

Citation of Foreign Decisions in Constitutional Adjudication: The Relevance of the Democratic Deficit

The Honorable Michael Kirby*

A particular feature of the past fifty years has been the introduction of the post-war independence constitutions of many nations. The introduction of such constitutions in India, Pakistan, Ireland, Ceylon, and then many parts of Africa, Asia and the Caribbean, has resulted in the adoption of human rights provisions that sometimes reflect an international template. Quite often, such provisions, in repeated language, can be traced to earlier progenitors, including the English Bill of Rights of 1688, the Bill of Rights of the American Constitution after 1791, and the Universal Declaration of Human Rights of 1948.¹

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

I. UNITED STATES CASE LAW

None of the foregoing statements would be regarded as strongly contestable or even controversial in any common-law country, or indeed in most civil-law countries, save for the United States of America and Australia. In both of the

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1. See G.A. Res. 217 A (III), U.N. Doc. A/217 (Dec. 10, 1948); see also Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287 (1996).

latter countries, for some similar and some different reasons, strong opinions have been expressed, antagonistic to any such references to foreign material in construing the provisions of the national constitution. This attitude has been evident in the United States, with respect to Bill of Rights provisions, such as the provision forbidding “cruel and unusual punishments.”² This expression was itself derived from the English Bill of Rights and was later adapted in the Universal Declaration of Human Rights³ and in the International Covenant on Civil and Political Rights.⁴

In a series of United States decisions involving constitutional questions, Justices of the Supreme Court have referred to provisions of international and foreign law and, in explaining their conclusions, occasioned such an antagonistic response from other members of the Court, both in their reasons⁵ and in extra-curial writing⁶ that a large public explosion of vituperation occurred. This was directed at the allegedly foreign-law-friendly Justices, culminating both in reported death threats directed at some of them and even the introduction of purported legislation, designed to make it an impeachable offense for a federal judge to base a decision on foreign law.⁷ Thus, section 201 of the proposed Constitution Restoration Act states:

In interpreting and applying the Constitution of the United States, a court of the United States may not rely upon any constitution, law, administrative rule, executive order, directive, policy, judicial decisions or any other action of any foreign state or international organization or agency, other than the constitutional law and English common law.⁸

Commenting on this bill, a United States Senior District Judge observed:

Aside from its grammatical incompetencies, the proposed Act does not define what it means by ‘constitutional law’ and ‘English common law’ As for the English common law, one would need to tread softly. Most American states included within their constitutions or statutes a provision that the

2. See U.S. CONST. amend. VIII.

3. See Universal Declaration of Human Rights, Art. 5, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (Dec. 10, 1948) (providing “[N]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”).

4. See International Covenant on Civil and Political Rights, Art. 7, G.A. Res. 2200A (Mar. 33, 1976) (reiterating terms of Article 5 of Universal Declaration of Human Rights).

5. See generally *Roper v. Simmons*, 125 S. Ct. 1183, 1217 (2005) (Scalia, J., dissenting).

6. See generally Justice A. Scalia, *Romancing the Constitution: Interpretation as Invention*, in CONSTITUTIONALISM IN THE CHARTER ERA 341 (Grant Hushcroft & Ian Brodie eds., 2004).

7. See Constitution Restoration Act of 2005, S. 520, 109th Cong. § 201 (2005); Constitution Restoration Act of 2004, H.R. 3799, 108th Cong. § 201 (2004); see also Charles Lane, *Ginsburg Faults GOP Critics, Cites a Threat from ‘Fringe’*, WASH. POST, Mar. 17, 2006, at A3 (describing death threats).

8. Constitution Restoration Act of 2005, S. 520, 109th Cong. § 201 (2005).

common law that can be considered of full force stops as of March 24, 1607: the day the last ship sailed from England to what would become the lost colony of Jamestown, Virginia. I would dare not cite the Statute of Frauds which was enacted by the British Parliament in 1677. A host of other precedents, such as the McNaghten Case, would be swept away from the American lexicon. I think the point is made that this proposed statute is utterly stupid. In the unlikely event that Congress would enact the Constitution Restoration Act, it would not be enforceable and the first court to review it would likely strike it down without having to rely on any foreign law. . . .

[B]eyond the xenophobic blindness of this proposed legislation, a more insidious danger lurks. We cannot afford to ignore outrageous demonstrations of ignorance such as the canard that the Holocaust never happened nor the instant one which presumes that the fundamental law of the United States can be understood without reference to the history of western civilization.⁹

The decisions of the Supreme Court of the United States, in which strong exchanges have occurred between the participating Justices over the references to foreign and international law in constitutional adjudication, include *Atkins v. Virginia*,¹⁰ *Lawrence v. Texas*,¹¹ and *Roper v. Simmons*.¹² As these decisions are recent and familiar, I will not repeat them or revisit their content once again.¹³

Because of my own sexuality, I naturally read with the closest attention the decision of the Supreme Court in *Lawrence*, which reversed the earlier holding of the Court in *Bowers v. Hardwick*.¹⁴ The Supreme Court in *Lawrence* invalidated a Texas law criminalizing sodomy between adults of the same sex, even if consenting and in private. The *Lawrence* court not only overruled *Bowers*, it declared that the decision had been wrong when decided. No mention had been made in the *Bowers* opinion to the decision of the European Court of Human Rights, issued five years earlier in *Dudgeon v. United Kingdom*.¹⁵ That decision had rejected similar statutory prohibitions in the law of the United Kingdom applicable in Northern Ireland. The European Court held that such laws constituted a violation of the right to privacy guaranteed by

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

10. 536 U.S. 304 (2002).

11. 539 U.S. 558 (2003).

12. 543 U.S. 551 (2005).

13. See Michael Kirby, Grotius Lecture for the American Society of International Law, in *International Law: The Impact on National Constitutions*, 21 AM. U. INT'L L. REV. 327, 332-33 (2006) (describing Supreme Court battles over citing foreign law).

14. See *Lawrence*, 539 U.S. at 578 (overruling *Bowers* and overturning law against homosexual sex); *Bowers v. Hardwick*, 478 U.S. 186, 195 (1986) (upholding state law against sodomy).

15. See *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. 4, 22 (1981); 4 Eur. H.R. Rep. 149 (1982) (holding 1855 and 1861 acts criminalizing "buggery" violate Convention).

the European Convention on Human Rights. The assertion by the majority of the Supreme Court in *Bowers* that the sodomy law reflected ancient and universal values of civilized states would have been at least subjected to some doubt and heightened scrutiny if a reference to the then recent decision of the European Court had been made and considered.

Writing for the Supreme Court in *Lawrence*, Justice Kennedy took note of the European Court's decision, declaring, "To the extent *Bowers* relied on values we share with the wider civilization, it should be noted that the reasoning and holding in *Bowers* has been rejected elsewhere. The European Court of Human Rights has followed not *Bowers* but its own decision in *Dudgeon v. United Kingdom*."¹⁶

At the conclusion of his opinion for the Court in *Lawrence*, Justice Kennedy went on to explain most eloquently how the concepts expressed in the United States Constitution have themselves evolved, just as the modern standards of decency and justice do in every civilized country:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.¹⁷

Reasoning of this kind produced not only strong reactions in the Congress and various civic groups; it also elicited extremely angry words from judicial dissenters. Thus, in *Lawrence*, Justice Scalia complained that the "Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed," and that the majority opinion is "the product of a law-profession culture that has largely signed on to the so-called homosexual agenda."¹⁸ In *Roper v. Simmons*, Justice Scalia again expressed his contrary opinion most forcefully: "[T]he basic premise of the Court's argument – that American law should conform to the laws of the rest of the world – ought to be rejected out of hand."¹⁹

Foreign readers of these exciting exchanges might conclude that the more temperate views of the majority Justices had the better of the argument. Thus, in *Roper*, Justice Kennedy remarked: "The opinion of the world community,

16. 539 U.S. at 577. The "living tree" approach to constitutional interpretation has a long history. See, e.g., *Edwards v. Canada*, [1930] A.C. 124, 136-37 (P.C.).

17. *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003).

18. *Id.* at 602-03 (Scalia, J., dissenting).

19. 543 U.S. 551, 624 (2005) (Scalia, J., dissenting); see also *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”²⁰

Justice O’Connor, whilst dissenting and herself more cautious about the use of foreign law, was defensive about its occasional utility: “[W]e should not be surprised to find congruence between domestic and international values . . . expressed in international law or in the domestic laws of individual countries.”²¹

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

Perhaps those Justices who are inclined to inform their minds about reasoning on common problems, expressed in foreign courts and tribunals, have noticed the fuss that such citations commonly cause in the Court, in the Congress and in sections of society of this country and decided, instead, to accept Justice Scalia’s advice to Justice Breyer in their public conversation. This was to the effect that it was alright for Justice Breyer to inform himself on international legal developments but that he should just “keep it out of his opinions.”²² For some judges, such a course might seem to be a path of prudence and wisdom. For others, it might seem a surrender to intellectual dishonesty and a departure from decisional transparency.

II. AUSTRALIAN CASE LAW

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

In 2004, the High Court of Australia was required to decide whether the provisions of the Migration Act 1958 (Aust.) authorized the indefinite detention, without any judicial order, of an illegal migrant, and, if so, whether

20. 543 U.S. at 578.

21. *Id.* at 606 (O’Connor, J., dissenting).

22. Norman Dorien, *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT’L J. CONST. L. 519, 534 (2005).

such an enactment was constitutionally valid.²³ A majority upheld the government's interpretation of the Act, concluding that, in the circumstances, the Act required the detention of Mr. Ahmed Al-Kateb indefinitely. On this point, the Court was divided 4 to 3.²⁴ The Act contained a provision that envisaged that an illegal migrant in detention could terminate the incarceration immediately by requesting the Minister to return him or her to the country of nationality.²⁵ The problem arose because Mr. Al-Kateb was a stateless Palestinian. Kuwait, where he had been born, would not receive him. Israel would not permit him to pass through its territory to Gaza. There was no other access. No other country would accept him. On the face of the Minister's submission, Mr. Al-Kateb could be kept forever in the Womera Detention Camp in the middle of Australia. The minority Justices concluded that such an interpretation should not be attributed to the Act, given that a fundamental postulate of the Act, envisaged by its terms, could not be fulfilled as the Act contemplated in the particular case.

The majority went on to hold that the result that they favored was not inconsistent with the Australian Constitution. That Constitution evinces the purest form of federal democratic governance. There is no general bill of rights. The founders rejected the American model in this respect because they believed that the Federal Parliament could always be trusted to protect the rights of the people. Americans will remember that this was the initial reaction of James Madison to the request that he draft a Bill of Rights for the United States. Mr. Al-Kateb's constitutional objection in Australia, therefore, had to be framed in terms of a suggested intrusion by the legislature into territory reserved by the Constitution to the Judicature (Ch. III), on the footing that long-term, and certainly indefinite, detention had to be subjected to judicial scrutiny. The majority dismissed this argument. But Justice Gummow and I would have upheld it.²⁶

A passing observation by me to the effect that the judicial chapter of the Australian Constitution should be construed today, so far as possible and consistently with the text, so as to conform with the principles of international human rights law, which demanded the subjection of prolonged deprivation of individual liberty to judicial supervision,²⁷ drew an extended coda from Justice Michael McHugh, the senior Justice of the Court after the Chief Justice. With reference to Australian and foreign authority and to history and arguments of legal principle, he declared that my invocation of international law, in resolving the purely Australian constitutional question, was impermissible, unsustainable

23. *Al-Kateb v. Godwin* (2004) 219 C.L.R. 562, 580-82.

24. *Id.* (McHugh, Hayne, Callinan and Heydon, JJ., majority; Gleeson, C.J., Gummow and Kirby, JJ., dissenting).

25. *Id.* at 630-31.

26. *See id.* at 611-13 (Gummow, J. dissenting); *id.* at 615 (Kirby, J., dissenting).

27. *See Al-Kateb v. Godwin* (2004) 219 C.L.R. 562, 616 (Kirby, J., dissenting).

and legally heretical:

[C]ontrary to the view of Kirby J, courts cannot read the Constitution by reference to the provisions of international law that have become accepted since the Constitution was enacted in 1900. Rules of international law at that date might in some cases throw some light on the meaning of a constitutional provision [But] the claim that the Constitution should be read consistently with the rules of international law has been decisively rejected by members of this Court on several occasions. As a matter of constitutional doctrine, it must be regarded as heretical. . . . [R]eading the Constitution up or down to conform to the *rules* of international law is to make those rules part of the Constitution, contrary to the direction in s 128 that the Constitution is to be amended only in accordance with the referendum process. . . . It is even more difficult to accept that the Constitution's meaning is affected by rules created by the agreements and practices of other countries. If that were the case, judges would have to have a 'loose-leaf' copy of the Constitution. If Australia is to have a Bill of Rights, it must be done in the constitutional way—hard though its achievement may be—by persuading the people to amend the Constitution by inserting such a Bill.²⁸

In my reasons, I rejected the arguments of Justice McHugh, proceeding through the same authorities and examining the approaches adopted in other countries. Specifically, I rejected the suggestion that what was involved was the application of “rules” of international law rather than an “interpretative principle” for the reading of the Australian Constitution in today’s world. In that world, any nation’s constitution must necessarily operate in a context profoundly affected by the growing body of international law.²⁹ I emphasized the role of both formal amendment and judicial reinterpretation, in the ongoing evolution of the constitutional text,³⁰ including the many cases in which, by reinterpretation, Justice McHugh had himself made distinguished contributions to new understandings of that text.³¹ I suggested:

[T]he willingness of national constitutional courts to look outside their own domestic legal traditions to the elaboration of international, regional and other bodies represents a paradigm shift that has happened in municipal law in recent years. There are many illustrations in the decisions of the courts of, for example, Canada, Germany, India, New Zealand, the United Kingdom and the United States.³²

28. *Id.* at 589-95 (McHugh, J., concurring) (emphasis added).

29. *See id.* at 623 (Kirby, J., dissenting).

30. *See id.* at 625.

31. *See* Al-Kateb v. Godwin (2004) 219 C.L.R. 562, 625-26 (Kirby, J., dissenting).

32. *Id.* at 627 (footnotes omitted).

As to the last, I noted the similar debates which had arisen in the Supreme Court of the United States in *Atkins v. Virginia* and *Lawrence v. Texas*, as well as *Grutter v. Bollinger*.³³ I concluded:

[O]pinions that seek to cut off contemporary Australian law (including constitutional law) from the persuasive force of international law are doomed to fail. They will be seen in the future much as the reasoning of Taney CJ in *Dred Scott v. Sandford*, Black J in *Korematsu [v. United States]* . . . are now viewed: with a mixture of curiosity and embarrassment. The dissents of McLean, J and Curtis, J in *Dred Scott* strongly invoked international law to support the proposition that the appellant was not a slave but a free man. Had the interpretative principle prevailed at that time, the United States Supreme Court might have been saved a serious error of constitutional reasoning; and much injustice, indifference to human indignity and later suffering might have been avoided. The fact is that it is often helpful for national judges to check their own constitutional thinking against principles expressing the rules of a 'wider civilisation'.³⁴

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

Although the view I propounded in *Al-Kateb* was a minority one, as it has been on other occasions, both earlier and later,³⁵ shortly before my retirement from the High Court of Australia a case arose which may indicate a shift in the tectonic plates. I refer to *Roach v. Electoral Commissioner*.³⁶

That was a case which involved a challenge by a prisoner to the constitutional validity of a federal enactment depriving all prisoners of the right to vote in the then forthcoming federal election, held in November 2007. Before a 2006 amendment to federal legislation, prisoners serving three years or more in prison were disqualified from voting in federal elections but shorter-term prisoners could vote. Indeed, under Australian electoral arrangements,

33. *See id.* at 627 n.294.

34. *Id.* at 629 (internal citations omitted).

35. *See Thomas v. Mowbray* (2007) 233 C.L.R. 307, 442; *Newcrest Mining (WA) Ltd. v. Commonwealth of Australia* (1997) 190 C.L.R. 513, 657-58, 661.

36. (2007) 233 C.L.R. 162.

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

The challenger pressed upon the Court developments that had occurred resolving like questions both in Canada under the country's Charter of Rights and Freedoms and in the European Court of Human Rights in respect of the United Kingdom.³⁷ The citation of these authorities was regarded by the government lawyers as provocative. The Solicitor-General urged that all such foreign law should be disregarded as immaterial to the meaning of the Australian Constitution. This irrelevance rested, he declared, upon the principle that the Australian Constitution placed its trust in the Federal Parliament and rendered it accountable to the electors if they considered that the trust was abused. Of course, the notion that the electors would rise in wrath to defend the civic rights to electoral participation of prisoners appeared a trifle ethereal in the real world of Australian politics. If anyone would defend such rights, it had to be the Court.

Nonetheless, a reflection of the governmental submission was accepted by Justice Heydon in his dissenting opinion.³⁸ This was published with the reasons of the majority who upheld, in part, the prisoner's challenge. In effect, the Court majority disallowed the 2006 amendment to the Electoral Act and thereby restored the previous law confining the disqualification to prisoners serving three-year terms or more. In terms of the text of the Australian Constitution, this conclusion was explained by reference to the three-year electoral cycle provided for the election of the Australian House of Representatives. Disqualification of prisoners serving a lesser sentence would be disproportional to the power proposed in Parliament to enact statutory disqualifications. Each of the opinions in support of the majority conclusion (by Chief Justice Gleeson and jointly by Justices Gummow, Crennan and myself), referred without embarrassment to the Canadian and European case

37. See *Roach v. Electoral Commissioner* (2007) 233 C.L.R. 162, 177-78 (discussing *Sauvé v. Canada* (Chief Electoral Officer) (2002) 3 S.C.R. 519, 585 and *Hirst v. United Kingdom* [No.2] (2005) 42 E.H.R.R. 41).

38. *Id.* at 223-36 (Heydon, J., dissenting).

law, whilst insisting that such law was not directly applicable and needed adaptation for any relevance to the Australian text.³⁹

This approach was still unacceptable to Justice Heydon, who, with Justice Hayne, dissented. Something of the flavor of recent American dissents can be observed in his reasons:

It is . . . surprising that the plaintiff submitted that [her] arguments were ‘strongly supported’ by decisions under the [ICCPR, European Convention on Human Rights, the Canadian Charter and the Constitution of South Africa] ‘which found that prisoner disenfranchisement provisions were invalid.’ It is surprising because these instruments can have nothing whatever to do with the construction of the Australian Constitution. These instruments did not influence the framers of the Constitution, for they all post-date it by many years. It is highly improbable that it had any influence on them. The language they employ is radically different. One of the instruments is a treaty to which Australia is not and could not be a party. Another . . . is a treaty to which Australia is a party, but the plaintiff relied for its construction on comments by the United Nations Human Rights Committee. If Australian law permitted reference to materials of that kind as an aid to construing the Constitution, it might be thought that the process of assessing the significance of what the committee did would be assisted by knowing which countries were on the committee at the relevant times; what the names and standing of the representatives of these countries were; what influence, if any, Australia had on the committee’s deliberations; and indeed whether Australia was given any significant opportunity to be heard. The plaintiff’s submissions did not deal with these points. But the fact is that our law does not permit recourse to these materials. The proposition that the legislative power of the Commonwealth is affected or limited by developments in international law since 1900 is denied by most, though not all, of the relevant authorities—that is denied by 21 of the Justices of this Court who have considered the matter, and affirmed by only one.⁴⁰

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

39. See *id.* at 177-79 (Gleeson, C.J., concurring); *id.* at 203 (Gummow, Kirby and Creenan, JJ., concurring).

40. See *id.* at 224-25 (Heydon, J., dissenting) (citations omitted).

III. THE CONCERN OF NATIONAL EXCEPTIONALISM

Inevitably, the foregoing analysis brings scholars and judges face-to-face with the essential reasons that lie behind the vehement rejection of foreign legal materials by learned judges and commentators.⁴¹ I suggest that one of these considerations is relevant to the United States, although it is not of much relevance to the thinking of Australian opponents. The other is a consideration that lies at the heart of the objections in both countries. It is by no means meritless, although, in my view, it is not controlling.

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

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling or executive or legislative act or judicial decision, resort must be had to the customs and usages of civilised nations⁴²

As Dean Harold Koh has pointed out, in the earliest days of the Republic, the United States was reliant upon the support and good opinion of civilized countries that supported it against its enemies.⁴³ Its engagement with the world has continued intermittently ever since. It has witnessed great periods of moral, intellectual and legal leadership in the world. Especially so during and after the Second World War when the new world legal order was created in the United Nations Organization and when the international law of human rights was constructed, based substantially on notions derived from the Anglo-American legal tradition.

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

41. See, e.g., James Allan, *Portia Bassanio or Dick the Butcher? Constraining Judges in the Twenty-First Century*, 17 K.C.L.R. 1 (2006); Richard Posner, *No Thanks, We Already Have Our Own Laws: The Court Should Never View A Foreign Legal Decision As A Precedent in Any Way*, LEGAL AFF., July-Aug. 2004, available at http://www.legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.msp (last visited Nov. 11, 2009); Ken I. Kersch, *Multilateralism Comes to the Courts*, PUB. INT., Winter 2004, available at http://findarticles.com/p/articles/mi_m0377/is_154/ai_n6062426/ (last visited Nov. 11, 2009).

42. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

43. See Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 48-49 (2004); see also Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1482 (2003).

interests. And the determination to achieve the protection of those interests, and if necessary alone, by the United States, currently the most powerful nation on earth. A striking instance of this latter attitude may be found in a document published by the White House in September 2001, asserting the right of the United States to take pre-emptive action against terrorists:

While the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting pre-emptively against such terrorists, to prevent them from doing harm against our people and our country.⁴⁴

The Australian scholar Owen Harries has identified American “exceptionalism” as a feature of United States policy in recent years. He concludes that, “the really interesting and important debate is not between anti-Americans and pro-Americans; it is between two different American traditions concerning how the United States can best promote its values and ideals.”⁴⁵

The Australian government has also occasionally been known to adopt exceptionalist policies. For example, these have involved excluding parts of continental and political Australia from the “migration zone” within which refugee applicants may claim asylum in Australia and also well-known circumstances invoking obligations under international law in respect of persons rescued on the high seas and thereafter seeking access to Australian territorial waters.⁴⁶ Australian exceptionalism does not matter greatly, whereas that of the United States matters a lot and tends to affect the whole world. Occasionally, when reading of the intolerance of American and (fewer) Australian judges and lawyers to the citation to, reference to, and use of, foreign law in constitutional adjudication, one cannot escape the impression that national exceptionalism is creeping into the law and the courts. It is here that we see the unfriendly face of legal nationalism, self-sufficiency and self-satisfaction. These are the attitudes of fortress America and fortress Australia. They have made several appearances in both countries in recent years.

There is a particular reason why this fortress attitude is much less successful, and therefore less worrying, in the case of Australia than in the United States. Until very recently, 1986 to be exact, the Australian legal system and its

44. See President George W. Bush, Message to Congress on a New National Security Strategic Doctrine For the United States of America (September 20, 2001).

45. See Audio tape: Boyer Lectures, Lecture 5: Challengers, presented by Owen Harries (Dec. 14, 2003), available at <http://www.abc.net.au/rn/boyers/index/BoyersChronoIdx.htm#2003> (last visited Nov. 11, 2009).

46. See Michael White, *Tampa Incident: Shipping, International and Maritime Legal Issues*, 78 AUSTL. L.J. 101 (2004) (a reference to the rescue of 433 asylum seekers by The Tampa on August 26, 2001). See generally Donald Rothwell, *The Law of the Sea and the MV Tampa Incident: Reconciling Maritime Principles with Coastal State Sovereignty*, 13 PUB. L. REV. 118 (2002).

Judicature were institutionally tied into the world-wide system supervised by the Judicial Committee of the Privy Council in London.⁴⁷ That link, which excluded only a limited category of constitutional cases in Australia,⁴⁸ instilled in all Australian lawyers a generally comfortable attitude towards the use of inter-jurisdictional comparative law, as much in constitutional and public law as in cases involving questions of private law. So established, the global linkage had its downside. However, some of its undoubted advantages were that it rescued its beneficiaries from narrow parochialism, set high standards of logical judicial reasoning, discouraged and corrected any obviously corrupt or incompetent decisions, and promoted a global view of law and of the relevance of international law.

With the decline of the British Empire, the jurisdiction of the Privy Council has receded almost to nothing. By chance, the last Australian appeal to the Privy Council was from a decision of the New South Wales Court of Appeal in which I presided, twenty years ago.⁴⁹ The appeal was dismissed.

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

To demonstrate that this is so, I need do no more than take the latest volume of the Law Reports of the Commonwealth.⁵⁰ The volume is full of public law cases, mostly concerned with constitutional law. Many of the cases deal with issues that are highly sensitive in their own national context, such as the apostasy case in Malaysia, *Joy v. Federal Territory Islamic Council & Ors.*;⁵¹ the jurisdiction of the High Court in Ghana;⁵² the constitutional validity of mandatory minimum sentences for rape in Botswana;⁵³ and the response to the problem of a sleeping judge in Australia.⁵⁴

A common feature of each of these and the other cases in the volume is the wealth of reference, in elucidating constitutional provisions and clarifying contested issues of public law, to what is done in other Commonwealth courts, courts in Europe and also courts of the United States. Thus, in the apostasy

47. See Australia Act, 1986, § 11 (Austl. & U.K.).

48. See Austl. Const. § 74.

49. See *Austin v. Keele*, 61 A.L.J.R. 605 (1987).

50. See LAW REPORTS OF THE COMMONWEALTH ("L.R.C.") (James S. Read & Peter E. Slinn, 2009).

51. (2009) 1 L.R.C. 1.

52. See generally *Republic v. Fast Track High Court Accra*; *Ex parte Commission on Human Rights & Administrative Justice* (2009) 1 L.R.C. 44.

53. See generally *State v. Mathlo* (2009) 1 C.L.R. 133.

54. See generally *R. v. Cessan* (2009) 1 L.R.C. 416.

decision in Malaysia, there are thirteen citations of United Kingdom judicial authority; four from the Indian Supreme Court; and one from the High Court of Australia. In the Ghana case, there are eleven United Kingdom citations, two from South Africa and one each from Canada and the United States. Decisions of the Supreme Court of India in the volume contain numerous references to the decisions of the United Kingdom and Australian courts. The reports of the opinions of the National Court of Papua New Guinea refer to United Kingdom, Australian and Irish decisions. In the Australian sleeping judge case, the opinion of Chief Justice French is replete with citations from other lands with similar problems, notably the United States. No fewer than thirteen such American decisions on the problem are noted, from both federal and state courts. This is done without embarrassment, self-consciousness or recrimination. It is a feature of a mature legal system which, for nearly 200 years, has been sharing judicial decisions across the world, including in very sensitive, local constitutional decision-making. This is a confident, comparativist outlook that the United States lost following the national judicial and legal self-sufficiency that arose in this country after the Revolution.

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

IV. THE CONCERN OF THE DEMOCRATIC DEFICIT

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

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

American constitutional theory has over its life span been hounded and pre-occupied, if not totally consumed, by a search for harmony between what are usually heard as two clashing commitments: constitutionalism and democracy Do we see some slight to democracy, some 'Counter-Majoritarian Difficulty' to recall Professor Bickel's famous phrase, in

unelected judges deciding the legal validity of the enactments of popular assemblies and thereby effectively ruling the country?⁵⁵

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

This is not an entirely theoretical issue. As Dean Alfred Aman has pointed out, the problem of the democratic deficit extends far beyond the incorporation of international law in judicial reasoning.⁵⁶ Most acutely, it is presented by the chilling effect on representative democracy that has arisen since markets came to be called upon to do some of the work that governments in the past traditionally used to perform in ways answerable to a political process. The worldwide moves towards privatization of governmental services have many implications to be resolved; not least in consequence of the 2009 global financial crisis. Professor Aman correctly poses the question as to whether citizens, organized in the nation state, can influence, even if they cannot control, private sector organizations that now play an increasing role in the world? Some large transnational corporations are much wealthier and more powerful than many poorer nation states. How can democratic impulses be brought to bear upon them? Finally, how can such impulses influence the outcomes of international meetings where, with compromises, back-room deals, and power politics at an ultra-elite level, texts are hammered out that are later propounded as expressing “universal principles” of international law?

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

55. Frank I. Michelman, *Brennan and Democracy: The 1996-97 Brennan Center Symposium Lecture*, 86 CAL. L. REV. 399, 399 (1998).

56. See generally Alfred C. Aman Jr., *THE DEMOCRATIC DEFICIT: TAMING GLOBALIZATION THROUGH LAW REFORM* (N.Y.U. Press, 2004).

Democracy is more than a set of tools or a public apparatus to be manipulated by the elite. It is, in the last resort, embedded deeply in our culture and our legal system. To date our apparent lack of response is due to the fact that we have not fully grasped the profound way in which globalization is embedded in our democratic institutions, now necessitating change and a reconceptualization of our basic operating assumptions. Recognizing how globalization has created a new public private sector, broadening the range of influential state, non-state and inter-state actors, positions us to reconceptualize administrative law as a resource for reform. Such a reconceptualization is necessary if we are to retain the values on which democracy is based—transparency, accountability, and a body politic of engaged and informed citizens. Globalization highlights the importance of such values, ever more strikingly, as fundamental to the ways in which we govern ourselves, every day, at the domestic level.⁵⁷

There are several answers to the concern about the democratic deficit, as it impinges upon the kind of judicial deployment of the principles of international law in constitutional adjudication, for which I would argue. First, it is important to stress once again that the judicial use of such material is not normative. No one believes that the principles of international human rights law, unless incorporated into municipal law by a lawmaker acting within power, operate as binding rules. No one suggests that they *bind* a judge to give effect to them, unless trumped by local constitutional or statutory law. The principles provide a context, a reminder of universal notions and a stimulus to the judge's own thinking. That thinking remains always anchored in the task presented by municipal law. In turn, this is generally controlled by the text of a municipal law, whether found in a national or sub-national constitution, statute, subordinate law or decisional authority.

Second, at this level of influence, it is not reasonable, nor is it logical, to demand a direct democratic component for such international law principles. In a world of nearly seven billion people, how would that be humanly possible, except by authority delegated to representatives of nation-states, to agree on any principles or rules on international questions? To expect such rules to be internationally answerable, in some direct way, to the opinions of local communities, or even to national communities in a country of great population such as the United States, is to indulge in a romantic concept of democracy. The building of international law is essential for the extension to all human beings of the benefits of the rule of law. It is necessary for building effective support for universal human rights. In such matters, romance must give way to reality. The United States, as a major actor in (and potential beneficiary of) the spread of international law, including the law of human rights, will in its own

57. See Aman, *supra* note 56, at 180-81.

interests support this development locally and not seek to frustrate it by unrealistic demands for direct accountability of international law to all citizens of the United States. If this were demanded by one nation, it would necessarily be required by all.

Third, used in the way propounded, international human rights law is simply part of the “dialogic process.”⁵⁸ As Justice Breyer pointed out in his public conversation with Justice Scalia: “It is common for an opinion to refer to material that . . . has no ‘democratic provenance.’ Blackstone has no democratic provenance. Law professors have no democratic provenance. Yet I read and refer to treatises and I read and refer to law review articles.” The principles of international human rights law are thus used in an analogous manner. They are deployed by independent members of the judicial branch whose justification in countries such as the United States and Australia need be no more than established constitutional principles governing judicial review and the necessity of creating and obeying an independent umpire with the power to decide contested constitutional questions.

Finally, within our own national politics, there remains a large element of fiction in the democratic component of law making. To say this is not to decry the great benefits of living in a representative democracy. Both in Australia and in the United States we have witnessed the democratic principle at work in electoral changes of the national government in 2007 and 2008. Yet once one gets away from the activities of local government, the notion of popular participation in the content of law is at best theoretical and at worst romantic.⁵⁹ To conceive of national electors, visiting polling stations every two, three, or more years, actually approving every law and every provision in every law that is thereafter enacted in their name is rather unpersuasive. Election campaigns in a modern democracy are typically concerned with bread and butter issues, if not with entertainment and personality. They are often controlled by huge donations of funds to political parties. Rarely do such electoral contests descend to the particularity of the rights of long-term refugees or the entitlements to vote of short-term prisoners. For such decisions, the rulings of national courts are required.

Democracy is a kind of symphony in which the democratic elements found in the legislative and executive branches are the violins and noisy trumpets. But for a true harmony, it is necessary to have the woodwinds of the civil service and the double basses provided by judges, tribunals and other authorities. As lawmakers in a minor key, the judiciary, even in a final court,

58. See Koh, *supra* note 43, at 55.

59. See M.D. Kirby, *Law Reform, Human Rights and Modern Governance: Australia's Debt to Lord Scarman*, 800 A.L.J.R. 299, 311-14 (2006); A.F. Mason, *Democracy and the Law: The State of the Australian Political System*, 43 LAW. SOC. J. 68, 69 (2005).

will often defer to the elected branches of government.⁶⁰ Yet, even then, there will be cases where they do not do so. The *Mabo* case on the recognition of native title in Australia was one such instance, as was the decision of the High Court of Australia striking down the Communist Party Dissolution Act of 1950.⁶¹ So were the decisions in Australia and United States upholding the right of indigent prisoners to legal representation.⁶² So too was the case, brought in Australia, on behalf of prisoners demanding the right to vote.⁶³

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

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

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

60. See Dame Mary Arden, *The Changing Judicial Role: Human Rights, Community Law and the Intention of Parliament*, 67 CAMBRIDGE L.J. 487, 499-500 (2008). See generally *Chevron U.S.A., Inc. v. Natural Res. Def. Counsel*, 467 U.S. 837 (1984).

61. See *Australian Communist Party v. Commonwealth of Austl.* (1951) 83 C.L.R. 1, 46-48. Cf. *Dennis v. United States*, 341 U.S. 494 (1951).

62. See generally *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Dietrich v. The Queen* (1992) 177 C.L.R. 292, 300.

63. See *Roach v. Electoral Comm'r* (2007) 233 C.L.R. 162, 162.