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AUSTRALIAN RED CROSS NATIONAL ORATION

**THE GROWING IMPACT OF INTERNATIONAL LAW ON
AUSTRALIAN CONSTITUTIONAL VALUES**

The Hon Justice Michael Kirby AC CMG*

THE INTERNATIONAL RED CROSS MOVEMENT

I begin by paying my respects on International Red Cross Day to all those who labour in the humanitarian cause of the International Red Cross and Red Crescent movement. It is a cause that demonstrates the power of an idea based on respect amongst human beings for our shared humanity, everywhere.

International Red Cross Day remembers the founder of the movement, Henri Dunant, the first Nobel Laureate for Peace, who translated his horror about needless cruelty and suffering into a highly

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practical movement to afford redress and protection and to build international co-operation. Whenever we think of our individual lack of power, we should remember Dunant and the way he galvanised the conscience of the international community into practical action.

The Australian Red Cross Society was founded in 1914, within days of the outbreak of the First World War. It was incorporated by Royal Charter in 1941. Apart from its vital work in time of war and in international peace-keeping operations, it has played, in Australia, a critical role in the activities of blood transfusion and disaster relief¹, although I will speak of neither of these. Since the Second World War, the Society has been particularly engaged in international humanitarian law. It has promoted knowledge in Australia of the Geneva Conventions and Protocols relevant to its mission. It has encouraged teaching of their principles in schools as well as instruction about basic first-aid to a wide cross-section of young Australians².

I honour the many activities that the Society has taken in Australia. I am proud to be the second orator in this series, following my colleague and friend, Professor Henk ten Have. I am especially glad to deliver the lecture at the behest of Professor Don Chalmers, Dean of the Faculty of Law of the University of Tasmania. In his distinguished

¹ *Australian Encyclopaedia*, Grolier Society, 4th ed, 1983, Vol 8, 219.

² *Ibid*, 220.

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service to the law, particularly in the field of bioethics, he has repeatedly addressed issues from a global perspective. It is my thesis that this is an attitude of mind that Australian lawyers should adopt today in all fields of the law. The time of legal parochialism has ended. By the internet, air transport and other means, we are linked together with today's world. Lawyers, hitherto locked in their local jurisdictions, are beckoned to embrace the approach taught by the International Red Cross – an international approach that seeks out, and enhances, the things that humanity shares in common.

I have not worked specifically with the International Red Cross. Nor from my own experience, can I speak on the subject of international humanitarian law. My international experience, such as it has been, is mainly within the specialised agencies of the United Nations, supplemented by activities with the Commonwealth Secretariat in London and the Organisation for Economic Co-operation and Development (OECD) in Paris. For a decade after 1995, I served as a member of the International Bioethics committee of UNESCO. It was there that I met Professor ten Have and laboured on the drafting of the *Universal Declaration on Bioethics and Human Rights*. Earlier I had worked with the International Labor Organisation, the United Nations Development Programme, the Office of the High Commissioner for Human Rights, the World Health Organisation, UNAIDS and as Special Representative of the Secretary-General of the United Nations for Human Rights in Cambodia. After my work in UNESCO I became involved in a project of United Nations Office on Drugs and Crime

concerned with developing international principles on judicial integrity³. These activities, extending over more than 25 years, and coinciding with judicial service at different levels of the Australian Judicature, have taught me to understand the growing role of international law in our world and the part that the United Nations agencies play in helping to implement international law, particularly the international law of human rights.

My activities in United Nations agencies have opened my eyes to what is actually going on. Not every judge, still less every Australian judge, can be closely involved in international activities whether in organs of the United Nations or international bodies such as the International Commission of Jurists, International Bar Association, Union Internationale des Avocats or even local bodies reaching out to those in need. However, every judge, and every citizen, today knows of the global dynamic to build peace and security in our world through strengthening universal principles of human rights.

It is exactly 60 years this year since those principles were adopted in the United Nations General Assembly. In 1948 the Assembly endorsed the *Universal Declaration on Human Rights*⁴. That *Declaration*

³ MD Kirby, "A Global Approach to Judicial Independence and Integrity" (2001) 21 *Queensland University Law Journal* 147.

⁴ UN Doc A/8/1; adopted and proclaimed by the General Assembly, Resolution 217A(III) of 10 December 1948.

was embraced as a response to the terrible sufferings of the Second World War and the genocide that accompanied it. As a schoolboy in Sydney, Australia, I remember receiving copy of the *Universal Declaration* from my teacher early in 1949. The objectives, the ideals and the practical necessities of the *Universal Declaration* have been in my mind ever since.

It is my thesis that these objectives and principles are not simply writing on paper. They are rules to inform our conduct as human beings, citizens and professionals. Judges, including Australian judges, do not leave these principles outside the courtroom when they perform their professional duties. The principles are not, as such, part of our Australian domestic law.⁵ They have not, as such, been enacted by an Australian Parliament. But they are an undoubted part of the reality of the world which judges and other citizens live in. They inform our perceptions of that world. Increasingly, they influence our perceptions of legal problems, legal values and of the solutions that conform to those values.

DEVELOPMENTS IN THE COURTS

Unlike some countries, Australia has not embraced the notion that international law (including the law of treaties) is part of national law, as

⁵ *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365 at 425 [170].

such. To this extent, Australia observes the "dualist" approach⁶. According to this approach, international law is a distinctive system operating outside the national legal sphere. Unless rules of international law are specifically incorporated into municipal law, usually by a Parliament, they are generally not regarded as obligatory within the national jurisdiction.

When the Commonwealth of Australia was established in 1901, international law existed; but was at a much earlier phase of its development. There was much talk at that time of the "sovereignty of Parliament". The nation state was generally the central actor in international affairs. Out of deference to notions of "parliamentary sovereignty", it was ordinarily left to legislatures to bring international law into local operation.

Nevertheless, even in Australia at that time and in the age of the British Empire, the divorce between national and international law was not absolute. As long ago as 1908 in *Jumbunna Coal Mine NL v Victorian Coal Miners' Association*⁷, Justice O'Connor observed, stating a basic principle of the common law:

⁶ R Higgins, *Problems and Process - International Law and How We Use It* (Clarendon, Oxford, 1994) 205.

⁷ (1908) 6 CLR 309 at 363.

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"... Every statute is to be interpreted and applied so far as its language admits so as not to be inconsistent with the comity of nations, or with the established rules of international law".

According to this principle, wherever there was ambiguity in a statute of an Australian Parliament, dealing with a matter that was affected by international law, it was proper for an Australian court to resolve the ambiguity by interpreting the local statute so as to conform so far as possible with the applicable principle of international law.

In *Minister for Immigration and Ethnic Affairs v Teoh*⁸, this basic principle was elaborated by Chief Justice Mason and Justice Deane:

"... [T]here are strong reasons for rejecting a narrow conception of ambiguity. If the language of legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail".

All of this is orthodox law. It has been such for the whole history of the Australian federation⁹. Thus, in *Plaintiff 157/2002 v The Commonwealth*¹⁰, Chief Justice Gleeson stated succinctly a principle of law that is long established as part of the law of this nation:

⁸ (1995) 183 CLR 273 at 287.

⁹ See eg *Chow Hung Ching v The King* (1948) 77 CLR 449 at 478.

¹⁰ (2002) 211 CLR 476 at 492 [29].

"[W]here legislation has been enacted pursuant to, or in contemplation of, the assumption of international obligations under a treaty or international conventions, in cases of ambiguity a court should favour a construction which accords with Australia's obligations".¹¹

There are many other decisions that state the principle more widely even than favouring international law where there is ambiguity. Thus, courts in Australia will not impute to Parliament an intention to abrogate, or curtail, fundamental rights or freedoms unless that intention is made unambiguously clear and unmistakable in the Act of Parliament. This well known rule may, today, legitimately be illuminated by reference to any relevant provisions of international law. It is an easy thing to talk about upholding fundamental rights or freedoms. It is much safer to give that expression meaning by having regard to the modern instruments of international human rights law. At least, it is legitimate to check the old statements made by judges about those "fundamental rights or freedoms" by looking at the universal principles that are accepted as part of contemporary universal human rights law¹².

Australia's notions of what *are* "fundamental rights or freedoms" almost invariably coincide with the universal principles stated in international human rights law. This is no accident. International human

¹¹ He cited *Teoh* (above) and *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38.

¹² Eg *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543 at 533 [11]; 562-563 [43], 578 [93]-[94], 591 [132]; *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 at 598-606 [160]-[181].

rights law substantially emerged through the machinery of the United Nations, following the Second World War. At that time especially, the Organisation, and its secretariat, were profoundly influenced by personnel trained in the Anglo-American legal tradition. That is the tradition of the common law in which we, in Australia, also participate. This is why, when we read the *Universal Declaration of Human Rights*, prepared by the committee under the chairmanship of Mrs Eleanor Roosevelt, people in English-speaking countries feel generally comfortable with its notions. It talks to us of universal principles that we recognise. It expresses such principles in a language which is familiar to our legal, moral and cultural tradition.

One further important development in extending the principle of the *Jumbanna* case came about in more recent times. Its history is a little curious. In 1988, I participated in a judicial meeting in Bangalore, India. It was organised by the Commonwealth Secretariat and Interights, an international civil society organisation. At Bangalore, the judges present included Judge Ruth Bader Ginsburg, then on the Court of Appeals for the District of Columbia Circuit in the United States. Like me, she was later to be appointed to her country's final court.

The *Bangalore Principles*, adopted by the participating judges, expanded the traditional rule for the interpretation of legislation in conformity with international law in a number of ways. Importantly, it extended the rule to apply to the expression of the principles of the common law. Thus, where a judge was faced with a new legal problem,

the *Bangalore Principles* declared that it was permissible for the judge to take into account any impact that international human rights law had upon older, traditional, statements of the common law. In short, where considered appropriate, the judge could check the statements of the common law expressed in old cases against contemporary understandings of "fundamental rights or freedoms"¹³.

When I returned from Bangalore to my post as President of the New South Wales Court of Appeal, I would, as appropriate, examine the interpretation of legislation or the propounded principles of the common law, by reference to universal principles of human rights¹⁴. Sometimes, this produced disagreement within the court¹⁵. But on other occasions, it produced judicial outcomes that were unanimous¹⁶. For some lawyers, whose minds had not kept pace with the impact on their discipline of global developments (including in the field of international human rights law), the *Bangalore Principles* appeared as legal heresy. For such lawyers, Australia remained, essentially, an isolated legal island, cut off from the great developments that were happening in the global legal

¹³ The *Bangalore Principles* are set out in MD Kirby, "The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms" (1988) 66 ALJ 514.

¹⁴ *Young v Registrar, Court of Appeal (NSW) [No 3]* (1993) 32 NSWLR 262.

¹⁵ As it did in *Young, ibid.*

¹⁶ See eg *Gradidge v Grace Bros Pty Ltd* (1988) 94 CLR 414; *Jago v District Court of New South Wales* (1988) 12 NSWLR 558 at 569.

community. They were thought to have nothing to say to us in the integrity and supposed completeness of our legal system. But gradually, the "heretical" idea of the *Bangalore Principles* came to be accepted.

The turning point in this respect was the decision of the High Court of Australia in *Mabo v Queensland [No 2]*¹⁷. There, in the most important decision of his distinguished service as a Judge and Chief Justice of the Court, Justice Brennan explained how it was possible, in a contemporary statement of the common law of Australia, to overcome what had been thought to be a settled principle of that law, denying Aboriginal Australians recognition of title to their traditional lands. In language that appeared to be influenced by the central idea of the *Bangalore Principles*, Justice Brennan (with the concurrence of Chief Justice Mason and Justice McHugh) explained¹⁸:

"Whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the *International Covenant on Civil and Political Rights* bring 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

¹⁷ (1992) 175 CLR 1.

¹⁸ *Mabo* (1992) 175 CLR 1 at 42 (footnote omitted).

common law, especially when international law declares the existence of universal human rights".

This principle has been referred to in the High Court and other Australian courts on many occasions. In *Environment Protection Authority v Caltex Refining Co Pty Ltd*¹⁹, Chief Justice Mason and Justice Toohey remarked:

"As this Court has recognised, international law, while having no force as such in Australian municipal law, nevertheless provides an important influence on the development of Australian common law, particularly in relation to human rights".

The position has therefore been reached that most of the elements in the *Bangalore Principles* have now come to be recognised as part of Australian law. Thus, it is no longer really controversial that international law will be taken into account in Australian courts in at least four circumstances:

1. It will be given effect where a parliament has expressly incorporated an international treaty and given it effect, as such, as part of Australian law²⁰;

¹⁹ (1993) 178 CLR 477 at 499.

²⁰ Eg *US Free Trade Agreement Implementation Act 2004* (Cth). See *Stevens v Kabushiki Kaisha Sony* (2005) 225 CLR 193 at 250 [199].

2. It will be relevant where, short of directly enacting treaty provisions, a local statute, in particular respects, uses the language of a treaty and thereby indicates that its purpose is to give effect to the treaty to that extent and to pick up its history, objects and jurisprudence so far as this is consistent with the other provisions of the statute. The adoption in the *Australian Migration Act 1958* (Cth) of the definition of "refugee", as used in the *Refugees Convention and Protocol*²¹ affords a good illustration of this increasingly common development²². The same principle applies where, instead of incorporating the treaty, as such, in Australian law, or exactly following the treaty language in the local statute, the drafter has obviously attempted to re-express the international treaty provisions in the adapted terms of the Australian law. This is what happened with the Regulations under the *Family Law Act 1975* (Cth), designed to give effect to the *Child Abduction Convention*²³. The purpose being clear, it is permissible, and natural, then, to interpret the Australian law having regard to the history, objects and jurisprudence of the

²¹ See *Migration Act 1958* (Cth), s 36.

²² See eg *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 251-256, 293-296.

²³ *De L v Director-General (NSW) Department of Community Services* (1996) 187 CLR 640 referring to *Family Law (Child Abduction Convention) Regulations 1986* (Cth).

treaty, so far as its terms are consistent with the text of the Australian law²⁴;

3. In construing other legislation, not necessarily designed to implement (or even to refer to) a treaty expressing universal principles of international law, specifically where the legislation relates to human rights, an Australian court should as a general rule prefer the interpretation of the local law which most closely accords with a universal rule of international law. This is a local contribution to the comity of nations. "It accords a decent respect to the opinions of mankind". That was one of the objectives for the law of a modern nation stated in the *Declaration of Independence* of the American colonies as long ago as 1776²⁵; and
4. Finally, even where there is no relevant ambiguity in the Australian common law, if that law, when examined, is found to be discordant with universal principles of international law, particularly where that law deals with fundamental human rights, it is permissible and proper for an Australian court to re-examine the Australian common law, as the High Court did in *Mabo*. Where disharmony is demonstrated, the court will review the common law and re-

²⁴ *MW v Department of Community Services (NSW)* [2008] HCA 12.

²⁵ RB Ginsburg, "A Decent Respect for the Opinions of [Human] Kind", unpublished, 7 February 2006.

express it where appropriate, so as to bring it into conformity with such universal principles. The *Mabo* decision does not stand alone. The same course was followed in other cases, including in *Dietrich v The Queen*²⁶. That was the decision that held that an indigent person, accused of a serious crime, ought not to be forced unwillingly to represent himself or herself at trial. Where need be, such a person must be afforded legal representation, if necessary at the expense of the community.

INTERPRETING THE CONSTITUTION

The real controversy about this topic in Australia concerns none of the above principles. It concerns the extent to which the *Bangalore Principles* were correct in suggesting that the same, or analogous, approaches to the legal task of interpretation should extend to construing a constitutional text, including by way of resolving any ambiguities in that text²⁷.

In a number of cases, I have suggested that the rule of construction permitting reference to universal principles of human rights is just as applicable to resolving uncertainties in the constitutional text as

²⁶ (1992) 177 CLR 292.

²⁷ As was recognised by Professor Charlesworth and her colleagues in (2003) 25 *Sydney Law Review* 423 at 424.

in any other contemporary legal text or legal exposition²⁸. Although the Constitution is a special law, and the foundation for other laws, in Australia, it is nonetheless expressed in a written text. It was originally enacted in the form of an Act of the British Parliament. Conceptually, therefore, it shares many functional features with other statutory provisions.

Constitutional law in Australia did not necessarily conform with international law²⁹. If the text is clear, it is the duty of a court to say so and to give effect to the law in the terms expressed. But if, as is very often the case, the Constitution is not clear, the interpretative principle may be invoked. As I put it in *Newcrest v Mining (W.A.) Ltd v The Commonwealth*³⁰, adapting the principle stated by the Court in *Mabo*:

"[I]nternational law is a legitimate and important influence on the development of the common law and constitutional law, especially when international law declares the existence of universal and fundamental rights. To the full extent that its text permits, Australia's Constitution, as the fundamental law of government in this country, accommodates itself to international law, including in so far as that law expresses basic rights. The reason for this is that the Constitution not only speaks to the people of Australia who made it and accept it for their governance. It also speaks to the

²⁸ *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 657-661; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 417-418; *Re East; Ex parte Nguyen* (1998) 196 CLR 354 at 380-381 [68]; *Austin v The Commonwealth* (2003) 77 ALJR 491 at 543-544 [257].

²⁹ (1997) 190 CLR 513.

³⁰ (1997) 190 CLR 513 at 657-658.

international community as the basic law of the Australian nation which is a member of that community".

This view of Australia's constitutional law is not universally agreed. Contrary opinions have been expressed by judges of the High Court of Australia. Thus, in *AMS v AIF*³¹, Chief Justice Gleeson and Justices McHugh and Gummow observed:

"As to the Constitution, its provisions are not to be construed as subject to an implication said to be derived from international law³²."

Until recent times, the most emphatic and extended statement to this effect appeared in the reasons of Justice McHugh in *Al-Kateb v Godwin*³³, where it was said:

"[C]ontrary to the view of Kirby J, courts cannot read the Constitution by reference to the provisions of international law that have become accepted since the Constitution was enacted in 1900. Rules of international law at that date might in some cases throw light on the meaning of a constitutional provision. [However] ... the claim that the Constitution should be read consistently with the rules of international law has been decisively rejected by members of the Court on several occasions. As a matter of constitutional doctrine, it must be regarded as heretical".

³¹ (1999) 199 CLR 160 at 180 [50].

³² Referring to *Polites v The Commonwealth* (1945) 70 CLR 60 at 69, 74-5, 77, 79, 80-81.

³³ (2004) 219 CLR 562 at 589 [62].

Al-Kateb was an unfortunate case where the High Court was closely divided. The appellant was a stateless person who had arrived in Australia without a visa and had been taken into immigration detention. He was held there for two-and-a-half years. Eventually he confirmed his request in writing to the Minister to be removed from Australia either to Kuwait or Gaza, where he had previously lived. Such removal did not take place because the attempts to obtain the necessary international cooperation were unsuccessful. Kuwait would not take him. Israel would not give the necessary permission for his movement into Gaza. On the hypothesis propounded by the Commonwealth, he might lawfully be retained in immigration detention indefinitely.

As an interpretation of the *Migration Act* this thesis was rejected by Chief Justice Gleeson, Justice Gummow and myself. That Act postulated the entitlement of an unlawful non-citizen to be removed from detention and Australia promptly upon requesting return to his country of nationality. But because Mr Al-Kateb was a stateless person, that hypothesis could not be fulfilled. On a construction of the law, we held he could not therefore be detained indefinitely. A majority of the Court (Justices McHugh, Hayne, Callinan and Heydon) concluded otherwise.

In what was intended to be a short aside to my reasons, basically agreeing with Justice Gummow, I remarked that an additional reason for interpreting the statute in the way favoured by the minority was that the alternative would envisage indefinite administrative detention, otherwise than under judicial order. This, I concluded, would be incompatible with

implications derived from the entrenched provisions governing the role of the Judicature in the Constitution³⁴. Justice Gummow, in his reasons, expressed a similar opinion³⁵.

It was my invocation of international human rights law in support of that constitutional conclusion that provoked the sharp exchange with Justice McHugh. He considered it to be impermissible, irrelevant and (as he said) "heretical". The other judges did not buy into the debate. I commend this vigorous exchange to those who have not read it. It encapsulates, in the Australian context, a strong difference of viewpoint about basic approaches to constitutional construction in the modern age. It concerns the way in which contemporary Australians read their constitutional text with, as I consider, the insights that they derive from living in their own generation, with the perceptions of their own nation in the world in which it must now exist and participate. Although I profoundly disagree with the views of Justice McHugh, I commend him for engaging with the issue. As I shall show, it is one of the most lively questions in today's discourse about constitutional law.

In Canada³⁶, South Africa³⁷ and other countries of our legal tradition, it is entirely normal and unremarkable for international law,

³⁴ (2004) 219 CLR 562 at 615 [146].

³⁵ (2004) 219 CLR 562 at 604-605 [110].

³⁶ See eg *Re Public Service Employee Relations Act* [1987] 1 SCR 313 at 349 per Dickson CJ; *United States v Cotrioni* [1989] 1 SCR 1469 at 1486; *Sleight Communications Inc v Davidson* [1989] 1 FCR

particularly the international law of human rights, to be invoked to assist judges in the task of constitutional interpretation. The great Canadian judge, Chief Justice Dickson, put it this way³⁸:

"The content of Canada's international obligations is, in my view, an important *indicia* of the meaning of 'full benefit of the Charter's protection'. I believe that the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified".

Increasingly, in most final courts of the world, it has been considered appropriate to extend the dialogue between international law and constitutional law, recognising the fact that, in this century, the two

1038 at 1056; *The Queen v Ewanchuk* [1999] 1 SCR 330 at 365 [73]; *United States v Burns* [2001] 1 SCR 283 at 286 [8]; *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3 at [46]; *United States v Shulman* [2001] 1 SCR 616 at 635-636 [41]-[42] per Arbour J considered *Pasini v United Mexican States* (2002) 209 CLR 246 at 274-279 [78]-[95]; cf AF Bayefsky, "International Human Rights in Canadian Courts" in B Conforti and F Francioni (eds) *Enforcing International Human Rights in Domestic Courts* (1997) 195 at 296; RStJ MacDonald, "The Relationship Between International and Domestic Law in Canada" in RStJ Macdonald et al (eds), *Canadian Perspectives on International Law and Organisation*, 88; LC Green, *International Law: A Canadian Perspective* (2nd ed, 1988), 85; "International Human Rights Law and the Interpretation of the Canadian Charter of Rights and Freedoms" in EP Belobaba and E Gertner, *The New Constitution and the Charter of Rights* (Butterworths, 1982) 287.

³⁷ *S v Makwanyane* 1995 (3) SA 391 [37]-[39]; *S v Williams* 1995 (3) SA 632 [22]; *Ferreira v Levin* 1996 (1) SA 984 [72]; *Mistry v Interim National Medical and Dental Council of South Africa* 1998 (4) SA 1127 [3]; cf J Dugard, "International Human Rights" in D van Wyk et al, *Rights and Constitutionalism: The New South Africa Legal Order* (Juta, 1994), 171 at 193.

³⁸ *Re Public Service Employees' Relations Act* [1987] 1 SCR 313.

must live and work and apply together. Yet, against this global movement, two great courts of the common law world have, until now, resisted. The High Court of Australia and the Supreme Court of the United States. In recent years the Supreme Court of the United States appears, in this respect, to be joining the courts of the rest of humanity.

An early indication of the new approach in the United States may be seen in Justice Stephen Breyer's dissenting opinion in *Printz v The United States*³⁹. He said:

"Of course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own ... But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem – in this case the problem of reconciling central authority with the need to preserve the liberty-enhancing autonomy of a smaller constituent governmental entity".

Even amongst those Justices considered generally unfavourable to such an attention to international norms, there has been some movement in the United States. In extra-judicial writing a few years earlier than *Printz*, Chief Justice Rehnquist noted that for more than a century the Supreme Court of the United States had not looked beyond

³⁹ 521 US 898 at 921 n 11, 977 (1997).

its own courts because unconvinced that precedents elsewhere would be of much help. Yet Chief Justice Rehnquist acknowledged⁴⁰:

"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".

Variations upon this theme can be seen over the past decade, particularly in speeches and extra-judicial statements of Justices O'Connor, Kennedy, Ginsburg and Breyer.

The 2002 Term of the Supreme Court of the United States may be recorded as an important turning point in that country's constitutional doctrine. The issue of the use of international law and constitutional construction was presented in *Atkins v Virginia*⁴¹. That case involved the question whether it was contrary to the provisions of the Eighth Amendment of the United States Constitution, forbidding "cruel and unusual punishments", to execute a convicted prisoner with established mental retardation. In a prolonged footnote to his opinion, for the Court majority, Justice Stevens referred to the *amici curiae* briefs, including

⁴⁰ WH Rehnquist, "Constitutional Courts - Comparative Remarks" (1989) reprinted in P Kirchhof and DP Connors (eds) *Germany and Its Basic Law: Past, Present and Future - A German-American Symposium* (1993), 411 at 412 quoted in Harold Hongju Koh, "International Law as Part of Our Law" (2004) 98 *American Journal of International Law* 2 at 6-7.

⁴¹ 536 US 304 (2002); 70 USLW 4585.

those demonstrating that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved"⁴².

This reference to international experience and law elicited a dissent from Chief Justice Rehnquist urging that the Court "limit ... our inquiry into what constitutes an evolving standard of decency under the Eighth Amendment to the laws passed by legislatures and the practises of sentencing juries in America"⁴³. More vigorously, Justice Scalia denounced the majority invocation of the views of the "world community" and their reference to the brief of the European Union, stating that it deserved "the Prize for the Court's Most Feeble Effort to fabricate national consensus"⁴⁴. He declared the opinions of the "world community" irrelevant because their "notions of justice are (thankfully) not always those of our people"⁴⁵. Resonances of Australian judicial nationalism may be recognised in this dissent.

Far from deflecting the new majority in *Atkins*, the members pursued their analysis and even gathered up new adherents. In the 2003 Term, Justice Ruth Bader Ginsburg asked a pertinent question

⁴² 536 US at 316 (2002); 70 USLW 4585 at 4589, fn 21.

⁴³ 536 US at 307 (2002); 70 USLW 4585 at 4591.

⁴⁴ 536 US at 325 (2002); 70 USLW 4585 at 4598 (Scalia J, with whom Thomas J joined).

⁴⁵ 536 US at 325 (2002); 70 USLW 4585 at 4598.

during oral argument in an affirmative action case concerned with constitutional law. She said⁴⁶:

"[W]e're part of world, and this problem is a global problem. Other countries operating under the same equality norm have confronted it. Our neighbour to the north, Canada, has, the European Union, South Africa and they have all approved this kind of, they call it positive discrimination ... [T]hey have rejected what you recited as the ills that follow from this. Should we shut that from our view at all or should be consider what judges in other places have said on this subject?"

In her concurring opinion in the case, *Grutter v Bollinger*⁴⁷, Justice Ginsburg answered the last question affirmatively. Joined by Justice Breyer, she said that:

"[T]he Court's observation that race-conscious programs 'must have a logical end point' accords with the international understanding of the ... affirmative action".

She cited the text and annex of the *International Convention on the Elimination of All Forms of Racial Discrimination*, which was ratified by the United States in 1994⁴⁸.

⁴⁶ Quoted from transcript, Koh, 8; Transcript of oral argument at 24. *Gratz v Bollinger* 123 S Ct 2411 (2003) (No 02-516), available in 2003 US Trans Lexis 27.

⁴⁷ 539 US 344 (2003); 123 S Ct 2325 at 2347.

⁴⁸ 539 US 344 (2003); 123 S Ct 2325 at 2347.

Three days after *Grutter*, with a still larger majority, in *Lawrence v Texas*⁴⁹, the Supreme Court invalidated a State law providing criminal punishment for consensual adult homosexual conduct in private. Not only did the Supreme Court overrule its 1986 decision in *Bowers v Hardwick*⁵⁰. It stated that *Bowers* had been wrong when decided⁵¹. Most importantly, in the text of the opinion of Justice Kennedy (for the Court), not in a footnote this time, the majority of the Supreme Court of the United States cited the decisions of the European Court of Human Rights in *Dudgeon v The United Kingdom*⁵². That case had been decided five years before *Bowers* but was not mentioned in argument or in the decision of that case. Times change. In *Lawrence*, Justice Kennedy wrote⁵³:

"To the extent *Bowers* relied on values we share with a wider civilisation, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has followed not *Bowers* but its own decision in *Dudgeon v The United Kingdom* ..., *Modinos v Cyprus* ... [and] *Norris v Ireland*. ... Other countries too have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct ... The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries.

⁴⁹ 539 US 558 (2003); 123 S Ct 2435 at 2472.

⁵⁰ 478 US 186 (1986).

⁵¹ 539 US 558 at 578-79 (2003); 123 S Ct 2235 at 1484.

⁵² (1981) 4 EHRR 149.

⁵³ 539 US 558 at 578-79 (2003); 123 S Ct 1435 at 1483. See Koh, above n 39, 8-9.

There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent".

Justice Kennedy went on in *Lawrence* to refer to the pages of an *amicus* brief filed by Mrs Mary Robinson, then United Nations High Commissioner for Human Rights. It was on those pages that the brief described the decision of the United Nations Human Rights Committee in *Toonen v Australia*⁵⁴. That decision had held in 1994 that in continuing criminalization of adult private consensual sexual conduct in Tasmania, Australia had brought itself into non compliance with the *International Covenant on Civil and Political Rights* (ICCPR). Mary Robinson had explained how the Australian Federal Parliament had enacted a law to implement the Committee's interpretation of the ICCPR and to end the criminal sanctions in Australia⁵⁵.

Professor Harold Hongju Koh, of Yale University, has described constitutional doctrine in the United States as it stands at this time. His description is relevant to Australia, the only difference being the currently dominant opinion⁵⁶:

"... [T]he last Supreme Court Term confirms that two distinct approaches now uncomfortably coexist within our Supreme

⁵⁴ *Toonen v Australia*, Communication No 488/1992, UN doc.CCPR/C/50/D/488/1992 (1994). See Koh, above n 54, 9.

⁵⁵ *Human Rights (Sexual Conduct) Act* 1994 (Cth).

⁵⁶ HH Koh, above n 39, 10.

Court's global jurisprudence⁵⁷. The first is a 'nationalist jurisprudence', exemplified by the opinions of Justices Scalia and Clarence Thomas⁵⁸. That jurisprudence is characterised by commitments to territoriality, extreme deference to national executive power and political institutions, and resistance to comity or international law as meaningful constraints on national prerogatives. This line of cases largely refuses to look beyond US national interests when assessing the legality of extra-territorial action. ... [It] dismiss[es] treaty or customary international law rules as meaningful constraints upon US actions. ... When advised of foreign legal precedents, these decisions have treated them as irrelevant, or worse yet, an impermissible imposition on the exercise of American sovereignty"⁵⁹.

A second, more venerable strand of 'transnationalist jurisprudence' now being carried forward by Justices Breyer and Ginsburg⁶⁰ began with Justice ... Jay and Justice ... Marshall, 'who were familiar' with the law of nations and 'comfortable navigating by it'⁶¹.

⁵⁷ This analysis builds on earlier discussion in Harold Hongju Koh, "On American Exceptionalism" 55 *Stanford Law Review* 1479 at 1513-1515 (2003); Harold Hongju Koh, "International Business Transactions in United States Courts" 261 *Recueil des Cours* 13, 226-234 (1996).

⁵⁸ Despite his occasional extrajudicial writings, according to Professor Koh, in his Court opinions Chief Justice Rehnquist "remains firmly in the nationalist camp".

⁵⁹ See eg *Foster v Florida* 537 US 990, 990n (2002) (Thomas J, concurring in denial of *certiorari*) ["[T]his Court ... should not impose foreign moods, fads or fashions on Americans"].

⁶⁰ According to Professor Koh, Justices Stevens and Souter are also regular supporters of this view. Through their extra-judicial statements and opinions, Justices Anthony Kennedy and, up to her retirement, Sandra Day O'Connor, also increasingly demonstrated transnationalist leanings'.

⁶¹ A cross-reference to HA Blackmun, "The Supreme Court and the Law of Nations" 104 *Yale Law Journal* 39 at 49 (1994). For elaboration of this theme see Harold Hongju Koh, "Justice Blackmun and the World Out There" 104 *Yale Law Journal* 23 at 28-31 (1994) (collecting cases).

The majority position in the United States Supreme Court on this subject has not changed in the intervening years despite changes in the personnel of that Court. Justice Kennedy's vote is still, presumably, with the approach he took in *Lawrence*. Upon this issue, therefore, there is still a majority of 5:4. In Australia, things are more complicated.

RECENT DEVELOPMENTS IN AUSTRALIA

Following the sharp exchange recorded in *Al-Kateb*, in 2007, the High Court of Australia had to decide a challenge by a prisoner which, once again, presented this constitutional question. The challenge concerned the validity of an amendment to electoral law in Australia that would deprive the prisoner, and many in like position, of the right to vote in the 2007 federal election⁶². Until changes enacted in 2006, Australian prisoners, serving sentences of less than three years' imprisonment, were entitled (indeed required) to vote in federal and State elections. In 2006 the electoral law was changed to disqualify all prisoners of this important privilege and duty of citizenship.⁶³

Ms Roach, a Victorian prisoner, challenged the law in the High Court. A majority of the Court upheld her challenge, in part. The Court

⁶² *Roach v Australian Electoral Commissioner* (2007) 81 ALJR 1830; 239 ALR 1.

⁶³ *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth) amending the *Commonwealth Electoral Act 1918* (Cth).

declared that the previous law (three year disqualification) was within the power of the Federal Parliament to define the participating electorate. But the majority concluded⁶⁴ that, to disqualify all prisoners from voting, was constitutionally disproportionate. It was therefore invalid. The 2006 amending law was struck down. Dissenting opinions were filed by two judges⁶⁵.

The majority reasoning in *Roach* is interesting because both Chief Justice Gleeson and the joint majority reasons of Justices Gummow, Crennan and myself, made a number of references to decisions of other national courts (particularly in the United Kingdom and Canada) dealing with like questions under their respective constitutional and public law – often referring to national Bill of Rights provisions. However, more importantly for present purposes, the majority invoked, for contextual relevance, general legal principles that had been expounded on a like question in the European Court of Human Rights⁶⁶.

The reference by the majority to analogous considerations of the basic democratic values (as important for the diverse constitutions of European countries as for the democratic Constitution of Australia) demonstrated, once again, how useful it can sometimes be to consider,

⁶⁴ Gleeson CJ, and Gummow, Kirby and Crennan JJ.

⁶⁵ Hayne J and Heydon J.

⁶⁶ *Hurst v United Kingdom* (2005) 42 EHRR 4.

and refer to, international law of this kind. None of the majority judges pretended that the decisions of the national and international courts that they cited were *binding* on the High Court of Australia. None of them suggested that, in construing the requirements of the Australian Constitution, one could simply pick up and apply the words of foreign judges to our legal problems. None purported to treat the foreign reasoning, still less the adjudications, as *precisely applicable* to the issues presented by the Australian Constitution. Yet the majority had no hesitation in invoking this reasoning of the European Court as *relevant* to explaining why they came to the conclusions they did.

So why did the majority judges do this? I cannot speak for the other judges in the majority. However, I can attempt to explain, for myself, why it seemed appropriate to refer to, and cite from, this body of non Australian legal analysis in deciding the resolution of an Australian constitutional problem:

- Constitutions, of their nature, tend to be concerned with abiding values of governance. Often these values are shared by different countries, making it useful and relevant to refer to, and consider, what foreign judges have said and reasoned about such issues;
- Like most other professions today, modern judges read widely, travel and attend legal conferences. They meet and learn to respect the intellect, judgment and wisdom of judges of other lands. When they see that such judges have written on the type of problem they later face, they may look with greater confidence

at the reasoning. Often, they know that what is written, although perhaps not exactly on point, may possibly bear some analogy for the resolution of their own controversies. In that event, there is no need for them to reinvent the wheel. Moreover, they can introduce into their own country the wisdom and justice of the reasoning of a foreign judge, thereby rendering it, in effect, one way of saying what the local judge is thinking as part of the local decision;

- Occasionally, the reasoning of others will help sharpen the exposition by the local judge of why a national constitutional text does, or does not, warrant a similar approach. By comparison and contrast, the reasoning of those who go before may assist in identifying the subjects that need to be considered in the home court's decision; and
- It is a feature of the current age that new ideas tend to present themselves at about the same time in different societies. Often these can be new ideas that challenge past ways of thinking, including about the meaning and operation of the Constitution – necessarily written in language that pre-dates the advent of such notions. Parochialism of the mind is singularly inappropriate to contemporary judges. Especially so for the judges of higher courts and for the first generation of judges of the internet age. The new technology puts us in contact with ideas that once would have been unknown to our forebears. To ignore them is to reject a pervasive and beneficial feature of the contemporary world.

Of course, some judges do not agree with this. To the contrary, they consider that developments in other national (but more especially international) courts and tribunals can have nothing whatever to say about Australian constitutional requirements. A possible exception is allowed with respect to earlier British opinions on constitutional norms that we have borrowed from the United Kingdom and, perhaps, judicial opinions in the United States concerning features of their Constitution which we have copied.

In Australia, some judges, to greater or lesser degree, adopt an "originalist" approach to constitutional meaning. That approach would effectively limit recourse to legal sources and to dictionaries written in the 1890s in order to find the meaning of our Constitution in the twenty-first century.

In my view, that approach is fundamentally inconsistent with the way the High Court, in recent years, has approached the task of constitutional construction⁶⁷. Indeed, in my opinion, it is fundamentally incompatible with the very nature and purpose of a constitutional text. By definition, such a text is meant to endure and to apply to new and completely unforeseen circumstances, unknown to those who wrote the text – such as nuclear weapons, modern terrorism, the internet, nanotechnology and present social change. The Constitution is not

⁶⁷ See eg *Sue v Hill* (1999) 199 CLR 462.

intended to shackle contemporary Australians, beyond any clear requirement of the text, to nineteenth century thinking and values.

In his reasons in *Roach*, Justice Heydon was quite blunt about his opinion about this issue. Reflecting the opinion of Justice McHugh in *Al-Kateb*, Justice Heydon wrote⁶⁸ :

"[T]he fact is that our law does not permit recourse to these materials. The proposition that the legislative power of the Commonwealth is affected or limited by developments in international law since 1900 is denied by most, though not all, of the relevant authorities – that is, denied by 21 of the Justices of the Court who have considered the matter, and affirmed by only one."

The "only one" to whom Justice Heydon referred in a footnote was myself. However, this is not, I believe, a correct summary of the state of Australian authority. In a review of High Court cases to that time, responding to the exchange recorded in *Al-Kateb*, Mr Ernst Willheim⁶⁹, an Australian lawyer with a lifetime's experience following the High Court's constitutional doctrines, remarked:

"[L]ong prior to the current division in the High Court, members of the Court referred to international law principles in constitutional matters. In *Polyukhovich v The*

⁶⁸ (2007) 81 ALJR 1830 at 1865 [181] (footnotes omitted).

⁶⁹ E Willheim, "Globalisation, State Sovereignty and Domestic Law: The Australian High Court Rejects International Law as a Proper Influence on Constitutional Interpretation" (2005) 1 *Asia-Pacific Journal on Human Rights and the Law* 1.

*Commonwealth*⁷⁰, (the *War Crimes* case), Deane J found support for his conclusion that Chapter III of the Constitution precluded *ex post facto* criminal laws, in 'provisions of international conventions concerned with the recognition and protection of fundamental human rights'⁷¹. In *Nationwide News Pty Ltd v Wills*⁷², Brennan J drew on European jurisprudence relating to the *European Convention for the Protection of Human Rights and Fundamental Freedoms* to support his view that a ban on political advertising was not unconstitutional⁷³. In *North Australian Aboriginal Legal Aid Service Inc v Bradley*⁷⁴, a challenge to the constitutional validity of the appointment of a Chief Magistrate of the Northern Territory, Gleeson CJ in his treatment of the fundamental importance of judicial independence, referred to the *Universal Declaration of the Independence of Justice*, the *Beijing Statement of Principles on the Independence of the Judiciary* in the LAWASIA region and the *European Convention for the Protection of Human Rights and Fundamental Freedoms*⁷⁵. Gummow J also referred to the *European Convention* in *Fardon v Attorney-General for the State of Queensland*⁷⁶ where the appellant unsuccessfully argued that conferral on the Supreme Court of Queensland of a power to order continuing (preventive) attention infringed Chapter III of the Constitution. In none of those cases did Deane J, Brennan J, Gleeson CJ or Gummow J find any necessity to justify their references to principles of international law and no other judge found reason to criticise their doing so".

Overseas public law observers of distinction sometimes express surprise at the extent to which Australian law, and specifically recent

⁷⁰ (1991) 172 CLR 501.

⁷¹ *Ibid*, 512.

⁷² (1992) 177 CLR 1.

⁷³ *Ibid*, 154.

⁷⁴ (2004) 218 CLR 146.

⁷⁵ (2004) 218 CLR 146 at 152 [3].

⁷⁶ (2004) 223 CLR 575 at 607 [64].

decisions of the High Court of Australia, appear to have cut themselves off from larger doctrinal developments in the law shared by other English-speaking democracies. One author has recently expressed the view that the High Court is "antagonistic towards both the language of human rights and the international and transnational discourse in which that language is most commonly located"⁷⁷. He is critical of what he perceives as the "abstract formalism" of the Court lacking "concern for either context or moral outcomes".

Even if such criticism over-states the position now reached, it is occasionally helpful, in law as if life, for all of us to see ourselves as others see us.

One of the great legal movements in the law of the past thirty years has been the rejection of the formalist or strictly textualist approach to the interpretation of legislation. This change has come about, in part, because of an appreciation of the way language actually works in human communication, and in legal language specifically. It involves an appreciation that the true meaning of words cannot, and should not, be derived from a study of words in isolation, taken out of context. It recognises that, at a minimum, one has to find the meaning of words from the sentence in which they appear; preferably from the

⁷⁷ Dr Thomas Poole (University of London), "Between the Devil and the Deep Blue Sea: Administrative Law in the Age of Rights" in *Festschrift for Professor Mark Aronson* (forthcoming).

page, the chapter or the entire text. Most desirably, from considering the background to the text and the text's history and purpose. Only then is it likely that the decision-maker will get the meaning of contested words right.

This realisation has led to a deeper concern in the courts about the purpose of language in *texts* and about the *context* in which (and *purposes* for which) the words have been used. There are very similar debates in other disciplines. Thus, in contemporary theology, there is a lively discussion in the world-wide Anglican Communion about the Biblical instructions about homosexuality based on the analysis of a few texts that also need to be read in the context of the Scriptures as a whole and specifically in relation to the purpose of those texts as expressing the instruction of a religion of love and reconciliation.

In the controversy recounted in this lecture, therefore, lawyers are not alone. Time is, I believe, on the side of deriving legal meaning from texts, read in context and with purpose at the forefront of our attention. It is not on the side of going back to words alone, taken in isolation, read with a dictionary of 1890 or even earlier. That is just not the way words are understood in real life – especially in a national Constitution of enduring application.

When the approach that I favour is taken to deriving constitutional meaning from the sparse language of the Australian document, it is little wonder that judges and other lawyers, faced with a puzzle about

meaning, will start with the text but then go further and deeper in their efforts to gain understanding.

To forbid today judicial and legal references to the analysis of analogous problems in the European Court of Human Rights (or other national and international tribunals) is frankly absurd. It will not happen. Judges will take that recourse. They will do so simply because they commonly read such materials and, sometimes, it will put their own thoughts exactly as they would express them when dealing with an analogous local problem. The only question is whether our judges should be cajoled into keeping their use of this contemporaneous legal material secret. That would neither be rational nor desirable.

Pretending that ideas today are not increasingly global and that the internet does not exist is not the way forward for Australian constitutional law. It is not appropriate to a branch of modern Australian government or to the principles of honesty and transparency that should inform the way that *all* those who temporarily hold governmental power in Australia deploy it. I realise that, to some extent, this requires a new way of thinking. For some judges, lawyers and other citizens, this is uncongenial and involves something of a strain. But it is the way of the future. So we had all better get used to it.

The reference in the prisoner's voting rights case to human rights reasoning and international law is, by no means, the only time that this has happened in recent years.⁷⁸ More and more it has happened and will happen, simply because it is a feature of the world in which the minds of contemporary judges and lawyers operate. Formalism, parochialism and narrow legal nationalism will not triumph in Australia. Contextualism and awareness of the international law dimension will prevail.

I pay my respects to the spirit of Henri Dunant. And to the work of the International Red Cross, including in Australia. If ever there was a living and fruitful symbol of thinking globally and remembering our shared humanity, beyond narrow national affiliation, it is this. Lawyers and judges need to be reminded, sometimes to their own surprise, that they and their discipline are part of the reality of universal humanity. They too need to adapt to the age we live in. And that includes in reasoning about the meaning of the Australian Constitution which lives and adapts to the times we live in.

⁷⁸ See eg *Koroitamana v The Commonwealth* (2006) 80 ALJR 1146 where, in explaining the content of s 51 (xix) of the Constitution ("naturalization and aliens") several Justices referred to recent developments in international law. See eg Gummow, Hayne and Crennan JJ at 1153 [38] and 1154 [44]; and at 1157 [66]-[67] and 1158 [68]-[69] of my own reasons.

UNIVERSITY OF TASMANIA

HOBART

TOWN HALL

THURSDAY, 8 MAY 2008

AUSTRALIAN RED CROSS NATIONAL ORATION

**THE GROWING IMPACT OF INTERNATIONAL LAW ON
AUSTRALIAN CONSTITUTIONAL VALUES**

The Hon Justice Michael Kirby AC CMG