

Albritton Lecture
University of Alabama School of Law

Home Grown Laws in a Global Neighbourhood
- Australia, the United States and the Rest

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Judge Albritton and Mrs Albritton, Dean Randall, Judge Colquitt, ladies and gentlemen, today's lecture has its origins in a conversation at the High Court in Canberra in 2009. The parties to the conversation were students from the University of Alabama School of Law, their Professor, Judge Joseph Colquitt, and myself. We talked for an hour or so about the law in Australia and the United States. We covered a range of topics and the exchange was enjoyable for all of us. Following that conversation and an approach from Judge Colquitt, I received a gracious invitation from Judge Albritton, on behalf of the Albritton Family, to come to Tuscaloosa and deliver the Albritton Lecture. I thank the family for its invitation and the School of Law for its hospitality.

Previous Albritton Lecturers have included two Chief Justices and six Associate Justices of the Supreme Court of the United States, the Chief Justice of Canada and the Chief Justice of Israel.

The exchanges between students of your Law School and of the College of Law at the Australian National University and the visits to your Law School of jurists from other countries are examples of many contacts and exchanges going on around the world between judges, lawyers, academics and law students. They reflect the reality that no legal system in today's world can be an island unto itself.

We live in a global neighbourhood. In our time, the words of the Roman poet Terentius, written in the second century before the birth of Christ, are probably more powerful than ever before:

Homo sum: humani nihil a me alienum puto
I am human and nothing human is foreign to me.

The application of that proposition to the law is the broad theme of this lecture. Within that theme, I wish to reflect upon:

1. The diversity of legal traditions.
2. How the law as it was informs the law as it is across both time and national boundaries.
3. How different cultures may interact within the one legal system.
4. The way in which the legal systems and judicial decisions of other countries that may have an influence in the development of our own domestic law.

The preceding topics are not mutually exclusive. In our global legal neighbourhood, past and present are entangled along with the jurisprudence of different legal systems. That entanglement was nicely illustrated by an episode of the "Star Trek" spin-off series "Deep Space Nine" broadcast on 3 March 1999 under the title "Inter Arma Enim Silent Leges". The Latin words were used by Starfleet Vice-admiral William Ross to justify a covert executive operation in breach of the laws of the Federation. His interlocutor and critic, Deep Space Nine Medical Officer, Dr Julian Bashir responded:

In time of war, the laws fall silent. Cicero.
So is that what we have become; a 24th century Rome, driven by nothing other than the certainty that Caesar can do no wrong?¹

¹ Memory Alfa, The Star Trek Wiki.

The idea for the title of the episode, according to a website dedicated to detailed analysis of Star Trek episodes, came from its screenwriter Ronald Moore. While the episode was in preparation he happened to be browsing in a bookstore and came across Chief Justice Rehnquist's book *All the Laws but One: Civil Liberties in Wartime*.² The Latin words were used as the heading for the last chapter and also appeared on the dust jacket.³ Given the plot of the proposed episode, Moore thought the title apposite.

Chief Justice Rehnquist's use of the term "Inter Arma Silent Leges", as it appeared in his book, directed his readers to the conflicts that can arise between constitutionalism and the imperatives of executive governments in what are said to be extreme circumstances. That conflict was exemplified in the suspension by President Abraham Lincoln of habeas corpus during the course of the American Civil War. The suspension was justified by a contentious construction of s 9 par (2) of Article I of the Constitution of the United States which provides:

The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it.

The application of Article I by the President was rejected by Chief Justice Taney. Lincoln disregarded the Chief Justice's opinion and asserted to Congress that in an emergency, when Congress was not in session, the President had the authority to act under s 9. In discussing Lincoln's actions and the like justification upheld by the Supreme Court for President Franklin Roosevelt's forced relocation of Japanese Americans during the Second World War, Chief Justice Rehnquist in a speech delivered in 2000 said:

² WH Rehnquist, *All the Laws but One: Civil Liberties in Wartime*, (Alfred A Knopf, New York, 1998).

³ Absent the word "enim".

While we would not want to subscribe to the full sweep of the Latin maxim – *Inter Arma Silent Leges* – in time of war the laws are silent, perhaps we can accept the proposition that though the laws are not silent in wartime, they speak with a muted voice.⁴

The words of the epigram were used by Lord Atkin in a famous passage in his dissent in *Liversidge v Anderson*⁵ in 1942. That case concerned the *Defence (General) Regulations 1959* (UK) under which a person could be detained upon a determination by the relevant Secretary of State. Lord Atkin said:

In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace.⁶

Cicero was the author, in about 63BC, of the statement in its original form "Silent enim leges inter arma". It seems to have been in truth a statement Cicero made about a person's right, according to what he called a "higher law", of self defence against attack. It has, however, been applied, as has been seen, out of that context to debates about executive power in times of asserted emergency.

The imagined future history of Star Trek and the histories of the United States, the United Kingdom and the Roman Republic of 63BC illustrate that there are some issues which can confront all societies aspiring to the rule of law despite differences in their legal systems.

⁴ Remarks of Chief Justice William H Rehnquist, 100th Anniversary Celebration of the Norfolk and Portsmouth Bar Association, Norfolk, Virginia, 3 May 2000. www.supremecourtus.gov/publicinfo accessed 14 February 2010.

⁵ [1942] AC 206.

⁶ [1942] AC 206 at 244

Legal traditions

The scope of global legal diversity, historically and in the current day, is evidenced by the range of legal traditions to be found around the world. In a time in which trade and commerce crosses national boundaries with greater facility than ever before and in which the global internet has itself become a market place, there are few lawyers who can afford to be unaware, at least in a general sense, of the different legal traditions which that market place encompasses. In another way, different cultural attitudes to the law, born of different legal traditions, may emerge in our own societies through the movements of people displaced from their countries of birth because of war, conflict, persecution or economic or environmental catastrophes.

Examples of major legal traditions in existence today are:⁷

1. *Chthonic Traditions* - Those traditions carried from the beginnings of mankind through oral transmission and memory and expressed in the customary laws of many of those peoples we call indigenous, such as the Aboriginal people of Australia.⁸
2. *The Talmudic Legal Tradition* of the Jewish people, "... one of the oldest, living, legal traditions in the world".⁹
3. *The Civil Law Tradition* – derived from Roman law, but based upon codification of the law in 19th century Europe, especially the French Civil Code of 1804 and the German Civil Code of 1900.¹⁰

⁷ This list is taken from the Second Edition of Professor H Patrick Glenn's Book, *Legal Traditions of the World*, (Oxford University Press, 2004).

⁸ Glenn, note 7 at 58.

⁹ Glenn, note 7 at 92.

4. *Islamic Legal Tradition* inspired by the Koran and commentaries on it and expressed in the "Shari'a".¹¹
5. *The Common Law Tradition* developed through judicial decision making. It persists even in an age of statutes, for the statutes must be interpreted by judges and important rules of interpretation are to be found in the common law.¹²
6. *The Hindu Legal Tradition* – born of revelations whose importance lies in their content rather than their source or in the manner of their revelation.¹³
7. *The Asian Legal Tradition* which combines secularity with a rejection in principle of former structures and sanctions.¹⁴

Despite their radical differences, these traditions do not exist in splendid isolation from each other. There are many examples of countries in which more than one of them may be found co-existing. The United States' legal system, while falling broadly within the common law tradition, also encompasses the civil law in the State of Louisiana. Your Supreme Court recognised, in the early part of the nineteenth century, the status of Native Americans as dependent nations and their rights of occupancy and possession of their land. There are other examples of more extensive co-existence of customary law systems and national laws. Among them are Indonesia, Kenya, the Philippines and Mexico.

¹⁰ Glenn, note 7 at 136.

¹¹ Glenn, note 7 at 172-173.

¹² Glenn, note 7 at 206-207.

¹³ Glenn, note 7 at 274.

¹⁴ Glenn, note 7 at 309.

In Indonesia, national laws enacted by the Indonesian legislature sit alongside laws from the Dutch colonial period, which derive from the civil tradition and also alongside *ardat* or customary law, which takes different forms in different parts of the Indonesia archipelago. There is also a system of religious courts administering family law for Muslims, outside the system of family law administered by the general courts.

Issues raised by co-existing cultural traditions may bear some similarity to issues raised by co-existing legal traditions. Difficulties sometimes arise for a legal system in dealing with people from cultures outside the mainstream culture and living within that country. This can arise acutely in the workings of the criminal justice system with respect to traditional indigenous people. In Australia, Aboriginal people are heavily over-represented in our criminal courts and prisons. One response among many, generated in particular by concerns about indigenous deaths in custody, has been federal funding for indigenous cultural awareness programs for judges and magistrates. An object of the program is to ensure that indigenous persons appearing in court are not disadvantaged because of failure to understand the context of their conduct and circumstances particular to them, as well as cultural factors and customary law requirements, which may affect the presentation of their evidence in court.¹⁵

In a related but different context, customary law interacts directly with the national legal system in Australia in the hearing and determination of claims for the recognition of customary native title. In such cases, the Federal Court of Australia has frequently taken evidence on the country the subject of the claim. It has rules of court providing for the reception of evidence, not only in the form of oral testimony,

¹⁵ Michael Cooke, "Angelo/Aboriginal communication in the criminal justice process: a collective responsibility" (2009) 19 *Journal of Judicial Administration* 26.

but also in the form of art, dance and song.¹⁶ Some witnesses may give testimony with a group of their community and be permitted to consult with members of the group before answering questions. Some evidence relates to restricted traditional knowledge. In such cases the Federal Court has heard evidence in the presence only of male legal practitioners and expert witnesses and has restricted distribution of the transcript.

On a larger scale, analogous problems can arise in court systems dealing with people from different cultures who are immigrants or prospective immigrants. As a Federal Court Judge dealing with judicial review applications by unrepresented asylum seekers speaking through interpreters, I sometimes wondered – how do you explain the limits of judicial review and jurisdictional error to a man fleeing from persecution in Iran? I also wondered how you explain it to anyone.

The appropriateness of having regard to cultural differences in the administration of justice has been the subject of debate in a number of jurisdictions. The debate is generated by the tension between the ideal that everybody should be treated alike and the reality that failure to recognise relevant individual circumstances and attributes may result in unfairness. The Australian Law Reform Commission, in 1992, recommended that the cultural background of offenders be taken into account in sentencing, bail decisions and the exercise of prosecutorial discretion.¹⁷ Its recommendations were not accepted.

There can be normative tensions between the legal rules of a host country and those of some of its immigrants, particularly in the area of human rights. The relationship between the freedom to practice religion and the equal treatment of women can give rise to such tensions.

¹⁶ Federal Court Rules, O 78 r 32.

¹⁷ Australian Law Reform Commission Report 57, *Multiculturalism and the Law* 1992 at [8.14], [8.16], [8.28] and [10.36].

The preceding are examples of contemporary interactions of different legal traditions and, indeed, different cultures within countries. However, one of the most important interactions in the legal systems of both of our countries is that between the past and the present.

The foreign country of the past

The English novelist, LP Hartley, once said:

The past is a foreign country; they do things differently there.¹⁸

There is a kind of resonance between the democratic legitimacy of considering laws and decisions and writings about law from the past and the democratic legitimacy of considering laws and decisions and writings of other countries. That resonance was reflected in the observation of Oliver Wendell Holmes that:

... the present has a right to govern itself so far as it can; and it ought always to be remembered that historic continuity with the past is not a duty, it is only a necessity.¹⁹

Justifying a voice for the past in the present, GK Chesterton wrote about tradition in a way in which some lawyers might like to write about the law, when he said:

Tradition means giving votes to the most obscure of all classes, our ancestors. It is the democracy of the dead. Tradition refuses to submit to the small and arrogant oligarchy of those who merely happen to be walking about. All democrats object to men being

¹⁸ LP Hartley, *The Go-Between*, (Hamilton, 1953).

¹⁹ OW Holmes, *Learning and Science in Speeches by Oliver Wendell Holmes* (Little, Brown & Co, 1934) at 68.

disqualified by the accident of birth; tradition objects to their being disqualified by the accident of death.²⁰

Most people would, I think, agree that the laws of the past are not to be discounted on the ground that people living today did not vote for them. There is, however, a tension between past and present when it comes to the law, particularly in the field of constitutional law. Justice Frankfurter, quoting Holmes' statement about the necessity of historical continuity, pointed out that for Holmes "the Constitution was not a literary document but an instrument of government ... it had its roots in the past ... it was also designed for the unknown future".²¹

It is a recognition of the necessity, which Holmes acknowledged, that in order to understand laws now in force we understand their origins and their historical context. That is not a particularly conservative doctrine. It will sometimes yield results which some think conservative and, on other occasions, yield results which some think progressive. The past can provide a variety of answers to contemporary legal issues.

Three classes of case in which past laws have important practical consequences for the present are:

1. The application of the common law from times past and across national boundaries to inform the development of the common law today and the interpretation of statutes.
2. The migration of constitutional ideas.

²⁰ GK Chesterton, "The Ethics of Elfland" in GK Chesterton *Collected Works*, vol 1 (1986) at 51 cited in Glenn, note 7 at 5 note 13.

²¹ F Frankfurter, "Oliver Wendell Holmes 1841-1935" in *Mr Justice Holmes and the Supreme Court*, 2nd ed, (The Bellknap Press of Harvard University Press, 1961) at 23 cited in Tom C Clark, "Mr Justice Frankfurter: A Heritage for All Who Love the Law (1965) 51 *American Bar Association Journal* 330 at 331.

3. The customary law of indigenous peoples in contemporary national legal systems.

Laws past

Much legal principle is the product of inspiration or borrowing from the past, as well as the evolutionary processes which are found in the common law tradition. The laws of Ancient Rome collected in written form by the Emperor Justinian, in about the 6th century AD, had a direct influence on the development of European legal culture and the civil law tradition. They also had an indirect influence on the development of the common law. The great English legal commentators, Glanvill and Bracton in the 12th and 13th centuries, used Justinian's Institutes.²² Bracton's treatise *Concerning the Law and Customs of England*, published in 1256, resorted to principles taken from Roman law to fill in gaps in the legal materials available to him in England at the time.²³ Roman law supplied principles which, via Bracton, informed the development of the common law of bailment and easements.²⁴ James Kent and Joseph Story frequently cited Roman and civil law sources in their commentaries. Joseph Story commenced his *Commentaries on Equity Jurisprudence*, published in 1884, with a discussion of the concept of equity under Roman law and the Roman notion of the equitable interpretation of statutes.

The common law of England evolved through custom and judicial decisions over hundreds of years and became part of the law of the English colonies subject to modification to local conditions. Despite the War of Independence and hostility to things English, the work of great English legal scholars was influential in the early

²² ADE Lewis and DJ Ibbetson (eds), *The Roman Law Tradition*, (Cambridge University Press, 1994) at 4.

²³ W Holdsworth, *A History of English Law*, vol 2, 4th ed (Methuen, 1936) 1971 reprint at 270-271.

²⁴ *Coggs v Bernard* [1703] 2 Ld Raym 900 [92 ER 107]; *Re Ellenborough Park* [1956] Ch 131.

United States. *Blackstone's Commentaries on the Law of England* were published in the 18th century and sold almost as many copies in the US as they did in England. It is said that when Abraham Lincoln was still a law student and was trying to get elected to the State Legislature in Illinois, he purchased a partnership interest in a grocery store to try to generate an income. The store was not particularly successful. The partner drank a lot, and Mr Lincoln studied law. Both ate the merchandise. According to FT Hill's book *Lincoln the Lawyer*, published in 1906:

... Lincoln afterward remarked that the best stroke of business he ever did in the grocery line was when he bought an old barrel from an immigrant for fifty cents and discovered under some rubbish at the bottom a complete set of Blackstone's Commentaries. That was a red-letter day in his life, and we have his own word for it that he literally devoured the volumes.²⁵

From the early years of the Union intellectual traffic travelled from the United States to the rest of the common law world. James Kent's *Commentaries on American Law*, which were twice as long as Blackstone's, were used in England, Canada and Australia. He sought to integrate the laws of each of the States of the United States with those of England and draw comparisons with the systems of France, Holland and other nations of the continent. Bruce McPherson, a former Judge of the Queensland Court of Appeal, who has recently published a comprehensive text on *The Reception of English Law Abroad*, explained that one of Kent's underlying purposes was:

[t]o offset the prevailing mood of hostility in the United States to the continued use of the common law as something English, by showing, as he sought to do, that like the common law those other systems were based on natural law and so arrived at similar results in practice.²⁶

²⁵ FT Hill, *Lincoln the Lawyer* (The Century Co, 1906) 1986 reprint at 50.

²⁶ BH McPherson, *The Reception of English Law Abroad*, (Supreme Court of Queensland Library, 2006) at 490.

Propositions from Kent's Commentaries were adopted in English decisions involving such disparate matters as bills of exchange, the effects of intoxication on contract and contractual liability and the sale of goods or bailment.²⁷

At a time in the mid 19th century when Australia was still a collection of colonies, Kent's writings on judicial review of legislation for constitutional invalidity played a surprising role. In a case decided in the Supreme Court of the Colony of New South Wales in 1861²⁸, the Court held that it had the power and was under the obligation to decide whether an Act of the colonial legislature contravened an Act of the Imperial Parliament and was invalid on that basis. Chief Justice Stephen referred to the Constitution of the United States and of the States of the Union and the limits they placed upon legislative powers. He referred to a number of cases in which the statutes of various legislatures had been declared void and noted the citation of many of them by Kent.²⁹

Justice Wise, in the same case, referred to Chancellor Kent as "one of the highest authorities on such a subject" and founded his judgment upon an important statement of principle by Kent:

The attempt to impose restraints upon the Acts of the legislative power would be fruitless, if the constitutional provisions were left without any power in the Government to guard and enforce them.³⁰

Story's texts also found their way across the Atlantic to England and Australia. Within a year of their publication, his *Commentaries on the Conflicts of*

²⁷ Ibid at 491 note 126.

²⁸ *Rusden v Weekes* (1861) 2 Legge 1406.

²⁹ *Rusden v Weekes* (1861) 2 Legge 1406 at 1414.

³⁰ *Rusden v Weekes* (1861) 2 Legge 1406 at 1420.

Laws were praised in the Court of Common Pleas in England on account of the "learning, acuteness and accuracy" of the author.³¹ Bruce McPherson has written:

Between them, Kent and Story not only naturalised English law and consolidated its place in the United States, they also rationalized the use, understanding and teaching of it in the place of its origin. It would not be the last occasion when the words of disciples of the common law from beyond the seas would be read in England.³²

Kent and Story are still cited in Australian judicial decisions. In 2009, the High Court of Australia decided a constitutional case about water rights.³³ Australia is one of the driest continents in the world and the question of water rights and their allocation has engaged the attention of both Commonwealth and State Governments in recent times. In the joint judgment of Justices Gummow, Crennan and myself, we said in passing:

The common law position in relation to flowing water, which adapted Roman law doctrine, was settled in *Embrey v Owen*. Parke B adopted the view of Chancellor Kent that flowing water is *publici juris* in the sense that no-one has "property in the water itself, but a simple usufruct while it passes along".³⁴ (footnotes omitted)

In another case in which the High Court held invalid a special Commonwealth tax on the judicial pensions of State judges, Justices Gaudron, Gummow and Hayne in a joint judgment said:

Secure judicial remuneration at significant levels assists, as the United States Supreme Court has emphasised, to encourage persons learned

³¹ *Huber v Steiner* (1935) 2 Bing NC 203 at 211 per Tindal CJ, cited in McPherson note 26 at 493.

³² McPherson, note 26 at 493.

³³ *ICM Agricultural Pty Ltd v Commonwealth* (2009) 240 CLR 140.

³⁴ *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140 at 173 [55] per French CJ, Gummow and Crennan JJ.

in the law, in the words of Chancellor Kent written in 1826, "to quit the lucrative pursuits of private business, for the duties of that important station".³⁵ (footnotes omitted)

There are seven recent cases in which the High Court has referred to Story. They have arisen in the disparate contexts of the equitable doctrine of contribution³⁶, the validity of control orders under anti-terrorism legislation³⁷, the unpaid vendor's lien³⁸, contribution between co-obligors³⁹, the common law doctrine of failure of consideration⁴⁰, unconscionable conduct⁴¹, and the proposition that guardianship applies to property and not to persons.⁴²

These decisions show the law of the past speaking to the law of the present across time and national boundaries. They also show that there is nothing new about trans-national influences on domestic law in the common law tradition. Nor is there anything new about the migration of constitutional ideas across national boundaries. And while there have been strong differences expressed in the United States about the place of the decisions of courts of other countries in constitutional interpretation, it is interesting to recall what Chief Justice Rehnquist said on the topic in 1989:

³⁵ *Austin v Commonwealth* (2003) 215 CLR 185 at 262 [159].

³⁶ *Friend v Brooker* (2009) 239 CLR 129 at [38] per French CJ, Gummow, Hayne and Bell JJ.

³⁷ *Thomas v Mowbray* (2007) 233 CLR 307 at 357 n 199 per Gummow and Crennan JJ.

³⁸ *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315 at 324 [21] per Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ.

³⁹ *Burke v LFOT Pty Ltd* (2002) 209 CLR 282 at 316 [87] and 318 [94] per Kirby J.

⁴⁰ *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 552-553 [94] per Gummow J.

⁴¹ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 242-243 [93] per Gummow and Hayne JJ.

⁴² *Clay v Clay* (2001) 202 CLR 410 at 428-429 [37]-[38] per Gleeson CJ, McHugh, Gummow and Callinan JJ.

When many new constitutional courts were created after the Second World War, these courts naturally looked to decisions of the Supreme Court of the United States, among other sources, for developing their own law. But now that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process.⁴³

Justice Sandra Day O'Connor expressed similar sentiments in 2003, observing:

As the American model of judicial review of legislation spreads further around the globe, I think that we Supreme Court Justices will find ourselves looking more frequently to the decisions of other constitutional courts, especially other common-law courts that have struggled with the same constitutional questions that we have: equal protection, due process, the Rule of Law and constitutional democracies ... All of these courts have something to teach us about the civilizing function of the constitutional law.⁴⁴

Similar views have been expressed by Justices Ginsberg, Breyer and Kennedy. That is a view, of course that is not uniformly held and an articulate opponent of the practice is Justice Scalia in judgments which he has written in such cases as *Thompson v Oklahoma*⁴⁵, *Printz v United States*⁴⁶ and *Roper v Simmons*⁴⁷. He was joined at various times by Chief Justice Rehnquist, Justice White and Justice Thomas in the expression of those views.⁴⁸

⁴³ Cited in CL Keitner, "International and Foreign Law Sources: Siren Song for US Judges?" 3 *Advance: The Journal of the ACS Issue Groups* 215 at 216 quoting WH Rehnquist, *Constitutional Courts – Comparative Remarks* (1989), reprinted in P Kirchhof and DP Kommers (eds), *Germany and its Basic Law: Past, Present and Future* (Nomos, 1993) 411 at 422..

⁴⁴ Ibid quoting S Day O'Connor *The Majesty of the Law: Reflections of a Supreme Court Justice* (Random House, 2003) at 234.

⁴⁵ 487 US 815 at 826-830 (1987-1988).

⁴⁶ 521 US 898 at 921 n 11 (1997)

⁴⁷ 543 US 551 (2005).

⁴⁸ See also *Atkins v Virginia* 536 US 304 at 324 (2002).

That is no doubt an ongoing debate. In the meantime the Australian and United States Constitutions provide a nice example of the migration of constitutional ideas from drafting through to interpretation.

Constitutional cross-fertilisation – Australia and the United States

The Constitution of the United States and Australia's Constitution have very different histories. The Constitution of the United States was born out of revolution and, in terms, conferred by the people on themselves. The Constitution of the Commonwealth of Australia is a schedule to an Act of the British Parliament. It is the product of a drafting process undertaken by colonial delegates at Conventions held in the late 19th century. The agreed draft was submitted to popular referendums in the colonies and then to the British Parliament.

Notwithstanding the differences attending the formation of our two Constitutions, important elements of the United States Constitution were reflected in the ultimate shape of the Australian Constitution. One of the colonial delegates, Andrew Inglis Clark, the Attorney-General for the Colony of Tasmania, was very familiar with the Constitution of the United States and with key decisions of the Supreme Court relevant to it. He was a great admirer of American democracy. He had visited the United States on a number of occasions and had struck up a friendship with Oliver Wendell Holmes. They exchanged a considerable correspondence.

In 1890, Clark prepared a preliminary draft of an Australian Constitution which drew extensively from that of the United States.⁴⁹ It formed the basis for much of what ultimately appeared in our Constitution. Clark sought unsuccessfully to incorporate due process and equal protection guarantees. These were opposed on

⁴⁹ A copy of Clark's draft is available in JM Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005) at 63-112.

the basis that they might interfere with the legislative powers of the States. In the event, Clark succeeded in having included a right to trial by jury in relation to indictable offences against the Commonwealth⁵⁰, a prohibition on the Commonwealth establishing any religion or preventing the free exercise of any religion⁵¹, and the protection of the residents of one State from discrimination by another State on the basis of residence.⁵²

Sir Owen Dixon, a former Chief Justice of the High Court of Australia, in an address to the American Bar Association in 1942, described the Australian Constitution "roughly speaking" as "a redraft of the American Constitution of 1787 with modifications found suitable for the more characteristic British institutions and for Australian conditions".⁵³ One of the most important modifications was that the Australian Constitution provides for responsible government, that is for the Ministers of the Executive Government to be members of, and responsible to, the Parliament and to hold office only for so long as they retain the confidence of the Parliament.⁵⁴ This reflected the model already established in the colonial Constitutions prior to Federation.

An important innovation in the Australian Constitution, inspired by its absence from the United States Constitution, was s 75(v) which confers original jurisdiction on the High Court of Australia "in any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth". This paragraph was inserted in the Constitution at the suggestion

⁵⁰ Constitution, s 80.

⁵¹ Constitution, s 116.

⁵² Constitution, s 117.

⁵³ O Dixon, "Two Constitutions Compared". Address to the American Bar Association, 26 August 1942 reprinted in Woinarski (ed) *Jesting Pilate*, 2nd ed, (William S Hein & Co, 1997) at 102.

⁵⁴ See Constitution, s 64.

of Clark who had read *Marbury v Madison*⁵⁵. While that case is well known for its assertion of the power of the Supreme Court of the United States to strike down laws not authorised by the Constitution, the underlying proposition was that the Constitution of the United States did not confer or authorise the conferral of original jurisdiction on the Supreme Court with respect to judicial review of federal administrative decisions. Because this jurisdiction in Australia is constitutional, it cannot be removed by statute. It was described by my immediate predecessor, Chief Justice Gleeson as "... a basic guarantee of the rule of law".⁵⁶

All that having been said, it is necessary to recognise that even legal systems in the same legal tradition may have important differences rooted in their particular cultures and histories which require caution against a contextual reference. There is, for example, a significant difference between the common law of the United States and the common law of Australia. In Australia there is but one common law. It is neither State nor federal law. It contains assumptions about the functions of government, the rule of law, the nature of the judiciary and the interpretation of statutes. In 1997, a unanimous High Court declared unequivocally:

There is but one common law in Australia which is declared by this Court as the final court of appeal.⁵⁷

The unity of the common law in Australia reflects the function of the High Court as the final appeal court for all courts in the country on all matters.⁵⁸ Article III of the Constitution of the United States, on the other hand, limits the cases in which the Supreme Court and federal courts may exercise the judicial power of the United States. The State courts otherwise stand as ultimate appellate courts.

⁵⁵ 5 US 137 (1803).

⁵⁶ AM Gleeson, *The Rule of Law and the Constitution* (ABC Books, 2000) at 67.

⁵⁷ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 563.

⁵⁸ Constitution, s 73.

The unity of the common law in Australia and the ability of the High Court definitively to declare it, leads on to consideration of the interaction between indigenous customary laws, the common law, statute law and international law.

Indigenous laws and the laws of those who came after

The legal tradition of indigenous peoples and the common law tradition of colonising societies has generated important decisions about the interests of indigenous people in land and waters according to their customary law. The United States has faced the issue with respect to Native American Indians.⁵⁹ Similar issues have arisen in Canada and New Zealand.⁶⁰

The common law of England when it arrived in Australia affected a blindness, based on ignorance, to indigenous legal systems. In 1833, the Supreme Court of the Colony of New South Wales described the Aboriginal people of that colony as "wandering tribes ... living without certain habitation and without laws [who] were never in the situation of a conquered people".⁶¹ A similar view, which had binding legal effect in Australia, was expressed by the Privy Council in 1889.⁶² It held that the property of the Colony of New South Wales had become the property of the Crown from the time of its annexation. No question of customary native title surviving that annexation arose.

⁵⁹ See eg *Fletcher v Peck* 10 US 87 (1910); *Johnson v McIntosh* 21 US 543 (1823).

⁶⁰ *Calder v Attorney-General (British Columbia)* [1973] SCR 313; *Delgamuukw v British Columbia* [1997] 3 SCR 1010; *R v Symonds* [1847] NZPCC 387.

⁶¹ *Macdonald v Levy* (1833) 1 Legge 39 at 45.

⁶² *Cooper v Stuart* [1889] 14 App Cas 286.

In 1992, the High Court, in its historic *Mabo* decision⁶³, held that the common law could, and should, recognise traditional ownership, albeit that ownership could be extinguished or suppressed by overriding statute law or dealings with land under statutory powers.

The decision was a common law decision. It was judge-made law. It was influenced, in part, by international law norms against racial discrimination. Justice Brennan, who wrote the principal judgment, with which Chief Justice Mason and Justice McHugh agreed, expressly linked those norms to contemporary social and community values. The judges aligned the "expectations of the international community" and the "contemporary values of the Australian people" and said:

It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organization of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.⁶⁴

Lawyers from the United States might discern an interesting resonance between the use of international norms to discern contemporary societal values affecting the content of the common law and their use to discern standards of decency in deciding whether particular applications of the death penalty constitute cruel and unusual punishment. Certainly the "contemporary values" aspect of Justice Brennan's judgment attracted some academic controversy and criticism.

International law, given effect in domestic statute law, played an important role in the post-*Mabo* protection of common law native title, which would otherwise have been vulnerable to extinguishment or impairment, without compensation, by legislative or executive acts of the State and Territory Governments. The existence

⁶³ *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

⁶⁴ (1992) 175 CLR 1 at 42.

of that protection was established while the Mabo litigation was still pending. Queensland was the defendant to Mabo's claim because it related to an island in the Torres Strait, which is part of Queensland. While the litigation was still pending, the Queensland Government passed a law purporting to extinguish all native title in the State. That law was held invalid by the High Court because it was inconsistent with the *Racial Discrimination Act 1975* (Cth), a Commonwealth law giving effect to Australia's obligations under the Convention for the Elimination of all forms of Racial Discrimination ("CERD").⁶⁵ Under s 109 of the Constitution, the Commonwealth law was paramount and the State law invalid to the extent of inconsistency. That important decision was called *Mabo (No 1)* and was decided in 1988. The decision recognising native title came later and was *Mabo (No 2)*.

The international dimension of the interaction between first peoples and colonisers, in which both our countries are involved, was reflected in the United Nations Declaration on the Rights of Indigenous Peoples, which was adopted by the General Assembly on 13 September 2007 by 144 States. Australia, Canada, New Zealand and the United States, although initially voting against the declaration, have since endorsed it, the United States in December last year. The significance of the United States' support is underlined by the fact, set out in its official announcement that the United States is home to over two million Native Americans, 565 federally-recognised tribes and other indigenous communities.

There are many facets to the announcement made by the United States Government of its support for the Declaration but one issue, relevant to the interaction of different legal systems, is reflected in Article 5, which provides:

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions,

⁶⁵ *Mabo v Queensland (No 1)* (1988) 166 CLR 186.

while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.⁶⁶

The scope of Article 5 and its implications for the relationship between the domestic laws of both our countries and the customary laws of our indigenous peoples will no doubt have to be worked out over time.

Cuckoos in the domestic nest – foreign and international law in the courts

It is necessary now to turn briefly to the question of the interpretation of domestic laws of one country by reference to judicial decisions and legal scholarship on the laws of another. This is just one species of the genus of legal entanglement which is the broad theme of this lecture. In my opinion it is doubtful whether any real issue of principle is raised by the use of such decisions or writings. There are, however, questions of a practical nature which suggest that care and discrimination is necessary in the use of such material. Its use is least problematical where a court is dealing with decisions or writings of another country in the same or a closely related legal tradition. Even then, contextual differences reflecting history and culture may affect the way in which such decisions and writings are to be read and understood.

There are a number of circumstances in which decisions of the courts or the writings of jurists in other countries may arguably play a legitimate part in decision making by a domestic court:

1. When the decision of the foreign court or foreign legal scholarship has played a part in the developmental history of the domestic law, be it constitutional or statutory or common law.

⁶⁶ United Nations Declaration on the Rights of Indigenous Peoples, (March 2008) at 5.

2. When the decision of the foreign court or foreign legal scholarship has been concerned with the same legal question as that before the domestic court.
3. When the decision of the foreign court or legal scholarship involves the construction and explanation of a treaty or a statute made under a treaty to which the domestic jurisdiction is a party.
4. When the content of a foreign law is an issue to be determined by the domestic court.

Where the problem before the domestic court is one of constitutional or statutory interpretation, it usually arises in the context of constructional choices which are open to the court. Ordinarily it would be expected that, whether dealing with a constitution or with a statute, the interpreting court will start with the words, look to the context and their purpose and have regard to their history. Constitutional words almost always offer choices to the court because they tend to be pitched at a high level of generality. A constitution is drafted with a view to the future. It is what Felix Frankfurter called "an instrument of government".⁶⁷ While having its roots in the past it is also designed for the unknown future.

Where, as in Australia, one constitution has been inspired by another, then it is quite appropriate to look to interpretive choices, principles and doctrines which have been developed in respect of the source constitution. Those choices, principles and doctrines can never bind the domestic constitutional court, nor can they even be regarded as "authoritative". But they may, like the original Constitution itself, be a source of intellectual inspiration.

⁶⁷ *Youngstown Sheet & Tube Co v Sawyer* 343 US 579 at 596 (1952).

By way of example, the Australian Constitution provides for federal jurisdiction to be conferred on the High Court, federal courts created by the Parliament and State and Territory courts⁶⁸ and does so by reference to "matters" identified in terms of various subjects. The US Constitution refers, in Article III to "cases" and "controversies". The High Court has held in Australia that a court exercising federal jurisdiction in respect of a matter can deal not only with a claim which arises under a federal law, but also any claims arising at common law or under State law which are part of the same dispute.⁶⁹ This is called the accrued jurisdiction. It is inspired by the doctrine of the "pendent" jurisdiction developed in the United States.⁷⁰

There are, of course, many constitutions around the world which incorporate concepts or terminology inspired by the United States and other federal constitutions. Nevertheless, the question whether the use of comparative materials in US constitutional interpretation can ever be appropriate, is a matter of ongoing debate. One side of that debate is reflected in a 2005 Senate resolution which referred to "inappropriate judicial reliance on foreign judgments, laws, or pronouncements" as threatening "the sovereignty of the United States".⁷¹

An area of obvious sensitivity arises where a constitution uses a value-laden term such as "cruel and unusual punishment", which appears in the Eighth

⁶⁸ Constitution, s 71.

⁶⁹ *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457; *Fencott v Muller* (1983) 152 CLR 570.

⁷⁰ See *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 514-515 per Mason J.

⁷¹ US Cong Senate. 109th Congress, 1st Session. S Res 92, *A Bill expressing the sense of the Senate that judicial determinations regarding the meaning of the Constitution of the United States should not be based on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements inform an understanding of the original meaning of the Constitution of the United States*. [Introduced in the US Senate; 20 March 2005].

Amendment to the US Constitution. It is possible to see how there can be a real debate in such a case about whether a standard of that kind is so strongly embedded in evolving national values and culture that it is inappropriate to have regard to standards applied by the courts of other countries or under international law. Other constitutional debates involving value-laden decisions might generate similar considerations. In the end, however, what are presented as questions of principle may in truth be questions of practical judgment for particular cases or classes of case.

Debate about the use of comparative materials seems to be a non-issue in Australia. One reason may be that while used, such material is not used particularly extensively. Another may be the absence of a Bill of Rights in the Constitution and associated normative criteria related to contemporary community attitudes or values. The contention generated by the *Mabo* and *Wik* decisions, to which I referred earlier, suggests that when courts enter into such issues and make decisions based on assessments of community values, there is a much higher probability of public disputation.

In the end, of course, it is not for me to express any views about the US debate which seems to focus on constitutional law. No doubt it will be carried on for some time to come.

In the area of statutory interpretation, particularly where statutes of one country are inspired or modelled upon those of another or are part of some international model, there is obvious scope for the use of comparative materials where appropriate. There does not seem to be the same level of contention in this area of judicial activity. The exercise of jurisdiction in areas such as admiralty law, intellectual property law and competition law is an obvious example. Further, in those parts of the law concerned with international trade and commerce and the use of standard form documents, such as the Contract for the International Sale of Goods, the jurisprudence can be regarded as properly international. It is in these areas that the consideration of foreign law is likely to be, in the words of Oliver Wendell Holmes, like the consideration of law past "not a duty but only a necessity".

Conclusion

The judges, lawyers, academics and law students of both our countries live in a global legal neighbourhood. It is a neighbourhood which is extended in time and space. It is an exciting time to be part of it. There are many dialogues to be had and many opportunities for the development of criteria for discriminating choice in the use of trans-national legal resources and participation in supra-national legal developments.

Once again, I thank the Albritton family and the Alabama Law School for the opportunity to be present and to raise these matters with you.