example, where the Refugees Convention² and Protocol³ have been ratified by the nation, and a definition of “refugee” adopted in federal law designed specifically to reflect the definition expressed in that international law, there has been no real question but that local courts may have resort to the *travaux préparatoires* preceding the treaty⁴ and also to the *Handbook* of the High Commissioner for Refugees, expounding state practice under the treaty.⁵

As well, the courts of Australia, like courts and tribunals of other countries of asylum, regularly examine the analysis, exposition, and application of the shared treaty language, expressed by the courts and tribunals of other countries. They do so in an endeavor (so far as they can) to promote consistency in the local understandings of this branch of international law. In a sense, this is done because courts impute to the legislature, when it effectively incorporates the treaty provisions into municipal law,⁶ an intention to import the meaning of the treaty as it evolves in its international understanding. So far, so good.

In some countries with constitutional documents more recent than those of the United States or Australia, provisions have been incorporated that expressly enjoin the local courts, with constitutional authority, to pay regard to international law in discharging their municipal functions. Thus the Indian Constitution in Article 51(c) requires the State to endeavour to “foster respect for international law.”⁷ The South African Constitution uses somewhat stronger terms. Both in its interim form of 1993 and in its post-apartheid provisions of 1996, it adopts an internationalist methodology. Section 39(1) specifically requires the Constitutional

2 Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150.

3 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 268.

4 Applicant A v. Minister for Immigration & Ethnic Affairs (1997) 190 C.L.R. 225, 252-58 (Austl.) (opinion of McHugh, J.); *id.* at 294-96 (Kirby, J., dissenting).

5 Minister for Immigration & Multicultural & Indigenous Affairs v. QAAH of 2004 (2006) 231 C.L.R. 1, 29-30 (Austl.).

6 *E.g.*, Migration Act 1958, § 36(2) (Austl.).

7 INDIA CONST. art. 51(c).

Court of South Africa to have regard for international law when giving meaning to the South African Bill of Rights.⁸ Moreover, in other matters, the same subsection provides that the court “may consider foreign law.”⁹ These provisions have been described as reflecting the South African Constitution’s “plural heritage,” identifying the country “as a global participant.”¹⁰

The Supremacy Clause of the United States Constitution adopted what was, for the time, an unusually strong statement about the supremacy of law as expressed in treaties. It declared: Such laws, together with “[t]his Constitution,” and the “Laws of the United States which shall be made in Pursuance thereof,” so long as made “under the Authority of the United States” to be “the supreme Law of the Land; and the Judges in every State shall be bound thereby.”¹¹ A safeguard against untrammelled government by the Executive was afforded by the requirement in Article II, Section Two that treaties could be made by the President but only “with the Advice and Consent of the Senate . . . provided two-thirds of the Senators present concur.”¹² These arrangements represented an innovative departure from the British practice that both preceded and followed them.

To untutored eyes, unfamiliar with more than two centuries of decision making, such a provision would seem to give extremely high authority in the United States to the substance of the international law of treaties, so far as the United States is a party to them. In most other common law countries, perhaps all of them, a treaty made by the Executive is not part of the supreme law of the land. Generally, a treaty has no constitutional status as such, relying for any municipal authority upon the acts of another lawmaker proceeding under lawful power to bring the treaty provision specifically into municipal legal effect. This requirement is explained in terms of the need for local legislation to breathe domestic life into treaty provisions. But, of course, the Executive can do so under any powers afforded to it by the legislature. And judges may also do so, to the extent that they exercise their limited powers of lawmaking and do not pretend to bring an entire treaty into effect, as it were, by “the back door.”¹³ That would not be a proper use of the judicial power.

8 S. AFR. CONST. 1996 § 39(1); S. AFR. (Interim) CONST. 1993 § 35(1).

9 S. AFR. CONST. 1996 § 39(1).

10 Yvonne Mokgoro, Homegrown Constitutional Jurisprudence: The Case of South Africa 11 (Apr. 28, 2000) (unpublished manuscript), *available at* <http://hub.hku.hk/handle/123456789/54949>; *see also* S. AFR. CONST. 1996 §§ 232-33.

11 U.S. CONST. art. VI, cl. 2.

12 U.S. CONST. art. II, 2.

13 *Minister of State for Immigration & Ethnic Affairs v. Teoh* (1995) 183 C.L.R. 273, 288 (Austl.); *see also* *Capital Cities Commc'ns Inc. v. Can. Radio, Television & Telecomms. Comm'n*, [1978] 2 S.C.R. 141, 171-76 (Can.).

In a country such as Australia, where there is no such Supremacy Clause in the national constitution, nor a construction clause of the Indian or South African kind, the dualist doctrine governing the relationship between international and municipal law continues to reign supreme. Indeed, since the decision of the Supreme Court of the United States in *Medellin v. Texas*,¹⁴ and despite the Supremacy Clause and its apparently emphatic language applicable to ratified treaties in this country, something like the traditional dualist doctrine appears to have been restored to the United States. Many lawyers of the English common law tradition would feel quite comfortable with the majority holdings in *Medellin*, with their strong resonances of the dualist theory. Again, so far, so good.

I now reach two forks in the road upon which I have embarked. The first is important and I will describe it. However, I will not tarry overlong to explore it because, interesting though it may be, pursuit of it would deflect me from my main purpose. I refer to the use of international law (at least so far as it declares universal human rights) in adapting, correcting, and expressing the content of the municipal common law.

Like the United States, Ireland, and virtually all countries of the Commonwealth of Nations (more than a quarter of humanity), Australia's foundational law is derived from the common law of England as received at specific dates in colonial times. In Australia, unlike the United States, in part because of the integrated appellate structure of the judiciary provided by the Constitution,¹⁵ there is a single common law, not separate common laws of the several states and territories:

With the establishment of the Commonwealth of Australia, as with that of the United States of America, it became necessary to accommodate basic common law concepts and techniques to a federal system of government embodied in a written and rigid constitution. The outcome in Australia differs from that in the United States. There is but one common law in Australia which is declared by this Court as the final court of appeal. In contrast to the position in the United States, the common law as it exists throughout the Australian States and Territories is not fragmented into different systems of jurisprudence, possessing different content and subject to different authoritative interpretations.¹⁶

Because state statutes often contain differential provisions, this rule occasionally gives rise to conceptual problems.¹⁷ However, for a large country with a comparatively small population, the rule works tolerably

14 552 U.S. 491 (2008).

15 AUSTL. CONST. ch. III.

16 *Lange v. Austl. Broad. Corp.* (1997) 189 C.L.R. 520, 562-63 (Austl.); *see also* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78-79 (1938); *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533-34 (1928) (Holmes, J., dissenting).

17 *Victorian Workcover Auth. v. Esso Austl. Ltd.* (2001) 207 C.L.R. 520 (Austl.).

well. It permits nationwide declarations of the common law to be made from time to time. Such became necessary in 1992 in an important case, *Mabo v. Queensland [No 2]*.¹⁸

Mabo was a decision that changed the established holding of earlier judicial authority to the effect that the common law of Australia recognized no land rights of the indigenous peoples of the country.¹⁹ That rule rested on the conclusion that at the time of the acquisition of British sovereignty, the indigenes had been uncivilized nomads with no developed legal order and specifically no laws governing ownership of land.²⁰ In *Mabo*, this long-standing decisional authority was undermined by much evidence demonstrating that it was based on a factually erroneous premise—the indigenous Aboriginals being shown to have had highly developed customary laws that attached great importance to land and its part in Aboriginal communal life.²¹

Such a factual difference would not alone have been sufficient to persuade the High Court of Australia to re-express the common law. Some other development of a legal character was necessary to do this. At a time three years before my own appointment to the High Court, the majority of the Justices found the legal “key” to unlock the door established by past judicial authority. They found it in the international law of human rights.

The leading exposition of the governing principle held to be applicable was given by Justice F.G. Brennan, later to be Chief Justice of Australia:

Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia’s accession to the Optional Protocol to the International Covenant on Civil and Political Rights 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. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule²²

18 (1992) 175 C.L.R. 1 (Austl.).

19 *Id.*

20 *Id.* at 45.

21 *Id.* at 39.

22 *Id.* at 42; *see also* A.D. v. Canada, Human Rights Comm’n, No. 78/1980, U.N. Doc. CCPR/C/OP/2 (July 29, 1984).

Chief Justice Mason and Justice McHugh concurred in this opinion.²³ The conclusions of Justices Deane, Toohey, and Gaudron were to similar effect.²⁴ Only Justice Dawson dissented, holding that any alteration of a rule of land law of such duration and importance was properly a matter for legislators, not courts.²⁵ In short, he felt that any new rule and any use of international human rights to derive it suffered the fatal defect of a democratic deficit.²⁶

The minority view notwithstanding, in Australia, following *Mabo*, the foregoing interpretative rule for checking and re-expressing earlier declarations of the common law has been deployed on many occasions. Indeed, it is not now controversial and is applied from time to time.²⁷ In a sense, this rule can be seen as a modern variation on a theme long established, as an interpretative principle, in most countries of the common law. The interpretation of statutes and the exposition of common law rules are regularly reassessed to ensure that they are in harmony with basic notions of fundamental civil rights, whether expressed in the Constitution or elsewhere in municipal law. Because of the differing development of the common law in our countries and the differing histories, as settler societies, of our respective dealings with indigenous peoples, it would be unfruitful for me to examine this common law doctrine at greater length. It is sufficient to note it. Stated as it was in 1992, the principle in *Mabo* is one that acknowledges the ongoing lawmaking role of common law courts in Australia. That role is today discharged in the context of a plethora of international laws, treaties, and otherwise. Views will differ on whether, in the particular case, it is appropriate for courts to harmonize old rules with developing understandings of universal rights or whether such functions should be left exclusively to the elected representatives in the legislatures of the nation.

Having put this third instance to one side, I now reach the crucial point upon which strongly differing views, in divided judicial decisions, have arisen both in the United States and in Australia. I refer to the extent to which the judiciary, in interpreting a national constitution, may have regard to, and cite, developments of international law (including on the subject of universal human rights) in interpreting the basic laws of a nation-state.

23 *Mabo*, 175 C.L.R. at 15-16.

24 *Id.* at 77-120 (opinions of Deane and Gaudron, J.J.); *id.* at 176-217 (opinion of Toohey, J.).

25 *Id.* at 138 (Dawson, J., dissenting).

26 *Id.*

27 *E.g.*, *Coleman v. Power* (2004) 220 C.L.R. 1 (Austl.).

II INTERNATIONAL AND CONSTITUTIONAL LAW

Upon this point, there is incontestably a very strong difference of judicial opinion, at least in the final courts of the United States and Australia. Over this issue, there have been differences of opinion that have come to the fore during the past two decades as municipal judges and lawyers have become more familiar with international law and, specifically, the international law of human rights.

In Canada, a turning point in the way the Supreme Court of that country was prepared to utilize international law arose in *Baker v. Canada*.²⁸ The majority in that case concluded that the Immigration Act of Canada²⁹ should be interpreted in conformity with international obligations arising from Canada's ratification of the Convention on the Rights of the Child.³⁰ Justice Claire L'Heureux-Dube', writing for the majority, agreed that as the Convention had not been implemented as part of municipal law, it had no direct application within Canadian law.³¹ "Nevertheless," she said, "the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review."³²

Strong dissents were filed in *Baker* by Justices Frank Iacobucci and Peter Cory. They insisted, in a more traditional dualist way, that "an international convention ratified by the executive branch of government is of no force or effect within the Canadian legal system until such time as its provisions have been incorporated into domestic law by way of implementing legislation."³³ As far as they were concerned, it should simply be ignored.

Nevertheless, just two years later in its decision in *United States v. Burns*, when interpreting the requirements of the Canadian Charter of Rights and Freedoms,³⁴ a constitutional text, the Supreme Court of Canada was unanimous in invoking the movement discerned in international law towards abolition of capital punishment in support of its interpretation of the Charter.³⁵ It held that the international trend was useful in discovering

28 [1999] 2 S.C.R. 817 (Can.).

29 Immigration Act, R.S.C., c. I-2 (1985) (Can.) (repealed 2001).

30 *Baker*, 2 S.C.R. at 861; see Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

31 *Baker*, 2 S.C.R. at 861.

32 *Id.*

33 *Id.* at 865 (Iacobucci, J., dissenting).

34 Canadian Charter of Rights and Freedoms, Part I of Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.).

35 *United States v. Burns*, [2001] 1 S.C.R. 283, 330-35 (Can.).

and declaring Canadian values in relation to capital punishment.³⁶ That, in turn, was relevant to the lawfulness in Canada of the extradition of the accused to the United States.³⁷

Still more important in the following year was the decision of the same court in *Suresh v. Canada*.³⁸ The applicant had contested a deportation certificate based on his alleged association with terrorist activities in Sri Lanka.³⁹ He did so on the ground that he would likely be subjected to torture if deported there.⁴⁰ In a unanimous opinion, the Supreme Court of Canada offered a detailed analysis of the Convention Against Torture⁴¹ and said:

A complete understanding of the Act and the *Charter* requires consideration of the international perspective.

International treaty norms are not, strictly speaking, binding in Canada unless they have been incorporated into Canadian law by enactment. However, in seeking the meaning of the Canadian Constitution, the courts may be informed by international law. Our concern is not with Canada's international obligations *qua* obligations; rather, our concern is with the principles of fundamental justice. We look to international law as evidence of these principles and not as controlling in itself.⁴²

Over the past decade, there have been a number of similar decisions in Canada, both in the Supreme Court and in intermediate appellate courts.⁴³

An important ingredient in the willingness of the Canadian courts to look to the jurisprudence that has developed around various international treaties has been the introduction of provisions concerning fundamental rights into constitutional language in the form of the Canadian Charter. Indeed, this has been a feature of constitutional and quasi-constitutional laws in many common law countries. The introduction of post-war independence constitutions in India, Pakistan, Ireland, and Ceylon,

36 *Id.* at 361.

37 *Id.*

38 [2002] 1 S.C.R. 3 (Can.).

39 *Id.* at 14.

40 *Id.* at 16.

41 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85; *see also* International Covenant on Civil and Political Rights, Dec. 19, 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171.

42 *Suresh*, 1 S.C.R. at 38.

43 *See, e.g.*, *R. v. Hape*, [2007] 2 S.C.R. 292, 2007 SCC 26 (Can.); *Mugesera v. Canada* (Minister of Citizenship and Immigration), [2005] 2 S.C.R. 100, 2005 SCC 40 (Can.); *Bouzari v. Iran* (Islamic Republic), [2004] 243 D.L.R. (4th) 406 (Can.); *Ahani v. R.*, [2002] 208 D.L.R. (4th) 6 (Can.); Youth Criminal Justice Act, 2002 S.C., ch. 1 (Can.); *see also* René Provost, *Judging in Splendid Isolation*, 56 AM. J. COMP. L. 125, 128-34 (2008) (outlining the international, jurisprudential evolution in Canada).

and then in many parts of Africa, Asia, and the Caribbean, has resulted in the adoption of human rights provisions that sometimes reflect an international template. Quite often, such provisions repeat language that can be traced to earlier progenitors, including the English Bill of Rights of 1688;⁴⁴ the Bill of Rights of the American Constitution after 1791;⁴⁵ and the Universal Declaration of Human Rights of 1948.⁴⁶

To many judges in national courts faced with cases for decision involving the meaning of their own constitutional charters of rights, it has seemed appropriate and useful over recent years to reach for the exposition of analogous problems written by judges and decision makers in the courts of other countries, international or regional courts, or other bodies. Doing so has not generally been viewed as evidencing any illegitimate loyalty or deference to non-binding texts. Still less has it been seen as exhibiting obedience to the norms of other countries or the international community or to the opinions of judges and others outside the municipal court hierarchy.⁴⁷ Instead, references to such elaborations have occurred because these expositions have been found helpful and informative in the development of the municipal decision maker's own opinions concerning apparently similar problems presented by the municipal constitution or other laws.

III UNITED STATES CASE LAW

If one surveys the international judicial scene, I believe that none of the foregoing statements would be regarded as contestable or even controversial in any common law country (or, indeed, in most civil law countries with which I am familiar), save for the United States of America and Australia. In both of these countries, for some similar and some different reasons, strong opinions have been expressly antagonistic to any such references to foreign material in construing the provisions of the national constitution. The attitude has been evident in the United States with respect to analyzing the Bill of Rights provisions, even where, as in the Clause forbidding "cruel and unusual punishments,"⁴⁸ this expression was itself derived from the English Bill of Rights⁴⁹ and later adapted in

44 Bill of Rights, 1689, 1W. & M., c. 2 (Eng.).

45 U.S. CONST. amends. I-X.

46 Universal Declaration of Human Rights, G.A. Res. 217A(III), art. 5 U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 10, 1948); see also Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287 (1966) (providing vast overview of the Universal Declaration of Human Rights).

47 See *Al-Kateb v. Godwin* (2004) 219 C.L.R. 562, 627 (Austl.) (Kirby, J., dissenting).

48 U.S. CONST. amend. VIII.

49 Bill of Rights, 1689, 1W. & M., c. 2 (Eng.).

the Universal Declaration of Human Rights⁵⁰ and in the International Covenant on Civil and Political Rights.⁵¹

In the United States, a series of decisions involving constitutional questions, in which Justices of the Supreme Court have referred to provisions of international and foreign law in explaining their conclusions, occasioned such an antagonistic response from other members of the Court, both in their opinions⁵² and in extra-curial writing,⁵³ that a large public explosion of vituperation occurred. This was directed at the allegedly foreign law-friendly Justices, culminating in both reported death threats directed at some of them and the introduction of legislation designed to make it an impeachable offense for a federal judge in the United States to base a decision on foreign law.⁵⁴ Thus, section 201 of the proposed Constitution Restoration Act states:

In interpreting and applying the Constitution of the United States, a court of the United States may not rely upon any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than English constitutional and common law⁵⁵

Commenting on this bill, one United States senior district judge observed:

Aside from its grammatical incompetencies, the proposed Act does not define what it means by “constitutional law” and “English common law.” . . .

As for the English common law, one would need to tread softly. Most American States include within their constitutions or statutes a provision that the common law of England that can be considered of full force stops as of March 24, 1607: the day the first ship sailed from England to what would become the lost colony of Jamestown, Virginia. I would dare not cite the Statute of Frauds which was enacted by the British Parliament in 1677. A host of other precedents, such as the *McNaghten Case*, would be swept away from the American lexicon. I think the point is made that this proposed statute is utterly stupid. In the unlikely event that Congress would enact [it], it would not be enforceable and the first court to review it would likely strike it down without having to rely on any foreign law.

50 Universal Declaration of Human Rights, *supra* note 46, art. 5 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”).

51 International Covenant on Civil and Political Rights, *supra* note 41, art. 7 (using the same language as Article 5 of the Universal Declaration of Human Rights).

52 See, e.g., *Roper v. Simmons*, 543 U.S. 551, 622–29 (2005) (Scalia, J., dissenting).

53 Antonin Scalia, *Romancing the Constitution: Interpretation as Invention*, in CONSTITUTIONALISM IN THE CHARTER ERA 337, 341 (Grant Huscroft & Ian Brodie eds., 2004).

54 See, e.g., Constitution Restoration Act of 2005, S. 520, 109th Cong. § 201 (2005); Constitution Restoration Act of 2004, H.R. 3799, 108th Cong. § 201 (2004); Charles Lane, *Ginsburg Faults GOP Critics, Cites a Threat From ‘Fringe,’* WASH. POST, Mar. 17, 2006, at A3 (describing death threats received by Justices Ginsburg and O’Connor).

55 Constitutional Restoration Act, S. 520.

... [B]eyond the xenophobic blindness of this proposed legislation, a more insidious danger lurks. We cannot afford to ignore outrageous demonstrations of ignorance such as the canard that the Holocaust never happened, nor the instant one which presumes that the fundamental law of the United States can be understood without reference to the history of western civilization.⁵⁶

The decisions of the Supreme Court of the United States in which strong exchanges have occurred between the participating Justices over the references to foreign and international law in constitutional adjudication include *Atkins v. Virginia*,⁵⁷ *Lawrence v. Texas*,⁵⁸ and *Roper v. Simmons*.⁵⁹ Because these decisions are recent and familiar, I will not repeat them or revisit their content again, except for *Lawrence*.⁶⁰

Because of my own sexuality, I naturally read, with the closest attention in faraway Australia, the Supreme Court's decision in *Lawrence*, which reversed the earlier holding in *Bowers v. Hardwick*.⁶¹ *Lawrence* invalidated a Texas law criminalizing sodomy between adults of the same sex even if they were consenting and acting in private.⁶² Not only did the *Lawrence* Court overrule *Bowers*, it declared that the decision had been wrong when decided.⁶³ No mention had been made in the *Bowers* opinion to the decision of the European Court of Human Rights, issued five years earlier in *Dudgeon v. United Kingdom*.⁶⁴ That decision rejected similar statutory prohibitions in the law of the United Kingdom applicable in Northern Ireland.⁶⁵ The European Court held that such laws constituted a violation of the right to privacy guaranteed by the European Convention on Human Rights.⁶⁶ The assertion by the majority of the Supreme Court in *Bowers* that the prohibition on sodomy reflected ancient and universal values of civilized states⁶⁷ would have been at least subjected to some doubt and heightened scrutiny if a reference to the then-recent decision of the European Court had been made and considered.

Writing for the Supreme Court in *Lawrence*, Justice Kennedy took note of the European precedent, declaring, "To the extent *Bowers* relied on

56 John Kane, *International Law from the Trial Judge's Vantage Point*, 35 *DENV. J. INT'L L. & POL'Y* 379, 386 (2007).

57 536 U.S. 304 (2002).

58 539 U.S. 558 (2003) (Scalia, J., dissenting).

59 543 U.S. 551 (2005).

60 See generally Michael Kirby, *International Law—The Impact on National Constitutions*, 21 *AM. U. INT'L L. REV.* 327 (2006) (addressing the role that international law plays in the constitutional jurisprudence of nation-states).

61 478 U.S. 186, 196 (1986).

62 *Lawrence*, 539 U.S. at 578–79.

63 *Id.*

64 45 *Eur. Ct. H.R.* 41 (1981).

65 *Id.*

66 *Id.*

67 *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986), overruled by *Lawrence*, 539 U.S. 558.

values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has followed not *Bowers* but its own decision in *Dudgeon v. United Kingdom*.⁶⁸ At the conclusion of his opinion for the Court in *Lawrence*, Justice Kennedy eloquently went on to explain how the concepts expressed in the U.S. Constitution have themselves evolved, just as the modern standards of decency and justice do in every civilized country:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.⁶⁹

Reasoning of this kind produced not only strong reactions in the Congress and various civic groups, it also elicited angry words from judicial dissenters. Thus, in *Lawrence*, Justice Scalia complained that “the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed.”⁷⁰ Scalia continued, “[The] opinion is the product . . . of a law-profession culture [that has] largely signed on to the so-called homosexual agenda.”⁷¹ In *Roper v. Simmons*, Justice Scalia again expressed his contrary opinion powerfully: “[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.”⁷² Foreign readers of these exciting exchanges might conclude that the more temperate views of the majority Justices had the better of the argument. Thus, in *Roper*, Justice Kennedy remarked, “The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”⁷³ Justice O’Connor, although dissenting and herself more cautious about the use of foreign law, was defensive about its occasional utility: “[W]e should not be surprised to find congruence between domestic and international values, especially where the international community has reached clear agreement—expressed in international law or in the domestic laws of individual countries. . . .”⁷⁴

68 *Lawrence*, 539 U.S. at 576. The “living tree” approach to constitutional interpretation has a long history. See, e.g., *Edwards v. Canada*, [1930] A.C. 124, 136 (P.C. 1929) (appeal taken from Can.) (U.K.).

69 *Lawrence*, 539 U.S. at 578–79.

70 *Id.* at 602 (Scalia, J., dissenting).

71 *Id.* at 602–03; see also *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

72 543 U.S. 551, 624 (2005) (Scalia, J., dissenting).

73 *Id.* at 578 (majority opinion).

74 *Id.* at 605 (O’Connor, J., dissenting).

After the sharp exchanges in the Supreme Court and in the Congress up to 2005, the reliance upon foreign and international legal materials in constitutional decisions of the Supreme Court appears to have receded. Perhaps no one thought that any foreign analogies presented to the Court were sufficiently close and useful to warrant their mention. This would seem surprising when it is remembered that during the past four years the Court has had to grapple with important questions of fundamental principles and values in a number of cases involving detainees in Guantanamo Bay and elsewhere.

Perhaps those Justices who are inclined to inform their minds about reasoning on common problems expressed in foreign courts and tribunals have noticed the fuss that such citations commonly cause in the Court, in Congress, and in sections of society of this country. Perhaps they decided instead to accept Justice Scalia's advice to Justice Breyer in their public conversation—that it was alright for Justice Breyer to inform himself on international legal developments but just “don't put it in your opinions.”⁷⁵ For some judges, such a course might seem to be a path of prudence and wisdom. For others, it might seem a surrender to intellectual dishonesty and a departure from decisional transparency.

IV AUSTRALIAN CASE LAW

If U.S. lawyers are now missing the vehemence of the exchanges over this subject, they have only to transfer their attention to Australian case law. Parallel judicial interchanges have taken place in Australia in the past and in recent times. Because we share the same attributes of a common judicial system — discursive reasoning, dissenting opinions, and robust interchange — many of the debates in the United States, recounted above, have resonances with those that have occurred in the High Court of Australia.

In *Al-Kateb v. Godwin*, the High Court of Australia was required to decide whether the provisions of the Migration Act⁷⁶ authorized the indefinite detention of an illegal migrant without judicial order, and if so, whether such an enactment was constitutionally valid.⁷⁷ A majority upheld the government's interpretation of the Act, concluding that, in the circumstances, the Act required the detention of Mr. Ahmed Al-Kateb

75 *The Relevance of Foreign Legal Materials in United States Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT'L J. CONST. L. 519, 534 (2005).

76 Migration Act, 1958, § 198 (Austl.).

77 *Al-Kateb v. Godwin* (2004) 219 C.L.R. 562 (Austl.).

indefinitely. On this point, the Court was divided four to three.⁷⁸ The Act contained a provision that envisaged that an illegal migrant in detention could terminate the incarceration immediately by requesting the Minister to return him or her to the country of nationality.⁷⁹ The problem arose because Mr. Al-Kateb was a stateless Palestinian.⁸⁰ Kuwait, where he had been born, would not receive him. Israel would not permit him to pass through its territory to Gaza. No other country would accept him.⁸¹ On the face of the Minister's submission, Mr. Al-Kateb could be kept forever in the Womera Detention Camp in the middle of Australia. The minority Justices concluded that such an interpretation should not be attributed to the Act, given that a basic postulate of the Act could not be fulfilled in the way the Act contemplated in the particular case.⁸²

The majority went on to hold that the result that they favored was not inconsistent with the Australian Constitution.⁸³ The Australian Constitution evinces the purest form of federal democratic governance. There is no general bill of rights. The founders rejected the American model in this respect because they believed that Parliament could always be trusted to protect the rights of the people. This, Americans will remember, was the initial reaction of James Madison to the request that he draft a Bill of Rights for the United States. Mr. Al-Kateb's constitutional objection in Australia, therefore, had to be framed in terms of a suggested intrusion by the legislature into territory reserved by the Australian Constitution to the Judicature, on the footing that long-term (and certainly indefinite) detention had to be subjected to judicial scrutiny.⁸⁴ The majority dismissed this argument, but Justice Gummow and I would have upheld it.⁸⁵

One of my passing observations drew an extended coda from Justice Michael McHugh, the senior Justice of the Court after the Chief Justice. I observed that the judicial chapter of the Australian Constitution should be construed today, so far as possible while remaining consistent with the text, to conform with the principles of international human rights law.⁸⁶ These principles demand judicial supervision over the prolonged deprivation of individual liberty. With reference to history, arguments of legal principle, and Australian and foreign authority, Justice McHugh

78 Justices McHugh, Hayne, Callinan, and Heydon were in the majority; Chief Justice Gleeson and Justices Gummow and Kirby dissented. See *id.*

79 Migration Act, § 198.

80 Al-Kateb, 219 C.L.R. at 596 (Gummow, J., dissenting).

81 *Id.* at 603.

82 *Id.* at 608.

83 *Id.* at 585–86 (McHugh, J., concurring).

84 *Id.* at 634–35 (Hayne, J., dissenting).

85 *Id.* at 614 (Gummow, J., dissenting); *id.* at 615 (Kirby, J., dissenting).

86 *Id.* at 616.

declared that my invocation of international law in resolving the purely Australian constitutional question was impermissible, unsustainable, and legally heretical:

[C]ontrary to the view of Kirby J, courts cannot read the Constitution by reference to the provisions of international law that have become accepted since the Constitution was enacted in 1900. Rules of international law at that date might in some cases throw some light on the meaning of a constitutional provision. . . .

The claim that the Constitution should be read consistently with the rules of international law has been decisively rejected by members of this Court on several occasions. As a matter of constitutional doctrine, it must be regarded as heretical. . . .

[R]eading the Constitution up or down to conform to the rules of international law is to make those rules part of the Constitution, contrary to the direction in s 128 that the Constitution is to be amended only in accordance with the referendum process.

It is even more difficult to accept that the Constitution's meaning is affected by rules created by the agreements and practices of other countries. If that were the case, judges would have to have a "loose-leaf" copy of the Constitution. If Australia is to have a Bill of Rights, it must be done in the constitutional way—hard though its achievement may be—by persuading the people to amend the Constitution by inserting such a Bill.⁸⁷

In my reasons, I rejected the arguments of Justice McHugh, proceeding through the same authorities and examining the approaches adopted in other countries.⁸⁸ Specifically, I rejected the suggestion that what was involved was the application of "rules" of international law rather than an "interpretative principle" for the reading of the Australian Constitution in today's world.⁸⁹ In that world, any nation's constitution must necessarily operate in a context profoundly affected by the growing body of international law.⁹⁰ I emphasized the role of both formal amendment and of judicial reinterpretation in the ongoing evolution of the constitutional text,⁹¹ including the many cases in which, by reinterpretation, Justice McHugh had himself made distinguished contributions to new understandings of that text.⁹² I suggested:

[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 illustrations in the decisions of the courts of, for example, Canada, Germany, India, New Zealand, the United Kingdom and the United States.⁹³

87 *Id.* at 589, 593, 595 (McHugh, J., concurring).

88 *Id.* at 617–30 (Kirby, J., dissenting).

89 *Id.* at 623.

90 *Id.* at 624.

91 *Id.* at 625.

92 *Id.*

93 *Id.* at 627 (citations omitted).

As to the last, I noted the similar debates which had arisen in the Supreme Court of the United States⁹⁴ in *Atkins v. Virginia*, *Lawrence v. Texas*, and *Grutter v. Bollinger*. I concluded:

[O]pinions that seek to cut off contemporary Australian law (including constitutional law) from the persuasive force of international law are doomed to fail. They will be seen in the future much as the reasoning of Tancy CJ in *Dred Scott v. Sandford* [and] Black J in *Korematsu v. United States* . . . are now viewed: with a mixture of curiosity and embarrassment. The dissents of McLean J and Curtis J in *Dred Scott* strongly invoked international law to support the proposition that the appellant was not a slave but a free man. Had the interpretative principle prevailed at that time, the United States Supreme Court might have been saved a serious error of constitutional reasoning; and much injustice, indifference to human indignity and later suffering might have been avoided. 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.”⁹⁵

American readers, observing these sharp exchanges in the Australian Court, should note that, whilst there was disagreement about the suggested use to be made of international law, no one questioned the legitimacy and utility of referring to the reasoning of the U.S. judges because that reasoning cast light on the meaning of the Australian constitutional text. This is something that is done all the time. In part, it is done because of the power of analogies and, in part, because some features of the Australian Constitution (like those of many other later written constitutions) were borrowed from the American template and are shared with other countries.

Although my view in *Al-Kateb* was a minority one, as it has been on other earlier⁹⁶ and later⁹⁷ occasions, shortly before my retirement from the High Court of Australia, a case arose which may indicate a shift in the tectonic plates. I refer to *Roach v. Electoral Commissioner*.⁹⁸

That case involved a challenge by a prisoner to the constitutional validity of a federal enactment depriving all prisoners of the right to vote in the then forthcoming federal election, held in November 2007.⁹⁹ Before a 2006 amendment to federal legislation, prisoners serving three years or more in prison were disqualified from voting in federal

94 Id. at 627 & n.294.

95 Id. at 629 (citations omitted). The last sentence is a reference to the reasoning of the majority in *Lawrence v. Texas*, 539 U.S. 558, 576 (2003) (noting that the reasoning in *Bowers v. Hardwick*, 478 U.S. 186 (1986), overruled by *Lawrence*, had been rejected by “wider civilization”).

96 E.g., *Newcrest Mining (WA) Ltd. v. Commonwealth* (1997) 190 C.L.R. 513, 657-71 (Austl.).

97 E.g., *Thomas v. Mowbray* (2007) 233 C.L.R. 307, 442 (opinion of Kirby, J.) (Austl.).

98 (2007) 233 C.L.R. 162 (Austl.).

99 Id. at 163.

elections, but short-term prisoners could vote. Indeed, under Australian electoral arrangements, shorter term prisoners, like all other citizens, were required to vote, in discharge of their civic duty, because casting a vote is compulsory in Australia. No express provision in the Australian Constitution governed the validity of the amending law. No Bill of Rights provision applied to resolve the point. From colonial times, longer term prisoners, attainted of treason and other grave crimes, were disqualified from voting.¹⁰⁰ The issue for the High Court of Australia was whether the detailed scheme for an elected representative democracy, as provided in the Constitution, rendered *total* disenfranchisement of *all* prisoners invalid.¹⁰¹ If they could be so disqualified, could Parliament restore the disqualifications that once existed in England for all Roman Catholics? Or that had earlier existed in Australia for Aboriginals? Could all Asian citizens be disqualified as a group? And if not, why not?

The challenger noted developments that had resolved like questions in both Canada, under the country's Charter,¹⁰² and the European Court of Human Rights in respect of the United Kingdom.¹⁰³ The government lawyers regarded the challenger's use of these authorities as provocative. The Solicitor General urged that all such foreign law should be disregarded as immaterial to the meaning of the Australian Constitution. This irrelevance rested, he declared, upon the principle that the Australian Constitution placed its trust in the Federal Parliament and rendered it accountable to the electors.¹⁰⁴ Of course, the notion that the electors would rise in wrath to defend the civic right to electoral participation for prisoners appeared a trifle ethereal in the real world of Australian politics. If anyone would defend such rights, it had to be the Court.

Nonetheless, a reflection of the governmental submission was accepted by Justice Heydon in his dissenting opinion.¹⁰⁵ This was published with the majority opinion, which upheld the prisoner's challenge in part.¹⁰⁶ In effect, the Court majority refused to allow the 2006 amendment to the Electoral Act. It thereby restored the previous law confining the disqualification to prisoners serving three-year terms or longer.¹⁰⁷ In terms of the text of the Australian Constitution, this conclusion was explained by reference to the three-year electoral cycle for the Australian

100 *Id.* at 189-92.

101 *Id.* at 199-200.

102 *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519, 585 (Can.).

103 *Hirst v. United Kingdom* [No 2], 2005-IX Eur. Ct. H.R. 187.

104 *Roach*, 233 C.L.R. at 168-69.

105 *Id.* at 224-25 (Heydon, J., dissenting).

106 *Id.* at 204-05 (majority opinion).

107 *Id.* at 204.

House of Representatives. Disqualification of prisoners serving a lesser sentence would be disproportionate to the power reposed in Parliament to enact statutory disqualifications. Each of the opinions in support of the majority conclusion (by Chief Justice Gleeson,¹⁰⁸ and jointly by Justice Gummow, Crennan, and myself¹⁰⁹) referred without embarrassment to the Canadian and European case law, whilst insisting that such law was not directly applicable and needed adaptation for any relevance to the Australian text. This approach was still unacceptable to Justice Heydon, who joined with Justice Hayne in dissent. Something of the flavor of recent American dissents can be observed in his reasons:

It is . . . surprising that the plaintiff submitted that [her] arguments were “strongly supported” by decisions under the [International Covenant on Civil and Political Rights, the European Convention on Human Rights, the Canadian Charter, and the Constitution of South Africa,] “which found that prisoner disenfranchisement provisions were invalid.” It is surprising because these instruments can have nothing whatever to do with the construction of the Australian Constitution. These instruments did not influence the framers of the Constitution, for they all post-date it by many years. It is highly improbable that it had any influence on them. The language they employ is radically different. One of the instruments is a treaty to which Australia is not and could not be a party. Another . . . is a treaty to which Australia is a party, but the plaintiff relied for its construction on comments by the United Nations Human Rights Committee. If Australian law permitted reference to materials of that kind as an aid to construing the Constitution, it might be thought that the process of assessing the significance of what the committee did would be assisted by knowing which countries were on the committee at the relevant times, what the names and standing of the representatives of these countries were, what influence (if any) Australia had on the Committee’s deliberations, and indeed whether Australia was given any significant opportunity to be heard. The plaintiff’s submissions did not deal with these points. But the fact is that our law does not permit recourse to these materials. The proposition that the legislative power of the Commonwealth is affected or limited by developments in international law since 1900 is denied by most, though not all, of the relevant authorities—that is denied by twenty-one of the Justices of this Court who have considered the matter, and affirmed by only one.¹¹⁰

The “only one” referred to in the footnote was myself. The sharp language in which this disagreement was expressed suggests that the persistence of the majority in the citation of international law materials was deliberate. Certainly, it could not be said that it was offered in oversight of the feelings that such citations appear to stir up in those of the contrary persuasion, whether in Australia or in the United States.

108 *Id.* at 177–79.

109 *Id.* at 203.

110 *Id.* at 224–25 (Heydon, J., dissenting) (citations and italics omitted).

V THE CONCERN OF NATIONAL EXCEPTIONALISM

Inevitably, the foregoing analysis brings scholars and judges face to face with the essential reasons that lie behind the commentators' and learned judges' vehement rejection of foreign legal materials.¹¹¹ One of these considerations is, I suggest, relevant to the United States, although it is not of much relevance to the thinking of Australian opponents. The other is a consideration that lies at the heart of the objections in both countries. It is by no means meritless, although, in my view, it is not controlling.

The consideration that is particular to the United States is a notion of a special American exceptionalism, so far as international law is concerned. Over the two-and-one-quarter centuries of U.S. history, that notion has had to compete with the alternative notion, stated in the 1900 Supreme Court decision, *The Paquete Habana*, in these well-known terms:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . . .¹¹²

As Harold Koh has pointed out, in the earliest days of the Republic, the United States was reliant upon the support and good opinion of civilized countries that supported it against its enemies.¹¹³ Its engagement with the world has continued intermittently ever since. It has witnessed great periods of moral, intellectual, and legal leadership in the world. Especially so during and after the Second World War when the new world legal order was created in the United Nations Organization and when the international law of human rights was constructed, based substantially on notions derived from the Anglo-American legal tradition.

Yet, intertwined with this engagement with the world, there has always been a notion of exceptionalism¹¹⁴—isolationism and hostility, or indifference to aspects of international law which is thought to cut across

111 See, e.g., James Allan, *Portia Bassanio or Dick the Butcher? Constraining Judges in the Twenty First Century*, 17 *KINGS C. L.J.* 1, 15 (2006) (criticizing, as antidemocratic, judicial revision of rights in order to keep up with international norms or in accordance with personal views); Ken I. Kersch, *Multilateralism Comes to the Courts*, *PUB. INT.*, Winter 2004, at 3, 18; Richard Posner, *Could I Interest You in Some Foreign Law? No Thanks, We Already Have Our Own Laws*, *LEGAL AFF.*, July–Aug. 2004, at 40, 41–42.

112 175 U.S. 677, 700 (1900).

113 Harold Hongju Koh, *International Law as Part of Our Law*, 98 *AM. J. INT'L L.* 43, 43–45 (2004).

114 See Harold Hongju Koh, *On American Exceptionalism*, 55 *STAN. L. REV.* 1479, 1482 (2003).

U.S. laws and interests, and the determination to achieve the protection of those interests by the United States, currently the most powerful nation on Earth. A striking instance of this latter attitude may be found in a document published by the White House in September 2002, asserting the right of the United States to take pre-emptive action against terrorists: “While the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting pre-emptively against such terrorists, to prevent them from doing harm against our people and our country.”¹¹⁵

The Australian scholar Owen Harries has identified American “exceptionalism” as a feature of U.S. policy in recent years. He concludes that “[t]he really interesting and important debate is not between anti-Americans and pro-Americans; it is between two different American traditions concerning how the US can best promote its values and ideals.”¹¹⁶

The Australian government has also occasionally been given to adopting exceptionalist policies. For example, these have involved excluding parts of continental and political Australia from the “migration zone,” within which refugee applicants may claim asylum in Australia, and also well-known circumstances invoking obligations under international law in respect of persons rescued on the high seas and thereafter seeking access to Australian territorial waters.¹¹⁷ Australian exceptionalism does not matter greatly, whereas that of the United States matters a lot and tends to affect the whole world. Occasionally, when reading of the intolerance of American and (fewer) Australian judges and lawyers to the citation, reference to, and use of foreign law in constitutional adjudication, one cannot escape the impression that national exceptionalism is creeping into the law and the courts. It is here that we see the unfriendly face of legal nationalism, self-sufficiency, and self-satisfaction. These are the attitudes of fortress America and fortress Australia. They have made several appearances in both countries in recent years.

There is a particular reason why this fortress attitude is much less successful and, therefore, less worrying in the case of Australia than

115 WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 6 (2002), available at <http://georgewbush-whitehouse.archives.gov/nsc/nss/2002/nss.pdf>.

116 Owen Harries, A New Threat to the US—From Within, SYDNEY MORNING HERALD, Dec. 12, 2003, at 13.

117 See Michael White, Tampa Incident: Shipping, International and Maritime Legal Issues, 78 AUSTL. L.J. 101, 101-04 (2004) (describing the Australian government’s refusal to permit 433 asylum seekers rescued by the Tampa, a Norwegian vessel, to enter Australian territory). See generally 13 PUB. L. REV. 85, 85-142 (2002) (a special issue of Public Law Review devoted entirely to the Tampa incident).

in the United States. Until very recently, 1986 to be exact,¹¹⁸ the Australian legal system and its Judicature were institutionally tied into the worldwide system supervised by the Judicial Committee of the Privy Council in London. That link (which excluded only a limited category of constitutional cases in Australia),¹¹⁹ instilled in all Australian lawyers a generally comfortable attitude towards the use of inter-jurisdictional comparative law, as much in constitutional and public law as in cases involving questions of private law. The global linkage so established had its downside. However, one of its undoubted advantages was that it rescued its beneficiaries from narrow parochialism; set high standards of logical judicial reasoning; discouraged and corrected any corrupt or incompetent decisions; and promoted a global view of law and of the relevance of international law.

With the decline of the British Empire, the jurisdiction of the Privy Council has receded almost to nothing. By chance, the last Australian appeal to the Privy Council was from a decision of the New South Wales Court of Appeal in which I presided twenty years ago.¹²⁰ The appeal was dismissed.¹²¹

In place of the Privy Council, the successor final courts in virtually all of the fifty-three countries of the Commonwealth of Nations now have the last word on the meaning of their respective constitutions and the content of their local laws. Nonetheless, an examination of the decisions of those final courts, long after the formal institutional links to the Privy Council have been severed, evidences a continuing, unembarrassed reference in all of them to decisions of final and intermediate courts in other Commonwealth countries.

To demonstrate that this is so, I need do no more than take the latest volume of the Law Reports of the Commonwealth.¹²² The volume is full of public law cases, mostly concerned with constitutional law. Many of the cases deal with issues that are highly sensitive in their own national context, such as the apostasy case in Malaysia,¹²³ the jurisdiction of the High Court in Ghana,¹²⁴ the constitutional validity of mandatory minimum

118 Australia Act 1986, 1985, § 11 (Austl.); Australia Act 1986, 1986, § 11 (U.K.).

119 AUSTL. CONST. § 74.

120 Austin v. Keele (1987) 61 A.L.J.R. 605, 611 (P.C.) (Austl.).

121 Id.

122 1 LAW REPORTS OF THE COMMONWEALTH 2009 (James S. Read & Peter E. Slinn eds., 2009).

123 Joy v. Fed. Territory Islamic Council, [2009] 1 L.R.C. 1, 1-2 (Malay.).

124 Republic v. Fast Track High Court, Accra, ex parte Comm'n on Human Rights & Admin. Justice, [2009] 1 L.R.C. 44, 45 (Ghana).

sentences for rape in Botswana,¹²⁵ and the response to the problem of a sleeping judge in Australia.¹²⁶

A common feature of each of these and the other cases in the volume is the wealth of reference, in elucidating constitutional provisions and clarifying contested issues of public law, to what is done in other Commonwealth courts, courts in Europe, and courts of the United States. Thus, in the apostasy decision in Malaysia, there are thirteen citations to U.K. judicial authority, four to the Indian Supreme Court, and one to the High Court of Australia.¹²⁷ In the Ghana case, there are nine U.K. citations, two from South Africa, two from Canada, and one from the United States.¹²⁸ Decisions of the Supreme Court of India in the volume contain numerous references to the decisions of the U.K. and Australian courts. The reports of the opinions of the National Court of Papua New Guinea refer to U.K., Australian, and Irish decisions.¹²⁹ In the Australian sleeping judge case, the opinion of Chief Justice French is replete with citations from other lands with similar problems, notably the United States. No fewer than thirteen such American decisions on the problem are noted, from both federal and state courts.¹³⁰ This is done without embarrassment, self-consciousness, or recrimination. It is a feature of a mature legal system which, for nearly 200 years, has been sharing judicial decisions across the world, including in very sensitive, local constitutional decision making. This is a confident, comparativist outlook that the United States lost, in part, following its embrace of national judicial and legal self-sufficiency that occurred in this country after the Revolution.

Perhaps in the future, a similarly mature attitude may be accepted in the United States. The key to doing so is to realize that decisions of foreign courts, tribunals, and other bodies, and the content of international and regional law outside one's own legal system are not studied because they provide a binding *rule* that governs a municipal case and determines its outcome. They offer no more than a contextual setting that helps the municipal decision maker to see his or her problem in a wider *context*. They also check local reasoning by reference to the discursive elaborations of judges and other decision makers operating in a different system of law, making proper allowance for what will usually be distinct rules that the others are applying.

125 *State v. Matlho*, [2009] 1 L.R.C. 133, 133 (Bots.).

126 *R. v. Cessan* (2009) 1 L.R.C. 416, 416 (Austl.); see also *Cesana v. The Queen* (2008) 236 C.L.R. 358 (Austl.).

127 *Joy*, 1 L.R.C. at 1.

128 *Fast Track High Court*, 1 L.R.C. at 44.

129 LAW REPORTS OF THE COMMONWEALTH 2009, *supra* note 122.

130 *Cessan*, 1 L.R.C. at 416.

VI THE CONCERN OF THE DEMOCRATIC DEFICIT

There remains, however, the democratic deficit. This is an objection common to the hesitation of U.S. and Australian jurists when analogies to the resolution of a municipal law problem are propounded with reference to the principles of foreign or international law as expressed in courts, tribunals, and other bodies outside the judicature of the nation-state.

Professor Frank Michelman, in a moving tribute to Justice William Brennan's writings on democracy, has remarked:

American constitutional theory has over its life span been hounded and pre-occupied, if not totally consumed, by a search for harmony between what are usually heard as two clashing commitments: constitutionalism and democracy.

Do we see some slight to democracy, some "Counter-Majoritarian Difficulty," to recall Professor Bickel's famous phrase, in unelected judges deciding the legal validity of the enactments of popular assemblies and thereby effectively ruling the country?¹³¹

In the context of the present subject matter, this question can be broadened: "Do we see [a particular] Counter-Majoritarian Difficulty" in those potential judicial rulers resolving cases by reference to the international law, which does not have the legitimacy of democratic endorsement by anyone, unless it be the officials of the nation-states who approved the principles or (much more indirectly) the legislators who gave advice and consent to approve a treaty, although not actually enacting it as part of the substantive law of the land? Do we feel a particular sense of disquiet in their doing so, especially in that most political, national, and sensitive document—the Constitution—which, of its nature, is designed to channel the institutions of popular democracy that grow out of the history and culture of a particular people on a given portion of the world's surface?

This is not an entirely theoretical issue. As Dean Alfred Aman has pointed out in his 2004 monograph *The Democratic Deficit*, the problem of the democratic deficit extends far beyond the incorporation of international law in judicial reasoning.¹³² Most acutely, it is presented by the chilling effect on representative democracy that has arisen since markets came to be called upon to do some of the work that governments had traditionally performed in ways answerable to a political process. The worldwide moves towards privatization of governmental services have

131 Frank I. Michelman, *Brennan and Democracy*, 86 *CAL. L. REV.* 399, 399 (1998).

132 ALFRED C. AMAN, JR., *THE DEMOCRACY DEFICIT: TAMING GLOBALIZATION THROUGH LAW REFORM* (2004).

many implications to be resolved—not least in consequence of the 2009 global economic downturn. Professor Aman correctly poses the question whether citizens organized in the nation-state can influence, even if they cannot control, private sector organizations that now play an increasing role in the world?¹³³ Some large transnational corporations are much wealthier and more powerful than many poorer nation-states. How can democratic impulses be brought to bear upon them? Finally, how can such impulses influence the outcomes of international meetings where, with compromises, back-room deals, and power politics at an ultra-elite level, texts are hammered out that are later propounded as expressing “universal principles” of international law?

Concern about the comparative lack of democratic input into the content of international law is understandable and reasonable. Anyone who has actually participated, as I have, in the development of international law will know that the input of popular and local opinions is minimal and, at best, theoretical and a legal fiction. Writing of the influence of democratic values on lawmaking in the United States, Professor Aman declared:

Democracy is more than a set of tools or a public apparatus to be manipulated by the elite. It is, in the last resort, embedded deeply in our culture and our legal system. To date our apparent lack of response is due to the fact that we have not fully grasped the profound way in which globalization is embedded in our democratic institutions, now necessitating change and a reconceptualization of our basic operating assumptions. Recognizing how globalization has created a new public private sector broadening the range of influential state, nonstate, and interstate actors positions us to reconceptualize administrative law as a resource for reform. Such a reconceptualization is necessary if we are to retain the values on which democracy is based—transparency, accountability, and a body politic of engaged and informed citizens. Globalization highlights the importance of such values, ever more strikingly, as fundamental to the ways in which we govern ourselves, every day, at the domestic level.¹³⁴

There are several answers to the concern about the democratic deficit as it impinges upon the kind of judicial deployment of the principles of international law in constitutional adjudication for which I would argue:

1. It is important to stress once again that judicial use of such material is not normative. No one believes that the principles of international human rights law, unless incorporated into municipal law by a lawmaker acting within power, operate as binding rules. No one suggests that they *bind* a judge to give effect to them, unless trumped by local constitutional or statutory law. The principles provide no more than a context, a reminder of universal notions, and a stimulus

¹³³ Id. at 142–43.

¹³⁴ Id. at 180–81.

to the judge's own thinking. That thinking remains always anchored in the task presented by municipal law. In turn, this is generally controlled by the text of a municipal law, whether found in a national or sub-national constitution, statute, subordinate law, or decisional authority.

2. At this level of influence, it is not reasonable, nor is it logical, to demand a direct and local democratic component for such international law principles. In a world of nearly seven billion people, how would that be humanly possible, except by authority delegated to representatives of nation-states, to agree on any principles or rules for international questions? To expect such rules to be internationally answerable, in some direct way, to the opinions of local communities, or even to national communities in a country of great population such as the United States, is to indulge in a romantic concept of democracy. The building of international law is essential for the extension to all human beings of the benefits of the rule of law. It is necessary for devising effective support for universal human rights. In such matters, romance must give way to reality. The United States, as a major actor and potential beneficiary of the spread of international law, including the law of human rights, will in its own interests support this development locally and not seek to frustrate it by unrealistic demands for direct accountability of international law to all citizens of the United States. If this were demanded by one nation, it would necessarily be required by all.
3. Used in the way propounded, international human rights law is simply part of the "dialogic process."¹³⁵ As Justice Breyer pointed out in his public conversation with Justice Scalia: "It is common for an opinion to refer to material that . . . has no 'democratic provenance.' Blackstone had no democratic provenance. Law professors have no democratic provenance. Yet I read and refer to treatises and I read and refer to law review articles."¹³⁶ The principles of international human rights law are thus used in an analogous manner. They are deployed by independent members of the judicial branch whose justification in countries such as the United States and Australia need be no more than established constitutional principles governing judicial review and the necessity of creating and obeying an independent umpire with the power to decide contested constitutional questions.

¹³⁵ Koh, *supra* note 113, at 56.

¹³⁶ A Conversation Between U.S. Supreme Court Justices, 3 *INTL. J. CONST. L.* 519, 541 (2005).

4. Within our own national politics, there remains a large element of fiction in the democratic component of lawmaking. To say this is not to decry the great benefits of living in a representative democracy. Both in Australia and in the United States, we have witnessed the democratic principle at work in the recent electoral changes of the national government. Yet once one gets away from the activities of local government, the notion of popular participation in the content of law is at best theoretical and at worst romantic.¹³⁷ To conceive of national electors, visiting polling stations every two or three years, as actually approving every law and every provision in every law that is thereafter enacted in their name, is unpersuasive. Election campaigns in a modern democracy are typically concerned with bread and butter issues, if not with entertainment and personality. They are often controlled by huge donations of funds to political parties. Rarely do such electoral contests descend to the particularity of the rights of long-term refugees or the entitlements of short-term prisoners to vote. For such decisions, the rulings of national courts are required.

Democracy is a kind of symphony in which the democratic elements found in the legislative and executive branches are the violins and noisy trumpets. But for a true harmony, it is necessary to have the woodwinds of the civil service and the double basses provided by judges, tribunals, and other authorities. As lawmakers in a minor key, the judiciary, even in a final court, will often defer to the elected branches of government.¹³⁸ Yet, there will be cases where they do not do so. The *Mabo* case on the recognition of native title in Australia was one such instance.¹³⁹ So was the decision of the High Court of Australia striking down the Communist Party Dissolution Act of 1950.¹⁴⁰ So were the decisions in Australia and the United States upholding the right of indigent prisoners to legal representation.¹⁴¹ So, too, was the case brought in Australia on behalf of prisoners demanding the right to vote.¹⁴²

If the reader can see a common thread here, it is the protection of vulnerable and sometimes unpopular minorities. For the rights of such

137 See Michael Kirby, *Law Reform, Human Rights and Modern Governance: Australia's Debt to Lord Scarman*, AUSTL. L.J.R. 299, 312-13 (2006); Anthony Mason, *Democracy and the Law: The State of the Australian Political System*, NEW S.WALES L. SOC'Y J., Nov. 2005, at 68, 69.

138 See Mary Arden, *The Changing Judicial Role: Human Rights, Community Law and the Intention of Parliament*, 67 CAMBRIDGE L.J. 487, 499-500 (2008).

139 *Mabo v. Queensland [No 2]* (1992) 175 C.L.R. 1 (Austl.).

140 *Austl. Communist Party v. Commonwealth of Austl.* (1951) 83 C.L.R. 1, 192-94.

141 *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963); *Dietrich v. The Queen* (1992) 177 C.L.R. 292, 315 (Austl.).

142 *Roach v. Electoral Comm'r* (2007) 233 C.L.R. 162 (Austl.).

people, democracy imports protection by the independent courts. Such courts remind transient majorities that a democracy includes *all* people. Minorities have fundamental rights that the majority may not neglect or override. International human rights law is useful in expressing and clarifying what such rights entail. That is what sometimes makes it useful for municipal judges to have regard to the growing body of international law and jurisprudence.

To the extent that familiarity with relevant provisions of international law reminds judges of these simple truths, it helps them to discharge their municipal tasks more accurately and carefully. It reminds them that every land today, even one as powerful as the United States of America, is part of the world, so it should generally act as such.

In navigating the present times, the United States of America and Australia, as mature democracies with independent judges and lawyers, must play leading parts in bringing international law and municipal law into greater harmony. This is a large challenge for judges in particular. However, I am confident that, though the judges do not personally feel the movement of the world, they know that it is moving. They sense its forward direction. They will not attempt to deceive themselves and others into believing that it is motionless and unaffected by the globalization that is everywhere about us. And with globalization comes an appreciation of the obligation of being part of common humanity and of protecting its universal values, which includes the exposition of national laws and the operation of municipal judicial institutions.