

NATIONAL CONSTITUTIONS IN AN INTERNATIONAL WORLD

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I.

In regional organisations such as the European Community, the boundaries between international law, regional law and constitutional law are increasingly blurred, and interpretations of constitutional provisions tend to be correspondingly influenced by international standards. By contrast, for countries that stand outside such regional arrangements, the question of whether and how far constitutional interpretation should be influenced by international law still evokes cautious responses. This article will compare some recent controversies in Australia and the United States with the positions in South Africa and India.

The Supreme Court of the United States decided in 1958¹ that for a deserter from the United States Army to be stripped of his American citizenship fell within the Eighth Amendment prohibition of “cruel and unusual punishment”. The Court noted that “[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime”, and that “denationalization as a penalty for desertion” was unknown except in the Philippines and Turkey.² The Court used this material to illustrate what it called “the evolving standards of decency that mark the progress of a maturing society”.³

More recently, despite its dislike of affirmative action programs as a remedy for past inequalities,⁴ the Supreme Court held that the narrowly-tailored affirmative action program of the University of Michigan Law School was constitutionally valid.⁵ Justice Ginsburg observed⁶ that this result “accords with the international understanding ...of affirmative action”, as exemplified by the International Convention on the Elimination of All Forms of Racial Discrimination⁷ and the Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”).⁸ Three days later came the

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1. *Trop v Dulles*, 356 US 86 (1958).

2. *Id.* at 102-03, citing the United Nations Survey of Laws Concerning Nationality, UN Doc No ST/LEG SER.B/4 (1954). At 126 the dissenting judges used the same UN survey to argue for the opposite conclusion.

3. *Id.* at 100.

4. *Regents of the University of California v Bakke*, 438 US 265 (1978).

5. *Grutter v Bollinger*, 539 US 306 (2003). Rehnquist CJ, Scalia, Kennedy and Thomas JJ dissented.

6. *Id.* at 344.

7. Opened for signature 7 March 1966; in force 4 January 1969; 660 UN Treaty Series 211.

8. Adopted 18 December 1979; in force 3 September 1981; 1249 UN Treaty Series 13.

dramatic overruling, in *Lawrence v Texas*,⁹ of the earlier decision in *Bowers v Hardwick*,¹⁰ which had held that criminal penalties for homosexual conduct did not infringe the Fourteenth Amendment. *Bowers* had held that homosexual conduct was not protected by the constitutional concept of “liberty”; *Lawrence v Texas* held that it was. Writing for the majority, Justice Kennedy spoke of an “emerging awareness” that adult sexual conduct in private is an aspect of personal liberty,¹¹ and illustrated this¹² by reference to developments “in many other countries”, including decisions in the European Court of Human Rights.¹³ Justice O’Connor, who had been in the majority in *Bowers v Hardwick*, declined to join in its overruling, but she too now agreed that the legislation was unconstitutional. Rather than the concept of “liberty” she relied on the “equal protection” clause, building on the earlier decision in *Romer v Evans*¹⁴ that discrimination against homosexuals was unconstitutional. In *Romer v Evans* Justice Scalia had memorably complained that the Court was “tak[ing] sides in the culture wars”.¹⁵ In *Lawrence v Texas* he returned to that theme – again complaining that the Court “has taken sides in the culture war”,¹⁶ and dismissing the reliance on “emerging awareness” as both factually incorrect and irrelevant:

“[A]n “emerging awareness” is by definition not “deeply rooted in this Nation’s history and tradition[s]” ... Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior. Much less do they spring into existence ... because *foreign nations* decriminalize conduct ... The Court’s discussion of these foreign views ... is therefore meaningless dicta. Dangerous dicta, however, since “this Court ... should not impose foreign moods, fads, or fashions on Americans.”¹⁷

The argument has raged most fiercely in cases concerning capital punishment. An attempt to argue that execution *always* violates the Eighth Amendment prohibition of “cruel and unusual punishment” was defeated in 1976;¹⁸ but since then there have been repeated arguments that the sentence of death in particular cases may violate the Eighth

9. 539 US 558 (2003).

10. 478 US 186 (1986).

11. 539 US at 572.

12. *Id.* at 573, 576.

13. *Dudgeon v United Kingdom*, (1981) 4 EHRR 149; *Norris v Ireland*, (1988) 13 EHRR 186; *Modimos v Cyprus*, (1993) 16 EHRR 485.

14. 517 US 620 (1996).

15. *Id.* at 652.

16. 539 US at 602.

17. *Id.* at 598. The final quotation is from Thomas J in *Foster v Florida*: see note 36 below.

18. In *Gregg v Georgia*, 428 US 153 (1976).

Amendment. By shifting majorities, often narrowly divided, the Court held in the 1970s and 1980s that the Eighth Amendment does *not* permit capital punishment for the rape of an adult woman;¹⁹ that it also excludes the doctrine of felony murder (according to which, if one participant in a robbery shoots to kill, all the participants are guilty of murder);²⁰ and that the Eighth Amendment *is* infringed by an execution where the offender was less than 16 years old when the offence was committed,²¹ but *not* where the offender was less than 18 years old²² or was.²³ In most of these cases the Justices opposed to capital punishment relied on comparative reference to developments in other countries.²⁴

Writing for the majority in *Thompson v Oklahoma*, Justice Stevens bolstered his *comparative* materials by references to *international law*²⁵ – including Article 4 of the American Convention on Human Rights,²⁶ Article 68 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War,²⁷ and Article 6 of the International Covenant on Civil and Political Rights (“the ICCPR”).²⁸ The dissenters in *Stanford v Kentucky* relied on the same three treaties,²⁹ and added the 1984 Resolution of the United Nations Economic and Social Council³⁰ that “[p]ersons below 18 years of age at the time of the commission of the crime shall not be sentenced to death”.

In both cases, the comparative material was scornfully dismissed by Justice Scalia. In a footnote to his dissent in *Thompson v Oklahoma*,³¹ he described it as “totally inappropriate”:

“We must never forget that it is a Constitution for the United States of America that we are expounding. The practices of other nations, particularly other democracies, can be relevant

19. *Coker v Georgia*, 433 US 584 (1977).

20. *Enmund v Florida*, 458 US 782 (1982).

21. *Thompson v Oklahoma*, 487 US 815 (1988).

22. *Stanford v Kentucky*, 492 US 361 (1989).

23. *Penry v Lynaugh*, 492 US 302 (1989).

24. In *Coker v Georgia*, 433 US at 592, fn 4, and 433 US at 596, fn 10; in *Enmund v Florida*, 458 US at 796, fn 22; in *Thompson v Oklahoma*, 487 US at 830-31; in *Stanford v Kentucky*, 492 US at 389-390 (Brennan, Marshall, Blackmun, and Stevens JJ dissenting).

25. 487 US at 831, fn 34.

26. Adopted at San José, Costa Rica, 22 November 1969; in force 18 July 1978; 1144 UN Treaty Series 123.

27. Signed at Geneva 12 August 1949; in force 21 October 1950; 75 UN Treaty Series 287.

28. Adopted 16 December 1966; in force 3 January 1976; 993 UN Treaty Series 3.

29. 492 US at 390, fn 10.

30. Res. 1984/50, UN ESCOR Supp (No 1), p 33, UN Doc E/1984/84 (1984), endorsed by the United Nations General Assembly, GAOR Res 39/118, UN Doc A/39/51 (1985), and adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, UN Doc A/Conf. 121/22 (1986).

31. 487 US at 868, fn 4.

to determining whether a practice uniform among our people is not merely an historical accident, but rather so “implicit in the concept of ordered liberty” that it occupies a place not merely in our mores but, text permitting, in our Constitution as well ... But where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution. In the present case ..., the fact that a majority of foreign nations would not impose capital punishment upon persons under 16 at the time of the crime is of no more relevance than the fact that a majority of them would not impose capital punishment at all, or have standards of due process quite different from our own.”

In *Stanford v Kentucky*, now writing for the majority, he again insisted that “it is *American* conceptions of decency that are dispositive”; what happens in other countries is irrelevant.³²

The Court has repeatedly refused to consider whether prolonged detention on death row might constitute “cruel and unusual punishment”.³³ In two cases Justice Breyer, dissenting, has relied on comparative materials to argue that the claim should at least be considered.³⁴ On each occasion he was rebuked by Justice Thomas – who protested in *Knight v Florida*³⁵ that if such a claim had any “support in our own jurisprudence”, it would be “unnecessary” to rely on external sources, and in *Foster v Florida*³⁶ that Justice Breyer had “added another foreign court to his list while still failing to ground support for his theory in any decision by an American court”. He insisted that the Court “should not impose foreign moods, fads, or fashions on Americans”.

The issue of capital punishment for juveniles and mentally retarded persons resurfaced in *Atkins v Virginia*.³⁷ In 1996, when Daryl Atkins committed armed robbery and murder, he was not only under 18 years of age, but also mentally retarded. The Supreme Court held that to execute him would infringe the Eighth Amendment, since to execute mentally retarded persons was “cruel and unusual punishment”. The opinion relied primarily on “a national consensus” in the United States,

32. 492 US at 369, fn 1.

33. See *Lackey v Texas*, 514 US 1045 (1995); *Elledge v Florida*, 525 US 944 (1998); *Knight v Florida*, 528 US 990 (1999); *Foster v Florida*, 537 US 990 (2002).

34. *Knight v Florida*, 528 US at 995-98; *Foster v Florida*, 537 US at 992-93.

35. 528 US at 990.

36. 537 US at 990 (asterisked footnote).

37. 536 US 304 (2002).

but a footnote added a reference to other sources, including the views of “the world community”.³⁸ In dissent, Justice Scalia scathingly dismissed this reference to “the so-called ‘world community’” as deserving “the Prize for the Court’s Most Feeble Effort”.³⁹ But the favourable outcome in *Atkins*’ case had also reopened the question of execution of persons less than 18 years old; and in *Roper v Simmons*,⁴⁰ in 2005, the Court overruled *Stanford v Kentucky*, holding that the reasoning in the *Atkins* case extended to all juvenile offenders. Writing for the majority, Justice Kennedy relied specifically⁴¹ on Article 37 of the United Nations Convention on the Rights of the Child,⁴² emphasising that it had been ratified by “every country in the world ... save for the United States and Somalia”, and that it “contains an express prohibition on capital punishment for crimes committed by juveniles under 18”. He also referred to similar provisions in Article 6 of the ICCPR, Article 4 of the American Convention of Human Rights, and Article 5 of the African Charter on the Rights and Welfare of the Child.⁴³ Combined with evidence of the movement away from capital punishment in other countries, these international instruments showed “the weight of authority ... in the international community” against the execution of juveniles. On that basis Justice Kennedy proclaimed:

“It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime ... The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions ... It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.”⁴⁴

Justice Scalia could hardly contain himself. His dissenting opinion, joined by Chief Justice Rehnquist and Justice Thomas, fulminated against

38. *Id.* at 316-17, fn 21.

39. *Id.* at 347.

40. 543 US 551 (2005).

41. *Id.* at 576.

42. Opened for signature 20 November 1989; in force 2 September 1990; 1577 UN Treaty Series 3.

43. Adopted at Addis Ababa July 1990; in force 29 November 1999; OAU Doc CAB/LEG/24.9/49 (1990).

44. *Roper v Simmons*, 543 US at 578.

the audacity of a five-judge majority which

“[P]roclaims itself sole arbiter of our Nation’s moral standards – and in the course of discharging that awesome responsibility purports to take guidance from the views of foreign courts and legislatures ... I do not believe that the meaning of our Eighth Amendment ... should be determined by the subjective views of five Members of this Court and like-minded foreigners.”⁴⁵

He emphasised that the United States had *not* ratified the Convention on the Rights of the Child, while its ratification⁴⁶ of the ICCPR was subject to an express reservation of the right to impose capital punishment, and to do so specifically “for crimes committed by persons below eighteen years of age”. He pointed out that this evidence in fact undermined the majority’s conclusions: it “can only suggest that *our country* has either not reached a national consensus on the question, or has reached a consensus contrary to what the Court announces”. He also questioned the majority’s claim that life imprisonment without parole was available as a sufficient alternative, since what the Convention on the Rights of the Child prohibits for offenders under 18 is not only “capital punishment”, but also “life imprisonment without possibility of release”.⁴⁷ He argued that the majority’s apparent belief “that American law should conform to the laws of the rest of the world” was highly selective and inconsistent, since in fact a number of fundamental American constitutional doctrines are different from those adopted elsewhere:⁴⁸

“The Court should either profess its willingness to reconsider all these [other] matters in light of the views of foreigners, or else it should cease putting forth foreigners’ views as part of the *reasoned basis* of its decisions. To invoke alien law when it agrees with one’s own thinking, and ignore it otherwise, is not reasoned decision-making, but sophistry.”

In a separate opinion Justice O’Connor also dissented. She was not convinced that within the United States a national consensus had emerged against the execution of juveniles, and hence there was nothing for the international material to reinforce or confirm. At the same time, she dissociated herself from Justice Scalia’s position:

“I disagree with Justice Scalia’s contention ... that foreign and international law have no place in our Eighth Amendment

45. *Id.* at 608.

46. Deposited 8 June 1992; effective 8 September 1992; 1676 UN Treaty Series 543.

47. *Roper v Simmons*, 543 US at 623.

48. *Id.* at 624-27.

jurisprudence. Over the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency ... Obviously, American law is distinctive in many respects ... But this Nation's evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries. On the contrary, we should not be surprised to find congruence between domestic and international values, especially where the international community has reached clear agreement – expressed in international law or in the domestic laws of individual countries – that a particular form of punishment is inconsistent with fundamental human rights.”⁴⁹

Perhaps encouraged by the success of the challenge in *Roper v Simmons*, other Eighth Amendment challenges to specific aspects of capital punishment continue to come before the Court.⁵⁰ In June 2007, in *Uttecht v Brown*,⁵¹ a 5:4 majority upheld a sentence of death despite the fact that a juror was excused from service because his “scruples against the death penalty” would “substantially impair” his impartiality as a juror. On 16 April 2008, in *Baze v Rees*,⁵² the Court rejected a challenge to the system of execution by lethal injection. The procedure most commonly used involves a “cocktail” of three drugs: the first induces unconsciousness, the second paralysis, and the third cardiac arrest. The procedure is intended to be humane. But it was common ground that if the first drug failed, the second and third would cause excruciating pain, and that this would be “cruel and unusual punishment”. The decision turned on the narrow factual issue of whether this was a significant risk. The constitutionality of capital punishment in general was not in issue: even

49. *Id.* at 604-05.

50. The cases include repeated challenges to the degree of sentencing discretion, and the suitability of criteria and procedures used to guide the discretion, in particular sentencing statutes. See, e.g., *McCleskey v Kemp*, 481 US 279 (1987); *Lowenfield v Phelps*, 484 US 231 (1988); *Maynard v Cartwright*, 486 US 356 (1988); *Mills v Maryland*, 486 US 367 (1988); *Blystone v Pennsylvania*, 494 US 299 (1990); *Boyd v California*, 494 US 370 (1990); *Walton v Arizona*, 497 US 639 (1990) – and most recently *Kansas v Marsh*, 548 US 163 (2006), where the dissenters (Stevens, Souter, Ginsburg and Breyer JJ) did *not* rely on international law or opinion, but that did not prevent Scalia J from returning to the fray. At 188 he noted the “sanctimonious criticism of America’s death penalty” that “exists in some parts of the world”, but retorted (a) that “most of the countries to which these finger-waggers belong had the death penalty themselves until recently” and (b) that many European countries “abolished the death penalty in spite of public opinion rather than because of it” – in part because of pressure from the European Union, whose views had been relied on in cases like *Atkins v Virginia* “in narrowing the power of the American people to impose capital punishment”.

51. 551 US 1, 127 S.Ct. 2218 (2007).

52. 128 S.Ct. 1520 (2008).

so, Justices Ginsburg and Souter dissented, and Justice Stevens, while agreeing with the majority on the immediate issue, announced that in his view, the time has come for a ruling that capital punishment was *always* unconstitutional.

In all these cases, what was at issue was capital punishment for murder. For almost 20 years after *Coker v Georgia*, where execution for rape of an adult woman was held to be unconstitutional,⁵³ no such sentence was imposed. But in 1995 the State of Louisiana reintroduced capital punishment for rape of a victim who was less than 12 years of age; and in the most recent Supreme Court decision, *Kennedy v Louisiana*,⁵⁴ that provision was held to be unconstitutional. The Opinion of the Court was written by Justice Kennedy (joined by Justices Stevens, Souter, Ginsburg and Breyer); the dissenting opinion was written by Justice Alito (joined by Chief Justice Roberts and by Justices Scalia and Thomas).⁵⁵ The case had been argued on 16 April 2008 – the very day that the decision in *Baze v Rees* was handed down – and was decided on 25 June.

The Opinion of the Court returned to the original formula in *Trop v Dulles*:⁵⁶ “the evolving standards of decency that mark the progress of a maturing society”. Expounding that formula in the light of *Roper v Simmons* and *Atkins v Virginia*, the Court concluded that the Eighth Amendment prohibits capital punishment for the rape of a child “where the crime did not result, and was not intended to result, in the death of the victim”. The precise holding was thus narrowly defined. In the course of its reasoning, however, the Court stated the proposition more broadly:

“Our concern here is limited to crimes against individual persons. We do not address, for example, crimes defining and punishing treason, espionage, terrorism, and drug kingpin activity, which are offenses against the State. As it relates to crimes against individuals, though, the death penalty should not be expanded to instances where the victim’s life was not taken.”

The relevance of practices in other countries, as well as international law, had been squarely before the Court, in the form of an *amicus curiae* brief filed by several bodies representing the English legal profession (including the Human Rights Committees of both the Bar and the Law Society). The brief was signed by four former Law Lords (Lord Browne-Wilkinson, Lord Griffiths, Lord Millett and Lord Steyn) and 62 Queen’s Counsel (including

53. Note 19 above.

54. 128 S.Ct. – (2008), decided 25 June 2008.

55. Compare the same 5:4 division in *Boumediene v Bush* and *Dada v Mukasey*, notes 106-07 below.

56. Note 1 above.

Cherie Blair). It invoked a long catalogue of resolutions and reports by the United Nations and its agencies, culminating in the General Assembly's Resolution in December 2007, calling on "all States that still maintain the death penalty to ... progressively restrict the use of the death penalty and reduce the number of offences for which it may be imposed".⁵⁷ During the course of the oral arguments, Justice Stevens had drawn attention to the brief filed by "the English law lords", but conceded: "I know it is not popular to refer to international commentary on issues like this". And when the case was finally decided, neither the majority nor the dissenters made any reference to international comparisons at all – not even to the *amicus* brief. The Court based its conclusions both on "objective indicia of consensus" and on "our own independent judgment"; but the indicia relied on were drawn entirely from developments in the United States.

All this has attracted much public controversy and Congressional disapproval. From time to time individual Supreme Court Justices, including Stephen Breyer,⁵⁸ Sandra Day O'Connor,⁵⁹ and Ruth Bader Ginsburg,⁶⁰ have spoken out extra-judicially to support the use of international law; and in 2005 a *New Yorker* profile of Justice Anthony Kennedy, emphasising his internationalism, added fuel to the flames.⁶¹ In the Congress, the majority House leader Tom DeLay (Republican, Texas), before his own indictment on charges related to campaign fraud effectively ended his Congressional career,⁶² made repeated attacks on Kennedy's reliance on un-American sources.⁶³ His colleague Tom Feeney (Republican, Florida) has been the

57. General Assembly Resolution GA/10678, §2(c), UN Doc A/C.3/62/L.29 (17 December 2007).

58. See Stephen Breyer, "Keynote Address" (2003) 97 *American Society of International Law Proceedings* 265; Norman Dorsen, "The Relevance of Foreign Legal Materials in US Constitutional Cases: A Conversation between Justice Antonin Scalia and Justice Stephen Breyer" (2005) 3 *International Journal of Constitutional Law* 519; Interview with Stephen Breyer, "Toward 'Active Liberty'", *Harvard Law Bulletin*, Spring 2006 at 14, 18, <http://www.law.harvard.edu/alumni/bulletin/2006/spring/feature_1.php> (accessed 2 June 2008).

59. See Sandra Day O'Connor, "Federalism of Free Nations" (1996) 28 *New York University Journal of International Law and Politics* 35; Sandra Day O'Connor, "Broadening Our Horizons: Why American Lawyers Must Learn About Foreign Law" (1998) 45 *Federal Lawyer* 20; Sandra Day O'Connor, "Keynote Address" (2002) 96 *American Society of International Law Proceedings* 348.

60. See Ruth Bader Ginsburg and Deborah Merritt, "Affirmative Action: An International Human Rights Dialogue" (1999) 21 *Cardozo Law Review* 253; Ruth Bader Ginsburg, "Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication" (2004) 22 *Yale Law & Policy Review* 329; Ruth Bader Ginsburg, "'A Decent Respect to the Opinions of [Human]kind': The Value of a Comparative Perspective in Constitutional Adjudication" (2005) 99 *American Society of International Law Proceedings* 351; Ruth Bader Ginsburg, "Judicial Independence: The Situation of the US Federal Judiciary" (2006) 85 *Nebraska Law Review* 1, at 9.

61. Jeffrey Toobin, "Swing Shift: How Anthony Kennedy's Passion for Foreign Law Could Change the Supreme Court", *New Yorker*, 12 September 2005, pp 42-51.

62. See *New York Times*, 29 September 2005, p 1.

63. See *New York Times*, 8 April 2005, §A, p 21; *New York Times*, 20 April 2005, §A, p 20; *Washington Post*, 20 April 2005, §A, p 4; *Investor's Business Daily*, 3 May 2005, §A, p 12; Tony Mauro, "U.S. Supreme Court vs The World", *USA Today*, 20 June 2005, p 15A.

principal sponsor of a Resolution⁶⁴

“[t]hat judicial determinations regarding the meaning of the Constitution of the United States should not be based in whole or in part on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws or pronouncements inform an understanding of the original meaning of the Constitution of the United States.”

A preamble to the Resolution protests that “Americans should not have to look for guidance on how to live their lives from the often contradictory decisions of any of hundreds of other foreign organizations”, and that “inappropriate judicial reliance on foreign judgments, laws or pronouncements threatens the sovereignty of the United States [and] the separation of powers”. The preamble also recites that in 1776

“[T]he Declaration of Independence announced that one of the chief causes of the American Revolution was that King George had “combined to subject us to a jurisdiction foreign to our constitution and unacknowledged by our laws.”

In an earlier resolution introduced by Congressman Sam Graves (Republican, Missouri) on 21 November 2003, the House of Representatives “reminds the Justices of the Supreme Court of the United States of [their] judicial oath”; “expresses its disapproval of the consideration of foreign laws and opinions in the decisions of the Court”, and “advises the Justices not to incorporate foreign laws or opinions in future decisions of the Court”.⁶⁵

These are non-binding resolutions; but another Congressman, Dr Ron Paul (Republican, Texas), has twice introduced a Bill for legislation “[t]o ensure that the courts interpret the Constitution in the manner that the Framers intended”, to be titled the *American Justice for American Citizens Act*.⁶⁶ Its operative section would provide that

“Neither the Supreme Court of the United States nor any lower Federal court shall, in the purported exercise of judicial power to interpret and apply the Constitution of the United States, employ the constitution, laws, administrative rules, executive

64. The first version (H Res 568, 108th Cong (2004)) referred to “the laws of the United States” rather than “the Constitution”. It was introduced on 17 March 2004. The present version (H Res 97, 109th Cong (2005)) was introduced on 15 February 2005. On 20 March 2005 it was also introduced in the Senate, by Senator John Cornyn, Texas (S Res 92, 109th Cong (2005)). It was introduced in the House again on 3 May 2007 (H Res 372, 110th Cong (2007), and again referred to a subcommittee.

65. H Res 468, 108th Cong (2003).

66. First introduced on April Fools Day 2004 (H Res 4118, 108th Cong (2004)); reintroduced on 14 April 2005 (H Res 1658, 109th Cong (2005)).

orders, directives, policies, or judicial decisions of any international organization or foreign state, except for the English constitutional and common law or other sources of law relied upon by the Framers of the Constitution of the United States.”

Another Bill for a *Constitution Restoration Act*, introduced simultaneously in both Houses on 3 March 2005,⁶⁷ would provide that

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

II.

This kind of legal isolationism has many difficulties. For one thing, its proponents apparently accept the influence of English common law as it was at the time of the adoption of the Constitution. Yet according to common law doctrine at that time, international law was part of the common law: it was only twelve years before the Revolution when Lord Mansfield reiterated “[t]hat the law of nations, in its full extent, was part of the law of England”.⁶⁸ In America at the end of the nineteenth century that was still the case. As the Supreme Court famously put it in *The Paquete Habana*:⁶⁹

“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.”

In recent years this proposition has been subject to vigorous academic debate – but only as to whether international law is part of “state” or “federal” common law.⁷⁰ In the latter view it would, of course, be accorded a preemptive operation as against the law of the States.

67. H Res 1070, 109th Cong (2005); S 520, 109th Cong (2005).

68. *Triquet v Bath*, (1764) 3 Burr 1478 at 1481 (97 ER 936). At much the same time Sir William Blackstone’s *Commentaries on the Laws of England* (1 ed 1765-69) took a similar view: see note 114 below.

69. 175 US 677, 700 (1900).

70. See, e.g., Curtis Bradley and Jack Goldsmith, “Customary International Law as Federal Common Law: A Critique of the Modern Position” (1997) 110 *Harvard Law Review* 815; Harold Hongju Koh, “Is International Law Really State Law?” (1998) 111 *Harvard Law Review* 1824; Ernest Young, “Sorting Out the Debate Over Customary International Law” (2002) 42 *Virginia Journal of International Law* 365.

In the second place, despite the controversy about using international law to interpret the Constitution, it is clear that, in the United States as elsewhere, legislation should be construed so far as possible so as not to infringe international law. The classic statement is that of Chief Justice Marshall in *The Charming Betsy*, in 1804:⁷¹ “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains”. Ironically, the fullest modern exposition of the doctrine was by Justice Scalia, in his 1993 dissent in *Hartford Fire Insurance Co v California*.⁷² In another case in 1993, the principle was invoked both by Justice Stevens (for the majority) and by Justice Blackmun (dissenting): the latter described it as “a well-settled rule”.⁷³ Confusingly, the same passage in *The Charming Betsy* has also been invoked for the different principle that, so far as possible, legislation will be construed so as to avoid “serious constitutional problems”,⁷⁴ but Justice Scalia’s more accurate reading in the *Hartford Fire Insurance Case* clearly remains good law.

Most importantly, in the earlier stages of the Supreme Court’s history, it was taken for granted that the operation of the United States Constitution was to be understood in the wider context of international law. In the early years Chief Justice Marshall repeatedly invoked international standards.⁷⁵ In cases where he had to work out the legal consequences of the acquisition of Florida (ceded by Spain in 1819),⁷⁶ or the settlement of lands belonging to the Indian tribes,⁷⁷ he repeatedly took as his starting point in the principles of international law governing the acquisition of sovereignty by conquest or cession; and in later years, as new territories came under American

71. *Murray v The Charming Betsy*, 6 US (2 Cranch) 64 at 188 (1804).

72. 509 US 764 at 814-17 (1993).

73. *Sale v Haitian Centers Council Inc*, 509 US 155 at 207 (1993). See also *Cunard Steamship Co Ltd v Mellon*, 262 US 100 at 132 (1923) (Sutherland J dissenting); *McCulloch v Sociedad Nacional*, 372 US 10 at 21 (1963); *Weinberger v Rossi*, 456 US 25 at 32 (1982); *Société Nationale Industrielle Aérospatiale v United States District Court*, 482 US 522 at 555, 567 (1987) (Blackmun J dissenting); *Sosa v Alvarez-Machain*, 542 US 692 at 761 (2004) (Breyer J dissenting).

74. *DeBartolo Corp v Gulf Coast Trades Council*, 485 US 568, at 575 (1988). The confusion appears to date from *Dalia v United States*, 441 US 238, at 265 (1979), and *National Labor Relations Board v Catholic Bishop of Chicago*, 440 US 490, at 500 (1979). Cf. *Concrete Pipe & Products of California Inc v Construction Laborers Pension Trust for Southern California*, 508 US 602, at 629 (1993); *United States v International Business Machines Corp*, 517 US 843, at 868 (1996); *Steel Co, AKA Chicago Steel & Pickling Co v Citizens for a Better Environment*, 523 US 83, at 133 (1998); *McConnell v Federal Election Commission*, 540 US 93, at 192 (2003).

75. For example, in *Gibbons v Ogden*, US (7 Peters) 51, at 86-87 (1832), he said that the freedom of interstate trade was derived “from those laws whose authority is acknowledged by civilized man throughout the world ... The Constitution found it an existing right, and gave to Congress the power to regulate it.”

76. See, e.g., *American Insurance Co v Canter*, 26 US (1 Peters) 511, at 542 (1828); *United States v Percheman*, 32 US (7 Peters) 51, at 86-87 (1832).

77. See, e.g., *Johnson v McIntosh*, 21 US (8 Wheat) 543 at 573, 588 (1823); *Worcester v Georgia*, 312 US (6 Peters) 515, at 542-44 (1832).

sovereignty, those principles were consistently invoked.⁷⁸ The high point of this development came at the end of the nineteenth century. On July 7, 1898 President William McKinley signed the Newlands Resolution,⁷⁹ effectively annexing the islands of Hawaii to the United States; and on 11 April 1899 the Treaty of Paris⁸⁰ came into force, ending the Spanish-American War and effecting the cession of Puerto Rico, Guam and the Philippines from Spain to the United States. These new acquisitions gave rise to both political and legal controversy: what was the basis in the Constitution for the acquisition of sovereignty?⁸¹ Did the Constitution apply to the new territories, and if so how? Predictably, this last question focused initially on constitutional provisions relating to trade and customs duties – on Article I, §8, cl 1, which provides that “all Duties, Imposts and Excises shall be uniform throughout the United States”, and on Article I, §9, cl 5, which provides that: “No Tax or Duty shall be laid on Articles exported from any State”. Did these provisions apply, for example, to trade between New York and Puerto Rico?

The questions were answered by a series of cases known as “the Insular Cases” (that is, cases relating to islands), which established that once the treaty of cession took effect in April 1899, Puerto Rico was no longer a “foreign country”.⁸² The pivotal case of *Downes v Bidwell*⁸³ upheld the validity of the Foraker Act⁸⁴ – enacted to establish a civil government for Puerto Rico, providing that goods imported into the United States from Puerto Rico were liable to fifteen percent of the duty that would have been paid

78. See, e.g., *Jones v United States*, 137 US 202, at 212 (1890) (Caribbean islands claimed under the *Guano Islands Act* 1852). See also *United States v Huckabee*, 83 US (16 Wall) 414, at 434-35 (1873) (applying the same principles to land in Alabama after the Civil War); *Chicago, Rock Island & Pacific Railway Co v McGlenn*, 114 US 542, at 546 (1885) (applying them by analogy to the cession of territory to the federal government by the State of Kansas). Conversely, the same principles had been invoked when American territory fell under the control of British forces during the War of Independence: see, e.g., *United States v Rice*, 17 US (4 Wheat) 246, at 254 (1819); *Shanks v Dupont*, 28 US (3 Peters) 242, at 246 (1830).

79. So called not because it gave the United States “new lands”, but because it had been introduced by Congressman (later Senator) Francis G. Newlands (Democrat, Nevada).

80. Signed at Paris 10 December 1898, US Ratification 6 February 1899, Spanish Ratification 19 March 1899, Ratifications exchanged 11 April 1899, 2 US Treaties 1690, 90 British & Foreign State Papers 382.

81. See HW Bicklé, “The Constitutional Power of Congress over the Territory of the United States” (1901) 49 *American Law Register* No 8, pp 11-120 (continued by *University of Pennsylvania Law Review*), with a Supplement at 104-120 on the Insular Cases.

82. Thus, once the treaty of cession became effective, the old legislation imposing a duty on “articles imported from foreign countries” could no longer apply: see *De Lima v Bidwell*, 182 US 1 (1901); *Goetze v United States*, 182 US 221 (1901); *Fourteen Diamond Rings v United States*, 183 US 176 (1901). But before that date duties could validly be imposed on shipments both from New York to Puerto Rico and from Puerto Rico to New York: see *Dooley v United States (No 1)*, 182 US 222 (1901); and *Armstrong v United States*, 182 US 243 (1901).

83. 182 US 244 (1901).

84. 31 Stat 77, c 191 (12 April 1900).

“upon like articles ... imported from foreign countries”. It was held that this provision did not infringe the requirement of uniformity “throughout the United States” – since, even though Puerto Rico was no longer a foreign country, it was also not a part of the United States.

As in all the Insular Cases, there was no majority view.⁸⁵ Broadly, the dissenters insisted that the 15% duty was unconstitutional because Congress, in legislating for the new islands, was bound by the Constitution just as it is in other legislative activity. All five majority judges relied on international law to argue that, in cases of conquest or cession, the new sovereign is free to determine what laws should apply to the territory thereby acquired. Justice Brown, for example, proceeded on the premise “that our power with respect to such territories is the same power which other nations have been accustomed to exercise with respect to territories acquired by them”.⁸⁶ He left open the possibility that the freedom to legislate might be constrained by *some* constitutional provisions: he suggested⁸⁷ that the requirement of uniform duties “throughout the United States” raised a merely geographical issue, and that the answer might be different for constitutional limitations going to “the very root of the power of Congress” to pass “a bill of that description” at all. Even legislation for dependent territories might have to observe *those* distinctions, which would obviously include provisions in the Bill of Rights.

The other majority Justices agreed with Justice White. In his view the whole question was one for Congressional choice; but if Congress enacted legislation “incorporating” the new territory into the United States, the Constitution would become fully applicable. A few years later, it looked as if this “incorporation” theory had been settled as the definitive answer: since the Philippines had *not* been incorporated into the United States by Congress, but Alaska *had* been, the Supreme Court held that the Sixth Amendment guarantee of trial by jury did not apply in the Philippines, but did apply in Alaska.⁸⁸ Yet even Justice White had recognized that *some* constitutional provisions “are an absolute denial of authority under any circumstances or conditions to do particular acts”, and that these restrictions “cannot be under any circumstances transcended, because of the complete absence of power.”⁸⁹

85. Harlan, Brewer and Peckham JJ consistently joined Fuller CJ in seeking to give maximum effect to the acquisition of the new territories, while Gray, Shiras, White and McKenna JJ consistently sought to maintain their differential status as compared with the mainland United States. The swing voter was Brown J.

86. 182 US at 285.

87. *Id.* at 277.

88. See respectively *Dorr v United States*, 195 US 138 (1904); *Rasmussen v United States*, 197 US 516 (1905).

89. 182 US at 294-95.

Accordingly, in more recent cases⁹⁰ the simple “incorporation” approach has been modified to allow a more “functional” assessment of particular individual problems; and in the Court’s dramatic 5:4 split in *Boumediene v Bush* in June 2008⁹¹, the majority used this “functional” approach to hold that the constitutional protection of habeas corpus applies in Guantánamo Bay, even though it has notoriously *not* been “incorporated” into the United States.

Back in 1901 in *Downes v Bidwell*, the effect of Justice White’s “incorporation” theory was that the “sole and only issue”⁹² was whether Puerto Rico had been “incorporated into and become an integral part of the United States”. In part this was a question of fact; but in part it depended on an interpretation of the Constitution, since one argument was that it was “incompatible with the Constitution ... to accept a cession of territory from a foreign country without complete incorporation following as an immediate result.”⁹³ It was in rebuttal of that submission that Justice White relied most heavily on international law – particularly as it had been expounded by Henry Wager Halleck, who during the American Civil War had preceded Ulysses S. Grant as Commander-in-Chief of the Union forces.⁹⁴ He quoted at length⁹⁵ from Halleck’s account⁹⁶ of the rules of international law that govern acquisition of territory, relying in particular on Halleck’s account of the different solutions available. First, the new sovereign may choose to govern its new subjects according to their existing laws. Secondly, “if he incorporates them with his former states, giving to them the rights, privileges and immunities of his own subjects, he does for them all that is due from a humane and equitable conqueror to his vanquished foes”. But thirdly, if they are “a fierce, savage and restless people”, he may choose to keep them on “a tighter rein”, to curb their “impetuosity, and to keep them under subjection”.⁹⁷

Accordingly, Justice White concluded that “under the Constitution”, the United States “in virtue of its sovereignty” has “the full right to acquire territory enjoyed by every other sovereign nation”:⁹⁸ “The general principle of the law of nations, already stated, is that acquired territory, in the absence

90. Beginning with *Reid v Covert*, 354 US 1 (1957).

91. *Boumediene v Bush*, 128 S.Ct. – (2008), decided 12 June 2008.

92. 182 US at 299.

93. *Id.* at 299-300.

94. See JF Marszalek, *Commander of All Lincoln’s Armies: A Life of General Henry W Halleck* (2004).

95. 182 US at 300-02.

96. HW Halleck, *International Law* (3 ed 1893) 76, 125, 814.

97. *Id.* at 814, quoted 182 US at 301-02. Of course, this last option would no longer be permitted by international law: see JE Horey, “The Right of Self-Government in the Commonwealth of the Northern Mariana Islands” (2003) 4 *Asian-Pacific Law & Policy Journal* 180, at 212.

98. 182 US at 302-03.

of agreement to the contrary, will bear such relation to the acquiring government as may be by it determined.”⁹⁹

The dissenting opinions seemed almost to be saying that the Constitution must prevail whatever international law might say, much as the Supreme Court’s Congressional critics seek to argue today. Chief Justice Fuller insisted that

“The United States is a separate, independent, and sovereign nation; but it does not derive its powers from international law, which, though a part of our municipal law, is not a part of the organic law of the land. The source of national power in this country is the Constitution of the United States; and the government, as to our internal affairs, possesses no inherent sovereign power not derived from that instrument, and inconsistent with its letter and spirit.”¹⁰⁰

Justice Harlan concurred in the Chief Justice’s opinion, but also wrote separately:

“In my opinion, Congress has no existence and can exercise no authority outside of the Constitution. Still less is it true that Congress can deal with new territories just as other nations have done or may do with their new territories. This nation is under the control of a written Constitution, the supreme law of the land and the only source of the powers which our Government, or any branch or officer of it, may exert at any time or at any place.”¹⁰¹

He denied that “we may solve the question of the power of Congress under the Constitution, by referring to the powers that may be exercised by other nations”; and concluded:

“We heard much in argument about the “expanding future of our country”. It was said that the United States is to become what is called a “world power”; and that if this Government intends to keep abreast of the times and be equal to the great destiny that awaits the American people, it must be allowed to exert all the power that other nations are accustomed to exercise. My answer is, that the fathers never intended that the authority and influence of this nation should be exercised otherwise than in accordance with the Constitution.”¹⁰²

99. *Id.* at 306.

100. *Id.* at 369.

101. *Id.* at 380.

102. *Id.* at 386.

For all this, the dissenters' insistence that the issue must be controlled by the Constitution, and not by international law, was itself based on Henry Halleck's view of international law: in 1861, he had written that the power to be exercised in a new territory must depend on "the institutions and laws of the new sovereign, which, though conformable to the general rule of the law of nations, affect the construction and application of that rule to particular cases".¹⁰³ The conduct of the new sovereign must conform to international law, but the operation of that law must be modified by its own Constitution.

In an early case, Chief Justice Marshall had spoken of "the American empire";¹⁰⁴ and throughout the Insular Cases that phrase was quoted repeatedly.¹⁰⁵ Comparing the judicial attitudes in the Insular Cases with those in the current controversies, one might be tempted to say that there is a certain American mindset that is happy to rely on international law to help establish the American empire, but equally happy to ignore it after the empire has been established. In fact, however, the four judges who in other cases have persistently refused to acknowledge the influence of international law are the same four judges who now refuse in *Boumediene v Bush*¹⁰⁶ to acknowledge the relevance of the Constitution as well: Chief Justice Roberts and Justices Scalia, Thomas and Alito.¹⁰⁷ The only real lesson to be drawn is that the ideological significance of constitutional theories varies according to the political context; and the political context of President McKinlay was very different from that of President Bush.

III.

An unusual feature of the recent American debate is that it relates equally to international law and comparative law without discrimination. I say this is unusual because, while the relation between national and international law needs careful analysis everywhere, most judges outside the United States habitually take notice of decisions from countries outside their own. Indeed, this tends to be particularly true in constitutional law, and typically the decisions most often consulted are those of the United States Supreme Court. Why this resort is so rarely reciprocal is one of the more perplexing questions about American judicial attitudes.¹⁰⁸

103. HW Halleck, *International Law* (1 ed 1861) c 33, §14. Halleck's work had also been relied on in *Dooley v United States (No 1)*, note 82 above, at 230-31, and in *Jones v United States*, note 78 above, at 212.

104. *Loughborough v Blake*, 18 US (Wheat) 317, at 319 (1820).

105. See, e.g., 182 US at 46, 52, 138, 261, 279, 286, 353.

106. Note 91 above.

107. See also *Dada v Mukasey*, 128 S.Ct. — (2008), decided 16 June 2008, where the same four Justices dissented again from a decision affirming the procedural rights of aliens.

108. See Cheryl Saunders, "The Use and Misuse of Comparative Constitutional Law" (2006) 13 *Indiana Journal of Global Legal Studies* 37.

One reason why so many judges elsewhere are relaxed about the use of foreign precedents is precisely that they are *not* strictly precedents. No matter how close the parallel may be between particular constitutional problems, the Constitutions are obviously different: at most, the decisions made by one Court are only “persuasive” for another. By contrast, there is an obvious sense in which rules of international law are binding on individual countries, at least in their external relations. There is thus an obvious possibility that international obligations might have some effect within the domestic legal system as well, and how far that is indeed the case, it is a question calling for careful analysis.

In the case of treaties, the Australian answer has largely evolved on traditional British lines. The Executive has unlimited power to sign and ratify a treaty with no parliamentary involvement, though in practice, since 1996 proposed treaties have been tabled in both Houses of Parliament and scrutinised by a Joint Standing Committee.¹⁰⁹ Once ratified, a treaty binds Australia internationally, but has no direct domestic effect until it is implemented by legislation.¹¹⁰ That the Commonwealth’s external affairs power covers such legislation, regardless of the treaty’s subject matter, was established by the *Tasmanian Dam Case*.¹¹¹

All this is sometimes thought to mean that Australia has adopted the “transformation” doctrine: that is, that no rule of international law (including customary international law) can have direct legal effect in Australia until it is “transformed” by a positive legislative act. This is contrasted with “incorporation”: that is, the old idea that customary international law was automatically incorporated into the common law. In *Chow Hung Ching v the King*,¹¹² Sir Owen Dixon thought that contemporary scholarship at Oxford¹¹³ had shown Blackstone’s version of the “incorporation” theory¹¹⁴ to be “without foundation”. But since that time the English courts have decisively reverted to the “incorporation” theory, led by Lord Denning’s public conversion in

109. See Hilary Charlesworth, Madelaine Chiam, Devika Howell and George Williams, “Deep Anxieties: Australia and the International Legal Order” (2003) 25 *Sydney Law Review* 423.

110. See, e.g., *Brown v Lizars*, (1905) 2 CLR 837; *Dietrich v The Queen*, (1992) 177 CLR 292.

111. *Commonwealth v Tasmania*, (1983) 158 CLR 1.

112. (1948) 77 CLR 449, at 477-78.

113. He cited JL Brierly, “International Law in England” (1935) 51 *Law Quarterly Review* 24, at 31; and WS Holdsworth, “Relation of English Law to International Law”, in *Essays in Law and History* (1946) 260, at 267.

114. In the passage cited by Dixon J (William Blackstone, *Commentaries on the Law of England* (15 ed, 1809) Bk 4, at 267), Blackstone had said that the law of nations is “adopted in its full extent by the common law, and is held to be a part of the law of the land”. In a further comment not quoted by Dixon J, he had expressly rejected the “transformation” theory, insisting that even when Acts of Parliament are enacted to implement rules of international law, they “are not to be considered as introductive of any new rule, but merely as declaratory”.

the *Trendtex Trading* case;¹¹⁵ and the only further comment in the High Court has been a remark by Sir Harry Gibbs, soon after *Trendtex Trading*, that it was “unnecessary to discuss the question”.¹¹⁶

Perhaps it still is. For one thing, the definitions of “incorporation” and “transformation” are hopelessly confused.¹¹⁷ For another, even if we assume that customary international law is automatically “incorporated”, that still gives it only the status of common law, which at a pinch can always be overridden by legislation. Thirdly, even if customary international law is not itself a *part of* the common law, it is well settled that it can be used to influence the development of the common law. Invariably cited nowadays in support of this proposition is what Sir Gerard Brennan said in the *Mabo* case:¹¹⁸

“The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.”

It is equally well settled that international law can be used as an aid to the interpretation of statutes.¹¹⁹ In 1908, Justice O’Connor was paraphrasing *Maxwell on Statutes*:¹²⁰

“[E]very Statute is to be so interpreted and applied as far as its language admits as not to be inconsistent with the comity of nations or with the established rules of international law.”

It is sometimes said that any interpretive use of a treaty should be limited to interpreting statutes enacted *after* the treaty. Three years ago in *Coleman v Power*,¹²¹ when Justice Kirby relied on the ICCPR, adopted in 1966, in interpreting Queensland legislation enacted in 1931, Chief Justice Gleeson found it “difficult to see” how this could advance the argument. A

115. *Trendtex Trading Corporation Ltd. v Central Bank of Nigeria*, [1977] 1 QB 529, at 554. See now *R v Bow Street Metropolitan Stipendiary Magistrate; Ex p Pinochet Ugarte (No 1)*, [2000] 1 AC 61, at 77, 89-90, 98, 103; *Ex p Pinochet Ugarte (No 3)*, [2000] 1 AC 147, at 251-52, 276, 285.

116. *Koowarta v Bjelke-Petersen*, (1983) 153 CLR 168, at 203-04.

117. See Kristin Walker, “Treaties and the Internationalisation of Australian Law”, in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 204, at 228-234; Sir Anthony Mason, “International Law as a Source of Domestic Law”, in Brian Opeskin and Donald Rothwell (eds), *International Law and Australian Federalism* (1997) 210, at 212-18.

118. *Mabo v Queensland (No 2)*, (1992) 175 CLR 1, at 42.

119. For customary international law see *Barcello v Electrolytic Zinc Co of Australasia Ltd*, (1932) 48 CLR 391; *Meyer Heine Pty Ltd v China Navigation Co Ltd*, (1966) 115 CLR 10. For treaties see *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*, (1992) 1, at 38.

120. 3 ed (1905) 200, as paraphrased in *Jumbunna Coal Mine NL v Victorian Coal Miners’ Association*, (1908) 6 CLR 309, at 363.

121. (2004) 220 CLR 1 (Kirby J at 91-96, Gleeson CJ at 28 and generally at 27-30).

more definite limit on interpretive options, recently acknowledged by Justice Kirby,¹²² is that the statute must be open to interpretation: if the statute is clearly inconsistent with international law, the statute must prevail. In the wartime case of *Polites v Commonwealth*¹²³ two Greek nationals claimed that, as aliens, they were protected against conscription for military service by a rule of international law. But the relevant regulations applied expressly and solely to aliens; and the *National Security Act* 1939, which had initially excluded the conscription of aliens, had been amended to remove that exclusion. Thus, assuming (without deciding) that there was such a rule of international law as the plaintiffs claimed, the Court held that it was overridden by the clear effect of the legislation.

It may be that international law can influence legal outcomes in other ways – as in the *Teoh* case,¹²⁴ which tailored the rules of natural justice to a “legitimate expectation” that the Australian government would comply with its international obligations. That decision is now controversial, and in *Ex parte Lam*¹²⁵ the High Court unanimously declined to follow it. It must be said, however, that the most biting criticism – that of Justices Gummow and McHugh – appeared to be directed at the concept of “legitimate expectation”, rather than the attempt to give it a content derived from international law.

The controversial question that is relevant here is whether international law can be used as an aid to the interpretation of the Australian Constitution – in other words, whether the settled rule about interpretation of statutes should extend to interpretation of the Constitution as well. One argument in favour of this extension is that the Australian Constitution is itself embodied in a statute, the *Commonwealth of Australia Constitution Act, 1900* (Imp). But that argument was scotched by Sir Owen Dixon in the *Polites* case. The plaintiffs had argued not only that the legislation should be construed so as not to infringe international law, but alternatively that the legislative power with respect to “defence” (Section 51(vi) of the Constitution) should be construed so as not to authorise such legislation. Presumably that would involve an implied limitation, confining the defence power – or possibly *all* constitutional grants of legislative power – to conformity with international law. Justice Dixon refused to entertain any such limitation. The idea, he said, “ought not to be countenanced”. The Constitution envisages “an autonomous government”, to which it gives “plenary legislative power”. To read it down by reference to international law “is to apply to the establishment of legislative power a rule for the construction of legislation

122. In *Re Woolley; Ex p Applicants M276/2003*, (2005) 225 CLR 1, at 71.

123. (1945) 70 CLR 60.

124. *Minister for Immigration and Ethnic Affairs v Teoh*, (1995) 183 CLR 273.

125. *Re Minister for Immigration and Multicultural Affairs; Ex p Lam*, (2003) 214 CLR 1.

passed in its exercise". He thought it "nothing to the point" that the Constitution derives its force from an Imperial enactment, and in that sense is itself a statute. Although it may be a statute in that sense, "[i]t is none the less a constitution".¹²⁶

Yet this rebuttal may not be conclusive. A limitation of the kind apparently proposed in *Polites* would not be based on any interpretation of the language used in the constitutional text, nor even on inference from its "basic structure"; it would have to be introduced from outside, as a limitation imposed upon grants of power from an external source. To say that the Constitution is "autonomous", and not subject to external limitations, is not to exclude the possibility that in reading the language used *within* the constitutional text – and possibly even in teasing out what is logically entailed in its structure – judges confronted with alternative readings may legitimately choose the reading that conforms more closely to international law.

Over the last decade this more modest approach has repeatedly been proposed by Justice Kirby – initially in *Newcrest Mining (WA) Ltd v Commonwealth*,¹²⁷ where he announced what he called an "interpretative principle":

"Where the Constitution is ambiguous, this Court should adopt that meaning which conforms to the principles of fundamental rights rather than an interpretation which would involve a departure from such rights."

He conceded that "[i]f the Constitution is clear, the Court must ... give effect to its terms." But he argued that, for other situations, the relevance of international law is still evolving:¹²⁸

"[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

126. 70 CLR at 78.

127. (1997) 190 CLR 513 at 657-58.

128. He quoted *Tavita v Minister of Immigration*, [1994] 2 NZLR 257 at 266, along with relevant House of Lords decisions and his own earlier writings: MD Kirby, "The Australian Use of International Human Rights Norms: From Bangalore to Balliol – A View from the Antipodes" (1993) 16 *University of New South Wales Law Journal* 363; MD Kirby, "The Impact of International Human Rights Norms – A Law Undergoing Evolution" (1995) 25 *University of Western Australia Law Review* 30. See also MD Kirby, "The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms" (1988) 62 *Australian Law Journal* 514; and more recently MD Kirby, "International law – The Impact on National Constitutions" (2005) 99 *American Society of International Law Proceedings* 1 (7th Annual Grotius Lecture).

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

Justice Kirby again invoked his “interpretative principle” in the *Hindmarsh Island Bridge Case*,¹²⁹ in support of his argument that the Commonwealth power to make laws “for the people of any race” (s 51(xxvi)) should nowadays be read as permitting only benign discrimination, not adverse discrimination. Again he conceded that “if the constitutional provision is clear ... no rule of international law, and no treaty (including one to which Australia is a party) may override the Constitution”. He contended only that

“Where there is ambiguity, there is a strong presumption that the Constitution, adopted and accepted by the people of Australia for their government, is not intended to violate fundamental human rights and human dignity.”

In later cases Justice Kirby has continued to invoke this principle. In *Attorney-General (WA) v Marquet*¹³⁰ he pinned it particularly to the ICCPR, as interpreted by the United Nations Human Rights Committee – thus appearing to merge his interpretive principle with the different but well established idea that the legislature is presumed not to infringe fundamental human rights.¹³¹ In *Re Colonel Aird*,¹³² he found that international law offered no assistance; but he spelled out reciprocal reasons why it should always be considered. On the one hand, national courts interpreting their national constitutions must increasingly do so in a global context. On the other hand, “judicial decisions ... of the various nations” are now among the acknowledged sources of international law, according to Article 38(1)(d) of the ICJ Statute; and it follows that each national court has a responsibility to contribute to the harmonious development of international law. Whenever their decisions will “affect the operation of universal principles of international law... municipal courts exercise a form of international jurisdiction” and should do so responsibly.¹³³

129. *Kartinyeri v Commonwealth*, (1998) 195 CLR 337, at 417-18.

130. (2003) 217 CLR 545, at 603-07.

131. See O'Connor J in *Potter v Minahan*, (1908) 7 CLR 277; Gleeson CJ in *Plaintiff S157 v Commonwealth*, (2003) 211 CLR 476, at 492. Kirby J saw the latter passage as direct support for his claims: 217 CLR at 605-06.

132. *Re Colonel Aird; Ex parte Alpert*, (2004) 220 CLR 308, at 344-350.

133. *Id.* at 345.

In this case, and in *Baker v The Queen*,¹³⁴ Justice Kirby drew support from the decisions in *Lawrence v Texas* and *Atkins v Virginia*. In *Baker* he also came up with a modern version of the argument that Sir Owen Dixon had rejected in *Polites*:

“Australian courts regularly construe ordinary statutes, so far as possible, to ensure that they do not operate in breach of international law, or, as it used to be put, “the comity of nations”. There is no reason why this Court should construe the Australian Constitution, a special statute, in a different, more restrictive and more parochial way. On the contrary, because the ultimate source of the binding power of the Australian Constitution lies in the sovereign will of the people of Australia, it should be accepted that their Constitution will be construed in the same way as ordinary statutes are. No other approach would reflect that sovereign will. No other approach is compatible with the operation of national constitutions, or with the jurisprudence of other final courts, in the contemporary world.”¹³⁵

In *Ex parte Ame*¹³⁶ he again drew support from American examples, now including *Roper v Simmons*, as well as examples from India.¹³⁷ But his formulation this time was less combative, asserting only that, like the American and Indian judges in the cited cases, he found it “useful and proper to check conclusions affecting constitutional interpretation by reference to any relevant international law, and especially as such law relates to human rights and fundamental freedoms”.¹³⁸

This more conciliatory tone was perhaps a response to the clash between Justices Kirby and McHugh in *Al-Kateb v Godwin*.¹³⁹ That was the case where Ahmed Al-Kateb was held in detention awaiting deportation, but since it was impossible to arrange his deportation he seemed destined to remain in detention forever. Justices McHugh, Hayne, Callinan and Heydon held that the *Migration Act* 1958 had authorised such an outcome. Chief Justice Gleeson joined Justices Gummow and Kirby in dissent, arguing that in such a case there must be an implied exception to the *Migration Act* provision. The aftermath of the case was less bleak: the Minister for Immigration at the time, Senator Amanda Vanstone, allowed Al-Kateb to

134. (2004) 223 CLR 513, at 558.

135. 223 CLR at 560.

136. *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex p Ame*, (2005) 222 CLR 439, at 484.

137. He cited *Vishaka v State of Rajasthan*, note 227 below.

138. 222 CLR at 484.

139. (2004) 219 CLR 562.

remain at liberty on a bridging visa, and eventually, on 11 October 2007, her successor Kevin Andrews granted Al-Kateb permanent residence.¹⁴⁰

In *Al-Kateb*, Justice McHugh launched a vigorous attack on Justice Kirby's "interpretative principle" – so vigorous that Justice Kirby later compared it to the polemics of Justice Scalia.¹⁴¹ The attack was on three main fronts. First, he emphasised the vast number of treaties to which Australia is now a party, made even more unmanageable when one includes "the general principles of law recognised by civilised nations and the rules derived from international custom". Given this vast and amorphous material, he found it "impossible to believe that, when the Parliament now legislates, it has in mind or is even aware of all the rules of international law". In other words, a presumption that Parliament intends to comply with international law would be pure fiction.¹⁴²

Secondly, he conceded that the meaning of a constitutional provision might conceivably be illuminated by reference to international law *at the time when the Constitution was drafted*, but insisted that it was wholly illogical to suppose that the meaning might be affected by later international developments. To allow this to happen must involve a change in the meaning of the Constitution, and this would effectively involve a constitutional amendment – despite the enjoiner in s 128 of the Constitution that "This Constitution shall not be altered except [by referendum]".¹⁴³

Thirdly, he insisted that what was at stake was an argument about the effect of *rules* of international law. He acknowledged that constitutional meanings can change in response to "political, social and economic developments since 1900"; but he insisted that "rules" are different:

"Rules are specific. If they are taken into account as *rules*, they amend the Constitution. That conclusion cannot be avoided by asserting that they are simply "context" or elucidating factors. Rules are too specific to do no more than provide insights into the meanings of the constitutional provision. Either the rule is already inherent in the meaning of the provision or taking it into account alters the meaning of the provision."¹⁴⁴

140. See David Marr, "Ahmed al-Kateb: Escape from a Life in Limbo", *Sydney Morning Herald*, 27 October 2007.

141. Grotius Lecture, note 128 above, at 9.

142. 219 CLR at 590-91. This argument, of course, would equally undermine the use of international law in the interpretation of statutes; but he conceded that in that context the rule "is too well recognised to be repealed now by judicial decision". In any event the argument seems fallacious: it is perfectly conceivable that members of Parliament, like the railway passengers in the old "ticket cases", might intend to be bound by the rules despite ignorance of what the rules may be. See, e.g., *Parker v South-Eastern Railway*, (1877) 2 CPD 416.

143. *Id.* at 589, 592.

144. *Id.* at 592-93.

He concluded that if the meaning of the Constitution were to be adapted to changing international “rules”, “judges would need to have a ‘loose-leaf’ copy of the Constitution”.¹⁴⁵

Justice Kirby’s reply was equally vigorous. In particular, he heatedly denied that he was talking about the mechanical application of international “rules”:

“‘Rules’ is a word I have not used, preferring as I do “principles” or “basic principles”. McHugh J accepts that phenomena other than international law can “result in insights concerning the meaning of the Constitution that were not present to earlier generations”. Once this concession is made, the difference between McHugh J and myself is narrowed ... “[P]olitical, social or economic developments”, which McHugh J accepts *can* throw light on the meaning of the Constitution, generally appear in other forms. But if they can have their influence in the form in which they exist, so can the “rules” of international law in the form in which they manifest themselves. They do not *bind* as other “rules” do. But the principles they express can *influence* legal understanding.”¹⁴⁶ (emphasis added)

Justice McHugh’s position in *Al-Kateb* is by no means the only explicit rejection of Justice Kirby’s proposal. Justice Callinan, in *Western Australia v Ward*,¹⁴⁷ delivered a particularly sweeping attack on the use of international law. He began by questioning even its relevance to statutory interpretation: “Where legislation is not genuinely ambiguous, there is no warrant for adopting an artificial presumption as the basis for, in effect, rewriting it.”¹⁴⁸ He conceded that it might “occasionally, perhaps very occasionally”, be helpful to look to international law as a guide to the development of the common law, but emphatically denied that there was any “requirement” or “obligation” to do so.¹⁴⁹ And predictably, he was even less enthusiastic about any suggestion that readings of the Constitution should be influenced by international law.

What had prompted him to consider the issue was a submission made on behalf of the Human Rights and Equal Opportunity Commission,

145. *Id.* at 595.

146. *Id.* at 623-24. He also criticized the willingness of McHugh J to take *Polites v Commonwealth* as a starting point, emphasising (at 623) that much had changed since 1945. But his main point was that “[i]n 1945, when *Polites* was decided, the Australian Constitution was commonly regarded as little more than a statute of the United Kingdom Parliament”. This, of course, was precisely the viewpoint that Dixon J chose *not* to adopt in *Polites*. See above at note 126.

147. (2002) 213 CLR 1, at 388-91.

148. *Id.* at 388-89.

149. *Id.* at 389.

although the question of whether it had actually supported Justice Kirby's position is unclear. The reported argument simply used international law as an aid to the interpretation of statutes¹⁵⁰ (in that case the *Native Title Act 1993*, as amended). It appears from Justice Callinan's paraphrase that a further submission began by invoking Sir Owen Dixon's remark that among the conceptions taken for granted in the way the Australian Constitution was framed, "it may fairly be said that the rule of law forms an assumption".¹⁵¹ This was read as importing a constitutional requirement of "lawfulness" in the exercise of legislative and executive power. What was then proposed was that "lawfulness" should be understood as requiring conformity not only with national law, but with international law as well.

Yet, despite the attempt to pin this submission to what Chief Justice Dixon had said about constitutional assumptions, it would still be only an argument about the interpretation of statutes. The submission¹⁵² went on to spell this out: the argument was only that while

"[T]he capacity of the Commonwealth Parliament to legislate contrary to the requirements of international law is fully recognised and conceded, the High Court should continue to expect (that is, unless disallowed by explicit contrary words) that the Commonwealth has exercised its legislative powers in accordance with that law."

But what Justice Callinan reacted to was the attempt to clothe this principle in constitutional force. If the argument was that legislative and executive conformity to international law is required by "a constitutional implication",

"...it is flatly contrary to authority and principle. The provisions of the Constitution are not to be read in conformity with international law. It is an anachronistic error to believe that the Constitution, which was drafted and adopted by the people of the colonies well before international bodies such as the United Nations came into existence, should be regarded as speaking to the international community. The Constitution is our fundamental law, not a collection of principles amounting to the rights of man, to be read and approved by people and institutions elsewhere. The approbation of nations does not give our Constitution any force, nor does its absence deny it

150. *Id.* at 30. Similarly (at 242, 247) Kirby J used international law only as an aid to statutory interpretation.

151. *Australian Communist Party v Commonwealth*, (1951) 83 CLR 1, at 193.

152. As quoted by Callinan J at 390.

effect. Such a consideration should, therefore, have no part to play in interpreting our basic law.”¹⁵³

The most recent case, *Roach v Electoral Commissioner*,¹⁵⁴ concerned the extent to which the Constitution permits the Parliament to restrict the right to vote. The plaintiff relied on international and comparative materials to support her claim. The majority, including Justice Kirby, were able to uphold her claim without reference to those materials: it was left to the dissenting judges, Justices Hayne and Heydon, to dispute their relevance. Justice Heydon did so by counting heads:¹⁵⁵ he trawled through the *Commonwealth Law Reports* to announce that 21 judges had denied the relevance of international law in such cases, while only one – Justice Kirby – had affirmed it.

Yet Justice Heydon’s head count depended on a good deal of equivocation. Clearly he was entitled to include Justices Callinan and McHugh in his head count; and Justice Dixon’s judgment in *Polites v Commonwealth* was sufficiently emphatic to justify his inclusion as well. Probably Justice Heydon was also justified in relying on the judgment of Justices Gummow and Hayne in the *Hindmarsh Island Bridge Case*.¹⁵⁶ Their actual decision was only that the *Hindmarsh Island Bridge Act*, a 1997 was unambiguous, and therefore valid even if it did infringe international law. But they added that the case also involved a discussion of the relevant constitutional power: “In essence, the submissions sought to apply a rule for the construction of legislation passed in the exercise of the legislative power to limit the content of the legislative power itself.”¹⁵⁷ Moreover, the constitutional issue depended on the effect of the 1967 amendment of the Constitution, introduced by the *Constitution Alteration (Aboriginals) Act*, 1967; and when counsel suggested that *that* legislation should be construed in conformity with international law, Justices Gummow and Hayne dismissed the idea because principles applicable to ordinary legislation could not be extended to a constitutional amendment, which “differs in character and quality from laws passed under the heads of power in ss 51 and 52”.¹⁵⁸ Above all, they quoted with apparent approval the passage from *Polites v Commonwealth* in which Sir Owen Dixon had insisted that the normal rules for interpretation of statutes should not extend to the Constitution.

Otherwise, Justice Heydon’s claim is equivocal. The general proposition that he sought to establish was that international and comparative

153. *Id.* at 390-91.

154. (2007) 239 ALR 1.

155. *Id.* at 47; see also Hayne J at 43-44.

156. *Kartinyeri v Commonwealth*, (1998) 195 CLR 337 at 383-86.

157. *Id.* at 386.

158. *Id.* at 385.

materials “can have nothing whatever to do with the construction of the Australian Constitution”. Yet when it came to the head count, his formulation was distinctly narrower: the proposition to be refuted was “that the legislative power of the Commonwealth is affected or limited by developments in international law”. It was this proposition that 21 High Court Justices were said to have denied. Yet the proposition is crucially ambiguous; it blurs two, or possibly three, different questions.

One question is whether the legislative powers conferred by the Constitution can be exercised to produce a consequence contrary to international law. It is clear that they can be so exercised. No one, including Justice Kirby, has attempted to argue the contrary.

A second question, which clearly overlaps with the first and may perhaps be the identical question, is whether the grants of legislative power in the Constitution are subject to an *implied limitation* excluding the use of the granted powers inconsistently with international law. In *Ward*, for example, Justice Callinan’s most indignant comments were directed against the suggestion of a “constitutional implication”. No doubt his scattergun approach in *Ward* went further. But in other cases on which Justice Heydon relies, the point being made was only the denial of any such implication. This was clearly so, for example, in *AMS v AIF*,¹⁵⁹ where the relevant passage held only that constitutional provisions “are not to be construed as subject to an implication said to be derived from international law”.

The third and quite different question is whether in interpreting the words of the Constitution – including, but not only, its words conferring and defining legislative powers – uncertainties and ambiguities may be resolved by reference to principles of international law. In other words, the question is whether the accepted rules about the interpretation of statutes apply to the interpretation of the Constitution as well. It is this possibility that Justice Kirby has sought to advance, and most of the comments relied on by Justice Heydon, simply do not respond to it. In particular, it is unresponsive to deny that grants of legislative power are subject to an *implied limitation* derived from international law.

Of course, to deny an implication of that kind is not to deny that there *are* limitations on the exercise of the granted powers, sometimes express¹⁶⁰ and sometimes implied. Justice Kirby would certainly argue that international law may be relevant in interpreting those existing limitations. Indeed, this is just the kind of context where his emphasis on international human rights is most likely to be relevant – for example, in deciphering the

159. (1999) 199 CLR 160 at 180.

160. E.g. ss 80, 92 and 116 of the Australian Constitution.

freedom of political communication,¹⁶¹ or the freedom of interstate trade. Intriguingly, in the latest decision on the scope of the latter freedom,¹⁶² the joint judgment – joined by all members of the Court except Justice Heydon – was willing to entertain the suggestion

“...that the emergence of global institutions, including the International Labour Organisation (1919), the General Agreement on Tariffs and Trade (1947) and the World Trade Organisation (1995), some of which appear to be premised on the economic value of “free trade”, is a development which properly fuels “an implicit assumption that anti-protectionist rules in national legal systems share that same normative foundation”.¹⁶³

What we are talking about, therefore, is the use of international law to interpret what is in the Constitution, including both its grants of power and express or implied limitations on the exercise of the granted powers. What we are *not* talking about is the use of international law to smuggle in new limitations with no textual or structural foundation. The distinction may need to be drawn with particular care in the case of the power to legislate with respect to “external affairs” (Section 51(xxix) of the Constitution), which may often intersect directly with international law. In the special and limited case where the *only* basis for reliance on Section 51 (xxix) is that Parliament is legislating to give effect to international law, *that* use of the power is indeed subject to a limitation that the legislation must be consistent with international law, as Justice Brennan correctly held in *Polyukhovich v Commonwealth*.¹⁶⁴

What Justice Heydon relies on from *Polyukhovich*, however, is a different passage, in which Justice Brennan found it unnecessary to decide whether s 51(xxix) is coextensive in scope with the power allowed by international law. It was in that context that Justice Brennan remarked: “The scope of the constitutional power is not determined by the law of nations.” The language was superficially apposite, but the point was simply that the scope of the power depends on the Constitution, not on the law of nations, which is indisputable common ground.

161. *Lange v Australian Broadcasting Corporation*, (1997) 189 CLR 520.

162. *Betfair Pty Ltd v Western Australia*, (2008) 244 ALR 32.

163. *Id.* at 44, quoting Amelia Simpson, “Grounding the High Court’s Modern Section 92 Jurisprudence: The Case for Improper Purpose as the Touchstone” (2005) 33 *Federal Law Review* 445, at 461.

164. (1991) 172 CLR 501, esp at 572, 575-76.

On analysis, that was also the point in another of Justice Heydon's exhibits – the unanimous judgment in *Fishwick v Cleland*,¹⁶⁵ written by Chief Justice Dixon but joined by five other members of the Court, four of them¹⁶⁶ included in Justice Heydon's head count on the basis of this case alone. The underlying problem related to Australia's authority to legislate for New Guinea. Did that authority flow from the 1946 Trusteeship Agreement with the United Nations,¹⁶⁷ and thus from international law? Or from Australia's acceptance of the Agreement, and thus from Australian sovereignty? The answer may depend on the legal system in which the question arises. In international law, the source of validity was the United Nations' approval of the Trusteeship Agreement; in Australian law, the source of validity was Australia's ability to accept it. In any event, the discussion in *Fishwick v Cleland* was not concerned with that question, the answer to which was simply assumed. The question that engaged Chief Justice Dixon was the constitutional basis for Australia's legislation in respect of the Territory: was it, as he thought, the "territories" power (Section 122 of the Constitution); or was it, as Justice Evatt had argued,¹⁶⁸ the "external affairs" power (Section 51(xxix))? The Chief Justice thought that "[o]n the whole" his own view "seems preferable".

It was as to this choice between two sources of power within the Australian Constitution that Sir Owen Dixon used the language on which Justice Heydon apparently relies:

"But that is a matter of the constitutional law of Australia, a municipal or domestic matter, and is not, we think, determined by reference to the provisions of the Trusteeship Agreement or of the Charter of the United Nations."¹⁶⁹

The real point was that, regardless of whether Justice Dixon or Justice Evatt was right, the legislation was a valid exercise of a legislative power conferred by one provision or other within the Australian Constitution, and must therefore be valid even if it was inconsistent with the Trusteeship Agreement. At the bottom, this was simply another example of the rule that, so long as legislation is clear, its possible inconsistency with international law is irrelevant.

165. (1960) 106 CLR 186.

166. Fullagar, Kitto, Menzies and Windeyer JJ.

167. Approved by the General Assembly 13 December 1946; 8 UN Treaty Series 181.

168. Notably in *Jolley v Mainka*, (1933) 49 CLR 242. See Tony Blackshield and Francesca Dominello, "Papua and New Guinea", in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 520.

169. 106 CLR at 197.

Another of Justice Heydon's exhibits is the judgment in *Horta v Commonwealth*,¹⁷⁰ which enables him to extend his head count to another seven judges (only two of whom can be included on the basis of other citations). The plaintiffs had proposed an implied limitation on the external affairs power, to the effect that it can *never* be exercised in violation of international law; and the language on which Justice Heydon relies is simply directed to a denial of any such implied limitation.

When all these cases are set aside, we are left with Justices Gummow and Hayne in the *Hindmarsh Island Bridge Case*, Justice Callinan in *Western Australia v Ward*, Justice McHugh in *Al-Kateb*, and Justice Dixon in *Polites v Commonwealth*. Justice Heydon attempts to enlarge his head count by counting all six members of the bench in *Polites*.¹⁷¹ Yet, apart from Justice Dixon, they touched on the issue only vaguely. Chief Justice Latham observed that the constitutional issue "was not really argued";¹⁷² and insofar as these judges touched on it at all, they seemed only to reject a supposed limitation on the constitutional grants of power. That, as we have seen, is a separate issue, and one which Justice Kirby's "interpretative principle" does not purport to raise.

IV.

The Directive Principle in Article 51(c) of the Constitution of India requires that the State (including the courts) shall endeavour to "foster respect for international law and treaty obligations". There is also clear provision for legislation to implement international treaties. By contrast with the protracted Australian uncertainties resolved by the *Tasmanian Dam Case*,¹⁷³ Article 253 of the Constitution¹⁷⁴ gives power to legislate "for the whole or any part of the territory of India" for the purpose of implementing "any treaty, agreement or convention with another country or countries", and indeed to implement "any decision made at any international conference, association or other body". Arguably this has a double edge: it is open to the interpretation that international treaties have no direct effect on domestic law unless it is given by the legislative mechanism that the Constitution provides. In other words, it is arguable that, at least as to treaties, the Constitution adopts a theory of "transformation" rather than "incorporation".

In fact, however, Indian courts have not been inhibited by this possibility. At least as to customary international law, they have seemed

170. (1994) 181 CLR 183 at 195.

171. Apart from the crucial passage in the judgment of Dixon J (at 78), he cited Latham CJ at 69, Rich J at 74, Starke J at 75-76, McTiernan J at 79 and Williams J at 81.

172. 70 CLR at 69.

173. Note 111 above.

174. See also the more general provisions in Entries 10 and 14 of the Union List.

increasingly willing to accept automatic “incorporation” rather than any need for specific legislative “transformation”.¹⁷⁵ Moreover, they have consistently “endeavoured to interpret the Indian Constitution and laws in consonance with the provisions of the international instruments ratified by India”.¹⁷⁶

In particular, the potential effect of Article 51(c)¹⁷⁷ has not gone unnoticed. In *Kesavananda v State of Kerala*,¹⁷⁸ Chief Justice Sikri famously suggested “that, in view of Art 51 of the directive principles, this Court must interpret language of the Constitution, if not intractable ..., in the light of the United Nations Charter and the solemn declaration subscribed to by India”. (This last reference was to the Universal Declaration of Human Rights, adopted in 1948.) The Chief Justice’s conclusion in *Kesavananda*, that certain fundamental rights must be “inalienable” and therefore beyond the reach of the power to amend the Constitution, was supported in particular by the Preamble to the International Covenant on Economic, Social and Cultural Rights,¹⁷⁹ with its reference to “the inherent dignity” and “the equal and inalienable rights of all members of the human family”. He quoted Lord Denning’s dictum in *Corocraft Ltd v Pan American Airways Inc.*¹⁸⁰ “it is the duty of these courts to construe our legislation so as to be in conformity with international law and not in conflict with it”. And he emphasised that the Constitution itself “is after all a municipal law”, and is therefore governed by the general principle that, so far as possible, municipal law should be construed so as not to conflict with international law.

The effect of *Kesavananda* was, of course, to place certain aspects of Part III of the Constitution of India beyond the reach of Parliament’s power to amend the Constitution. What has come to be the settled rationale for

175. In *VO Tractor Export, Moscow v M/s Tarapore & Co*, AIR 1971 SC 1, at 8, Shah and Grover JJ were of the view that the “transformation” theory applies; but in *Gramophone Co of India Ltd v Birendra Bahadur Pandey*, AIR 1984 SC 667, at 670-71, Chinappa Reddy J opted for “incorporation”. He even suggested that *Tractor Export* must *impliedly* reflect “incorporation”, since unless international law is “incorporated” into the legal system, it makes no sense to require that statutes be read as conforming to it.

176. Chief Justice A.S. Anand, “Inaugural Address”, in *Developing Human Rights Jurisprudence, Volume 8* (Proceedings of the 8th Judicial Colloquium on the Domestic Application of International Human Rights Norms, 1998, published jointly by the International Centre for the Legal Protection of Human Rights and the Legal and Constitutional Affairs Division of the Commonwealth Secretariat) (2001) 1, at 3.

177. It has also been argued that Art 372 might be relevant, since it expressly preserves in force “all the law in force in the territory of India” prior to the Constitution, and this language is said to pick up the old common law statements that international law is part of “the law of the land”. Unsurprisingly, the argument has received short shrift. See Beg J in the *Habeas Corpus Case*, note 183 below, at 1291.

178. AIR 1973 SC 1461, at 1510.

179. Adopted 16 December 1966; in force 3 January 1976; 993 UN Treaty Series 3.

180. [1969] 1 QB 616, at 653.

that holding¹⁸¹ was not the Chief Justice's theory of "inalienable" rights, but the notion developed in other majority judgments that the power of amendment does not extend to the "basic structure" of the Constitution. In expounding that concept, Justice Khanna was at pains to reject the approach of Chief Justice Sikri. He insisted that the concept of "basic structure" focused wholly on elements *within* the constitutional text, and rejected any appeal to concepts of "inalienable" or "natural" rights derived from outside that text. Ironically, this rejection extended specifically to concepts derived from international law.¹⁸²

I say this is ironic because in the infamous *Habeas Corpus Case*,¹⁸³ now commonly regarded as the nadir of the Indian Supreme Court's contribution to fundamental rights jurisprudence, it was Justice Khanna's courageous dissent that provided one of the most powerful examples of the use of international law in constitutional interpretation. The majority judgments in that case held that the 1975 Declaration of Emergency under Article 352 of the Constitution, and the accompanying Presidential Order made under Article 359, had effectively suspended any right of persons detained without trial to seek redress under Article 21 of the Constitution. In 1978 the effect of that decision was reversed by the Forty fourth Amendment, which places Article 21 beyond the reach of the suspension power, and thereby effectively vindicates Justice Khanna's dissenting judgment. More precisely, however, what Justice Khanna had done was to circumvent the suspension of Article 21 by arguing that the right to personal liberty was not confined to that Article, but rested on a broader conception of the rule of law, of which Article 21 was only one manifestation.¹⁸⁴ In support of that broader conception he invoked the reaffirmation of the rule of law by the International Commission of Jurists in the 1959 "Delhi Declaration",¹⁸⁵ and Articles 8 and 9 of the Universal Declaration of Human Rights.¹⁸⁶ He quoted extensively¹⁸⁷ from authorities for the standard rule that, in cases of direct conflict with international law, municipal law must prevail, but that legislation must be construed so far as possible to avoid such conflict. While most of these

181. Especially as a result of *Smt Indira Nehru Gandhi v Raj Narain*, AIR 1975 SC 2299. Among many later decisions see now *IR Coelho (Dead) v State of Tamil Nadu*, AIR 2007 SC 861.

182. AIR 1973 SC 1461, at 1874.

183. *Additional District Magistrate, Jabalpur v Shivakant Shukla*, AIR 1976 SC 1207.

184. See generally *id.* at 1253-56.

185. See International Commission of Jurists, *The Rule of Law in a Free Society: Report of the International Congress of Jurists*, New Delhi 1959 (Geneva, 1959).

186. Art 9 prohibits "arbitrary arrest, detention or exile" and Art 8 proclaims "the right to an effective remedy" for violations of fundamental rights. Later (at 1270) Khanna J also invoked the report of the UN Seminar on the Protection of Human Rights in Criminal Law and Procedure, Baguio City, Philippines, 1958 (UN Document ST/TAO/HR/2), affirming the "fundamental principle that the individual should never be deprived of the means of testing the legality of his arrest or custody by recourse to judicial process even in times of emergency".

authorities dealt only with the interpretation of statutes,¹⁸⁸ they also included a passage from Charles Fenwick¹⁸⁹ extending the principle to “numerous cases in which the provisions of the national constitution ... may be interpreted so as to enable the executive and the judicial agencies of the state to act in accordance with the obligations of international law”. On the basis of that passage, Justice Khanna was able to invoke with approval¹⁹⁰ the very same dictum of Chief Justice Sikri that he had rejected in *Kesavananda*.

This, however, was a dissenting judgment. Speaking for the majority, Justice Beg rejected the appeal to international law as an attempt “to weave certain ethical rules and principles into the fabric of our Constitution”. He observed that the relevance of Article 51 of the Constitution “is not at all evident to me”: for him, the only relevant principle of international law was that the operation and effects of constitutional provisions “are entirely the domestic concern of legally sovereign States and can brook no outside interference”.¹⁹¹

Perhaps as part of the Court’s reaction away from the *Habeas Corpus* case, the late 1970s saw a series of cases in which the Court affirmed the human rights of prisoners. In *Sunil Batra (No 1)*¹⁹² the petitioner Sunil Batra had been held in solitary confinement while awaiting execution, while his fellow petitioner, the notorious Charles Sobhraj,¹⁹³ had been kept in bar fetters while awaiting trial, respectively under ss 30 and 56 of the *Prisons Act*, 1894. The Supreme Court refused to hold that the statutory provisions were unconstitutional, but held that in the light of Articles 14, 19 and 21 of the Constitution the provisions must be interpreted humanely so as not to authorise “cruel and unusual punishment”. So construed, the provisions did not authorise the treatment accorded to either petitioner. On the one hand, the leading judgment delivered by Justice Krishna Iyer referred at length to American precedents and to penological reforms in Europe; on the other hand, he noted with alarm the trend in many countries¹⁹⁴ towards an increasing use of torture. In *Sunil Batra (No 2)*,¹⁹⁵ the Court exercised its epistolary jurisdiction in response to a letter from Sunil Batra drawing

187. AIR 1976 SC at 1259-60.

188. These included *Maxwell on the Interpretation of Statutes* (12 ed by P Langan, 1969) 183; and *Oppenheim’s International Law* (8 ed by H Lauterpacht, 1955) Vol I, 45-46.

189. Charles G Fenwick, *International Law* (3 ed 1948) 90.

190. AIR 1976 SC at 1260.

191. *Id.* at 1291. Similarly he insisted that the rule of law “can only mean, for lawyers with their feet firmly planted in the realm of reality, what the law in a particular State or country is and what it enjoins ... [T]he Constitution of a country and not something outside it contains the Rule of Law of that country.” (*Id.* at 1309.)

192. *Sunil Batra v Delhi Administration (No 1)*, AIR 1978 SC 1675.

193. Now serving a life sentence in Nepal (*Times of India*, 13 August 2004).

194. Including Uganda, Brazil, Chile and Iran: see AIR 1978 SC at 1721-22.

195. *Sunil Batra v Delhi Administration (No 2)*, AIR 1980 SC 1579.

attention to the torture of another prisoner, Prem Chand. Again invoking American precedents, the Court adapted the writ of habeas corpus as a way of imposing humanitarian limits on the conduct of prison authorities. This time Justice Krishna Iyer invoked “the world legal order, which now recognises rights of prisoners in the International Covenant of Prisoners’ Rights to which our country has signed assent”.¹⁹⁶ (Presumably this was a reference to Article 10 of the ICCPR.) More specifically, he relied on Articles 8 and 9 of the General Assembly’s 1975 Declaration on Torture,¹⁹⁷ and on paragraphs 57-61 of the United Nations’ Standard Minimum Rules for the Treatment of Prisoners.¹⁹⁸ Four months later habeas corpus was used again to restrict the practice of handcuffing prisoners on their way to court.¹⁹⁹ Again the decision was based primarily on Articles 14, 19 and 21 of the Constitution; but the reading of those provisions was “informed by the compassionate international charters and covenants”, and read in the context of “the collective consciousness relating to human rights burgeoning in our half-century”²⁰⁰ – as evidenced in particular by Article 5 of the Universal Declaration of Human Rights, and Article 10 of the ICCPR.

In 1986, faced with evidence of abuses in a children’s Remand Home, the Supreme Court issued orders for strict compliance with the Bombay *Children’s Act*, 1948 and Articles 21 and 24 of the Constitution, as well as the relevant directive principles in Part IV. The Court invoked the 1959 Declaration of the Rights of the Child,²⁰¹ as well as the requirement, in Article 24 of the ICCPR, of adequate “measures of protection” for children, and argued that since India was “a party to these International Charters”, both the central government and the instrumentalities of the State of Bombay (including the Children’s Aid Society) had “an obligation ... to implement the same in the proper way”.²⁰² In 1991 the Court was divided over how to interpret a definition in the *Employees’ State Insurance Act*, 1948. The Act sought to provide compulsory insurance for workers, funded by employer contributions. It extended to workers employed by sub-contractors provided

196. *Id.* at 1590.

197. Declaration on the Protection of All Persons from Torture and Other Cruel, Inhuman or Degrading Treatment, adopted by the UN General Assembly 9 December 1975 (Resolution 3452 (XXX)). See now the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly 10 December 1984; in force 26 June 1987; 1465 UN Treaty Series 85.

198. Adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders, Geneva, 1955; approved by UNESCO Resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

199. *Prem Shankar Shukla v Delhi Administration*, AIR 1980 SC 1535.

200. AIR 1980 SC at 1539, 1537.

201. Adopted by the General Assembly 20 November 1959 (Resolution 1386 (XIV)). See now the Convention on the Rights of the Child, note 42 above.

202. *Sheela Barse v Secretary, Children’s Aid Society*, AIR 1987 SC 656, at 658.

that they were “under the supervision of the principal employer or his agent”. The question was whether workers employed by contractors for the Calcutta Electricity Supply Corporation (“CESC”) were under the Corporation’s “supervision”. The majority held that they were not;²⁰³ hence the Corporation need not pay contributions, and the workers were not insured. In dissent Justice Ramaswamy insisted that the statute must be construed to further its beneficial purpose – as illumined by Article 39(e) of the Constitution, Article 25(2) of the Universal Declaration of Human Rights, Article 7(b) of the International Covenant on Economic, Social and Cultural Rights, and recommendations of the International Labour Organisation.²⁰⁴

In *Kasturi Lal v State of Uttar Pradesh*,²⁰⁵ the Supreme Court held that a State was not liable in tort for the negligent acts of its servants, in that case the police. But in a series of cases beginning with *Rudul Sah v State of Bihar*,²⁰⁶ the Court held that monetary compensation *could* be awarded for infringement of fundamental rights. The distinction was finally clarified in the *Nilabati Behera* case,²⁰⁷ when the Court upheld an award of damages to a mother whose son had died as a result of multiple injuries sustained in police custody. The Court explained that for breach of fundamental rights, as distinct from liability in tort, a defence of sovereign immunity is simply inappropriate. As well as the Privy Council decision in *Maharaj v Attorney-General of Trinidad and Tobago (No 2)*,²⁰⁸ the Court relied on Article 9(5) of the ICCPR, which provides that “victim[s] of unlawful arrest or detention shall have an enforceable right to compensation”. There was no suggestion that the Court’s decision was directly governed by Article 9; the point was only that it showed that compensation for breach of a fundamental right is a meaningful and viable conception.

Despite the decision in *Nilabati Behera*, continued newspaper reports of deaths in custody led in 1996 to the wide-ranging judgment in *Dilip K.*

203. *CESC Ltd v Subhash Chandra Bose*, AIR 1992 SC 573, esp at 579 – on the basis of the definition of “independent contractor” in *Halsbury’s Laws of England*, as previously accepted in *Superintendent of Post Offices v PK Rajamma*, AIR 1977 SC 1677.

204. AIR 1992 SC at 584. He cited the Recommendation Concerning Medical Care (Recommendation No 69 (26th ILO Convention, Philadelphia, 12 May 1944), as well as a resolution at the ILO Asian Regional Conference, Delhi, 1947.

205. AIR 1965 SC 1039. See Tony Blackshield, “Tortious Liability of Government: A Jurisprudential Case Note” (1966) 8 *Journal of the Indian Law Institute* 643.

206. AIR 1983 SC 1086. See also *Sebastian M. Hongray v Union of India*, AIR 1984 SC 1026; *Bhim Singh v State of Jammu & Kashmir*, AIR 1986 SC 494; *Mehta v Union of India*, AIR 1987 SC 1086; *Saheli, A Women’s Resource Centre v Commissioner of Police, Delhi*, AIR 1990 SC 513; *State of Maharashtra v Ravikant S. Patil*, AIR 1991 SC 871; Lisa Ann Tortell, *Monetary Remedies for Breach of Human Rights: A Comparative Study* (2006) ch 3.

207. *Nilabati Behera v State of Orissa*, AIR 1993 SC 1960.

208. [1979] AC 385. See now *Attorney-General of Trinidad and Tobago v Ramanoop*, [2006] 1 AC 328.

*Basu v State of West Bengal*²⁰⁹ – which reexamined the whole issue of deaths in custody, and the torture or other maltreatment of prisoners by police or wardens as well. The result was a series of numbered guidelines²¹⁰ on the proper conduct of arrest and detention, which were said to flow from the requirements of Articles 21 and 22 of the Constitution. In addition, the Court reaffirmed the availability of monetary compensation. On the issue of torture the Court again invoked Article 5 of the Universal Declaration of Human Rights; on the issue of compensation it again invoked Article 9(5) of the ICCPR. India had ratified that instrument with the reservation that it did *not* acknowledge a right to compensation for victims of unlawful arrest or detention, but the Court now held that the reservation had “lost its relevance”²¹¹ in view of the line of Supreme Court decisions developing such a right. The Court also noted that the decisions in India had been followed in New Zealand.²¹²

In another decision handed down the same day,²¹³ the Court imposed strict procedural guidelines on the practice of telephone tapping. It refrained from deciding that the statutory authorisation of such interceptions was unconstitutional, but urged the central government to introduce more adequate procedural safeguards, and directed that its guidelines were to have the force of law in the meantime. As the basis for its interpretation of the Constitution the Court again invoked the Universal Declaration of Human Rights (Article 12) and the ICCPR (Article 17), and justified the resort to these instruments by noting the dicta in earlier cases²¹⁴ holding that construction of statutes by reference to international law is *required* by Article 51 of the Constitution. The Court also regarded it as “almost accepted” that “the rules of customary international law which are not contrary to the municipal law shall be deemed to be incorporated in the domestic law”.²¹⁵

The line of cases culminating in *Dilip K. Basu* was again relied on in February 1997,²¹⁶ when the Court ordered compensation, in the amount of Rs 100,000 for each family, in respect of the unlawful killing of two political

209. AIR 1997 SC 610. See Justice Mukul Mudgal (Delhi High Court), “Prisons and Custody: Application of International Human Rights Norms by the Supreme Court of India”, in *Developing Human Rights Jurisprudence*, note 176 above, 127, at 142-46.

210. AIR 1997 SC at 623-24; see also AIR 1997 SC 3017.

211. AIR 1997 SC at 624.

212. *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667. See New Zealand Law Reform Commission, *Crown Liability and Judicial Immunity: a Response to Baigent's Case and Harvey v Derrick* (Report 37, 1997); Tortell, note 206 above, ch 4.

213. *People's Union for Civil Liberties v Union of India*, AIR 1997 SC 568.

214. They cited the dicta of Sikri CJ in *Kesavananda*, note 178 above, Khanna J in the *Habeas Corpus Case*, note 183 above, and Krishna Iyer J in *Jolly George Varghese v Bank of Cochin*, AIR 1980 SC 470.

215. AIR 1997 SC at 575.

216. *People's Union for Civil Liberties v Union of India*, AIR 1997 SC 1203.

activists. The police had loaded them into a truck and driven them to a place where they were shot. The judgment of Justice Jeevan Reddy again affirmed the reasoning in *Nilabati Behera* and *Dilip K. Basu*, but tentatively went further, raising the question of whether the Australian *Teoh* decision²¹⁷ should be followed in India. He reviewed the discussion in *Teoh* at length, pausing only at the warning sounded by Chief Justice Mason and Justice Deane that the courts should act “with due circumspection when the Parliament itself has not seen fit to incorporate the provisions of a convention into our domestic law”.²¹⁸ This led him to hesitate over whether, in fact, the Indian Parliament had ever *approved* the ratification of the ICCPR, and if so “whether such approval can be equated to legislation and invests the covenant with the sanctity of a law made by Parliament”. He was unable to give a definite answer. In either event, he thought,

“...it would suffice to state that the provisions of the covenant, which elucidate and go to effectuate the fundamental rights guaranteed by our Constitution, can certainly be relied upon by courts as facets of those fundamental rights and hence, enforceable as such.”²¹⁹

In a curious afterthought, Justice Jeevan Reddy noted that “[s]o far as multi-lateral treaties are concerned, the law is, of course, different – and definite”.²²⁰ That comment sits oddly with the preceding discussion of the ICCPR, itself a multilateral treaty. In fact, his Honour’s comment seems to be based on a misconception. The English decision that he cites²²¹ affirmed simply “that judicial review is available for the purpose of securing a declaration that certain United Kingdom primary legislation is incompatible with European Community law”²²², because of the unique position accorded to European Community law by the *European Communities Act*, 1972.²²³ The American cases that he cites²²⁴ both involved the interpretation of the 1929 Warsaw Convention,²²⁵ which as Justice O’Connor had explained in an

217. Note 124 above; see AIR 1997 SC at 1206-07.

218. 183 CLR at 288.

219. AIR 1997 SC at 1207-08.

220. *Id.* at 1208.

221. *R v Secretary of State for Employment; Ex p Equal Opportunities Commission*, [1995] 1 AC 1.

222. *Id.* at 26-27.

223. Cf *R v Secretary of State for Transport; ex p Factortame Ltd (No 1)*, [1990] 2 AC 85; *R v Secretary of State for Transport; ex p Factortame Ltd (No 2)*, [1991] 1 AC 603; and *R v Secretary of State for Transport; ex p Factortame Ltd (No 3)*, [1992] QB 680.

224. *Chan v Korean Airlines Ltd*, 490 US 122 (1989) (Scalia J for the Court) and *Eastern Airlines Inc v Floyd*, 499 US 530 (1991).

225. Convention for the Unification of Certain Rules Relating to International Transportation by Air, signed at Warsaw 12 October 1929; in force 13 February 1933; 137 League of Nations Treaty Series 11.

earlier case is a self-executing treaty, so that “no legislation is required to give [it] ... the force of law in the United States”.²²⁶

The relevance of *Teoh* was raised again in *Vishaka v State of Rajasthan*.²²⁷ In this case, as in *Dilip K. Basu*, the Supreme Court issued a set of numbered guidelines to be treated as “binding and enforceable in law until suitable legislation is enacted”,²²⁸ this time on the subject of sexual harassment in the workplace. The Court had been asked to intervene in a case involving the brutal gang rape of a social worker in a Rajasthan village; but because that case was the subject of pending criminal proceedings, the Court did not intervene. Instead it treated the incident as illustrating “the hazards to which a working woman may be exposed and the depravity to which sexual harassment can degenerate”, and took the opportunity to deal with that broader issue.

It was partly because of the absence of any legislation on the subject that Chief Justice Verma felt entitled in *Vishaka* to look to international law:

“In the absence of domestic law occupying the field ..., the contents of International Conventions and norms are significant for the purpose of interpretation of the guarantee[s] of gender equality, [and] right to work with human dignity in Arts 14, 15, 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein. Any International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof.”²²⁹

Notice the mandatory language here: the effect of the Convention “must” be read into the constitutional provisions. Later the Chief Justice repeated the point:

“The meaning and content of the fundamental rights guaranteed in the Constitution of India are of sufficient amplitude to encompass all the facets of gender equality including prevention of sexual harassment or abuse The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard *must* be had to international conventions and norms

226. *Trans World Airlines Inc v Franklin Mint Corp*, 466 US 243, at 252 (1984).

227. AIR 1997 SC 3011.

228. *Id.* at 3015-17.

229. AIR 1997 SC at 3013-14.

for construing domestic law when there is no inconsistency between them and there is a void in the domestic law (emphasis added).”²³⁰

It was in this context that the Chief Justice referred to *Teoh*, as well as to *Nilabati Behera*.²³¹ In any event, he argued that these propositions were “implicit” both in the obligation, under Article 51(c) of the Constitution, to “foster respect for international law and treaty obligations”, and in the grant of legislative power to implement treaties and Conventions.²³²

He also invoked Article 73, which provides that the executive power of the central government shall extend “to the matters with respect to which Parliament has power to make laws”. What followed was an apparent slippage from *executive* power to implement treaties and Conventions, to *judicial* power to do so – or at least to an assumption that executive and judicial power could collaborate to this end, and that *Vishaka* itself was an example of this collaboration since the Solicitor-General, representing the government, had assisted in formulating the guidelines and signified the government’s consent to their content.²³³

The *Vishaka* guidelines drew largely on the CEDAW, but also on the Fourth World Conference on Women in Beijing,²³⁴ where the Government of India had made an official commitment “to formulate and operationalize a national policy on women”.²³⁵ A later Chief Justice, Dr. A.S. Anand, saw *Vishaka* as “a rather innovative judicial law making process”,²³⁶ but he, too, relied on the provisions of CEDAW and the final declaration of the Beijing World Conference, as well as “several provisions particularly important for women” in the International Covenant on Economic, Social and Cultural Rights.²³⁷ The case was one where a government employee, dismissed for the sexual harassment of a typist, had been reinstated by the Delhi High Court on the basis of the trial judge’s finding that he had not in fact molested the complainant, but had only tried to molest her. The Supreme Court indignantly reinstated the original dismissal:

“These international instruments cast an obligation on the Indian State to gender sensitise its laws and the Courts are under

230. *Id.* at 3015.

231. Note 207 above.

232. AIR 1997 SC at 3014.

233. *Id.*

234. 4-15 September 1995. See Vol 14, Nos 10-21 of the *Earth Negotiations Bulletin* <<http://www.iisd.ca/vol14/>> (accessed 2 June 2008); United Nations Department of Public Information, *Platform for Action and the Beijing Declaration* (1996).

235. AIR 1997 SC at 3015.

236. *Apparel Export Promotion Council v A.K. Chopra*, AIR 1999 SC 625, at 633.

237. *Id.* at 634.

an obligation to see that the message of the international instruments is not allowed to be drowned. This Court has in numerous cases emphasised that while discussing constitutional requirements, court and counsel must never forget the core principle embodied in the International Conventions and Instruments and as far as possible give effect to the principles contained in those international instruments. The Courts are under an obligation to give due regard to International Conventions and Norms for construing domestic laws more so when there is no inconsistency between them and there is a void in domestic law ... In cases involving violation of human rights, the Courts must for ever remain alive to the international instruments and conventions and apply the same to a given case when there is no inconsistency between the international norms and the domestic law.”²³⁸

That decision became a precedent for a later case in which Chief Justice Anand again invoked the provisions of CEDAW and the Beijing Declaration.²³⁹ This time the principles of gender equality were used to interpret s 6(a) of the *Hindu Minority and Guardianship Act*, 1956, which provides that the “natural guardians of a Hindu minor”, in the case of a boy or an unmarried girl, are “the father, and after him, the mother”. The Court construed the word “after” to mean “in the absence of”, and construed that expression in turn to refer to “the father’s absence from the care of the minor’s property or person for any reason whatever”, including the case where “the father is wholly indifferent”, or leaves the mother “exclusively in charge”.²⁴⁰ Thus for all practical purposes the parents should be seen as alternative guardians, neither having priority over the other.

Vishaka had not been the first example of the Court’s reliance on CEDAW. In January 1996 Justice Ramaswamy had taken part in two cases in which, as one commentator has put it, he “included long references to equality for women and sang the praises of [CEDAW]”.²⁴¹ In the first case²⁴² CEDAW probably made little difference to the result – namely, that a University law lecturer applying for a position reserved for members of a backward class, could not claim to be eligible simply because her husband belonged to that class. In the second case,²⁴³ CEDAW led the Court to a

238. *Id.*

239. *Githa Hariharan v Reserve Bank of India*, AIR 1999 SC 1149, at 1154 (Anand CJ; cf Banerjee J at 1155).

240. *Id.* at 1152 (Anand CJ; cf Banerjee J at 1159-60).

241. Laura Dudley Jenkins, *Identity and Identification in India: Defining the Disadvantaged* (2003) 34.

242. *Valsamma Paul v Cochin University*, AIR 1996 SC 1011.

243. *C Masilamani Mudaliar v Idol of Sri Swaminathaswami Swaminathaswami Thirukoil*, AIR 1996 SC 1697.

boldly purposive interpretation of the *Hindu Succession Act*, 1956. The testator had left property in equal shares to his wife and his cousin's wife – stipulating that it was left to them only for life, since he was “duty bound to provide [for their] maintenance”, and that after their deaths it was to be held in trust for the performance of pooja and feeding the poor. The Court held that despite these restrictions the widow had acquired a full beneficial estate. It did so by giving a broad effect to s 14(1) of the Act – which provides that “[a]ny property possessed by a female Hindu ... shall be held by her as full owner thereof and not as a limited owner”, and expressly extends that provision to “movable and immovable property acquired ... by inheritance ... or in lieu of maintenance”. This formula was said to be applicable despite Section 14(2) of the Act, which stipulates that sub-section (1) is *not* applicable to property acquired under a will if the terms of the will “prescribe a restricted estate in such property”.

In reaching these conclusions, Justice Ramaswamy quoted at length from what he had said about CEDAW in the earlier case. He also incorporated the same material into his new exposition. In both cases he relied in particular on Article 2(b) of CEDAW – by which States undertake “to pursue by all appropriate means and without delay a policy of eliminating discrimination against women”, and to this end to adopt “appropriate legislative and other measures ..., prohibiting all discrimination against women”. He also relied on Article 8(1) of the 1986 Declaration on the Right to Development,²⁴⁴ which stipulates that: “Effective measures should be undertaken to ensure that women have an active role in the development process.” As to CEDAW, he noted that India had ratified it only with reservations. But he thought that these reservations could be swept aside: “they bear little consequence in view of the fundamental rights in Article 15(1) and (3) and Article 21 and the directive principles of the Constitution”.²⁴⁵

All this was said to be available for direct judicial enforcement by virtue of s 2 of the *Protection of Human Rights Act*, 1993. Although the principal function of that legislation is to establish a Human Rights Commission, Justice Ramaswamy seized on the fact that s 2 of the Act defined “human rights” to mean “the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the *International Covenants and enforceable by courts in India*” (emphasis added). According to his account in both cases:

“Thereby the principles embodied in CEDAW and the concomitant right to development became integral parts of the

244. Adopted by the General Assembly on 4 December 1986 (Resolution 41/128); see AIR 1996 SC at 1700-01.

245. *Id.* at 1021 (*Valsamma Paul*), repeated at 1703 (*Masilamani Mudaliar*).

Indian Constitution and the Human Rights Act and became enforceable.”²⁴⁶

This conclusion apparently ignored the fact that the same section defined “the International Covenants” to mean only the two great 1966 Covenants on Civil and Political Rights and Economic, Social and Cultural Rights. Perhaps Justice Ramaswamy’s approach was vindicated a decade later, when the definition was amended to include, in addition to the 1966 Covenants, “such other Covenant or Convention adopted by the General Assembly of the United Nations as the Central Government may, by notification, specify”.²⁴⁷ At all events, he was able to conclude that the international instruments “add impetus and urgency to eliminate gender based obstacles and discrimination”: in particular, the CEDAW “enjoins ... this Court to breath[e] life into the dry bones of the Constitution ... and the *Protection of Human Rights Act* ... to prevent gender based discrimination and to effectuate right to life including empowerment of economic, social and cultural rights to women”.²⁴⁸

Another case in which CEDAW was quoted at length involved women engaged in construction work – making roads and digging trenches – for the Municipal Corporation of Delhi.²⁴⁹ The women were engaged from a “Muster Roll” – that is, they were selected for work on a daily basis and paid by the day, though some of them had been employed on that basis for ten years continuously. Women employed by the Corporation on a permanent basis were entitled to maternity leave, but women on the muster roll were not. An Industrial Tribunal came to the view that maternity leave should be made available to all women on the muster roll who had been continuously employed for three years or more. Accordingly, the Tribunal ordered the Corporation to extend to those women the benefits of the *Maternity Benefit Act*, 1961. The fact that the Corporation and its employees were not already covered by the Act was seen by the Tribunal as a “lacuna”, and the order was predicated on the fact that, under a proviso to Section 2 of the Act, the State government had the power to declare that the Act should be applied “to any other establishment”.

The Corporation complained that since no such declaration had been made, the Act did not in fact apply to the Corporation or its employees, and accordingly the Tribunal’s order had no legal basis. The Supreme Court rejected this as “a narrow way of looking at the problem”: “anyone acquainted with the working of the Constitution [and its commitment to social and

246. *Id.*

247. *Protection of Human Rights (Amendment) Act* 2006, s 2(a).

248. AIR 1996 SC at 1702.

249. *Municipal Corporation of Delhi v Female Workers (Muster Roll)*, AIR 2000 SC 1274.

economic justice] ... would outrightly reject the contention”.²⁵⁰ Instead, the Court concluded that the provisions of CEDAW must be “read into the contract of service” between the Corporation and its women employees; “and so read these employees immediately become entitled to all the benefits conceived under the *Maternity Benefit Act*, 1961”.²⁵¹

The use of the word “lacuna” was perhaps significant. In *Vishaka* the Court had spoken of recourse to international conventions and norms “in the absence of enacted domestic law occupying the field”, and had spoken of “a void in the domestic law”.²⁵² Similarly, in the earlier case of *Laxmi Kant Pandey v Union of India*,²⁵³ Justice Bhagwati had formulated elaborate guidelines for the adoption of Indian children by foreign parents, drawing in particular²⁵⁴ on the United Nations Declaration of the Rights of the Child²⁵⁵, the 1982 Brighton Guidelines for Intercountry Adoption,²⁵⁶ and the 1978 Draft Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children.²⁵⁷ But he stressed that he did so in a context where one legislative attempt to deal with the issue had failed in 1972, and another attempt, The Adoption of Children Bill 1980, “has unfortunately not yet been enacted into law”.²⁵⁸ In short, in both these cases, the Court had acted to fill a legislative gap. It was this aspect of those cases that was emphasised when the Court was asked to adapt the provisions of the Indian Penal Code so that definitions of rape and sexual intercourse would no longer be confined to penile penetration of the vagina.²⁵⁹ The Court noted²⁶⁰ the relevance of CEDAW, the Convention on the Rights of the Child,²⁶¹ and decisions of the International Criminal Tribunal for the Former Yugoslavia.²⁶² But the Court accepted an argument that the use of international materials

250. *Id.* at 1281.

251. *Id.* at 1283.

252. See the passage quoted at note 230 above.

253. AIR 1984 SC 469; see also the further directions reported in AIR 1986 SC 272 and AIR 1987 SC 232.

254. AIR 1984 SC at 475-76, 476-80.

255. Note 201 above.

256. Originally formulated at the Regional Conference of the International Council of Social Welfare, Bombay, 1981, and approved at the Workshop on Inter-country Adoption, Brighton, England, 4 September 1982. See now the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, done at The Hague 29 May 1993, in force 1 May 1995; 1870 UN Treaty Series 181.

257. Draft Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, adopted by the General Assembly 16 December 1981, UN Doc A/RES/36/167.

258. AIR 1984 SC at 472.

259. *Sakshi, A Women's Resource Centre v Union of India*, AIR 2004 SC 3566.

260. *Id.* at 3570, 3572, 3574.

261. Note 42 above.

262. *Prosecutor v Anton Furund·ija*, Case No IT-95-17/1 (10 December 1998); *Prosecutor v Dragoljub Kunarac and Radomir Kovac*, Case Nos IT-96-23 and 23/1 (22 February 2001).

in cases like *Vishaka* and *Laxmi Kant Pendey* is permissible only in the absence of relevant legislation – so that where legislation already exists, its amendment is a matter for the legislature.²⁶³

Incidentally, despite the earlier references to the Australian *Teoh* decision, this case yielded the first example of a specific argument that India's international commitments had given rise to a "legitimate expectation".²⁶⁴ But the argument received short shrift.

V.

In South Africa the 1996 Constitution takes elaborate care to deal with the use of international law by explicit provisions. Treaties must normally be approved "by resolution in both the National Assembly and the National Council of Provinces" (Section 231(2)), though certain agreements, primarily "of a technical, administrative or executive nature" will be binding without such approval if tabled within a reasonable time (Section 231(3)). On either basis, most treaties then require to be "enacted into law by national legislation" in order to take effect as "law in the Republic" – though a self-executing provision becomes law immediately once it has parliamentary approval, "unless it is inconsistent with the Constitution or an Act of Parliament" (Section 231(4)). Thus, apart from self-executing provisions, the Constitution spells out a requirement of "transformation" by legislative action in order for treaty obligations to have domestic legal effect. By contrast, s 232 provides that customary international law "is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament". Thus, subject to a requirement of consistency, the Constitution explicitly adopts the "incorporation" theory for giving effect to customary international law.

In several places, the Constitution explicitly acknowledges the international implications of its provisions.²⁶⁵ In particular, it explicitly requires resort to international law as an aid to interpretation. Thus, the general rule that legislation should be interpreted so far as possible conformably to international law is spelled out in s 233 in a particularly strong form:

"When interpreting any legislation, every court *must* prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law (emphasis added)."

263. AIR 2004 SC at 3574. The Court also reaffirmed (at 3575) that an unambiguous statute is binding even if it is contrary to international law – citing Ian Brownlie, *Principles of Public International Law* (5 ed 1998).

264. *Id.* at 3570.

265. See, e.g., s 35(3)(l), s 37(4)(b)(i) and (8), s 198(c), s 199(5), s 200(2), and s 201(2)(c).

More significantly still, Section 39(1) provides that any court or other tribunal interpreting the Bill of Rights in Chapter 2 of the Constitution “*may* consider foreign law” and “*must* consider international law”. And in practice both this requirement about constitutional interpretation, and the one in Section 233 about statutory interpretation, operate in tandem with Section 39(2), which requires that interpretation of statutes, and also development of the common law, “*must* promote the spirit, purport and objects of the [constitutional] Bill of Rights”. To obey that enjoinder inevitably entails attention to the major international human rights instruments.²⁶⁶

The constitutional provisions have ensured that South African courts, and particularly the Constitutional Court, have been scrupulous in giving extensive consideration both to relevant principles of international law, and to the international implications of their decisions. Already before the 1996 Constitution came into force, the Constitutional Court had already considered such matters on the basis of analogous provisions in the Interim Constitution of 1994. Most notably, in *State v Makwanyane and Mchunu*,²⁶⁷ the Constitutional Court held that capital punishment was inconsistent with the constitutional prohibition²⁶⁸ of “cruel, inhuman or degrading punishment”, and could not be saved (as Section 33(1) of the Interim Constitution permitted)²⁶⁹ as “reasonable” and “justifiable in an open and democratic society based on freedom and equality”.

As well as reviewing decisions on capital punishment in other countries,²⁷⁰ the Constitutional Court looked to broader evidence of international law and practice – not only to decisions of the European Court of Human Rights²⁷¹ and the UN Human Rights Committee,²⁷² but also to the broad pattern of “movement away from the death penalty” in almost half the world’s countries, which had “gained momentum” in the second half of the twentieth century. The Court stressed that the constitutional requirement to “have regard” to “public international law” includes “non-binding as well as binding law”:²⁷³

Interestingly, the Court’s approach to constitutional decisions in other countries was perceptibly more cautious. While conceding that such material

266. See, e.g., *Islamic Unity Convention v Independent Broadcasting Authority*, 2002 (4) SA 294, at 307 (CC).

267. 1995 (3) SA 391 (CC).

268. In s 11(2) of the 1994 Interim Constitution; see now s 12(1)(e) of the 1996 Constitution.

269. See now s 36(1) of the 1996 Constitution.

270. See 1995 (3) SA at 415-17 (reviewing United States decisions), 426-29 (reviewing decisions in India).

271. *Soering v United Kingdom*, 11 EHRR 439 (1989).

272. *Kindler v Canada*, Communication No 470/1991, 30 July 1993; *Ng v Canada*, Communication No 469/1991, 5 November 1993.

273. 1995 (3) SA at 413.

“will no doubt be of importance, particularly in the early stages of the transition when there is no developed indigenous jurisprudence in this branch of the law”, the Court stressed that “it is important to appreciate” that such material “will not necessarily offer a safe guide to the interpretation of Chapter Three of our Constitution”:

“In dealing with comparative law, we must bear in mind that we are required to construe the South African Constitution, and not an international instrument or the constitution of some foreign country, and that this has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution. We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it.”²⁷⁴

Another significant case decided under the Interim Constitution²⁷⁵ involved a challenge to the legislation establishing the Truth and Reconciliation Commission, the *Promotion of National Unity and Reconciliation Act*, 1995. Four applicants including the widow of the late Steve Biko, who died in police custody in 1977, challenged the validity of the provisions enabling those responsible for abuses under the apartheid regime to apply for “amnesty”. The challenge rested in part on an argument “that the State was obliged by international law to prosecute those responsible for gross human rights violations and that the provisions of s 20(7) which authorised amnesty for such offenders constituted a breach of international law.”²⁷⁶

In particular, this argument relied on the provision, in all four of the principal Geneva Conventions,²⁷⁷ by which member states undertake to provide “effective penal sanctions for persons committing, or ordering to be committed”, a range of actions including wilful killing, torture or inhuman treatment, and the wilful causing of suffering or serious injury.

The challenge was rejected. The Constitutional Court emphasised that under Section 231 of the Interim Constitution, international agreements were to have legal effect within South Africa “unless provided otherwise by an Act of Parliament”, while, similarly, customary international law was to

274. *Id.* at 414-15.

275. *Azanian Peoples Organisation (Azapo) v President of the Republic of South Africa*, 1996 (4) SA 671 (CC).

276. 1996 (4) SA at 687.

277. Signed at Geneva 12 August 1949; in force 21 October 1950; 75 UN Treaty Series 31-417. The relevant provisions are Art 50 of the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Art 51 of the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Art 130 of the Convention Relative to the Treatment of Prisoners of War; and Art 147 of the Convention Relative to the Protection of Civilian Persons in Time of War.

have effect “unless inconsistent with this Constitution or an Act of Parliament”. In other words, even if the amnesty provisions were inconsistent with the Geneva Conventions, the statutory provisions should prevail. Similarly, the Court emphasised that its obligation under Section 35 was only to “have regard” to public international law when interpreting the fundamental rights, not necessarily to apply it. In any event, the Court went on to hold that the amnesty provisions were not in fact inconsistent with the Geneva Conventions. The original 1949 Conventions applied only to truly international conflicts, not to upheavals within a country. The 1977 Protocols²⁷⁸ had extended the scope of Convention protection; but the extensions did not necessarily apply to the South African situation during the apartheid era. In any event, Article 6(5) of the Second Protocol provided explicitly that, in cases of prolonged armed conflict within a country, “[a]t the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.”

The Court saw this provision as reflecting international recognition of the difference between invasion by a foreign country, and internal upheavals after which the former adversaries “inhabit the same sovereign territory. They have to live with each other and work with each other and the State concerned is best equipped to determine what measures may be most conducive ...[to] such reconciliation and reconstruction ... having regard to its own peculiar history, its complexities ... and its emotional and institutional traditions.”²⁷⁹

In earlier proceedings,²⁸⁰ the Cape Provincial Division had emphasised that the very concept of “amnesty” was itself derived from international law; and the Constitutional Court followed that judgment by accepting Vattel’s definition of “amnesty” in his classic work on *The Law of Nations*.²⁸¹

Under the 1996 Constitution, the Constitutional Court has continued to build on the foundations laid in *Makwanyane*. In the *Grootboom* case,²⁸²

278. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II): adopted at Geneva 8 June 1977, 1125 UN Treaty Series 3, 609.

279. 1996 (4) SA at 690.

280. *Azanian Peoples’ Organization (Azapo) v Truth and Reconciliation Commission*, 1996 (4) SA 562 at 571-75.

281. Emeric De Vattel, *Le Droit des Gens; ou Principes de la Loi Naturelle, Appliqués à la Conduite et aux Affaires des Nations et des Souverains* (1758), transl CG Fenwick as *The Law of Nations, or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns* (Carnegie Institute, 1916) Book IV, c 2, paras 20-22.

282. *Government of the Republic of South Africa v Grootboom*, 2001 (1) SA 46 (CC).

Justice Yacoob observed that, of course, “the weight to be attached to any particular principle or rule of international law will vary”. But he added that “where the relevant principle ... binds South Africa, it may be directly applicable”. In that case the Court had to interpret Section 26 of the Constitution, which recognises “the right to have access to adequate housing”, but then provides only that the State “must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right”. The language parallels that of Article 2(1) of the International Covenant on Economic, Social and Cultural Rights, which requires that each State shall “take steps ... to the maximum of its available resources, with a view to achieving progressively the full realization of the [Covenant] rights”. Accordingly, in interpreting Section 26 of the Constitution, the Court turned not only to the Covenant, but to the interpretation placed upon it by the United Nations Committee on Economic, Social and Cultural Rights.²⁸³

While conceding the importance of “resource constraints”, the UN Committee had read Article 2 as imposing “a minimum core obligation”. Asked to spell out the details of a “minimum core obligation” in relation to housing, the Court felt unable to do so – certainly because of its own lack of resources, and possibly because that might not be a proper task for a court to undertake.²⁸⁴ The Court did, however, treat the concept of “minimum core” as a helpful guide to determining what would satisfy the constitutional obligation to take “reasonable” legislative measures. On that basis it concluded that the government had an obligation to develop a “comprehensive and coordinated” housing program, and that it had failed to do so. In *Minister for Health v Treatment Action Campaign (No 2)*,²⁸⁵ the Court again took this approach, this time in relation to health care.

The effect of the enjoinder in Section 39(2) of the Constitution with regard to the development of the common law was considered at length in *Carmichele v Minister of Safety and Security*,²⁸⁶ where the victim of a vicious assault, by an assailant who at the time was awaiting trial on a charge of rape, sought to sue the police and prosecutorial authorities for negligence in allowing the assault. The question was whether the common law of delict should be developed to allow such a claim. The Constitutional Court declined to undertake such a development itself, but held that there might well be good grounds for doing so. The Court took full account of the constitutional injunction that development of the common law “must

283. UN Committee on Economic, Social and Cultural Rights, 5th Session, 14 December 1990, *General Comment 3: The Nature of States Parties Obligations (Art 2, par 1)* (UN Doc E/1991/23).

284. 2001 (1) SA at 66.

285. *Minister of Health v Treatment Action Campaign (No 2)*, 2002 (5) SA 721, at 737-740 (CC).

286. 2001 (4) SA 938 (CC).

promote the spirit, purport and objects of the Bill of Rights”. It followed, said the Court, “that where the common law deviates from the spirit, purport and objects of the Bill of Rights the courts have an obligation to develop it by removing that deviation”.²⁸⁷

Moreover, the Court treated the Bill of Rights as reinforced by the “duty under international law to prohibit all gender-based discrimination” if its “effect or purpose” would impair the enjoyment of fundamental rights and freedoms by women. The duty was said to extend to “reasonable and appropriate measures” to prevent the violation of rights.²⁸⁸ The Court referred specifically to the CEDAW, and also to the 1992 recommendation, pursuant to that Convention, that a State may be responsible for wrongs done by private individuals if the State has failed “to act with due diligence to prevent violations of rights or to investigate and punish acts of violence”.²⁸⁹

The Court returned to this aspect of *Carmichele* in the case of Ahmed Omar, whose wife had successfully proceeded against him for an interim protection order under the *Domestic Violence Act* 1998.²⁹⁰ Pursuant to Section 8 of the Act, the protection order was accompanied by the issue of a suspended warrant of arrest, to remain unexecuted so long as Omar complied with the protection order. He argued that the provision for such a warrant was unconstitutional. In the light of “the constitutional requirement to deal effectively with domestic violence”, as reinforced by the international obligations acknowledged in *Carmichele*, the Court concluded that the argument was quite “without merit” and “to a considerable extent ill-conceived”.²⁹¹

Other arguments have received fuller attention. In 2004 the Constitutional Court struck down the *Black Administration Act*, 1927 – now seen as a forerunner of apartheid, but originally enacted to safeguard the indigenous customary laws of marriage and succession, much as the British administration in India had done for communal laws. Moreover, the Court also struck down the indigenous customary laws themselves, as embodying patriarchal principles of male domination and ignoring the rights of women and children. The Court held that neither the legislation nor the relevant indigenous practices were compatible with the rights to equality and human dignity (Sections 9 and 10 of the Constitution), or with the special protection of the rights of children (s 28).²⁹² In construing these provisions, Deputy

287. *Id.* at 953-54.

288. *Id.* at 964-65.

289. General Recommendation 19, UN GAOR, Committee on the Elimination of Discrimination Against Women, 11th session (1992).

290. *Omar v Government of the Republic of South Africa*, 2006 (2) SA 284 (CC).

291. 2006 (2) SA at 308-09. For the reference to *Carmichele* see the text and footnotes at 295.

292. *Bhe v Magistrate of Khayelitsha*, 2005 (1) SA 580 (CC).

Chief Justice Langa drew repeatedly on international law, insisting that “[i]n interpreting both s 28 and the other rights in the Constitution, the provisions of international law must be considered”.²⁹³ Among the relevant international instruments to which South Africa was a party, he cited Article 24(1) of the ICCPR; Article 2 of the Convention on the Rights of the Child;²⁹⁴ Article 3 of the African Charter on the Rights and Welfare of the Child;²⁹⁵ and Article 18 of the African Charter on Human and People’s Rights.²⁹⁶ He also cited decisions in the United States Supreme Court²⁹⁷ and the European Court of Human Rights.²⁹⁸ Similarly, on the rights of women, both he and Justice Ngcobo²⁹⁹ cited Article 2 of CEDAW, Article 18 of the African Charter on Human and People’s Rights, and Articles 2, 21 and 25 of the 2000 Protocol thereto.³⁰⁰ In an earlier case³⁰¹ the Constitutional Court had held by majority that, consistently with the 1996 Constitution, the word “spouse” in the *Intestate Succession Act*, 1987 and the *Maintenance of Surviving Spouses Act*, 1990 must now be read to include women married according to Muslim rites. In that case, in a passage which he now quoted again,³⁰² Justice Ngcobo had said:

“Our Constitution contemplates that there will be a coherent system of law built on the foundations of the Bill of Rights, in which common law and indigenous law should be developed and legislation should be interpreted so as to be consistent with the Bill of Rights and with our obligations under international law. In this sense the Constitution demands a change in the legal norms and the values of our society.”

Several important and difficult cases have concerned the relationship of South Africa with its African neighbours. In 2004 a group of South African citizens left South Africa by air, ostensibly to take up employment as private security guards for a mining company in the Democratic Republic of the Congo. When the plane touched down to refuel in Zimbabwe the men

293. *Id.* at 610.

294. Note 42 above.

295. Note 43 above.

296. Adopted 27 June 27 1981; *in force* 21 October 1986; OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982).

297. *Weber v Aetna Casualty and Surety Co*, 406 US 164 (1972); *Levy v Louisiana*, 391 US 68 (1968); *Glona v American Guarantee and Liability Insurance Co*, 391 US 73 (1968); *Trimble v Gordon*, 430 US 762 (1977).

298. *Marckx v Belgium*, [1979] EHRR 2; *Inze v Austria*, [1987] EHRR 28.

299. 2005 (1) SA at 608 (Langa DCJ), 654 (Ngcobo J).

300. Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, 13 September 2000; *in force* 25 November 2005; CAB/LEG/66.6 (reprinted in 1 *African Human Rights Law Journal* 40).

301. *Daniels v Campbell*, 2004 (5) SA 331 (CC).

302. 2005 (1) SA at 657.

were arrested and charged with a series of offences relating to the possession of dangerous weapons, apparently on the basis of information supplied by the South African security services. The men lodged an urgent application to the High Court in Pretoria for a declaration that the South African government had a constitutional duty to intervene on their behalf, and to seek their extradition so that any trial would be conducted in South Africa under South African law. Apparently the men were apprehensive that without such intervention, the authorities in Zimbabwe might agree to their extradition to Equatorial Guinea, where they feared that they might face the death penalty for alleged involvement in a conspiratorial coup. The High Court rejected their application, and on appeal the Constitutional Court affirmed that result.³⁰³

In the principal judgment Chief Justice Chaskalson held that citizens abroad have a right to seek diplomatic assistance from their home governments, but that generally governments have no duty to provide such assistance. In other words, he thought that the Hohfeldian correlative³⁰⁴ of the citizen's right to seek diplomatic assistance is simply a government obligation "to consider the request and deal with it consistently with the Constitution".³⁰⁵ He added, however – in an evident concession to the view of the dissenting judges – that "in extreme cases", where a citizen in another country suffers a "gross" or "egregious" abuse of international human rights norms, a government may have a duty to act.³⁰⁶

Justices O'Regan and Mokgoro dissented, holding that under the South African Constitution – albeit not at international law – the government *does* have an obligation to respond to requests for diplomatic assistance. In their view "the rights, privileges and benefits of citizenship" that accrue to all citizens by virtue of Section 3 of the Constitution must include "the right of the State to make diplomatic representations on their behalf to protect them against a breach of international law".³⁰⁷ Yet their final position differed from that of the Chief Justice only in emphasis, since they too limited their finding of an "obligation" to cases involving "egregious breaches of international human rights norms".³⁰⁸

In the end, the divergence of opinion turned largely on differing factual assessments of the immediate risk of "egregious" breaches – in particular, the degree of likelihood that if the applicants were extradited to

303. *Kaunda v President of the Republic of South Africa*, 2005 (4) SA 235 (CC).

304. See WN Hohfeld, *Fundamental Legal Conceptions As Applied in Judicial Reasoning* (1919).

305. 2005 (4) SA at 259 (Chaskalson CJ).

306. *Id.* at 260.

307. *Id.* at 303.

308. *Id.* at 305.

Equatorial Guinea, they might face unfair trial procedures, torture, and perhaps execution.³⁰⁹ The majority view was not that these risks were not real, but that intervention at this stage – particularly judicial intervention – might be premature:

“The situation that presently exists calls for skilled diplomacy the outcome of which could be harmed by any order that this Court might make. In such circumstances the government is better placed than a court to determine the most expedient course to follow.”³¹⁰

By contrast, the dissenting judges emphasised that the threatened abuses would themselves involve breaches of the international norms relating to fair trial procedures, torture and capital punishment; and that the case therefore fell within the “egregious” category in which they maintained that an obligation to render diplomatic assistance clearly arose.³¹¹

Justices Sachs and Ngcobo gave separate judgments, agreeing with the majority in result, but also expressing a good deal of sympathy with the dissenting view. In particular, Justice Ngcobo noted a curious irony. Customary international law is established by what States do in practice; yet when a State refuses to recognise a rule of customary law on the ground that there is insufficient State practice to support it, that very decision “[prevents] the practice from ripening into a rule of customary international law”.³¹² This, he thought, was what was happening in relation to diplomatic protection. He listed almost thirty countries which had “constitutionalised the duty to provide diplomatic protection”; yet “reluctance to recognise this practice as [giving rise to] a rule of customary international law” had left it, at this stage, still no more than “an exercise in the progressive development of international law”. He implied that this placed a particularly heavy responsibility on the Court: “it is true that customary international law is part of our law, but it can be altered by our law, and, in particular, by our Constitution.”³¹³ That is, in deciding the constitutional issue, the Court was itself assuming a responsibility for contributing one way or the other to the development of international law. A month later, Justice Kirby was to make a similar argument in the High Court of Australia.³¹⁴

All of the judgments were sensitive to the interaction between international and constitutional law,³¹⁵ and all of them reviewed the relevant

309. *Id.* at 270; see generally *id.* at 270-74.

310. *Id.* at 274.

311. *Id.* at 312-15.

312. *Id.* at 279.

313. *Id.* at 280.

314. In *Re Colonel Aird; Ex p Alpert*, discussed at notes 132-33 above.

315. See in particular O'Regan J at 299.

international materials with care. Those materials bore on the outcome in many different ways. First,³¹⁶ there were the international rules and practices relating to diplomatic protection, as illustrated in particular by the judgment of the ICJ in the *Barcelona Traction* case,³¹⁷ the review of the issue by the International Law Commission in the year 2000,³¹⁸ and the Special Rapporteur's report prepared for the purposes of that review.³¹⁹ Equally important to the majority was the well established principle of international law that the sovereignty of any country is normally confined to its own territory.³²⁰ Then there were difficult questions of international comity between South Africa and its neighbours – in particular, the question of whether the South African government could be said to have acted wrongfully in passing on to Zimbabwe and Equatorial Guinea the information that led to the arrests. Chief Justice Chaskalson, in particular, denied that this had been wrongful:

“On the contrary, a failure to pass on the intelligence to the authorities in Zimbabwe and Equatorial Guinea would have been a breach of the duties that South Africa owed to those countries ... In the times in which we live it is essential that this be done, and comity between nations would be harmed by a failure to do so.”³²¹

On this point the whole Court agreed. Yet no less important for the dissenters were the international norms concerning fair trial procedures, torture, and capital punishment – including, in particular, the course to be followed by one country when its citizens, or other persons entitled to its protection, face the prospect of human rights abuses under the law of another country.³²² A final problem was the “confused” relationship between nationality and citizenship.³²³

316. 2005 (4) SA at 248-250, 259 fn 47, 260 and 270 (Chaskalson CJ); 279-280 and 285-86 (Ngcobo J); 295-97 (O'Regan J).

317. *Barcelona Traction, Light and Power Company, Ltd (Belgium v Spain)*, [1970] ICJ Rep 3.

318. *Report of the International Law Commission on the work of its 52nd session*, 1 May to 9 June and 10 July to 18 August 2000 (General Assembly Doc A/55/100). See now the Draft Articles on Diplomatic Protection adopted by the Commission at its 58th session: *Official Records of the General Assembly*, 61st Session, Supplement No 10 (General Assembly Doc A/61/10).

319. John Dugard, “First Report on Diplomatic Protection”, 7 March 2000 (Special Rapporteur's Report), General Assembly Doc A/CN.4/506.

320. As evidenced in particular by the decision of the Permanent Court of International Justice in *The Case of the SS Lotus (France v Turkey)* (1927) PCIJ Series A, No 10, and the later Canadian case of *R v Cook*, [1998] 2 SCR 597, (1997) 146 DLR (4th) 1. See 2005 (4) SA at 252-54 (Chaskalson CJ); 300-01 (O'Regan J).

321. *Id.* at 256 (Chaskalson CJ).

322. *Id.* at 312-16 (O'Regan J). See also Chaskalson CJ at 257-58, 267, 271-72; Ngcobo J at 282-85, 291-92.

323. *Id.* at 305 (O'Regan J); cf Chaskalson CJ at 258-59.

From one point of view, the problem here was one of potential outrages against South African nationals by other African countries. From another point of view the problem was just the reverse – of potential outrages by South African nationals *against* other African countries. The continuing saga of Dr. Wouter Basson involves issues of the latter kind. In October 1999, Dr. Basson, a cardiologist who during the apartheid era was in charge of chemical and biological warfare for the then South Africa Defence Force, was prosecuted for his role in alleged atrocities committed outside the borders of South Africa – mostly in other parts of Africa, but as far afield as England. In April 2002, after a trial lasting for 31 months, the defendant was acquitted. The prosecution appealed. Only one of the grounds of appeal was successful, but it was here that international law was directly engaged.³²⁴

The charges were laid under Section 18(2) of the *Riotous Assemblies Act*, 1956, which applies to any person who “conspires ... to aid or procure the commission of or to commit” an offence, or “incites, instigates, commands, or procures any other person to commit” an offence. A person convicted of such involvement may incur the same punishment as for the substantive offence. The trial judge had treated this provision as applicable only where the substantive offence was committed within South Africa. The Constitutional Court ruled that, having regard to the international significance of the issues, the trial judge’s ruling was wrong; and that in refusing to accept an appeal on that issue despite procedural defects, the Supreme Court of Appeal had also erred.

On both issues, the Constitutional Court relied strongly on international law. The substantive issue about the interpretation of the statute was seen as depending on well established exceptions to the general principle that national jurisdiction should normally respect territorial limits: the Court held that South Africa was required by “comity to the international community ... to punish members of its military who committed such grave offences, contrary to the Geneva Convention[s] and international law”.³²⁵ On the jurisdictional issue of whether the appeal was of constitutional significance,³²⁶ the Court observed that “universally accepted norms of conduct in times of war” had been evolving “from antiquity onwards”.³²⁷ The Rome Statute of the International Criminal Court³²⁸ “represents the culmination of a centuries-old process of developing international humanitarian law”, but “in no way deprives national courts of responsibility

324. *State v Basson*, 2007 (3) SA 582 (CC).

325. *Id.* at 662.

326. See also *State v Basson*, 2005 (1) SA 171 (CC), especially at 203, 207-08, and 210-17.

327. 2007 (3) SA at 645-46.

328. Opened for signature 17 July 1998; in force 1 July 2002 (UN Doc A/CONF.183/9).

for trying cases involving breaches of such law”.³²⁹ The Court quoted³³⁰ the repeated insistence of the ICJ on “elementary considerations of humanity”³³¹ which are “fundamental to the respect of the human person”, and are therefore “to be observed by all states whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of customary international law”.³³² The point was reinforced in the interlocutory judgment of the International Criminal Tribunal for the former Yugoslavia in the *Tadić* case.³³³

On this basis the Constitutional Court concluded that the activities imputed to Dr. Basson, even in the absence of relevant Conventions or treaties, would have “grossly transgressed even the most minimal standards of international humanitarian law”.³³⁴ But the Court also noted³³⁵ that the charges, if proved, would involve violations of international agreements relating to bacteriological warfare,³³⁶ as well as provisions in all four of the 1949 Geneva Conventions dealing “expressly with the treatment of non-combatants and indirectly with the responsibilities of medical officers”. The Court concluded that the Court of Appeal

“...should have given appropriate weight and attention to these considerations, even in the absence of any argument on these issues by the State. Given the extreme gravity of the charges and the powerful national and international need to have these issues properly adjudicated, particularly in the light of the international *consensus* on the normative desirability of prosecuting war criminals, only the most compelling reasons would have justified [the Court] in exercising its discretion to refuse to rule on the charges.”³³⁷

329. 2007 (3) SA at 646.

330. *Id.* at 646-47.

331. *Corfu Channel Case, Merits*, [1949] ICJ Rep 1, at 22.

332. *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, [1006] ICJ Rep 226, at 257; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits*, [1986] ICJ Rep 14, at 114.

333. *Prosecutor v Dusko Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)*, Case No IT-94-1-A (2 October 1995), reported in (1996) 35 *International Legal Materials* 32.

334. 2007 (3) SA at 648.

335. *Id.* at 648-49.

336. The Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (signed at Geneva, 17 June 1925; in force 8 February 1928; 94 League of Nations Treaty Series 65); and the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (opened for signature 10 April 1972; in force 26 March 1975; 1015 UN Treaty Series 163).

337. 2007 (3) SA at 649.

The end result was that the criminal charges against Dr. Basson were “reinstated”, but “[t]he State must determine what steps it wishes to take in respect of those charges”.³³⁸ The question of whether a fresh prosecution would constitute double jeopardy was expressly left open. In fact there has been no new prosecution under the criminal law. But in November 2007 the Health Professions Council of South Africa began hearing six charges against him which, if successful, would result in his deregistration. The proceedings have now been adjourned until September 2008.

In 2006 the Constitutional Court heard a challenge³³⁹ to Section 23(1)(a) of the *Private Security Industry Regulation Act 2001*, which effectively limits employment in the security industry to citizens or permanent residents. The challenge was brought on behalf of a number of women living in South Africa as refugees from other African countries, whose applications for registration under the Act had been refused. The Constitutional Court held by majority that the provision was *not* unconstitutional – by reason of the further provision in Section 23(6) that, in spite of the general limit, “any person” is entitled to registration on showing “good cause”, on grounds “not in conflict with the purpose of this Act”. At the same time, the majority judges directed the regulatory authority to change its employment practices: the women in the case must be allowed to reapply for employment, and the authority must ensure that in future all applicants were made fully aware of their options under Section 23(6).

Predictably, Justices Mogkoro and O’Regan, who dissented,³⁴⁰ invoked Conventions relating to refugees,³⁴¹ stressing that the provisions of the South African Refugees Act, 1998

“...are based on the provisions of the UN Convention and need to be understood in terms of that Convention. Where there is any doubt as to the meaning of these provisions, preference should be given to a meaning which is consistent with our international obligations, for section 233 of our Constitution provides that –

‘When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that

338. *Id.* at 581.

339. *Union of Refugee Women v Director, Private Security Industry Regulatory Authority*, 2007 (4) SA 395 (CC).

340. *Id.* at 427-431.

341. Convention Relating to the Status of Refugees, done at Geneva 28 July 1951; in force 22 April 1954; 189 UN Treaty Series 150; Protocol Relating to the Status of Refugees, noted by General Assembly resolution 16 December 1966; *in force* 4 October 1967; 606 UN Treaty Series 26; Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, done at Addis Adaba 10 September 1969; in force 20 June 1974; 1001 UN Treaty Series 45.

is consistent with international law over any alternative interpretation that is inconsistent with international law.’

In addition, the Constitution enjoins us to consider international law when interpreting the rights in the Bill of Rights. Our international law obligations are therefore relevant to the interpretation both of the legislation under consideration in this case, and of interpreting section 9(3) of the Constitution.”³⁴²

They held that the impugned provisions were unfairly discriminatory and thus infringed Section 9(3) of the Constitution, insisting that this reading of Section 9(3) “gives proper weight to our international law obligations in the light of the constitutional injunction to do so”.³⁴³

The majority judges also relied on the 1951 Convention.³⁴⁴ As Acting Justice Kondile put it, while the *Private Security Industry Regulation Act* “is not a negation of our international duties towards refugees”, nevertheless “care must be taken to ensure that ... [it is administered] in as flexible a manner as possible in order to be consistent with our international obligations”.³⁴⁵ For Justice Sachs, in his concurring judgment, the *Refugees Act* 1998 was a clear legislative acknowledgment “of the need to create a progressive and humane refugee regime in keeping with South Africa’s international legal obligations”,³⁴⁶ while the way in which the *Private Security Industry Regulation Act* had been administered was “in flagrant disregard of the status granted to refugees by international and domestic law”.³⁴⁷ He also invoked the Preamble to the 1996 Constitution, which speaks of building “a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations”. For Justice Sachs,

“...[t]his acknowledges two things: the international support, based upon the principles of the Universal Declaration of Human Rights and the United Nations, that enabled our country to overcome division and achieve constitutional democracy, and the humanitarian obligations that go with achieving a dignified place as a democratic member of the international community.”³⁴⁸

342. 2007 (4) SA at 427-28.

343. *Id.* at 431.

344. See *id.* at 407 and 415-16 (Kondile AJ), 438-440 (Sachs J).

345. *Id.* at 407.

346. *Id.* at 441.

347. *Id.* at 437.

348. *Id.* at 442.

VI.

It is not surprising that judicial recourse to international law is more frequent under Constitutions that permit or require such recourse by specific references to international law. The effect of such provisions is to offer a bridge between what are sometimes regarded as distinct and separate legal systems – those of international law, and those of individual sovereign countries. The Australian case of *Fishwick v Cleland*³⁴⁹ illustrates the conceptual problem: was Australia's legislative authority for the Trust Territory of New Guinea prior to 1975 derived from the United Nations Trusteeship Agreement, or from the Australian Constitution? I suggested earlier that the answer depends on the legal system within which the question is raised: as a matter of international law one would give the former answer, as a matter of Australian law the latter. A similar analysis applies to the widespread judicial acceptance of the rule that when legislation is clearly in breach of international law, the courts must enforce the legislation. Such a rule postulates that legislation may simultaneously be valid as a matter of municipal law, and a breach of international law.

This kind of equivocation could be resolved if it were possible to settle the old theoretical debate as to whether international law or national law has “primacy”. On the former view, the national legal system is valid only because it reflects an exercise of national sovereignty, which in turn depends on international recognition according to the rules of international law. On the latter view, international law arises only from the exercise of national sovereignties, either through their express agreement to treaties and Conventions, or through their adherence to practices perceived as responsive to legal obligation.

The great jurist Hans Kelsen always maintained that, either way, there is ultimately only *one* legal system: whether national laws depend on international law or *vice versa*, their necessary interconnectedness results in a seamless whole. As to whether international law or national law had “primacy”, Kelsen was at one time agnostic.³⁵⁰ My own teacher Julius Stone rebuked him for that, insisting as I have done here that the answer depends simply on the legal system within which the question arises³⁵¹ – presumably because each legal system will tend to give primacy to itself, as psychologists tell us young children do. In later life Kelsen resolved the problem by concluding that “primacy” must *always* be accorded to international law – that the sovereignty of every nation state, and hence the validity of its legal

349. Note 165 above.

350. Hans Kelsen, *General Theory of Law and State* (1946) 385-86.

351. Julius Stone, *Legal System and Lawyers' Reasonings* (1964, reprinted 1968) 118-19.

system, is derived from international law as a necessary consequence of his “pure theory of law”.³⁵²

On that view, one would have to conclude that any national Constitution must *always* be interpreted in conformity with international law, whether or not it includes provisions like those in South Africa and India. We take it for granted that legislation must always comply with the Constitution, because it depends on the Constitution for its legal validity. For the same reason, we would now have to say that the Constitution must always comply with international law.

That, of course, would be a much stronger claim than those advanced in America by Justice Anthony Kennedy, or in Australia by Justice Michael Kirby. At the same time, the critics of Kennedy and Kirby would be quick to point out that an international “primacy” of that kind is exactly what they have been afraid of.

352. Hans Kelsen, *The Pure Theory of Law* (transl Max Knight, 1967) 215.