

INTERNATIONAL LAW - THE IMPACT ON NATIONAL CONSTITUTIONS*

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

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

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

Justice O'Connor (diss) in *Roper v Simmons* 583 US __ at 19 (2005)

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

Justice Scalia (diss) in *Roper v Simmons* 583 US __ at 18 (2005)

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ARRIVING AT A "GROTIAN MOMENT"¹:

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

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

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

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

² *On the Law of War and Peace*.

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

3.

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

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

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

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

4.

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

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

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

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

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

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

All of these developments, manifesting themselves in the space of a relatively short period, constitute a significant and interesting legal story. But it is not the subject of this lecture. It

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

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

6.

may be taken as a given. It represents the context in which the topic that I will tackle should be understood.

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

In addressing this issue, I mean to make no intrusive comment upon domestic topics that are sensitive and that fall for resolution in a country other than my own. However, the issue at stake is an important one, occurring in global intellectual discourse. As I shall show, it is a lively topic in my own court. This is a fact that focuses my attention on the arguments and how they should be resolved. In the United States, these issues are fought out not only in the pages

of the reports of courts of high authority¹⁰ but also in countless academic articles and comments in the popular media. They have been the subject of a lively and entertaining public exchange between two Justices of the Supreme Court (Justices Scalia and Breyer) explaining in simple language to law students the competing views that they hold¹¹. So far, in Australia, the debates have been more low key. However (as I will show) the temperature was recently raised by the publication of a decision of the High Court of Australia containing somewhat sharp exchanges between myself and one of my colleagues (Justice McHugh). Our words resonate with the American controversy¹².

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

¹⁰ eg *Atkins v Virginia* 536 US 304 (2002) and *Lawrence v Texas* 539 US 558 (2003); *Roper v Simmons* 543 US ___ (2005) (slip opinion); 125 S Ct 1183.

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

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

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

THE BANGALORE PRINCIPLES AND THEIR APPLICATION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE INCORPORATION CONTROVERSY IN AUSTRALIA

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

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

²⁵ (1988) 93 FLR 414 (NSWCA).

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

On an urgent motion for relief in the Court of Appeal, the resolution of the case took me, in default of a clear local rule, to the *International Covenant on Civil and Political Rights*²⁷ (ICCPR). Australia had ratified that treaty and, in any case, it probably stated customary international law in this respect. I held that, in developing the Australian common law, such law should, so far as possible, be in harmony with the ICCPR provisions, including Art 14²⁸ and the jurisprudence gathered around it²⁹. The two other judges sitting

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

²⁷ Arts 14.1, 14.3(a) and 14.3(f).

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

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

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

In later cases, where I reached a point of decision upon which any local statute or subordinate statutory rule were ambiguous³¹ or the common law was unilluminating, I reached for the statement of basic principles about universal human rights and fundamental freedoms expressed in the ICCPR and like instruments. As a busy working judge, I quite often found these sources to be extremely helpful. After all, until shortly before that time, Australian courts, bound by the Privy Council, were not unused to looking to the elucidations of basic legal principle by the judges of England upon matters such as procedural fairness, natural justice and the protection of common law rights. Now, in a new era, a fresh and different source of the exposition of fundamentals and stimulus to consistency was available. Unsurprisingly, that source commonly proved helpful³². Other judges would usually content themselves with references to old Australian, English and other cases as a more

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

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

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

traditional source of legal authority. For me, the particular advantage of the international jurisprudence was often, as I discovered, that it addressed more precisely the issue before my Court. Typically, that issue was of a kind that was occurring in many contemporary societies. It involved conflicts between competing fundamental principles upon which international law was often very useful.

Whereas, at first, my approach seemed heretical to many Australian lawyers, the tide turned in 1992 when the High Court of Australia decided *Mabo v Queensland [No 2]*³³. That case concerned the question whether the common law of Australia gave any recognition to the title to land of indigenous people, derived from a time before the British acquisition of sovereignty over Australia. The conventional view to that time, supported by nineteenth century court decisions, was that it did not. The key that unlocked the door that permitted the Court to overcome these decisions was a recognition that they were fundamentally incompatible with universal principles, accepted by international law, denying prejudicial deprivation of basic rights on the grounds of race or ethnic origin.

Between the *Bangalore Principles* and *Mabo*, Australia had acceded to the First Optional Protocol to the ICCPR. That

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

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

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

This was a crucial legal development in harmony with the essential idea of the *Bangalore Principles*. Adaptation of the common law in Australia, by having regard to the principles of international law, is now generally uncontroversial³⁴. So, at least in many cases, is the interpretation of legislation which is ambiguous and which, interpreted one way, will conform to international law and avoid needless disharmony³⁵. Of course, there remain

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

³⁵ *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at 479; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 492 [29]; *Coleman v*

controversies about the extent to which this interpretative technique will be used where the statute in question was enacted before the adoption and general acceptance of the propounded norm of international law³⁶. It is unnecessary to explore that matter of detail. In this way, the international law of human rights is undoubtedly seeping into Australian judicial elaborations of statute and common law. Indeed, this is something that is happening in courts throughout the Commonwealth of Nations.

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

In 1997, in a closely divided decision, a question arose concerning the resolution of an ambiguity in the Australian Constitution about whether one of the few express rights, dealing with the necessity to pay just terms for federal acquisitions of

Power (2004) 78 ALJR 1166 at 1171-1172 [17]-[23]; 1209-1212 [240]-[249].

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

property³⁷, extended to public acquisitions by the government of a federal territory. The Australian Constitution could be read either way. There were conflicting holdings over the century of its existence. In expounding the way that I came to my conclusion as part of the majority in the Court, favourable to the right to just terms, I invoked the *Bangalore Principles* in the resolution of the constitutional ambiguity³⁸.

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

"Where the Constitution is ambiguous, this Court should adopt that meaning which conforms to the principles of universal and fundamental rights rather than an

³⁷ Australian Constitution, s 51(xxxi).

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

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

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

None of the six current members of the High Court of Australia has so far accepted this principle of constitutional interpretation⁴⁰. Observations exist in cases before and during the Second War that reject the notion that the Australian Constitution contains an implication that it should be construed to conform with the rules of international law⁴¹. Antipathetic views have also been stated in more recent times⁴², including (as I shall show) in response to my own remarks ⁴³.

⁴⁰ See eg *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 417-418 [166]-[167].

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

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

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

In many decisions over the past decade, I have referred to the relevant principles of the international law of human rights in expounding the meaning and operation of the Australian Constitution⁴⁴. In most cases where I have raised the issue, the other members of my Court have not found such considerations to be of assistance for their reasoning. For the most part, they have ignored them.

The *Bangalore Principles* confirm the duty of the municipal judge to give effect to domestic law in such a case⁴⁵. In this respect, they adopt a principle different from the rule of international law that holds that a "state cannot plead provisions of its own law or deficiencies in that law in answer to a claim against it for an alleged breach of the obligations under international law"⁴⁶. The authority of a municipal judge derives from the national Constitution. He or she must therefore uphold its rules, although it is always permissible to call attention (as I have done) to any discordancy between the two legal systems. If the judge cannot, in conscience,

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

⁴⁵ *Bangalore Principles* (above n 21) para 8. See (1988) 62 *Australian Law Journal* 531 at 532.

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

act in this way, the only proper course is resignation. It is not disobedience to, or manipulation of, a constitutionally valid law, challenged within its own system⁴⁷.

This non-dialogue between judges of different persuasions on this subject might have continued in Australia but for developments in the United States discourse on the same topic. According to a commentator⁴⁸, the *Bangalore Principles* are "immensely popular in the law schools, and with many barristers. Nothing is more predictable than that [they] will have many future outings"⁴⁹. But getting them adopted by the current generation of judges is sometimes another matter.

⁴⁷ cf D Luban, "Nazis in the Courtroom: Lessons from the Conduct of Judges and Lawyers Under the Laws of the Third Reich and Vichy France" 61 *Brook L Rev* 1121 at 1141-1144 (1995); M Lippman, "Law, Lawyers and Equality in the Third Reich: The Perversion of Principle and Professionalism", 11 *Int'l & Comp LJ* 199 at 233 (1997); V Curran, "Fear of Formalism: Indications from the Fascist Period in France and Germany of Judicial Methodology's Impact on Substantive Law" 35 *Cornell Int'l LJ* 101 at 169-171 (2002). I am indebted to Justice B M Selway of the Federal Court of Australia for his access to unpublished paper, "The Role of Judges in Protecting Human Rights" (2005) where there is discussion of this topic.

⁴⁸ G Craven, "Judicial Activism: The Beginning of the End of the Beginning" in *Upholding the Australian Constitution* (Proceedings of the 16th Conference of the Samuel Griffith Society) (March 2004, 16), 153 at 169.

⁴⁹ *Ibid*, at 169.

In *Al-Kateb v Godwin*⁵⁰, late in 2004, one of my colleagues, Justice McHugh, responded to this question. In language reminiscent of that of Justice Scalia for the dissenters in the United States Supreme Court in *Atkins v Virginia*⁵¹, *Lawrence v Texas*⁵² and most recently in *Roper v Simmons*⁵³, Justice McHugh entered the debate. He rejected the suggestion that the Australian Constitution could be read by reference to the provisions of international law, invariably adopted after the Australian Constitution came into force in 1901⁵⁴. He declared that this was heresy so far as past Australian authority was concerned⁵⁵. He expressed concern at the possibility of the huge body of treaty and other law being used to introduce "general principles of law recognised by civilised nations" into Australian constitutional elaboration⁵⁶. He acknowledged that the Constitution could sometimes have meanings different from those accepted in earlier times⁵⁷. However, it was one thing to take into account "political, social and economic developments in the intervening period" and quite another to accept the authority of *rules*

⁵⁰ (2004) 78 ALJR 1099.

⁵¹ 536 US 304 at 347-348 (2002).

⁵² 539 US 558 at 586 (2003).

⁵³ 543 US __ (2005) (slip opinion).

⁵⁴ (2004) 78 ALJR 1099 at 1112 [62].

⁵⁵ (2004) 78 ALJR 1099 at 1112 [63].

⁵⁶ (2004) 78 ALJR 1099 at 1113 [64]-[65].

⁵⁷ (2004) 78 ALJR 1099 at 1114 [69].

of international law⁵⁸. He said that it was arguable that the Australian Constitution *should* contain a Bill of Rights; but stated that it was not the function of judges to adopt a "loose leaf" approach to the Constitution, inserting basic rights in the text without the authority of the people expressed in a formal constitutional change at referendum⁵⁹.

The case of *Al-Kateb* concerned the power of the Australian Parliament, and Executive, to detain indefinitely a stateless person who, as an alien, had entered the country unlawfully. The issue was whether the federal *Migration Act* 1988 should be read down to avoid such a consequence or whether the Constitution itself reserved prolonged detention to the cases of those whose imprisonment was ordered by a court, in application of the law. The Court divided on the outcome. The lawfulness of the detention was upheld by the narrowest margin⁶⁰.

In my reasons, I sought to respond to Justice McHugh's criticisms. In doing so, I invoked the way in which, successive

⁵⁸ (2004) 78 ALJR 1099 at 1115 [71]. (Emphasis added)

⁵⁹ (2004) 78 ALJR 1099 at 1115 [73]. The Australian Constitution, s 128, provides for formal amendments. It mandates passage of a proposal through the Federal Parliament and an affirmative vote nationally and in a majority of the States.

⁶⁰ McHugh, Hayne, Callinan and Heydon JJ; Gleeson CJ, Gummow J and myself dissenting.

majorities in the Supreme Court of the United States, in recent times, have used the universal principles of human rights and fundamental freedoms to confirm the judges' understandings of the meaning of the United States Constitution. They have done so using the light thrown by what Justice Kennedy, for the Court, in *Lawrence* has described as "a wider civilisation"⁶¹. In *Al-Kateb*, I said⁶²:

"[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"⁶³.

BY reference to the dissents of Justices McLean⁶⁴ and Curtis⁶⁵ in *Dred Scott v Sandford*⁶⁶, both of whom had strongly invoked

⁶¹ 539 US 558 at 576 (2003).

⁶² (2004) 78 ALJR 1134 [citations omitted].

⁶³ With reference to the extracurial remarks of Ginsburg J in R B Ginsburg and D J Merritt, "Fifty-First Cardozo Memorial Lecture - Affirmative Action: An International Human Rights Dialogue" 21 *Cardozo Law Review* 253 at 282 (1999).

⁶⁴ 60 US 393 at 534, 556-557 (1856).

⁶⁵ 60 US 393 at 594-597, 601 (1856).

⁶⁶ 60 US 393 (1856).

international law to support the conclusion that the appellant was not a slave but a free man, I observed⁶⁷:

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

What is being attempted by this reasoning is not an amendment of the Constitution but an elaboration and enforcement of it, properly understood in the context of the world of today in which any constitutional text must now operate⁶⁸:

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

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

⁶⁷ (2004) 78 ALJR 1099 at 1136 [190].

⁶⁸ (2004) 78 ALJR 1099 at 1136 [191].

ARGUMENTS AGAINST INTERPRETATIVE INCORPORATION

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

In the days of the British Empire, it was not at all unusual for British subjects, including those appointed to judicial office, to view foreign systems of law (including, dare I say it, that of the United States) as necessarily inferior to the common law of England, at the time applicable throughout its imperial domain⁶⁹. In practice, there might be grave inequalities, such as Judge Weeramantry described. But in theory, there was a strong sense of superiority, self-satisfaction and sharing within this imperial hegemony. Whilst in Commonwealth countries where "provincialism in the development of the common law is no longer an option"⁷⁰, these views now seem outdated, and even embarrassing, ever so often, one detects in contemporary rhetoric about international human rights law, written

⁶⁹ See eg *Riley v Attorney-General of Jamaica* [1983] AC 719 at 729 (PC).

⁷⁰ A M Gleeson, "Centenary of the High Court: Lessons from History", *13th Australian Institute for Judicial Administration Oration*, October 3, 2003, p 8.

by foreigners, remnants of the same imperial attitude of superiority. As a child of the last decades of the British Empire, I am alert to such signals. I recognise them instantly when I see them⁷¹.

Setting aside such considerations (and the view that would confine all constitutional interpretation to the original intentions of the Founders - an American theory regarded in most countries as a form of ancestor worship⁷²) - there remain serious arguments that need to be considered in pursuing the course of having regard to international law, and other foreign sources of ideas, when elaborating the meaning of a national constitution, particularly as it concerns human rights.

First, there is the view espoused by opponents of the idea in the United States, that of its nature, a national constitution is a unique document, designed specifically for the governance of the people of the nation to which it applies and only them. Thus, Judge Richard Posner has argued that "the judicial systems of the rest of the world are immensely varied"⁷³. They give rise to foreign judicial

⁷¹ cf J Stoner, *Common Law and Liberal Theory: Coke, Hobbes and the Origins of American Constitutionalism* (1992) pp 48-68.

⁷² M D Kirby, "Constitutional Interpretation and Original Intent - A Form of Ancestor Worship?" (2000) 24 *Melbourne University L Rev* 1 at 2. The description derives from a comment of Binnie J of the Supreme Court of Canada.

⁷³ R Posner, "Could I interest You in Some Foreign Law? No Thanks, We Already Have Our Own Laws" *Aug Legal Affairs* 40 at 41-42 (2004) ("Posner").

decisions that "emerge from a complex socio-historico-politico-institutional background of which our judges ... are almost entirely ignorant"⁷⁴. This consideration has led such writers as Michael Wells⁷⁵ to argue that it is "better for courts ... to focus on resolving conflicts by paying close attention to the history and culture of the society in which they act, rather than to try to identify and apply trans-cultural principles of morality".

Taken at face value, there is force in these arguments. If constitutional provisions are different and if societies are distinguishable, the utility of international law sources will generally be confined. But this does not mean that they must be ignored⁷⁶. The United States, Australia and other countries share the common law heritage, tradition and history with many foreign constitutional systems⁷⁷. Furthermore, the United States Constitution, including the Bill of Rights, has itself greatly influenced foreign constitutional texts. Courts around the world use American judicial elaborations all

⁷⁴ Posner, *ibid* at 42.

⁷⁵ M Wells, "International Norms in Constitutional Law" 32 *Georgia Journal of International and Comparative Law* 429 at 436 (2004) ("Wells").

⁷⁶ G L Neuman, "The Uses of International Law in Constitutional Interpretation" 98 *American Journal of International Law* 82 at 87 (2004) ("Neuman").

⁷⁷ H H Koh, "International Law as Part of our Law" 98 *American Journal of International Law* 43 at 47 (2004) ("Koh").

the time. In the era of globalism, why should the process not be reciprocal⁷⁸?

Secondly, concern is sometimes expressed that international law is used selectively, merely to support the subjective opinions of the judges invoking it. Thus, Justice Scalia takes his colleagues to task for failing to utter "a whisper about foreign law in the series of abortion cases"⁷⁹. He suggests that references to foreign judges and their opinions "looks lawyerly" but "invites manipulation"⁸⁰. Judge Posner argues that the free citation of such law "would mean that any judge wanting a supporting citation has only to troll deeply enough in the world's *Corpus Juris* to find it"⁸¹. He declares that it is a form of "judicial fig-leafing"⁸².

This criticism is rightly targeted at any unbalanced use of international law. However, the answer to this argument is that a

⁷⁸ Wells, 32 *Georgia Journal of International and Comparative Law* 429 at 429-430 (2004).

⁷⁹ Breyer and Scalia JJ, Transcript at pp 8, 14. This is also a point mentioned by Scalia J in *Olympic Airways Ltd v Husain* 540 US 633 (2004); 124 S Ct 1221 at 1231 and in *Roper v Simmons* 543 US ___ at 19 (2005) (slip opinion); 125 S Ct 1183 at 1227.

⁸⁰ Breyer and Scalia JJ, Transcript at p 22.

⁸¹ Posner, *Aug Legal Affairs* 40 at 41-42 (2004).

⁸² Posner, *Aug Legal Affairs* 40 at 42 (2004) . See to similar effect Roger Alford, "Misusing International Sources to Interpret the Constitution" 98 *American Journal of International Law* 57 at 67 (2004).

proper use of this source can sometimes actually help to reduce subjectivity. In the recent public "conversation", Justice Breyer answered this concern⁸³:

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

To similar effect, Dean Harold Hongju Koh of the Yale Law School points out that the use of international law and foreign constitutional law does not involve a global "nose count". Still less does it involve direct application of foreign rules, as such, or deference to foreign and international judges. What is at stake is a wider pool of source material, where the new sources are directly relevant and may be helpful⁸⁴.

Thirdly, opponents have suggested that reference to international law may involve, or lead to, a loss of national sovereignty. Thus, Justice Scalia has denied emphatically that "we want to be governed by the views of foreigners"⁸⁵. In some of his judicial opinions he is dismissive of the writings on common

⁸³ Breyer and Scalia JJ, Transcript, p 40.

⁸⁴ Koh, 98 *American Journal of International Law* 43 at 56 (2004).

⁸⁵ Breyer and Scalia JJ, Transcript, p 7.

constitutional questions of other courts and scholars ("thankfully" regarded as different)⁸⁶.

There are many answers to this attitude. I will confine myself to four. If one accepts a precondition of constitutional ambiguity, the invocation of international law is self limiting⁸⁷. In any case, as technology and the economy are internationalised, it is both inevitable and desirable that the same development should happen in the law. By the act of municipal judges utilising and explaining applicable principles of international and comparative law, the process derives its municipal legitimacy⁸⁸. Moreover, it involves participation within one's own constitutional discourse in an interactive dialogue occurring between the constitutional courts of many countries⁸⁹. It is from such a dialogue that a transnational law is emerging, especially on common issues about human rights. Over time, such a law may help to merge aspects of national and the international law, in some areas at least⁹⁰.

⁸⁶ *Atkins v Virginia* 536 US 304 at 347-348 (2002).

⁸⁷ A Simpson and G Williams, "International Law and Constitutional Interpretation" (2000) 11 *Public Law Review* 205 at 225. ("Simpson and Williams").

⁸⁸ K Knop, "Here and There: International Law in Domestic Courts" 32 *NYU Journal of International Law and Policy* 501 at 505-506 (2000) ("Knop").

⁸⁹ A Chayes and A Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* 27 (1995).

⁹⁰ Koh, 98 *American Journal of International Law* 43 at 53 (2004).

Fourthly, opponents point to the fact that the making of international law is substantially in the hands of the Executive Government, which ordinarily initiates involvement in the process of treaty negotiation and commences, or controls, the procedures of ratification. It was this concern that led Justice Iacobucci in the Supreme Court of Canada to express reservations about incorporating international law by the "back door", without express parliamentary endorsement⁹¹. Similar views have been stated in Australia, defensive of the legislature's power of veto over incorporation into municipal law of treaty provisions ratified by the Executive⁹². Particularly in countries which, unlike the United States, have no constitutional provision for a legislative veto over treaties, this can be a very practical consideration⁹³.

In part, the answer to this concern is an improvement in national procedures for the ratification of treaties. In any case, courts are aware that it is not their role to incorporate an entire

⁹¹ cf *Capital Cities Communication Inc v Canadian Radio-Television Commission* [1978] 2 SCR 141.

⁹² R Piotrowicz, "Unincorporated Treaties in Australian Law" [1996] PL 190 at 195; G Evans, "The Impact of Internationalisation on Australian Law: A Commentary" in C Saunders (ed) *Courts of Final Jurisdiction* (1996) at 240. See also the dissent of McHugh J in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 313.

⁹³ M Chiam, "Comment: Evaluating Australia's Treaty-Making Process" (2004) 15 *Public Law Review* 265.

treaty, or body of international law, into municipal law, still less into constitutional interpretation, "by the back door"⁹⁴. However, to deny courts any role in having regard to evolving treaty standards represents a negation of the legitimate, although limited, lawmaking role of the courts, certainly in common law countries; the accepted utilisation of these sources in developing the common law; and the assumption that a nation means what it says when it ratifies a treaty. If it does not, a judicial practice of taking the country's practice at its word may have the beneficial effect of putting a brake on ill-considered or purely cynical ratifications.

Fifthly, it is argued by critics that international law is usually ambiguous and therefore unhelpful⁹⁵. Whilst this is sometimes true, in many cases the applicable principles of international law are detailed, clear immediately relevant and well reasoned. This is particularly so in many areas the subject of decisions of the European Court of Human Rights and the Inter-American Court of Human Rights. The "judicial dialogue" that is already occurring between such courts and national constitutional courts is one from which the hold-outs should not cut themselves off.

⁹⁴ *Teoh* (1995) 183 CLR 273 at 288.

⁹⁵ Simpson and Williams, *ibid* (2000) 11 *Public Law Review* 205 at 218.

Sixthly, it is certainly the case that interpreting a constitution in the light of the developing principles of international law may sometimes involve conflict with other interpretative principles⁹⁶. However, all interpretative principles are simply guides to the decision-maker. They are not, as such, binding rules that automatically solve every problem. Most, if not all, interpretative principles have a counterpart, in recognition of the elements of evaluation and judgment that are inescapable in the interpretation of contested language. Thus, an approach of deference to originalism conflicts with the perception of a constitution as a "living tree", whose meaning necessarily varies from age to age. Conflicts of principles in this area are normal. The function of courts is to choose or to bring all of the relevant principles into reconciliation in a judgment.

Seventhly, a more weighty criticism concerns the so-called "democratic deficit". In part, this involves acknowledgment of the typical lack of legislative participation in the treaty-making process in most countries⁹⁷. But in part, this objection rests on a broader footing.

⁹⁶ Simpson and Williams (2000) 11 *Public Law Review* 205 at 222.

⁹⁷ M D Kirby, "The Role of International Standards in Australian Courts" in Alston and Chiam (eds), *Treaty-making and Australia: Globalisation versus Sovereignty?* (1995) at 87.

Judge Posner complains that "the judges of foreign countries, however democratic those countries may be, have no democratic legitimacy here [in the United States]"⁹⁸. Similarly, Michael Weld points out that "international courts, committees and other groups are not at all accountable to the American electorate for the norms they generate"⁹⁹. Jed Rubenfeld describes international law as "undemocratic" and its organs as "famous for their ... opacity, remoteness from popular or representative politics, elitism and unaccountability"¹⁰⁰.

Whilst few, if any, other countries have gone to the lengths of Jacksonian democracy evidenced in the election and recall of judges in the United States (usually viewed as extreme elsewhere), the force of this consideration in America, at least as a matter of rhetoric, cannot be denied¹⁰¹. Constitutions are typically difficult to amend. Giving any constitutional status to the rules of international law may remove the emerging interpretation from legislative

⁹⁸ Posner, *Aug Legal Affairs* 40 at 42 (2004).

⁹⁹ Wells, 32 *Georgia Journal of International and Comparative Law* 429 at 433 (2004).

¹⁰⁰ J Rubenfeld, "Unilateralism and Constitutionalism" 79 *NYU Law Review* 1971 at 2017-2018 (2004); cf A Bianchi, "International Law and US Courts: The Myth of Lohengrin Revisited" (2004) 15 *European Journal of Int'l Law* 751 at 775.

¹⁰¹ As for Australia, see Simpson and Williams, "International Law and Constitution Interpretation" (2000) 11 *Public Law Review* 205 at 223.

lawmaking and thus from democratic influence¹⁰². This is a serious objection. It is necessary to respond to it.

There are many answers to such anxieties. The function of a judiciary is inescapably elitist, at least to some extent. Like it or not, judges' values are shaped and influenced by a huge range of information, bombarding them from many sources. Thus, Justice Breyer, not wholly in jest, gave this answer during his recent "conversation"¹⁰³:

"You're always referring to materials, even if it's Blackstone or whoever. The material doesn't have to have a democratic base. You reason all the time. You read law professors. They're not elected".

More fundamentally, Dean Koh denies the role of judges as imputed oracles for majoritarian will¹⁰⁴:

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

¹⁰² Wells, 32 *Georgia Journal of International and Cooperative Law* 429 at 432 (2004).

¹⁰³ Breyer and Scalia JJ, Transcript, p 40.

¹⁰⁴ Koh, 98 *American Journal of International Law* 43 (2004).

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

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

opinions¹⁰⁵. For many judges, such a course is inconsistent with a commitment to intellectual honesty and to transparent processes for argument, contradiction, reasoning and decision-making.

Eighthly, some critics deny that human rights are universal or founded on a higher principle, such as human dignity or natural law. They see this as a discredited theory, incompatible with national sovereignty. They view it as an impermissible restraint on democratic accountability¹⁰⁶.

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

Nevertheless, there are other responses to this complaint. The municipal judge may always evaluate the utility that will be derived

¹⁰⁵ Breyer and Scalia JJ, Transcript, p 27.

¹⁰⁶ Wells, 32 *Georgia Journal of International and Cooperative Law* 429 at 434 (2004).

from the jurisprudence of international courts and treaty bodies. Even if the character of human rights as "natural" or "innate" is disputable, the international law of human rights is already having a large impact on the values and ideals of judges, lawyers and other citizens in many countries. Justice Breyer has explained it this way¹⁰⁷:

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

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

Ninthly, critics point to the lack of knowledge about international law amongst the personnel of domestic courts and thus to the risk of mistakes and misunderstandings, or selective and

¹⁰⁷ S Breyer, "Keynote Address" 97 *American Society of International Law Proceedings* 265 (2003).

incomplete presentations of the "true state of international and foreign affairs"¹⁰⁸.

An institutional incapacity to engage in scrutiny of such materials does indeed present some risks. However, an increasing number of judges are now embarking on the task. Given the extensive use of international and transnational law in most courts of the world, it could not be maintained persuasively that judges are unable to learn how to find applicable sources of international law on a given matter where those sources are considered likely to be relevant and helpful. Succinct texts are available to help in this task so far as the international law of human rights is concerned¹⁰⁹.

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

¹⁰⁸ R P Alford, "Misusing International Sources to Interpret the Constitution" 98 *American Journal of International Law* 57 at 64 (2004).

¹⁰⁹ Such as Lord Lester of Herne Hill QC and D Pannick, *Human Rights Law and Practice* (2nd ed, 2004); H Steiner and P Alston, *International Human Rights in Context* (2nd ed, 2000); S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd ed, 2004).

which they may inflict wounds on the Constitution that may be difficult to repair¹¹⁰.

Whilst this argument introduces an element of *Realpolitik* into the debate, it founders on its assumption of judicial dishonesty. Judges, if they like, can use *any* source materials dishonestly. We assume that they will not do so. The overwhelming force of the judicial and other discourse in the elaboration of the international law of human rights has been one sensitive to minorities and protective of the basic rights and fundamental freedoms of the individual. The discourse has sometimes been helpful in its elaboration of the freedoms that human beings hold in common, simply because they are human. The contemporary body of international human rights law has grown out of Anglo-American jurisprudence that dominated the United Nations in the years in which the basic instruments were drafted and adopted. It is there to be used. Courts in many lands are now using it. They are doing so in reasoning in constitutional cases. The question is whether some courts should continue to hold out and to treat such materials as irrelevant *per se*?

¹¹⁰ cf R Hasen, "The Supreme Court and Election Law: Judging Equality from *Baker v Carr* to *Bush v Gore*, 164 (2003).

ARGUMENTS FOR THE INTERPRETATIVE PRINCIPLE

So far, I have responded to the critics. Let me say, in conclusion, some affirmative things. There are strong reasons why courts, interpreting municipal constitutions, should inform themselves of the content of any relevant international law, and especially as that law relates to human rights and fundamental freedoms. It does not usually bind them, as such¹¹¹. But it will often "provide respected and significant confirmation for [their] our conclusions"¹¹².

First, it has now been accepted by courts in many countries that, where their constitutional text itself refers to fundamental rights and freedoms, it is proper, and useful, to have access to expert elaborations of the same, or like, provisions in other national constitutions and in international courts and tribunals. That great judge, Chief Justice Dickson, in the Supreme Court of Canada, in the early years of the *Canadian Charter of Rights and Freedoms*, said

¹¹¹ I leave aside serious crimes of universal jurisdiction. See M D Kirby, "Universal Jurisdiction and Judicial Reluctance" in S Macedo (ed) *Universal Jurisdiction - National Courts and the Prosecution of Serious Crimes under International Law* (2004) 240 at 259.

¹¹² *Roper v Simmons* 543 US ___ at 24 (2005) per Kennedy J (slip opinion); 125 S Ct 1183 at 1186.

that such access would provide "relevant and persuasive sources for interpretation"¹¹³. So it has been ever since¹¹⁴.

An identical approach has been taken to the elucidation of human rights provisions in the national constitutions (or equivalent documents) by the Judicial Committee of the Privy Council, for example, in respect of Trinidad and Tobago¹¹⁵ and by the final appellate courts of Germany¹¹⁶; India¹¹⁷; Papua-New Guinea¹¹⁸; Hong Kong¹¹⁹; Namibia¹²⁰; Zimbabwe¹²¹ and doubtless many other countries.

¹¹³ *Reference re Public Service Employees Relations Act* (Alberta) [1987] 1 SCR 313 at 348 [57].

¹¹⁴ A Lamer, "Address at the International Conference on Enforcing International Human Rights Law: The Treaty System in the 21st Century" (22 June 1997), quoted in K Knop, 32 *NYU Journal of International Law and Policy* 501 at 518 (2000); C L'Heureux-Dube, "The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court" 32 *ULSA Law Journal* 15 at 24 (1998).

¹¹⁵ *Mathew v The State (Trinidad and Tobago)* [2004] 3 WLR 812 at [13].

¹¹⁶ Presumption of Innocence and the European Convention on Human Rights (1987) B ver f GE 74, 358, translated into English in Decisions of the Bundesverfassungsgericht - Federal Constitutional Court - Federal Republic of Germany, Vol 1/ii(1992) at 637-638.

¹¹⁷ *Vishaka v State of Rajasthan* 1997 AIR SC 3011 at 3015. See G P Singh, *Principles of Statutory Interpretation* (9th ed, 2004), 529ff.

¹¹⁸ *Hiiveta, Leader of Opposition v Wingti, Prime Minister* [1994] PNGLR 197.

¹¹⁹ *Schum Kwok Sher v H K SAR* [2002] 2 HK LKRD 793 at [59] per Mason NPJ.

In constitutional interpretation, especially, the courts of most countries have accepted, in the words of Justice Aharon Barak, President of the Supreme Court of Israel, that "the Constitution is intended to solve the problems of the contemporary person, to protect his or her freedom"¹²².

In constitutional elaboration, international law, like the law of foreign states, does not control the decisions of municipal judges. It is left to such judges to decide whether they can derive assistance from its exposition and reasoning. Many respected judges in many countries have found such assistance useful. Thus, Chief Justice Dickson in Canada declared that "international law provides a fertile source of insight"¹²³. Chief Justice Chaskalson in South Africa has said that "international and foreign authorities are of value because they analyse arguments ... and show how courts of other

¹²⁰ *Ex parte Attorney-General (Namibia): In re Corporal Punishment* 1991 (3) SA 76 at 86.

¹²¹ *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General, Zimbabwe* 1993 (4) SA 239 at 247-248 per Gubbay CJ.

¹²² A Barak, "Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy", 116 *Harvard Law Review* 16 at 69 (2002) ("Barak").

¹²³ *Ref Re Public Service Employee Relations Act (Alberta)* [1987] 1 SCR 313 at 348.

jurisdictions have dealt with this vexed issue"¹²⁴. To like effect, President Barak has written¹²⁵:

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

A lot of very intelligent and experienced people, in many lands and sometimes in international courts and tribunals, are now engaged in elucidating the meaning and application of common or identical principles in the context of solving social problems that have a tendency to present themselves, in different countries, at the same time. So far as international and regional human rights law is declared by judges, in principled decisions supported by detailed and publicly available reasons, it is unconvincing to suggest that this should be ignored in an unworthy self-denying ordinance of intellectual restriction¹²⁶.

¹²⁴ *S v Makwanyane* 1995 (3) SA 391 at 413 [34] (a case on the death penalty).

¹²⁵ Barak, 116 *Harvard Law Review* 16 at 110 (2002).

¹²⁶ G A Christenson, "Using Human Rights Law to Inform Due Process and Equal Protection Analyses" 52 *University of Cincinnati Law Review* 3 at 17 (1983).

Far from enhancing idiosyncratic decision-making, the reference to such sources in international law may provide a check against "strong passion or momentary interest"¹²⁷. It is surely preferable that judges should have regard to such sources where they are relevant than that they should rely solely upon their own personal preferences and beliefs or on expositions written decades before by judges having no understanding of the society in which the law must now operate¹²⁸. The use of such materials, far from undermining the legitimacy of municipal constitutional jurisprudence, contributes to "greater legitimacy by virtue of having paid due respect to the decisions of others". This is so even if those others happen to be foreigners and the ultimate conclusion is different¹²⁹.

It follows that engaging, in the analysis of analogous points, with the opinions of judges and other writers in many countries, helps ensure national courts against intellectual isolation and, consequentially, a diminished influence of their own in the world of ideas¹³⁰. Of course, this objection may be of no interest to those

¹²⁷ Bodansky, 32 *Georgia Journal of International and Comparative Law* 421 at 421 (2004).

¹²⁸ Simpson and Williams, 11 *Public Law Review* 205 at 217 (2000).

¹²⁹ D M Amann, "'Raise the Flag and Let it Talk': On the use of External Norms in Constitutional Decision Making" 2 *International Journal of Constitutional Law* 597 at 606 (2004).

¹³⁰ L'Heureux-Dubé, "Realizing Equality in the Twentieth Century: The Role of the Supreme Court of Canada in Comparative

who are satisfied to live within their own national intellectual cocoon. But it hardly accords with the world trends of globalism in economics, transport and communications that have contributed so significantly to the advance of freedom in every corner of the planet¹³¹.

It is impossible to expect the relatively small numbers of international and regional courts and tribunals to carry the entire burden of upholding the rapidly developing corpus of international law. That is why national courts have an increasing role to play in this regard¹³². In the United States Supreme Court, Justice Blackman put it well when he explained how, in the contemporary world, American courts must look beyond narrow national interests to the "mutual interests of all in a smoothly functioning international legal regime". "Whenever possible they should", he said, "consider if there is a course that furthers, rather than impedes, the development of an ordered international system"¹³³. Even Justice Scalia has favoured this approach in respect of the domestic

Perspective" 1 *International Journal of Constitutional Law* 35 at 36 (2003).

¹³¹ cf J C Clifford, "Globalization and Judicial Education" 28 *Yale Journal of International Law* 355 at 360 (2003).

¹³² Knop, 32 *NYU Journal of International Law and Policy* 501 at 517 (2000); A M Slaughter, "Judicial Globalization" 40 *Virginia Journal of International Law* 1103 at 1103 (2000).

¹³³ *Société Nationale Industrielle Aérospatiale v United States District Court* 482 US 522 at 555, 567 (1987).

application of international law having no constitutional or human rights content¹³⁴

One of the few real innovations in the Australian Constitution's treatment of the judicial branch was a provision permitting State courts to exercise federal jurisdiction¹³⁵. Australian lawyers are thus familiar with the express sharing of jurisdiction and power between courts within the one polity, federal, State and territory. Professor Ian Brownlie¹³⁶ has suggested that, in determining matters upon which international law speaks, municipal courts are now to be understood as exercising a kind of international jurisdiction. In the end, they must normally resolve any conflict between international and municipal law in favour of valid and binding domestic laws. But international law would be grievously injured if national courts, out of a sense of their own superiority or proclaimed ignorance, were to reject the rules and influence of the international legal order.

¹³⁴ See eg *Olympic Airways v Husain* 540 US 644; 124 S Ct 1221 at 1231 (2004).

¹³⁵ Australian Constitution, s 77(iii) ["... investing any court of a State with federal jurisdiction."]

¹³⁶ I Brownlie, *Principles of Public International Law* (5th ed, 1998) at p 584. See also *Reference re Secession of Québec* [1998] 2 SCR 217 at 234-235 [20]-[22] and D Turp and G van Ert, "International Recognition in the Supreme Court of Canada's Québec Reference" (1998) *Canadian Yearbook of International Law* 335 and G van Ert, *Using International Law in Canadian Courts* (2002) at pp 44-45.

To the greatest extent possible, in constitutional as in other branches of the law, domestic courts should seek a reconciliation of the international and municipal legal regimes. After all, as Daniel Bodansky put it: "Even the United States ... is part of the globe, connected to other countries in myriad ways"¹³⁷. The same is certainly true of Australia. Increasingly, it is true for the courts of every nation. And a great part of the explanation for this originates in the United States itself and in the ideas and inventions that have propelled us into the era of globalisation, where we are at once freer but more inter-dependant.

A TIMELY ACQUAINTANCE

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

¹³⁷ Bodansky, 32 *Georgia Journal of International and Comparative Law* 421 at 421 (2004); Charlesworth, (1998) 20 *Adelaide Law Review* 57; Neuman, 98 *American Journal of International Law* 82 at 87 (2004).

The dangers to the planet render more urgent the building of the international rule of law. No country, however wealthy and powerful in arms and economics, can shoulder, single handedly, the burdens of being the effective world policeman. Cyrus the Great, the Romance and the British Empire of my youth all ultimately were forced to acknowledge this truth. The diversity of humanity demands diversification of our responses to the opportunities and perils of the time. It also demands utilisation of established national courts in spreading, where appropriate, any emerging consensus of humanity, that international law expresses. The alternative, a trophy, is unthinkable. Yet, as John Murphy has explained in his new book *The United States and the Rule of Law In International Affairs*¹³⁸:

"The present posture of the United States toward international institutions ... gives little expectation that the United States is likely to make much use of the World Court. On the contrary, as the International Criminal Court shows, the United States is unlikely to support any international tribunal that it cannot control in large measure".

Municipal courts remain. They are long established and less susceptible to such control. This fact affords them the opportunity

¹³⁸ Cambridge, 2004, p 278.

and responsibility of playing a role in the building of the international rule of law.

It is possible, in the end, that the rhetorical contests over these questions display less real division about the utilisation of international law in domestic jurisdiction than might sometimes appear on the surface of the competing judicial and academic opinions¹³⁹. For some, the debate is a battle over transparency in judicial reasons. For others, it involves clarification of the limited function of international borrowings. Still others, require reassurance that domestic law, with its longer history and its democratic foundations, will ultimately prevail within its own country. But, particularly in the world of human rights and fundamental freedoms, there is a need to engage in a global dialogue. Increasingly, such a dialogue is happening amongst judges of final courts¹⁴⁰. They meet in person. Their minds meet in the internet. They read each other's opinions. Their discourse about international law is no longer an indulgence or an esoteric legal specialty. As Justice O'Connor has said, it is now "becoming a duty"¹⁴¹. They are not a cheer squad of a global elite, encouraging

¹³⁹ *Al-Kateb v Godwin* (2004) 78 ALJR 1099 at 1132 [173].

¹⁴⁰ One of the forums of significance is the Global Constitutionalism seminar series conducted most years by the Yale Law School. It is attended by senior judges of final courts of several countries together with judges of international and regional courts and tribunals.

each other to heretical judgments. They are judges of the modern age - faithful to their own legal duties but willing sometimes to learn from judges in other lands and from international law on how those duties might best be discharged.

What I have described in this lecture is an intellectual movement. It is a source of analysis and ideas. It is a font of shared wisdom. It is irreversible, as human reason itself is¹⁴². Its momentum is unstoppable. It identifies the next phase in the advancement of international law and the international rule of law.

What carries us forward is the memory of the terrible wrongs to human rights and knowledge of the dangers for the world we live in, absent international law. It is not too much to say that the interaction of international and national law constitutes one of the largest challenges for the law in the century ahead. Its outcome is critical for the future of international law¹⁴³. That future is, in turn, critical for the future of human life. It is vital that national judges should be aware of this challenge and alert to the need, individually

¹⁴¹ O'Connor, above n 18, 96 *Am Soc'y Int'l Proc* 348 at 351 (2002).

¹⁴² O Fiss, "The Irrepressibility of Reason" in *The Law as It Could Be* (2003) 221 at 228.

¹⁴³ D Kennedy, "The Twentieth-Century Discipline of International Law in the United States" in Austin Sarat et al *Looking Back at Law's Century* (2002) 386 at 410.

and institutionally, to respond. We will not in our lifetimes resolve these questions finally. Indeed, it is not our duty to finish the task. But neither are we free of the moral obligation to try¹⁴⁴.

ANNEXURE

1. Fundamental human rights and freedoms are inherent in all humankind and find expression in constitutions and legal systems throughout the world and in the international human rights instruments.
2. These international human rights instruments provide important guidance in cases concerning fundamental human rights and freedoms.
3. There is an impressive body of jurisprudence, both international and national, concerning the interpretation of particular human rights and freedoms and their application. This body of jurisprudence is of practical relevance and value to judges and lawyers generally.
4. In most countries whose legal systems are based upon the common law, international conventions are not directly enforceable in national courts unless their provisions have been incorporated by legislation into domestic law. However, there is a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law - whether constitutional, statute or common law - is uncertain or incomplete.
5. This tendency is entirely welcome because it respects the universality of fundamental human rights and freedoms and the vital role of an independent judiciary in reconciling the competing claims of individuals and groups of persons with the general interests of the community.
6. While it is desirable for the norms contained in the international human rights instruments to be still more widely recognised and applied by national courts, this process must take fully into account local laws, traditions, circumstances and needs.

¹⁴⁴ Rabbinical Instruction, *Pirkei Avot (Ethics of the Fathers)* attributed to Rabbi Tarphon, 2nd Century AD, quoted in L Star, *Julius Stone* (1992) at xii.

7. It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes - whether or not they have been incorporated into domestic law - for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.
8. However, where national law is clear and inconsistent with the international obligations of the State concerned, in common law countries the national court is obliged to give effect to national law. In such cases the court should draw such inconsistency to the attention of the appropriate authorities since the supremacy of national law in no way mitigates a breach of an international legal obligation which is undertaken by a country.
9. It is essential to redress a situation where, by reason of traditional legal training which has tended to ignore the international dimension, judges and practising lawyers are often unaware of the remarkable and comprehensive developments of statements of international human rights norms. For the practical implementation of these views it is desirable to make provisions for appropriate courses in universities and colleges, and for lawyers and law enforcement officials; provision in libraries of relevant materials; promotion of expert advisory bodies knowledgeable about developments in this field, better dissemination of information to judges, lawyers and law enforcement officials; and meetings for exchanges of relevant information and experience.
10. These views are expressed in recognition of the fact that judges and lawyers have a special contribution to make in the administration of justice in fostering universal respect for fundamental human rights and freedoms.

**INTERNATIONAL LAW - THE IMPACT ON NATIONAL
CONSTITUTIONS**

The Hon Justice Michael Kirby AC CMG

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