

# The World, through the Judge's Eye

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## I. Introduction

How should the constitution of a democracy address the world? How should its constituent actors — its legislators, its administrators and its judges — react to legal developments that have taken place elsewhere? For legislators, the choice seems clear — no country is unaffected by outside developments, and the content of legislation can, and should, be influenced by legal and other change. For judges, however, the alternatives are differently cast. Is their choice to resist the influence of non-national law, or else engage with it as a body of law containing methods of reasoning and results that are sometimes persuasive, sometimes irrelevant, and sometimes positively aversive to Australian law?<sup>1</sup> How should judges perceive the world, and what is special about their perception? In other words, what is the world, through the judge's eye?

The irony of these questions is that engagement with the world helps to provide an answer. Constitutional judges around the world have shown themselves to be open to considering legal developments elsewhere, and openly expressive about that fact. They are looking beyond the familiar sources of constitutional interpretation — written text and structure, founding debates and history, and perhaps national values or experience — to norms developed in foreign case law, international instruments and even international institutions.<sup>2</sup> The question, in other constitutional systems at least, is no longer whether to engage with non-national law, but how.

For the past twenty years, while these developments seemed to barely touch the Australian antipodes, Michael Kirby has wanted us to see our law in international

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<sup>1</sup> For a description of these attitudes, with respect to comparative law, see K Lane Scheppelle, 'Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models', (2003) 1 *International Journal of Constitutional Law* 296; V Jackson, 'Constitutional Comparisons: Convergence, Resistance, Engagement', (2005) 119 *Harvard Law Review* 109. See also V Jackson, 'Transnational Challenges to Constitutional Law: Convergence, Resistance, Engagement', (2007) 35 *Federal Law Review* 161.

<sup>2</sup> For example, *Roper v Simmons*, 543 US 551 (2006) (United States); *S v Makwanyane* 1995 (3) SA 391 (CC) (South Africa); *R v Ewanchuk* [1999] 1 SCR 330 (Canada); *Apparel Export Promotion Council v AK Chopra* [1999] All India Reporter (S.C.) 625 (India).

terms. He has wanted us, that is, to engage in a kind of worldly thought experiment by imagining that, through the power of judicial knowledge — and judicial dialogue — about world history, present global practices, and indeed the very future of the planet, the Australian legal system can be made more justifiably our own. His advancement of an international lens — of seeing Australian law through ‘the world’s eye’<sup>3</sup> — includes reference to international law, encompassing resolutions and treaties made by states within the United Nations system, especially the Universal Declaration of Human Rights<sup>4</sup> and the decisions of international tribunals and committees established under treaty law. His lens also includes reference to comparative law, expanding his reference list from the traditional English Law Reports, beyond even the United States opinions which permeate other opinions in Australia, to caselaw and legislation from jurisdictions as diverse as Canada, Germany, Hong Kong, India, Israel, Japan, Malaysia, New Zealand and South Africa. Indeed, his lens blurs the very division between international and comparative law.

It is not that Kirby, the recently retired Australian High Court Justice best known for his defense of judicial activism,<sup>5</sup> his prolific legal contribution,<sup>6</sup> and his record-breaking term of office,<sup>7</sup> has moved closer to the world. The world has moved closer to Kirby. It has provided him with a situation in which his bold dissents have become persuasive (international) authority, his outlier interpretations have been bolstered by likeminded judicial examples elsewhere, and his own position in the Australian legal system — laggard, in world terms, in the transjudicial constitutional conversation at least — has given him leadership status.

In essence, Kirby J’s interpretive principle — which advocated the use of international law as a guide in common law development, statutory interpretation, and, most controversially, in constitutional interpretation — has scrambled the categories of minority and majority opinions, of the legal communities in which orthodoxies become heresies and heresies become orthodoxies, and of the professional timelines and geographic spaces in which loners become leaders.<sup>8</sup>

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<sup>3</sup> Justice M Kirby, *Through the World’s Eye* (2000), (speeches selected and edited by C Sampford, S Blencowe and S Condln), xxv.

<sup>4</sup> Universal Declaration of Human Rights, G A Res 217A (III), U N Doc A/810 (10 December 1948).

<sup>5</sup> See, eg, Justice M Kirby, *Judicial Activism: Authority, Principle and Policy in the Judicial Method* (2004) 25 (reclaiming the term with the rhetorical question ‘Where else ... did the common law and the principles of equity come from, if it was not from judicial activity?’).

<sup>6</sup> See the nearly 1000-page collection, I Freckelton and H Selby (eds), *Appealing to the Future: Michael Kirby and His Legacy* (2009).

<sup>7</sup> Serving from 1983 to 2009 in the Federal Court of Australia, New South Wales Court of Appeal, and High Court of Australia. During that time, he also held numerous international posts, including Special Representative of the Solicitor-General of the United Nations for Human Rights in Cambodia, President of the International Commission of Jurists, and membership of the Ethics Committee of the Human Genome Organisation, London.

<sup>8</sup> Two commentators have suggested that Kirby J sought vindication from subsequent

These categories have been complicated, expanded, and sped up, by globalisation. As Justice Heydon of the High Court of Australia recently instructed us, twenty-one Justices who have considered the influence of international law on the Australian Constitution (specifically in affecting legislative powers) have denied it; only one has affirmed it.<sup>9</sup> And yet Kirby — who might easily have remained in the defensive rearguard within a changing High Court (his term of office spanned the Mason Court, and the Brennan, Gleeson and French Courts that followed) — has become a leading advocate of an interpretive practice now inexorably part of the practice of judging in other parts of the world.

## II. The World as Prism

Justice Kirby advocated the virtues of seeing Australian law through the world's eye.<sup>10</sup> Yet we might understand the practice of looking outwards differently. The practice is one of judges seeing the world through their own judicial lens: a world of majorities and minorities, of tightly bounded rules of decision-making and of touchstone notions of authority, persuasiveness and relevance. The world, through the judge's eye, is thus a place of sharp foregrounds and blurred backgrounds: of foregrounded law, legitimately presented and discussed, and of background extraneous material.

In this manner, Kirby J did not reject the basic characteristics of judging. He drew support from the conventional tasks of the judicial role — of careful consideration of text, structure, and precedent, and — what will be important to this analysis — of the fundamental importance of giving reasons.<sup>11</sup> In addition, he marshalled the examples of another Australian High Court Justice who had drawn on international law in interpretation, including in constitutional cases: Justice Murphy had considered the relevance of developments in international law in interpreting the scope of the external affairs power<sup>12</sup> — a view that ultimately

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generations of High Court Justices and from the people of Australia. My thesis is that his audience is much larger, and is of the present: cf Gavan Griffith and Graeme Hill, 'Constitutional Law: Dissents and Posterity' in I Freckelton SC and H Selby (eds), *Appealing to the Future: Michael Kirby and His Legacy* (2009) 217, 237–38.

<sup>9</sup> *Roach v Electoral Commissioner* [2007] HCA 43, [181] (Heydon J) (noting those who have denied '[t]he proposition that the legislative power of the Commonwealth is affected or limited by developments in international law since 1900'). Kirby J may indeed have been in the minority, as the Court is presently constituted, however Justice Heydon's counting is, with respect, incorrect. Other members of the Court have certainly viewed the legislative power with respect to external affairs as *affected* by developments in post-1900 international law, although this power was not treated as *limited* by international law: compare *Horta v The Commonwealth* (1994) 181 CLR 183 with cases cited below n 12.

<sup>10</sup> Kirby, above n 3, xxv.

<sup>11</sup> Justice M Kirby, 'Reasons for Judgment: "Always Permissible, Usually Desirable"' (1994) 12 *Australian Bar Review* 121; see also Justice M Kirby, 'Appellate Reasons' (2007) 30 *Australian Bar Review* 3.

<sup>12</sup> *Dowal v Murray* (1978) 143 CLR 410 (noting the relevance of the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights to the external affairs power in s 51(xxix), as a supplementary source

prevailed.<sup>13</sup> Kirby J also drew support from judges (and their judgments) elsewhere, such as Lord Cooke of Thorndon, then President of the New Zealand Court of Appeal,<sup>14</sup> and members of the Canadian Supreme Court<sup>15</sup> and the United States Supreme Court.<sup>16</sup> He was influenced — indeed, he describes it as an ‘epiphany’<sup>17</sup> — by a conference in 1988, in Bangalore, India, at which common law judges such as former Chief Justice P N Bhagwati from the Indian Supreme Court, and Justice Ginsburg, now of the United States Supreme Court, were present.<sup>18</sup> By the end of this conference, the judges had together formed a set of principles to guide their work. Included in these ten principles was the following:

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- to support the Family Law Act 1975 (Cth), along with the marriage power in s 51(xxi); see also *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168, 237 (interpreting the external affairs power as support for the Racial Discrimination Act 1975 (Cth)); see also at 217 (Stephens J) noting ‘the content of [the external affairs power] lies very much in the hands of the community of nations of which Australia forms a part’. Murphy was the first to note the importance of the United Nations human rights instruments, but earlier cases had upheld other laws enacted on the basis of multilateral instruments: *Roche v Kronheimer* (1921) 29 CLR 329 (Higgins J) (upholding legislative implementation of the Treaty of Peace signed at Versailles after World War I on basis of external affairs); see also *R v Burgess; Ex parte Henry* (1936) 55 CLR 608. In recording his debt to Murphy, Kirby concedes that he himself once found the use of international law ‘heretical’: see Kirby, ‘The Power of Lionel Murphy’s Ideas’, in Kirby, *Through the World’s Eye*, above n 3, 127, 137–38; Cf *Al-Kateb v Godwin* (2004) 219 CLR 562, 589 [63] (McHugh J) (using the same language to denounce the practice), described below n 63.
- <sup>13</sup> *Commonwealth v Tasmania* (*‘The Tasmanian Dams Case’*) (1983) 158 CLR 1 (a matter of international concern); see also *Victoria v Commonwealth* (*‘Industrial Relations Act Case’*) (1996) 187 CLR 416. For an overview of the use of international law in other constitutional cases, see K Walker, ‘International Law as a Tool of Constitutional Interpretation’ (2002) 28 *Monash University Law Review* 85 (including an analysis of the influence of international law on the interpretation of Ch III of the Constitution, the implied freedom of political communication, and s 44). For a list of specifically human rights arguments — comparative, historical, and/or international — see F E Johns, ‘Human Rights in the High Court of Australia, 1976-2003: The Righting of Australian Law?’, (2005) 33 *Federal Law Review* 287, 322 (Appendix) (List One)
- <sup>14</sup> *Kartinyeri v Commonwealth* (*‘Hindmarsh Island Bridge Case’*) (1998) 195 CLR 337, 417 (Kirby J), citing *Tavita v Minister of Immigration* [1994] 2 NZLR 257, 266 (Cooke P).
- <sup>15</sup> *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 417 (Kirby J).
- <sup>16</sup> *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 218 ALR 483, 517–19 (citing *Roper v Simmons*, 543 US 551 (2006)); see also *Re Colonel Aird; Ex parte Alpert* (2004) 220 CLR 308, fn 152 (Kirby J) (citing *Atkins v Virginia* 536 US 304, 316 (2002), *Lawrence v Texas* 539 US 558, 572–73, 576–77 (2003) (Kennedy J)).
- <sup>17</sup> Justice M Kirby, ‘To Judge Is to Learn’ (2007) 48 *Harvard International Law Journal Online* 36, 38.
- <sup>18</sup> For his recollection of prominent participants, see Justice M Kirby, ‘The Growing *Rapprochement* between International Law and National Law’, in G Sturges and A Anghie (eds), *Visions of the Legal Order in the 21<sup>st</sup> Century: Essays to Honour His Excellency Judge C J Weeramantry* <[www.hcourt.gov.au/speeches/kirbyj/kirbyj\\_weeram.htm](http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_weeram.htm)>.

1. Fundamental human rights and freedoms are inherent in all humankind and find expression in constitutions and legal systems throughout the world and in the international human rights instruments.
2. These international human rights instruments provide important guidance in cases concerning fundamental human rights and freedoms.
3. There is an impressive body of jurisprudence, both international and national, concerning the interpretation of particular human rights and freedoms and their application. This body of jurisprudence is of practical relevance and value to judges and lawyers generally.
4. In most countries whose legal systems are based upon the common law, international conventions are not directly enforceable in national courts unless their provisions have been incorporated by legislation into domestic law. However, there is a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law — whether constitutional, statute or common law — is uncertain or incomplete. ...<sup>19</sup>

In short, the Bangalore Principles heralded the fact of, and judicial approval for, a transnational judicial dialogue.<sup>20</sup> They also provided it with a normative theory: the practice was welcomed 'because it respects the universality of fundamental human rights and freedoms and the vital role of an independent judiciary in reconciling the competing claims of individuals and groups of persons with the general interests of the community.'<sup>21</sup> The dialogue that is established incorporates a practice of referring to foreign caselaw, including the work of international tribunals, in considering domestic law. For international law scholars, this practice suggests an ever-closer connection between international and domestic law,

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<sup>19</sup> The Bangalore Principles were released as a summary of issues discussed at a Judicial Colloquium on 'The Domestic Application of International Human Rights Norms', held in Bangalore, India from 24–26 February 1988. Reprinted in Commonwealth Secretariat, *Developing Human Rights Jurisprudence: The Domestic Application of International Human Rights Norms*, vol 1, (1998) ix-x and in (1989) 1 *African Journal of International and Comparative Law/ Revue Africaine de Droit International et Comparé* 345. The principles are also appended to an early and comprehensive discussion by Justice Kirby, in 'The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms' 62 (1988) *Australian Law Journal* 514, 531.

<sup>20</sup> While the forum at Bangalore might have been one of the first, subsequent judicial conferences have been hosted by US law schools, through 'outreach' by the Office of the High Commissioner for Human Rights, and through the Commonwealth network: see Justice M Kirby, 'Transnational Judicial Dialogue, Internationalisation of Law and Australian Judges' (2008) 9 *Melbourne Journal of International Law* 171, 173–80 (providing a summary of the various venues).

<sup>21</sup> Kirby, 'The Role of the Judge', above n 19.

bringing to fruition a long-hoped for source of enforcement for a notoriously under-enforced body of law.<sup>22</sup>

For domestic lawyers, too, many of the connections between the two bodies of law make sense, at least on conventional rule of law principles. That is, once the Australian government has ratified a treaty, the treaty should inform the judicial interpretation of Australian legislation, on the theory that Australia should be presumed to have enacted law in compliance with its international obligations.<sup>23</sup> Of course, if express statutory words depart from those obligations, they override the presumption. A similar theory has been held to legitimate recourse to treaties in administrative decision-making.<sup>24</sup> Further support for judicial recourse to international law comes from the principle of legality — or the ‘fundamental rights principle’ — which requires that parliament use clear and unambiguous language to interfere with fundamental rights of the common law, and the ‘legitimate influence’ principle, which allows that international law may guide common law development.<sup>25</sup> (For international custom, where the laws are arguably less accessible to domestic judges than treaty law, these broad rule of law principle raises additional complications.)<sup>26</sup>

It is in the realm of constitutional interpretation that the interpretive principle is most controversial.<sup>27</sup> Those resisting the use of international law in constitutional interpretation see one (or more) of many dangers to the integrity of our constitutional system. First, they may stress the threat of ‘empire’. The threat of a new imperialism is the idea that our independent Constitution, wrested from British legal control,<sup>28</sup> is now to be controlled by a different set of powerful countries

<sup>22</sup> For example, H Hongju Koh, ‘International Law as Part of Our Law’ (2004) 98 *American Journal of International Law* 43, 56 (celebrating a ‘transnational legal process’ through which ‘interlinked rules of domestic and international law develop, and ... interlinked processes of domestic and international compliance come about’).

<sup>23</sup> *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 38; See further the propositions in *Minister for Foreign Affairs and Trade v Magno* (1992) 112 ALR 529, 534–5 (Gummow J); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [27]–[34] (Gleeson CJ).

<sup>24</sup> *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; but see *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1.

<sup>25</sup> *Coco v R* (1994) 179 CLR 427, 437 (fundamental rights); *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 42 (legitimate influence). For an analysis of the present operation of these principles, see Wendy Lacey, *Implementing Human Rights Norms: Judicial Discretion and Use of Unincorporated Conventions* (2008).

<sup>26</sup> For example, *Polyukhovich v Commonwealth* (1991) 172 CLR 501, [65]. Less accessible, but not impossible: the test for ascertaining customary international law parallels the work of a domestic tribunal: compare *Paquete Habana; The Lola*, 175 US 677 (1900) with Statute of the International Court of Justice, art 38(1)(b); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, *Merits, Judgment*, (1986) ICJ Reports, 14.

<sup>27</sup> The mainstream resistance to international law is well-presented by the following statement: *AMS v AIF* (1999) 199 CLR 160, 180 (the Constitution’s provisions ‘are not to be construed as subject to an implication said to be derived from international law’) (footnote omitted) (Gleeson CJ, McHugh and Gummow JJ).

<sup>28</sup> For a recognition that sovereignty resides with the Australian people, and not the

which now set the international agenda: an agenda which this country, as a Western middle-power, may influence, but surely does not control.<sup>29</sup> The 'democratic deficit' that attends the introduction of these laws is exacerbated by the fact that it is the executive, rather than the legislature, that has the power to ratify.<sup>30</sup> Only resistance prevents the subservience of the Australia people — via their constitutional document — to the more powerful legal practitioners of the more powerful states and hence the more powerful laws they are able to devise.<sup>31</sup>

Second, is the reverse threat of 'vacuum'. This is the threat that international law presents no constraint on the development of Australian constitutional law. The threat of the vacuum expresses the fear, always present in constitutional law (which, because of its capacity to override simple majoritarian control, vests considerable power in judges<sup>32</sup>), that judges can cherry-pick what to take from the

Imperial Parliament, see Australia Act 1986 (Cth); see also *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 138 (Mason CJ).

<sup>29</sup> For a description of the sites of lawmaking, from colonial forums to international forums, from a 'small commonwealth country perspective', see J McLean, 'From Empire to Globalization: The New Zealand Experience' (2004) 11 *Indiana Journal of Global Legal Studies* 161.

<sup>30</sup> The fear of the 'democratic deficit', although expressed in similar terms in many constitutional systems, emerges from quite different institutional arrangements: see, eg, K G Young, 'The Implementation of International Law in the Domestic Laws of Germany and Australia' (1999) 21 *Adelaide Law Review* 177 (comparing the input of both state and federal parliaments in the decision to ratify a treaty). Australian reforms have led to a greater role for Parliament in both scrutinising treaties and in debating implementing legislation: Senate Legal and Constitutional References Committee, Parliament of Australia, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* (1995); Minister for Foreign Affairs and the Attorney-General, *Government Announces Reform of Treaty-Making* (Media Release FA-29, 2 May 1996) (<http://www.foreignminister.gov.au/releases/1996/fa29.html>).

<sup>31</sup> Indeed, the fear of empire has been expressed in the US, with respect to 'foreign law'. For a rather extraordinary expression of this sentiment, see Congressman Ted Poe of Texas, calling attention to the patriots who "spilled their blood ... to sever ties with England forever .... Now justices in this land of America ... use British court decisions ... in interpreting our Constitution. What the British could not accomplish by force, our Supreme Court has surrendered to them voluntarily", 151 Congress Records H3105 (May 10, 2005). These statements have attended the resolutions in the US House of Representatives and Senate, where members of the Republican Party have proposed legislation to prohibit the Court from citing foreign materials: see Constitution Restoration Act of 2004, HR 3299, 108<sup>th</sup> Cong, 2d Sess (2004), and Constitution Restoration Act of 2005, S 520, 109<sup>th</sup> Cong, 1<sup>st</sup> Sess (2005).

<sup>32</sup> The canvassing of constitutional practice around the world indicates that this fear can be mediated through a variety of institutional forms: see, eg, Canadian Charter of Rights and Fundamental Freedoms, s 33 (override clause). The legislative protection of rights is another institutional mechanism which ultimately limits the judiciary in cases involving fundamental rights: see, eg, British Human Rights Act 1998 (UK), New Zealand Bill of Rights 1990 (NZ). Gardbaum has described these variations as models which limit judicial power while nevertheless protecting rights: S Gardbaum, 'The New Commonwealth Model of Constitutionalism' (2001) 49 *American Journal of Comparative Law* 707 (terming this a 'Commonwealth' model, but excluding Australia and other Commonwealth countries from the analysis).

world and use it to support their own idiosyncratic values.<sup>33</sup> The vacuum exerts no influence: but only exacerbates the indeterminacy and discretion in the hands of the judge. Again, resistance is thought to protect against this, especially in relation to constitutional law.<sup>34</sup> Other imagined threats to democracy — and local knowledge, community values, or judicial accountability — sound similar notes on these two themes.

Justice Kirby saw things differently. The Constitution speaks not only to the Australian people, ‘who made it and accept it for their governance’, but ‘to the international community as the basic law of the Australian nation which is a member of that community’.<sup>35</sup> A Constitution, therefore, faces two ways: inwards to its citizenry, its traditional *demos*, and outwards to the world. And the meaning of a Constitution is influenced by both audiences, especially in the case of ‘universal and fundamental rights’. Thus, in extending the previous position expressed by Justice Brennan in *Mabo*,<sup>36</sup> that international human rights law might be a legitimate influence on the common law, Kirby J suggested that international human rights law could influence the Australian Constitution. This was especially fitting, he suggested, in light of the fact that Australian constitutional law ‘may sometimes fall short of giving effect to fundamental rights’.<sup>37</sup>

Justice Kirby’s position appears to be a bold — even audacious — meta-principle for the Australian Constitution: a ‘meta’ principle because it arguably changes the entire character of that document, rather than specific individual provisions.<sup>38</sup> It was audacious in 1997 (a time closer to the highpoint of implied rights in the Australian Constitution promoted by the Mason Court<sup>39</sup>), and perhaps

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<sup>33</sup> See, eg, the position taken by Roberts CJ in his criticism of the practice before the US Judicial Committee at his nomination, Confirmation Hearing on the Nomination of John G Roberts, Jr to be Chief Justice of the United States Before the S Comm on the Judiciary, 109th Cong 200 (2005), 200–01 (statement of Judge John Roberts), ([In] foreign law, you can find anything you want.); for a similar position, see Judge R Posner, *How Judges Think* (2008).

<sup>34</sup> *Printz v United States*, 521 US 898, 921 fn 11 (1997) (Scalia J).

<sup>35</sup> *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513.

<sup>36</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 42.

<sup>37</sup> *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513.

<sup>38</sup> For suggestions of its incompatibility with the current interpretive theories of the Australian Constitution, see A Simpson and G Williams, ‘International Law and Constitutional Interpretation’ (2000) 11 *Public Law Review* 205, 222 (suggesting a potential for conflict between the use of Convention Debates to resolve constitutional ambiguities, suggested by *Cole v Whitfield* (1988) 165 CLR 360, and recourse to current international law). For a suggestion that recourse to international law, if permissible, might follow a similar structure to the Convention Debates, see *Roach v Electoral Commissioner* [2007] HCA 43, [181] (Heydon J) (suggesting that the plaintiff should have presented information about the countries present on the Human Rights Committee at the relevant times of passage into international law, and the influence Australia had on the deliberations).

<sup>39</sup> For example, *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (involving the reliance, by a number of judges, on a constitutional implication of a freedom of communication, on the basis that the Australian Constitution was regarded as one bringing into existence a system of representative government). For a



all the more so a decade later. Yet it is, counter-intuitively, a position shared by many judges interpreting many constitutions around the world, and is becoming ever more widespread.

Indeed, Kirby J's interpretive principle maps partly onto the principles espoused by judges in other final courts. Some of these courts are interpreting post-Second World War constitutions, which have borrowed textually and structurally from the Universal Declaration of Human Rights and subsequent international covenants.<sup>40</sup> Most recently, this practice has ignited controversy in relation to the United States Constitution, which of course precedes the international bill of rights by an even greater number of years than the Australian Constitution.<sup>41</sup> For example, United States Supreme Court Justices have used international sources to assist them in interpreting the constitutional prohibition on cruel and unusual punishment in the Eighth Amendment, and the protection of sexual privacy in the substantive due process clause of the Fourteenth Amendment.<sup>42</sup>

We may distinguish these two examples — of the postwar paradigm and the United States paradigm — from the Australian Constitution on the grounds of 'genealogy'. The United States Bill of Rights itself influenced the drafting of the international human rights instruments, which has led to a 'wise parent' justification for the recourse by American judges to international law.<sup>43</sup> On this theory, the U.S. Bill of Rights has indirectly generated a great deal of useful rights-jurisprudence from around the world, from which its judges can learn. The postwar paradigm, on the other hand, allowed national constitutions to join the model of rights protection, once fundamental rights had been drafted in international

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discussion of the use of foreign law in developing this doctrine, including the caselaw of Canada, the United Kingdom, the United States, and the European Court of Human Rights, see C Saunders, 'The Use and Misuse of Comparative Constitutional Law' (2006) 13 *Indiana Journal of Global Legal Studies* 37. Saunders describes the greater utilisation of foreign law in cases involving new doctrine, as opposed to settled doctrine: *ibid*, 43.

<sup>40</sup> L E Weinrib, 'The Postwar Paradigm and American Exceptionalism' in S Choudhry (ed), *The Migration of Constitutional Ideas* (2006) 84, 89–98 (describing the framework of fundamental rights that followed the defeat of Nazism).

<sup>41</sup> For example, R P Alford, 'Misusing International Sources to Interpret the Constitution' (2004) 98 *American Journal of International Law* 57, 57–58 (suggesting that '[i]ncluding a new source fundamentally destabilises the equilibrium of constitutional decision making', but nevertheless noting that, 'Of course, this essay does not suggest that international sources should never be used as persuasive authority in certain types of constitutional analysis', citing copyright protection as an example).

<sup>42</sup> For example, *Roper v Simmons*, 543 U.S. 551, 578 (2005); *Lawrence v Texas* 539 US 558, 572–3, 576–77 (2003).

<sup>43</sup> *United States v Then*, 563 F 3d 464, 468–69 (2d Cir, 1995) (Calabresi J, concurring) (citing the approach of German and Italian constitutional courts to statutory interpretation in light of changed circumstances); Chief Justice M H Marshall, 'Wise Parents Do Not Hesitate to Learn from Their Children: Interpreting State Constitutions in an Age of Global Jurisprudence' (2004) 79 *New York University Law Review* 1633, 1641 (presenting a justification for judges in state courts to take advantage of comparative constitutional law).

covenants. These constitutions benefited from the internationalised conversation on rights from the moment that they came into existence. The Australian Constitution is unlike both. It famously contains no comprehensive Bill of Rights. Justice Kirby therefore used other, non-genealogical, sources of justification for his interpretive principle. Before turning to these, and the forms of engagement that they promote, it is worth describing the transnational judicial community, in which Kirby J was in a (sort of) majority.

### III. A New Plurality?

Justice Kirby's interpretive principle arguably creates a new plurality of judges, sourced outside of Australia. The principle itself is supported by many judges elsewhere. Moreover, the application of the principle opens up his decisions to a new body of legal support. This 'global community of courts'<sup>44</sup> has different parameters from the Australian High Court, from the Australian community of courts, and from the Australian legal community. Enlarging this community can lead to a different decision-making process, and sometimes a different result.

For example, when the U.S. Supreme Court overturned the juvenile death penalty in *Roper v Simmons*, it did so after acknowledging 'the overwhelming weight of international opinion' against the punishment.<sup>45</sup> Ultimately, the majority held that the penalty was contrary to the American constitutional prohibition on 'cruel and unusual' punishment.<sup>46</sup> In understanding this provision, the U.S. Supreme Court had previously incorporated the importance of 'evolving standards of decency that mark the progress of a maturing society'.<sup>47</sup> No other country in the world officially retained the death penalty for offenses committed by minors. This proved relevant to, if not determinative for, the test.<sup>48</sup>

One American scholar suggested that the use of non-U.S. law was a tool to 'swell the denominator' against which the state jurisdictions retaining the juvenile death penalty were measured.<sup>49</sup> Ernest Young suggested that this made a significant proportion of American states — a twenty to thirty split — seem small and aberrant. Moreover, he criticised the way in which the focus on numbers taken by the majority, rather than on the substance of their reasons, lent an almost 'authoritative' force to non-U.S. law.<sup>50</sup> This criticism of numbers is not, at least in

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<sup>44</sup> A Slaughter, 'A Global Community of Courts' (2003) 44 *Harvard International Law Journal* 191 (describing this phenomenon in terms of the relationships that it establishes).

<sup>45</sup> *Roper v Simmons*, 543 US 551, 578 (2005).

<sup>46</sup> United States Constitution, VIII Amt.

<sup>47</sup> *Trop v Dulles*, 356 US 86, 101 (1958).

<sup>48</sup> *Roper v Simmons*, 543 US 551, 578 (2005) ('The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.').

<sup>49</sup> E A Young, 'Foreign Law and the Denominator Problem' (2005) 119 *Harvard Law Review* 148.

<sup>50</sup> *Ibid* 151 ('When a legal rule has force whether or not we agree with the reasons used to justify it, is that not the very definition of binding legal authority?').

Young's formulation, about numbers per se.<sup>51</sup> Number-counting is central to the democratic credentials of the American constitutional system — majorities are of course proxies for democracy.<sup>52</sup> It is the idea that some numbers — some opinions — should count beyond the traditional subjects of U.S. law. It is the fact that majorities become minorities, and vice versa, once the community is broadened.

Justice Kirby's (meta) interpretive principle performs a similar feat, except that it operates as a way in which to read all the terms of the Australian Constitution, and not only those invited by evaluative language, such as, in the American context 'cruel and *unusual*'<sup>53</sup> (in which one Australian corollary might be '*just terms*').<sup>54</sup> Justice Kirby's principle operates — at least, as it is presently framed<sup>55</sup> — in the case of ambiguous or vague language. The threshold of ambiguity does not seem to be a high one.<sup>56</sup> Of course, this aspect of the principle means that a debate is generated about what the words might mean, rather than the perhaps more healthy debate about what values are at stake in the Constitution.

Is Kirby J's interpretive principle undemocratic? On at least two understandings of democracy, it may be the opposite. The first, presented by Eyal Benvenisti, is the idea that judges can bolster their own government's ability to resist the influence of more powerful international participants by strategically selecting what sources of international law to rely on, and choosing those which enhance national democratic processes.<sup>57</sup> This would make the use of international law especially applicable in the courts of a country of Australia's size. In this justification, it is the forging of a 'united judicial front' amongst courts, in regard to issues over which their own government's ability to represent their people may be restricted, which helps

<sup>51</sup> See also Alford, above n 41, (describing this in terms of an 'international countermajoritarian difficulty', which expands the traditional tension represented by judges' capacity to prevail over majorities in constitutional law).

<sup>52</sup> J Rubinfeld, 'Unilateralism and Constitutionalism' (2004) 79 *New York University Law Review* 1971 (distinguishing between a characteristically American preference for 'democratic constitutionalism', and a European 'international constitutionalism').

<sup>53</sup> See further Koh, above n 22, 46, who notes the evaluative exercise invited by the words of '*due process*', and '*unreasonable searches and seizures*'.

<sup>54</sup> Australian Constitution, s 51(xxxi) (guaranteeing just terms for the acquisition of property); see *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 (Kirby J); *Commonwealth v Western Australia* (1999) 196 CLR 392, [194] fn 205 (Kirby J).

<sup>55</sup> In *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, fn 495, Kirby J left open the possibility that his interpretive principle might apply to non-ambiguous language. But see his rejection of international law in the case of clear statutory language in *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365, 426 [171] (Kirby J).

<sup>56</sup> Compare with *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J).

<sup>57</sup> Eyal Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts' (2008) 102 *American Journal of International Law* 241, 259–62. Compare with D F Jackson, 'Internationalisation of Rights and the Constitution', in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (2003) 105 (assessing the multiple ways in which globalization impacts on rights).

democracy.<sup>58</sup> There is evidence that judges have applied independent review to their national government's responses to issues such as counterterrorism and the status of asylum seekers: policies and laws whose content has been influenced heavily by other governments, rather than local actors.<sup>59</sup> The second, more ambitious, approach to understanding the transnational judicial dialogue in democratic terms is the idea that a new, global, *demos* has challenged the territorial boundaries in which the basic unit of democracy can be understood.<sup>60</sup> From this cosmopolitan justification it would follow that seeking a new plurality of opinions is democratically legitimate, if the judges are sufficiently attune to the measures of political participation at the international level. Nonetheless, while the implications of a new, cosmopolitan, political order are highly relevant to the work of domestic judges, especially in national systems belonging to a regional system (most fittingly, Europe),<sup>61</sup> Australian judges do not experience anything comparable to European integration. Moreover, nothing in Kirby J's position expressly supports these particular conceptions of an internationally-responsive democracy, although he has elsewhere invoked a substantive conception of democracy, which incorporates a concern for minorities' rights, and argues strongly for the role of non-majoritarian institutions in upholding democracy.<sup>62</sup> For present purposes, we can ask instead a parallel question: is the interpretive principle unconstitutional?

Clearly, there are many who consider that it is. Before his retirement from the High Court of Australia, Justice McHugh described the application of Kirby J's interpretive principle to the Constitution as 'heretical'.<sup>63</sup> In suggesting that indefinite detention (or, in formal terms, the continued detention of a person who cannot be practicably deported) was not inconsistent with the Australian Constitution,<sup>64</sup> he emphatically rejected the relevance of international law to the interpretation of that instrument. For McHugh J, 'If the [presumption] were

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<sup>58</sup> Benvenisti, above n 57, 242.

<sup>59</sup> Ibid (providing examples of the judicial review of (coordinated) governmental responses in respect of counterterrorism measures, environmental protection in developing countries, and the status of asylum seekers in destination countries).

<sup>60</sup> Compare D Held, *Democracy and the Global Order* (1995) (suggesting that 'the artificial person at the center of the modern state must be reconceived in terms of cosmopolitan public law') with J Habermas, *The Postnational Constellation* (M Pensky trans, 2001 ed) [trans of: *Die postnationale Konstellation* (1998)]. In recent years, Held has also pulled back from a strong conception of cosmopolitan law: see, eg, D Held, *Models of Democracy* (3<sup>rd</sup> ed, 2006).

<sup>61</sup> See, eg, the survey of arguments in B Bryde, 'International Democratic Constitutionalism?' in R S J Macdonald and D M Johnston (eds), *Towards World Constitutionalism* (2005) 103–25.

<sup>62</sup> Justice MD Kirby, 'The Impact of International Human Rights Norms: A Law Undergoing Evolution' (1995) 25 *The UWA Law Review* 30, 43. This aspect is discussed in Simpson and Williams, above n 38, 223.

<sup>63</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562, 589 [63].

<sup>64</sup> This was on the basis that the Migration Act 1958 (Cth) was within Commonwealth legislative power, and did not contravene the vesting of judicial power in Ch III of the Constitution. On the latter point, Gummow J registered his explicit dissent: *Al-Kateb v Godwin* (2004) 219 CLR 562, 604–5 [110], see also Kirby J at 615 [146].

applicable to a Constitution, it would operate as a restraint on the grants of power conferred. The Parliament would not be able to legislate in disregard of the implication.<sup>65</sup> Moreover,

[i]f Australian courts interpreted the Constitution by reference to the rules of international law now in force, they would be *amending* the Constitution in disregard of the direction in s 128 of the Constitution. Section 128 declares that the Constitution is to be amended only by legislation that is approved by a majority of the States and 'a majority of all the electors voting'.<sup>66</sup>

At the same time as taking this position, McHugh J maintained an interpretive standpoint with respect to constitutional law that allowed for judges to take into account the 'political, social and economic developments inside and outside Australia' that have occurred since the Constitution's enactment in 1900.<sup>67</sup> (Justice McHugh thus provided a very broad description of the world, through the judge's eye). Of course, to do otherwise might have put him off-side the independence understood to be gained by the Constitution by the passage of the Australia Acts in 1986 (and would have thereby set him at odds with modern democratic principles).<sup>68</sup> His objection that a 'loose-leaf copy of the Constitution'<sup>69</sup> would be required for judges following Kirby J's interpretive principle does not cohere with his broader acceptance of the relevance of developments inside and outside of Australia. For McHugh J, coherence comes from drawing a sharp distinction between 'rules' of international law, that apply through the force of law, and non-legal 'developments', that allow readers of the Constitution 'to deduce propositions from the words of the Constitution that earlier generations did not perceive'.<sup>70</sup> Justice McHugh's complaint resembles the 'empire', rather than 'vacuum' problem, described above, although he also shows how the two fears converge.

In describing the binding force of international law, McHugh J noted that the High Court had earlier been informed that Australia was 'a party to *about* 900 treaties', as well as bound by customary law and general principles of law.<sup>71</sup> He complained that the body of international law is now much greater than it was at the Constitution's founding. In this comment, McHugh J is expressing the threat of both empire and vacuum: empire, because of the sheer number of treaties binding on Australia; and vacuum, because the Minister had so lax a knowledge of what the executive had ratified. (McHugh J neglected to note the several important reforms to the treaty-making process in Australia since *Teoh*, as well as the fact that only a small fraction of this number would be relevant to any domestic dispute).<sup>72</sup>

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<sup>65</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562, 591 [66] (McHugh J).

<sup>66</sup> *Ibid* 592 [68].

<sup>67</sup> *Ibid* 593 [68].

<sup>68</sup> For example, *Sue v Hill* (1999) 199 CLR 462 (holding that a 'foreign power' for the purposes of s 44(i) of the Constitution includes the United Kingdom).

<sup>69</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562, [73] (McHugh J).

<sup>70</sup> *Ibid* 593 [69].

<sup>71</sup> *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 316 (McHugh J) (footnote omitted, emphasis added by McHugh J).

<sup>72</sup> For example, McHugh J did not comment on the establishment, in 1996, of (1) the

This returns us to the uses that are made by Kirby J of international law. Is he treating the sources of international law as binding authority, allowing Australia's own Constitution to perform the commitments made by Australia internationally, and risking, as McHugh J would have it, the restraint on legislative power by an exercise of legislative power?<sup>73</sup> Or is he instead treating international law in a different sense, acknowledging the importance of world legal opinion on the development of the fundamental rights of people in Australia? In order to respond to this question, it is helpful to turn to the justifications employed by Kirby J. I suggest that his justifications rely on rather conventional ideas about the judicial method, as well as three theories of the relationship between international law and the Constitution, some of which provide a sounder justification for his use of international law in the Australian context.

#### IV. Justifications of Method

Two impulses of judicial method guide Kirby J's interpretive principle. The first is the importance of giving reasons. If judges are influenced by a source, on their journey of reason to judgment, they should not hide that source.<sup>74</sup> For Kirby J, as for all common law judges, it is important to express, on the record, the matters that have influenced the judge. The articulation of reasons promotes transparency in the legal process and the accountability of judges exercising judicial power.<sup>75</sup> A judge who reads about the decisions of international and comparative tribunals (and international treaties, and comparative legislation), finds them persuasive, and yet omits their consideration from the record of the opinion, would not be exercising judicial power transparently. Unlike judges in Japan, say, who have developed considerable expertise in relation to the U.S. Constitution, but withhold any mention of it from their decisions,<sup>76</sup> this position advocates that material remains in the judgment, in order that the parties, subsequent lawyers and judges recognise the foundation on which the reasoning lies. This practice requires a wide reading of international law and opens up new challenges for the judicial

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parliamentary Joint Standing Committee on Treaties (JSCOT), (2) the Treaties Council comprising the Prime Minister, Premiers and Chief Ministers, (3) the requirement for a National Interest Analysis (NIA) for each treaty, (4) the requirement for at least 15 sitting-days of the tabling in Parliament of treaties, and (5) the Australian Treaties Library: see Senate Legal and Constitutional References Committee, above n 30; Minister for Foreign Affairs and Attorney-General, above n 30. For an overview, see, eg, H Charlesworth, M Chiam, D Hovell and G Williams, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25 *Sydney Law Review* 423.

<sup>73</sup> See also *Polites v The Commonwealth* (1945) 70 CLR 60, 78 (Dixon J); *Kartinyeri v Commonwealth* (1998) 195 CLR 337, [98] (Gummow and Hayne JJ).

<sup>74</sup> Kirby, 'Appellate Reasons', above n 11, 19 (noting that the methods to ensure that petty interactions and rivalries, identified by Judge R Posner, do not inappropriately influence judging 'include subjection of oneself to the discipline of expressing reasons as honestly and persuasively as one can').

<sup>75</sup> Kirby, 'Appellate Reasons', above n 11, 6, citing *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515, [160].

<sup>76</sup> See, eg, B Markesinis and J Fedtke, 'The Judge as Comparatist' (2005) 80 *Tulane Law Review* 121.

(and the litigant) role, particularly in appellate courts. Nonetheless, as the practice continues, appropriate techniques for arguing and distinguishing the persuasiveness of international law will develop.<sup>77</sup> Litigants in Australia have already proven themselves willing to research and present arguments from international law, despite discouragement from the Court.<sup>78</sup>

The second clear motivation for Kirby J's interpretive principle is the continuity between international law and comparative law.<sup>79</sup> Rather than a new, novel, source of law, Kirby J has always stressed the consistency of his interpretive principle with the long-standing practice of looking elsewhere for guidance and inspiration on the development of Australian law. Moreover, the usefulness of international law signals not only continuity, but enhancement. Justice Kirby, who was schooled in the era of Privy Council appeals from Australian law, saw international law as a more modern source of influence on Australian law than English or Imperial law.<sup>80</sup>

This rationale stood out in 1988, while Kirby was still President of the New South Wales Court of Appeal. In a case examining the right to be tried without undue delay in Australia, Kirby P compared traditional foreign sources with the modern human rights principles of the *International Covenant on Civil and Political Rights*.<sup>81</sup> Aside from his reference to the Magna Carta and the Habeas Corpus Act, he 'did not find it useful, in such an important matter, to attempt to find and declare the common law of this State in 1988 by raking over the coals of English legal procedures of hundreds of years ago'.<sup>82</sup> These procedures, which were 'imperfectly known and subject to much scholarly controversy', were unlikely to assist. 'A more relevant source of guidance', he suggested, 'may be the modern statements of human rights found in international instruments, prepared by

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<sup>77</sup> Simpson and Williams, above n 38, 217 (suggesting a ranking of international law according to their suitability for constitutional interpretation); cf A M Weisburd, 'Using International Law to Interpret National Constitutions — Conceptual Problems: Reflections on Justice Kirby's Advocacy of International Law in Domestic Constitutional Jurisprudence' (2006) 21 *American University International Law Review* 365, 374 (defending 'a vital, active bar and legal academic community', with minds trained on domestic law, as sufficient for providing feedback for judges).

<sup>78</sup> For example, *Roach v Electoral Commissioner* [2007] HCA 43, [181].

<sup>79</sup> For an exploration of the comparative turn in international law, see K Knop, 'Here and There: International Law in Domestic Courts' (2000) 32 *New York University Journal of International Law and Policy* 501; L Amede Obiora, 'Toward an Auspicious Reconciliation of International and Comparative Analyses' 46 (1998) *American Journal of Comparative Law* 669.

<sup>80</sup> In this respect, Kirby J's position suggests the modernism which, in Fleur Johns' characterisation, is the predominant style of human rights discourse — and scholarship — in Australia. See Johns, 'Human Rights in the High Court of Australia', above n 13. See discussion of this categorisation at text accompanying n 140–142 below.

<sup>81</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171.

<sup>82</sup> *Jago v District Court of New South Wales* (1988) 12 NSWLR 558, 569.

experts, adopted by organs of the United Nations, ratified by Australia, and now part of international law'.<sup>83</sup> It is:

at least as relevant to search for the common law of Australia applicable in this State with the guidance of a relevant instrument of international law to which this country has recently subscribed, as by reference to disputable antiquarian research concerning the procedures which may or may not have been adopted by the itinerant justices in eyre in parts of England in the reign of King Henry II.<sup>84</sup>

Thus, Kirby J's interpretive principle was not simply that we should look to international law to improve the laws of Australia. It carried within it the much more profound point that we need to rid ourselves of the pervasive assumption that the English laws were necessarily the best ones for Australia. The clear implication is that international law does not replace English law as a new form of 'imprisonment' for Australian legal development. On the contrary, judges are exhorted to look selectively across our borders in order to broaden Australian legal development, in constitutional law no less than elsewhere.

### **V. Justifications of Theory**

This continuity between domestic and international law has been lost to those advocating judicial isolation and resistance. Yet the continuity is striking. A rough analogy demonstrates the point. Comparative law in Australia was, in this legal system's early years of development, a practice of 'comparing' local laws to assess their possible 'repugnancy' with Imperial enactments and their compatibility with the English common law. As the Australian legal system began to evolve to understand English law as 'foreign law', the practice of referring to a comparative legal system ceased to involve the question of bindingness. References to sources outside of the United Kingdom began to proliferate. Similarly, in the enterprise of transnational judicial dialogue, it is not the bindingness, or authority, of international law, that directs its use in domestic law. Domestic judges treat it as persuasive, only — as attracting adherence rather than obliging it.<sup>85</sup> Nonetheless, there are gradations of this embrace. Three aspects of Kirby J's approach are described here, which draw attention to different aspects of the persuasiveness of international law. These I term internationalism, worldliness and constitutionalism. These three aspects have received support by judges elsewhere: lending a circular justification to Kirby J's own approach: that is, a justification for using world legal opinion that lies itself in world legal opinion.

#### **(a) The Internationalist Judge**

The internationalist judge defers to international law in decisions which also raise issues of domestic law. The starkest example of this position is the judge who does not differentiate between international treaties on the basis of their content. The

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<sup>83</sup> Ibid.

<sup>84</sup> Ibid.

<sup>85</sup> See H Patrick Glenn, 'Persuasive Authority' (1987) 32 *McGill Law Journal* 261, 263–64 (arguing that 'choice of an external authority which effectively persuades is ... in many cases more effective than adherence to binding, but unpersuasive, law').



main source of the influence of international law is not its substance, then, but rather its authority as law. This is a 'rule of law' justification — or imperative — for the use of international law, in the sense that it requires that government is 'bound by rules fixed and announced beforehand'.<sup>86</sup>

This is the use that provoked McHugh J's criticism in *Al-Kateb v Godwin*.<sup>87</sup> In taking aim at this aspect of Kirby J's approach, McHugh J suggested that

courts cannot read the Constitution by reference to the provisions of international law that have become accepted since the Constitution was enacted in 1900. Rules of international law at that date might in some cases throw some light on the meaning of a constitutional provision. .... But rules of international law that have come into existence since 1900 are in a different category.<sup>88</sup>

McHugh J's preference for freezing international law in its 1900 form is similar to the view espoused by Justice Scalia of the U.S. Supreme Court, that 'foreign law' is inappropriate as a source of guidance in constitutional interpretation, (apart from very old English common law).<sup>89</sup> While it is unsurprising that Scalia J would take that position, in light of his consistent defense of originalism, it is more remarkable in McHugh J.<sup>90</sup>

Justice Kirby's early invocation of international law suggests an internationalist standpoint. His initial pronouncements were premised on support for international law and an appreciation of the need for compliance with it. For example, in *Newcrest Mining*,<sup>91</sup> in treating the right to property expressed in international law as relevant to the constitutional guarantee of just terms for the acquisition of property,<sup>92</sup> Kirby J relied on the arguably customary status of the Universal Declaration of Human Rights. He went on to cite the Constitutions of the United States, India, Malaysia, Japan and South Africa, suggesting that these 'do no more than reflect universal and fundamental rights by now recognised by customary

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<sup>86</sup> R Bahdi, 'Globalization of Judgment: Transjudicialism and the Five Faces of International Law in Domestic Courts' (2002) 34 *George Washington International Law Review* 555, 560 (citing the rule of law justification presented by F A Hayek, *The Road to Serfdom* (1944) 72).

<sup>87</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562.

<sup>88</sup> *Ibid* 589 [62].

<sup>89</sup> 'The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation between Justice Antonin Scalia and Justice Stephen Breyer' (2005) 3 *International Journal of Constitutional Law* 519.

<sup>90</sup> This is less the case for Callinan J: see, eg, *Sue v Hill* (1999) 73 ALJR 1016, 1077 (Callinan J). Justice Callinan outlined this position in *Western Australia v Ward (Miriuwung-Gajerrong Case)* (2002) 213 CLR 1, [961] ('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.') (footnotes omitted). For Kirby J's own views on originalism as applied in Australia, see Justice M Kirby, 'Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?' (2000) 24 *Melbourne University Law Review* 1.

<sup>91</sup> (1997) 190 CLR 513.

<sup>92</sup> Australian Constitution s 51(xxxi).

international law.’<sup>93</sup> By drawing attention to custom, he appeared to enthusiastically embrace a new source of law, binding on domestic legal decision-makers, including constitutional interpreters.

Although the rhetoric of Kirby J’s judgment in *Newcrest Mining* encapsulates an internationalist standpoint, it is worth pointing out that the right to property is a controversial provision from which to launch the interpretive principle, at least from the perspective of an international lawyer. As Kristin Walker has noted, the right to property in the Universal Declaration of Human Rights is reflected in neither the *International Covenant on Civil and Political Rights*, nor the *International Covenant on Economic, Social and Cultural Rights*.<sup>94</sup> It may therefore serve as a more doubtful statement of custom than other provisions of the Universal Declaration, despite the association of property rights with the fundamental principles of common law. Concerns about the status of the right to property as custom would be less troublesome for a worldly or constitutionalist judge, as described below.

Nevertheless, the internationalist orientation continued in Kirby J’s later invocations of the interpretive principle. For example, in *Re Colonel Aird; Ex parte Alpert*, Kirby J stated his support for the ‘enlargement of the international rule of law, to which municipal, regional and international law together contribute’.<sup>95</sup> ‘The decisions of national courts ... contribute to the content of public international law, as the Statute of the International Court of Justice recognises. In making such decisions ..., municipal courts exercise a form of international jurisdiction’.<sup>96</sup> This, for Kirby J, extends not only to cases in which domestic judges are deciding matters of international law, but to domestic law, and to the Constitution: ‘it makes little sense to acknowledge such obligations in connection with other municipal laws but to deny them when it comes to the national constitution’.<sup>97</sup> Moreover, in pointing to the necessity of upholding the internationalist enterprise, he suggested that ‘[i]gnoring international law’ could lead to ‘chaos and futility’.<sup>98</sup> Citing an opinion issued from the International Criminal Tribunal for Rwanda, he proposed that a judge who was unconcerned by ‘conceptions of the world in which the Constitution operates’, and particularly by ‘universal principles of international law’, would be “‘act[ing] on a blinkered view and ... wield[ing] power divorced from responsibility”’.<sup>99</sup> This position reflects a strong commitment to consider the international audience that Kirby J suggests is contemplated by the Australian Constitution.

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<sup>93</sup> *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513.

<sup>94</sup> See Walker, above n 13, 12; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3; *International Covenant on Civil and Political Rights*, 999 UNTS 171.

<sup>95</sup> *Re Colonel Aird; Ex parte Alpert* (2004) 220 CLR 308, 345.

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.*, citing ICTR-97-20-A (Decision of 31 May 2000), [25] (Judge Shahabuddeen).

Other judges around the world have similarly invoked international law as a body of binding law. One commentator, describing the ‘creeping monism’ that she observed in many systems in which judges considered international law in interpreting historically dualist common law, described Kirby J as ‘one of the strongest proponents’ of the monist-oriented approach.<sup>100</sup> Although local observers of Kirby J’s approach would probably disagree with this description, it is remarkable that an Australian justice, presiding in a local community so heavily committed to dualism, was characterized as taking the lead.<sup>101</sup> The dynamics of internationalism have played out differently elsewhere. In Canada, the presumption of conformity with international law has operated to inform the protection of the constitutional rights entrenched in the Charter of Rights and Fundamental Freedoms. For example, as early as 1987, Chief Justice Dickson held that ‘the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.’<sup>102</sup>

Strict internationalism has not always been consistent with fundamental rights. In the later Canadian case of *United States v Cotrioni*, Justice La Forest, writing for the majority, held that the operation of Canada’s extradition treaties justified a limitation on the citizen’s right to remain in Canada, emphasising conformity, reciprocity and international cooperation over the Charter’s mobility rights.<sup>103</sup> The decision was criticised as reversing ‘international law’s status as the soft, naturalist support for entrenched constitutional reform ... [to] the hard-bitten, positivist counterweight to rights-oriented activism’.<sup>104</sup>

The internationalist orientation therefore prioritises the fact of compliance over the content of law and ratified treaties over other examples of supranational — and ‘suprapositive’<sup>105</sup> — laws, such as the European Convention on Human Rights (to which Australia is not party and yet which informs much of the jurisprudence of the United Nations committees which operate in respect to many of the human

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<sup>100</sup> M A Waters, ‘Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties’ (2007) 107 *Columbia Law Review* 628, 684.

<sup>101</sup> Cf H Charlesworth, ‘The High Court on Constitutional Law: The 2004 Term’ (2005) 28 *UNSW Law Journal* 1, 2, 4-5 (suggesting that Kirby J’s use of international law remains a ‘relatively conservative’ restatement of dualism).

<sup>102</sup> *Reference Re Public Service Employee Relations Act (Alta)* [1987] 1 SCR 313, 349 (Dickson CJ); *Slaight Communications v Davidson* [1989] 1 SCR 1038, 1056–057 (invoking the right to work under the ICESCR).

<sup>103</sup> *United States v Cotrioni* [1989] 1 SCR 1469, 1486; Cf Canadian Charter of Rights and Fundamental Freedoms, s 6(1).

<sup>104</sup> E Morgan, ‘In the Penal Colony: Internationalism and the Canadian Constitution’ (1999) 49 *University of Toronto Law Journal* 447, 448. But see now *United States v Burns* [2001] 1 SCR 283. For a recent consideration, in the counter-terrorism context, compare *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3; with *Charkaoui v Canada (Citizenship and Immigration)* [2007] SCC 9.

<sup>105</sup> G L Neuman, ‘Human Rights and Constitutional Rights: Harmony and Dissonance’ (2003) 55 *Stanford Law Review* 1863 (distinguishing between three aspects of legal rights across both domains of law: their consensual, supra-positive, and institutional characteristics).

rights treaties to which Australia is party). It can be criticised, on the one hand, for straining out many of the sources of authority informing the United Nations system as a whole. On the other, it exerts the pressure of ‘empire’ described above, tying the Constitution to the set of instruments ratified by the Australian government.

Despite his celebration of the international rule of law in *Re Colonel Aird; Ex parte Alpert*, Kirby J’s internationalism is tempered by an acceptance of a hierarchy in values in international law, which does not treat all of its parts as positivist equal.<sup>106</sup> Human rights may occupy a special place in this hierarchy. Moreover, in his illuminating exchange with McHugh J in *Al-Kateb v Godwin*, Kirby J insisted that it was not ‘rules’, but rather ‘principles’, that guided his approach. ‘They do not *bind* as other “rules” do. But the principles they express can *influence* legal understanding’.<sup>107</sup>

Nonetheless, this influence is not a flexible one: Kirby J went further than simply understanding the consideration of international law as *permitted* under the Constitution. He suggested, instead, an *obligation*: ‘national constitutional courts such as this, have a duty, so far as possible, to interpret their constitutional texts in a way that is generally harmonious with the basic principles of international law, including as that law states human rights’.<sup>108</sup> Where does this duty come from? Given that our Constitution, unlike prominent counter-examples, contains no requirement that its interpreters consider international law,<sup>109</sup> one source of the duty is international law. It is both the existence of this duty, and its sourcing in international law, that marks the internationalist position. It sets it apart from the position of worldliness, which does not see the consideration of international law as obligatory; and the position of constitutionalism, which accepts a duty to consider international law, but derives it from constitutionalist principles.

### (b) The Worldly Judge

The worldly judge views more information as better than less, and brings an inquisitiveness to the use of international law as an interpretive guide. The idea behind this approach is that judges are served in their capacity of resolving disputes by learning from others, especially from others in a similarly aligned adjudicative role. For the worldly judicial posture, there are no strict rules or hierarchies of various jurisdictions or various rules. There may be a sense that some jurisdictions,

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<sup>106</sup> This position is shared by those who assert a normative hierarchy in international law, with fundamental human rights exerting an influence as *jus cogens*.

<sup>107</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562, 624 (Kirby J).

<sup>108</sup> *Ibid.*

<sup>109</sup> In South Africa, the Constitution mandates the court to consider international law, and recommends it to consider comparative law, when interpreting the Bill of Rights: s 39 (‘When interpreting the Bill of Rights, a court, tribunal or forum - 1. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; 2. must consider international law; and 3. may consider foreign law.’). See also ss 231–33 (outlining the application of international law). For the comparative value of this example, see D Hovell and G Williams, ‘A Tale of Two Systems: The Use of International Law in Constitutional Interpretation in Australia and South Africa’ (2005) 29 *Melbourne University Law Review* 95.

and some sources of international law are more accessible, or more reliable, or more roughly relevant. But there is nothing stronger than this to guide the use of international law. It is a parallel source to academic opinion on the subject, but has the added benefit of representing an opinion formed in the context of real-world responsibility.<sup>110</sup>

The nation-state has disaggregated into different functions and branches, with the relationships between each branch — the executive, the legislature, and the judiciary — opening up to foreign counterparts and influence. For judges, this map of relationships inspires a global community of courts,<sup>111</sup> a worldwide stage on which they publish their opinions, share professional insights, make collegial friendships, and perhaps become famous. That world, indeed, has become smaller: with the help of internet data-bases, judicial conferences and judicial email listserves, judges can access and evaluate each other's work with speed and ease. The formal citation of foreign opinions is one way in which to publicise and cement this relationship.

The approach of the worldly judge explicitly places international law on the same level of importance as comparative domestic law. The binding nature of the international instrument is rendered largely irrelevant and thus regional treaties that are non-binding elsewhere, such as the European Convention on Human Rights, are included within the range of sources to be considered. International trends and foreign decisions not yet proven as custom are given equivalent weight to ratified treaties and customary international law. Indeed, it matters little if a foreign decision was issued in dissent, or has been overturned by subsequent jurisprudence.<sup>112</sup>

For Kirby J, the Constitution, 'like all other law in Australia, now operates in a context profoundly affected by international law. Context is always a vital consideration in deriving legal rules.'<sup>113</sup> Thus, he suggested, in this century, 'national final courts must accommodate the global context in which municipal law, including constitutional law, has its operation. The proliferation of international law, especially in the last three decades, demands [its consideration by] this Court'. Citing authority from the United States, he suggested that Australians cannot have 'trade and commerce in world markets and international

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<sup>110</sup> Jackson, above n 1, 118 (describing this with respect to the use of comparative law); see also V Jackson, 'Transnational Challenges to Constitutional Law: Convergence, Resistance, Engagement' (2007) 35 *Federal Law Review* 161.

<sup>111</sup> Slaughter, above n 44; See also A Slaughter, *A New World Order* (2004).

<sup>112</sup> This is an interesting phenomenon for the new plurality thesis. For example, in South Africa, the Constitutional Court has considered the decisions of the US Supreme Court — decisions issued over 40 years ago — as most relevant to its interpretation of free expression; ignoring subsequent US jurisprudence on the subject. See, eg, *Du Plessis v De Klerk* 1996 (3) SA 850 (citing *New York Times v Sullivan*, 376 US 254, 265 (1964) (Justice William Brennan)).

<sup>113</sup> *Re Colonel Aird; Ex parte Alpert* (2004) 220 CLR 308, 345.

waters exclusive on our terms, governed by our laws, and resolved in our courts'.<sup>114</sup>

This global awareness is also reflected in judicial attitudes elsewhere. In 1989, Chief Justice William Rehnquist of the United States Supreme Court suggested that the time had come, with the grounding of constitutional courts created after the Second World War, for United States courts to 'begin looking to the decisions of other constitutional courts to aid in their own deliberative process'.<sup>115</sup> Justice Ruth Bader Ginsburg, for example, argued with respect to the use of foreign law in the interpretation of the United States Constitution, that the practice resembled a process of 'sharing with and learning from others';<sup>116</sup> a practice in which those who resist were the 'losers'. Justice Sandra Day O'Connor suggested that jurists in other places, 'who have given thought to the same difficult issues that we face here' could teach American judges much about their own law.<sup>117</sup>

One value of worldliness lies in reciprocal engagement — as judges consider the opinions of their colleagues elsewhere, they bestow prestige — and a form of informal authority — to those ideas. Justice Kirby has been a vocal participant in this exercise, opening up the practice of Australian courts, and himself being cited in return. For example, when the Delhi High Court read down a provision of the Indian Penal Code which had penalised 'unnatural offenses', and interpreted the provision to exclude consensual sex between adults in private, Chief Justice Ajit Prakash Shah cited Kirby's comments on the subject, alongside broader Australian legislative practice, and the decisions of other courts.<sup>118</sup>

Nonetheless, while consensus may be fostered on an issue elsewhere, worldliness may have the opposite result within the local system. Hilary Charlesworth warns, for example, that the regular appearance of international law in Kirby J's dissenting opinions, often invoked as a subsidiary source for a reason reached by other means, and appearing without comment or engagement by other

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<sup>114</sup> Ibid, citing *The Bremen v Zapata Off-Shore Co*, 407 US 1, 9 (1971).

<sup>115</sup> Chief Justice W H Rehnquist, 'Constitutional Courts — Comparative Remarks' (1989) reprinted in P Kirchhof and D Kommers (eds), *Germany and its Basic Law: Past, Present and Future — A German American Symposium* (1993) 411, 412.

<sup>116</sup> Justice R B Ginsburg, 'Looking beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication' (2004) 22 *Yale Law and Policy Review* 329.

<sup>117</sup> Justice S D O'Connor, Keynote Address, Ninety-Sixth Annual Meeting of the American Society of International Law, March 16, 2002, in (2002) 96 *American Society of International Legal Procedure* 348, 350.

<sup>118</sup> *Naz Foundation v Union of India*, (2009) WP(C) No 7455/2001, [85] citing the Hon. M Kirby, 'Homosexual Law Reform: An Ongoing Blind Spot of the Commonwealth of Nations', 16th National Commonwealth Law Conference, Hong Kong, 8 April 2009. See also *Naz Foundation v Union of India*, (2009) WP(C) No 7455/2001, [57], citing *Lawrence v Texas*, 539 US 558 (2003) (US), and [58] citing decriminalization of sodomy in most Australian states by 1982, and later in Tasmania as a result of the decision of the United Nations Human Rights Committee in *Toonen v Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

members of the High Court, intensifies the “already marginalized image [of international law] in the Australian legal system”.<sup>119</sup>

Perhaps the overarching difficulty to the worldly use of international law is the danger of vacuum articulated above — as judges open up to the world, and as that world is growing in complexity and scope, what operates to constrain the judicial role? Why should a decision from the European Court of Human Rights be considered more persuasive than caselaw from Zimbabwe?<sup>120</sup> The question seems to demand a more substantive answer than merely pointing to the importance of ‘worldliness’. Similarly, why should the rights of homosexual people to engage in consensual sex, or prisoners to avoid the death penalty, or asylum-seekers to avoid indefinite detention, or Aboriginal people to have guaranteed access to land, all seem to call for an internationalised standpoint of consideration, while other matters of law do not? One answer to these inevitable questions is provided by the constitutionalist position.

### (c) The Constitutionalist Judge

A third justification for recourse to international law, which is also found in the justifications employed by Kirby J, and which I contend lies somewhere between the presumption of conformity and its informative value, is a particular moral commitment to international human rights law. It is this sub-category of international law that purports to reflect the fundamental characteristics of the human condition. According to the constitutionalist position, the Constitution must be interpreted in line with the inherent dignity and equal worth of all citizens, as articulated in part, in human rights instruments. The gravity and importance of this task is justification in itself for allowing external values to intrude into the domestic realm.<sup>121</sup> International law is relevant because its practitioners have, at certain points in time, strived to include a statement of universal norms, to which the Constitution necessarily gives weight.<sup>122</sup> This is the balance expressed in the Bangalore Principles.<sup>123</sup>

This aspect of justification is elaborated in two of Kirby J’s dissenting opinions, first in *Kartinyeri*, and later in *Al-Kateb v Godwin*. In the former, he held that the

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<sup>119</sup> Charlesworth, ‘The High Court on Constitutional Law’, above n 101, 5. Compare with the expectation that Kirby J’s use of international human rights law would encourage other (Australian) judges to ‘accept the responsibility they have to protect human rights’: L Johns, ‘Justice Kirby, Human Rights and the Exercise of Judicial Choice’, 27 (2001) *Monash University Law Review* 290, 318.

<sup>120</sup> Justice Breyer had cited a Zimbabwean opinion to support his view in *Knight v Florida*, 528 US 990, 996 (1999), a move he later conceded was ‘a tactical error’: see Conversation with Scalia and Breyer, above n 89.

<sup>121</sup> Bahdi, *Globalization of Judgment*, above n 86, 569.

<sup>122</sup> For a description of the normatively charged moment of global politics at the adoption of the Universal Declaration of Human Rights, and the way in which its drafters understood themselves to be striving for universal acceptance, see K G Young, ‘Freedom, Want, and Economic and Social Rights: Frame and Law’ 24 (2009) *Maryland Journal of International Law* 182, 182–84, 186.

<sup>123</sup> See text accompanying n 21, above.

‘races power’ in the Constitution does not extend to laws that are detrimental, or discriminatory, on racial grounds. He suggested that:

where the Constitution is ambiguous, this Court should adopt the meaning which conforms to the principles of universal and fundamental rights rather than an interpretation which would involve a departure from such rights.<sup>124</sup>

He cited Cooke P, then-President of the New Zealand Court of Appeal, who advocated the use of international law in constitutional interpretation ‘in light of the universality of human rights’,<sup>125</sup> as well as other judicial opinions supportive of fundamental rights.

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.<sup>126</sup>

Similarly, in *Al-Kateb v Godwin*, Kirby J (concurring with Gleeson CJ and Gummow J on this point), regarded the statute in question as ambiguous with respect to the detention of those whose removal from Australia was not reasonably practicable in the foreseeable future, and therefore construed it as subject to the presumption that the legislature did not intend to abrogate or curtail certain human rights or freedoms. Although he applied the presumption only to the legislation,<sup>127</sup> Kirby J suggested in *obiter* that the Constitution, which applies to all Australian lawmakers, and the statutory and common law, are all subject to the terms of international human rights law. This is the application of the universalist aspect of his position: ‘such rights and freedoms express the common rights of all humanity. They pre-existed their formal expression.’<sup>128</sup>

Within these terms, Kirby J was expressing a higher law, akin to natural law, for its distinctive connection with justice.<sup>129</sup> He cited the infamous U.S. slavery decision in 1857, in which the dissenting opinions of McLean J and Curtis J invoked international law to support the proposition that Dred Scott was not a slave but a free man.

Had the interpretive principle prevailed at that time, the United States Supreme Court might have been saved a serious error of constitutional reasoning; and much injustice, indifference to human indignity and later suffering might have been avoided. The fact is that it is often helpful for national judges to check their own

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<sup>124</sup> *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 411 (s 51(xxvi)).

<sup>125</sup> *Tavita v Minister of Immigration* [1994] 2 NZLR 257, 266, cited in *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 417 (Kirby J).

<sup>126</sup> *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 418.

<sup>127</sup> Only Gummow J expressed his explicit disagreement with the view that a potentially indefinite detention of non-citizens by the executive would be compatible with Ch III of the Constitution, with Gleeson CJ and Kirby J not deciding: *Al-Kateb v Godwin* (2004) 219 CLR 562, 609 [127].

<sup>128</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562, 634 [176].

<sup>129</sup> For a similar position, see *Gerhardy v Brown* (1985) 159 CLR 70, 125 (Brennan J); But see *Kruger v Commonwealth* (‘*Stolen Generations Case*’) (1997) 190 CLR 1. For a critique of the earlier case, see Johns, ‘Human Rights in the High Court of Australia’, above n 13.



constitutional thinking against principles expressing the rules of a 'wider civilization'.<sup>130</sup>

This justification gives a special, 'suprapositive' significance to international law: it is a source of law which enjoys both natural law and positive law credentials. The justification understands international law as 'the law of nations' which reflects a consensus in legal systems over the most complex — if basic — aspects of justice and injustice, and of right and wrong. Jeremy Waldron, in his suggestive exploration of a 'modern' *ius gentium*, traced this use of consensus to Roman law, in which the judge had regard to the laws of nations (or at least those nations with immigrants in Rome). The traditional *ius gentium* evolved to link reason with what law had actually achieved. Thus, the early usage of *ius gentium* developed into a role similar to equity — 'a method of cutting through layers of local technicalities and idiosyncrasies to get at the essence of justice'.<sup>131</sup> Later, international law began to develop independently, creating a more marked distinction between domestic and international law in the twentieth century. This distinction has again blurred due to the instruments and institutions of international human rights law.<sup>132</sup> This practice therefore draws explicit attention to the constitutionalist learning that took place after the Second World War, and to the international institutions that have been established.<sup>133</sup>

Something similar is proposed in Kirby J's constitutionalist justifications — indeed Kirby J might represent what Waldron cannot find on the present United States Supreme Court — a real-life practitioner to prove his theory.<sup>134</sup> Why do I term this position a constitutionalist, rather than a 'universalist', approach?<sup>135</sup> I suggest that the emergence of the instruments and institutions of human rights lends force to a distinctively constitutionalist mode of reasoning about rights and justice. This reasoning is analogous to scientific inquiry. Waldron suggests that judges relying on foreign law are engaging the problem-solving component of law. Together, they check results, duplicate experiments, credential useful findings, and forge ahead with knowledge about the difficult issues of human organisation that are mediated by law — how we should live together, what we should owe to each other, and the like.

Constitutionalism is the branch of practical knowledge that works to disentangle these issues through law. In particular, it is the working out of a higher

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<sup>130</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562, 629 [190], citing *Dred Scott v Sandford*, 60 US 393 (1867).

<sup>131</sup> J Waldron, 'Foreign Law and the Modern *Ius Gentium*' (2005) 119 *Harvard Law Review* 129, 134.

<sup>132</sup> *Ibid* 135.

<sup>133</sup> Justice Breyer has valued the method because 'foreign nations have become democratic; to an ever greater extent, they have sought to protect basic human rights; to an ever greater extent they have embodied that protection in legal documents enforced through judicial decision making': see Breyer, above n 89.

<sup>134</sup> Waldron, above n 131, 146.

<sup>135</sup> Justice Kirby himself has laid claim to this label, but notably rejects the 'infantile notion that everyone is the same': see Kirby, 'To Judge Is to Learn', above n 17, 22.

law that enables and constrains self-government by counteracting the force of domestic majorities. This includes majorities, represented by legislatures, who have allowed laws to be passed, unchallenged, that abrogate fundamental rights. It also includes majorities within final courts, who have allowed laws to stand, unchallenged, that abrogate fundamental rights. It is relevant, in this latter respect, that an interpretation of the Constitution issued in dissent maintains its importance, despite consistent rejection by other judges. On this view, it is the Constitution, not the judgments, which allows judges to retain their fidelity to law in future cases: ‘The task’, as one High Court justice put it, is ‘to apply the Constitution, not the judicial decision’.<sup>136</sup>

The constitutionalist position is one which, compatibly with the style of scientific inquiry, encourages critique. When Fleur Johns examined the operation of human rights in the High Court of Australia between 1976 and 2003, she found that rights discourse had not resulted in any greater substantive concern for people who are vulnerable or disenfranchised in Australian law and society.<sup>137</sup> Evaluating the discourse of human rights with pragmatist tools,<sup>138</sup> Johns suggested that rights-arguments had involved, in Australia, a complacent veneration of the law, with limited ‘progressive’ effects.<sup>139</sup> Instead, human rights in Australia, sourced internationally or comparatively or otherwise, had crowded out other styles of argument, positively demobilized claimant groups, and seen the High Court justices ‘endlessly polishing rather conventional dance steps, tinkering with the institutional choreography, and quibbling sotto voce about judicial activism’.<sup>140</sup>

Johns’ examination suggests an uneven protection of rights in the High Court, even in cases whose outcomes represent litigation victories. Johns takes this fact as one which should recommend different strategies and discourses for people experiencing vulnerability or disenfranchisement in the Australian legal system. We might alternatively take this fact as one pointing to the immense difficulty of articulating a discourse of legal and political emancipation: a difficulty with which rights, no less than other discourses, must contend. What is special about rights, and why so many resources and energies remain committed to them in Australia, is an important question, which the constitutionalist standpoint takes seriously. Part of this seriousness comes from the international audiences that rights arguments attract, as well as the international lessons that can be drawn. Moreover, the

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<sup>136</sup> *Buck v Bavone* (1976) 135 CLR 110, 137 (Murphy J). The role of *stare decisis* has always been complicated in relation to constitutional law: a fuller discussion of this careful point is beyond the scope of this article.

<sup>137</sup> Johns, ‘Human Rights in the High Court of Australia’, above n 13, 294.

<sup>138</sup> *Ibid.*, 306. See also David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (2004) (mounting this critique against the style of human rights arguments advanced elsewhere).

<sup>139</sup> *Ibid.* Johns’ preliminary analysis explored *Gerhardy v Brown* (1985) 159 CLR 70 and *Pearce v The Queen* (1998) 194 CLR 610, the former as exemplar of the early effort of the High Court to engage with international human rights law, and the latter as indicative of the contemporary banality in which its guidance is sought.

<sup>140</sup> Johns, ‘Human Rights in the High Court of Australia’, above n 13, 294.

success of rights arguments in Australia, from indigenous rights to women's rights to human rights, is not to be judged solely by the ability of representatives to win local court-room victories or even to achieve favourable rhetoric in judicial opinions.<sup>141</sup> And while the lack of receptivity to human rights, both in the current High Court and in other branches of government, may point to a present remoteness of constitutionalism in Australia, it does not discount its future role — whether first through advancement, or first through retreat — in shifting the terms of legal and political debate.<sup>142</sup>

Returning to the way in which judges rely explicitly on international human rights, it is the constitutionalist position, more than internationalism or worldliness, that provides the most coherent support for the tendency to appeal to a new plurality. Indeed, the inversion of local judicial majorities may be more consistent with constitutionalism, than the inversion of legislative majorities. There is nothing that, in principle, combines constitutionalism with an expansion of judicial review.<sup>143</sup> In particular legal and political cultures, the use of international law — and particularly, international human rights law — may be more consistently confined to the development of common law, or the interpretation of statutes, including statutory bills of rights. In this respect, Parliament may be given the final word in deciding to protect rights, and may be empowered to override judicial interpretations of the common law or of any statute. There may be a heavy political cost in doing so, but one that does not sound in further judicial action.

I suggest that it is in these two respects — in construing legislation and the common law consistently with fundamental human rights — that Kirby J's interpretive principle — and indeed, the constitutionalist justification for his interpretive principle — will have the greatest impact in Australian law, at least in the near future. International law has already played a significant role in both. It was famously present in *Mabo v Queensland (No 2)*, when Justice Brennan invoked the principle of non-discrimination in the *International Covenant on Civil and Political Rights*, and noted that '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'.<sup>144</sup> When the High Court determined the contours of a right to publicly funded counsel in Australia in *Dietrich v The Queen*, Chief Justice Mason and Justice McHugh suggested that the use of international law may present a 'common-sense' approach to common law development, and cited Justice Kirby's earlier deployment as an example.<sup>145</sup> There

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<sup>141</sup> Alan Hunt, 'Rights and Social Movements: Counter-Hegemonic Strategies' (1990) 17 *Journal of Law and Society* 309, 324.

<sup>142</sup> See discussion of the new legislative protections of rights in text accompanying n 151–153 below.

<sup>143</sup> M Tushnet, 'When Is Knowing Less Better than Knowing More? Unpacking the Controversy over Supreme Court Reference to Non-U.S. Law' (2006) 90 *Minnesota Law Review* 1275; see also Gardbaum, above n 32.

<sup>144</sup> (1992) 175 CLR 1 (Brennan J, written with concurrence of Mason CJ and McHugh J).

<sup>145</sup> (1992) 177 CLR 292, [18], citing *Jago v District Court of New South Wales* (1988) 12 NSWLR 558, 569.

continue to be important statements that link the common law presumption that Parliament will not abrogate fundamental human rights with international human rights principle.<sup>146</sup> Moreover, as the final court of appeal with jurisdiction over both constitutional and non-constitutional matters, constitutional law and the common law are always in close proximity in the practice of the High Court.<sup>147</sup>

Nonetheless, there are certain ‘idiosyncratic’ obstacles to the ‘constitutionalization’ of the common law,<sup>148</sup> in part because of the way the text and structure of our written Constitution have been understood as covering the field on the constitutionalist aspects of the relationship between government and individual.<sup>149</sup> When the legislature explicitly seeks to override fundamental rights, the common law is a weak instrument, even if its development is informed by international human rights. Those justices who would have avoided the terrible result in *Al-Kateb v Godwin*, a result which means that it is possible for the Australian government to indefinitely detain an individual, were in the minority, and were forced to read the legislation in careful and perhaps constrained terms.<sup>150</sup> There is a greater hope, perhaps, from legislative bills of rights, which present a different balance between judges and legislatures than simple common law interpretation.

Indeed, in the new legislative bills of rights in the Australian Capital Territory and Victoria, international human rights law is proving to be an important source of principle. In the Human Rights Act 2004 (ACT), section 31 invites the consideration of international law in interpreting human rights, especially where there are clear advantages in doing so, and where the material is accessible to the public. This has been construed to include sources from the European Court of Human Rights, which are regarded as worthy of respect because of the universality of human rights.<sup>151</sup> In the Charter of Human Rights and Responsibilities Act 2006 (Vic), section 32 permits recourse to international human rights law in statutory interpretation, including the provisions of the Charter. Other principles of interpretation, such as taking context and purpose into account, the presumption of conformity with international obligations, and the principle of legality, are also held to be relevant to this exercise.<sup>152</sup> Unsurprisingly, debates about a new

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<sup>146</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562; see also Chief Justice R French, ‘International Law and Australian Domestic Law’, Supreme Court of New South Wales Annual Conference, Hunter Valley, Pokolbin, 21 August 2009; E Willheim, ‘Globalisation, State Sovereignty and Domestic Law: The Australian High Court Rejects International Law as a Proper Influence on Constitutional Interpretation’ (2005) 6 *Asia-Pacific Journal on Human Rights and the Law* 1.

<sup>147</sup> See Simpson and Williams, above n 38, 226.

<sup>148</sup> See Lacey, above n 25, 7.

<sup>149</sup> But see, for example, *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

<sup>150</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562 (Gleeson CJ, Gummow and Kirby JJ).

<sup>151</sup> For example, *Hakimi v Legal Aid Commission (ACT)* [2009] ACTSC 48 [69]–[70]. My thanks to Renuka Thilagaratnam for pointing me to this case.

<sup>152</sup> For example, *Kracke v Mental Health Review Board* [2009] VCAT 646 [38]. Note at [40] Justice Bell’s preference for Kirby J’s view in *Coleman v Power* (2004) 220 CLR

legislative bill of rights at the federal level have also drawn on international and comparative legal examples.<sup>153</sup> Ultimately, the fact that constitutionalism is evolving to incorporate a more global standpoint,<sup>154</sup> links the constitutionalist judge with both the worldly and the internationalist positions.

## VI. Conclusion

In one of his last judicial words on the subject, Kirby J defiantly declared that his interpretive principle was just one more inevitable step in the process of evolution of the Australian Constitution.<sup>155</sup> One need not subscribe to an overarching narrative of progress to agree.<sup>156</sup> Majorities abroad can bolster minorities here, given the judicial preference for persuasion and reason. Moreover, majorities abroad can exert an indirect pressure on Australian judges,<sup>157</sup> because of three anomalies that are produced if international law is ignored. First, the gap between international and comparative law is closing. Judges who consider comparative law, but refuse to consider international law, may find themselves relying on the jurisprudence of courts which are themselves borrowing busily from international sources. Second, the gap between common law and constitutional law is not fixed, particularly given the view taken in Australian law that they are closely proximate areas of law. Third, the trend in some Australian states and territories towards legislative bills of rights has opened up those sources of law to international human rights, and to the stream of international authority, with which the High Court will inevitably become more versed.

If Kirby J's interpretive principle is ultimately accepted by the High Court, we do not know which position will be emphasised — whether it will be

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1, 91–96; cf Gleeson CJ at 27–30, that an international instrument can inform the interpretation of a previously enacted statute.

<sup>153</sup> As Kirby himself noted, the launch of a national consultation on federal statutory protection for human rights, coincided with the 60<sup>th</sup> anniversary of the adoption of the Universal Declaration of Human Rights by the United Nations General Assembly: Justice M Kirby, 'An Australian Charter of Rights — Answering Some of the Critics' (2008) 31 *Australian Bar Review* 149, 149. See also Commonwealth of Australia, *National Human Rights Consultation Report* (September 2009), 100–04, 241–57, available at <[www.humanrightsconsultation.gov.au](http://www.humanrightsconsultation.gov.au)> and <[www.ag.gov.au](http://www.ag.gov.au)>.

<sup>154</sup> See text accompanying n 60 above.

<sup>155</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562, 622 [169].

<sup>156</sup> For a criticism of this narrative of 'progress', see Johns, 'Human Rights in the High Court', above n 13, 317 (describing Brennan J's recourse to international and comparative texts, in order to ascertain the protection afforded, over time, to racial minorities). Yet the fact that law advances and retreats is acknowledged by the comparative exploration of decisions outside of their chronological and precedential development: see my comments above n 112 (noting the tendency, within the South African Constitutional Court, to cite early jurisprudence of the United States Supreme Court).

<sup>157</sup> In some of the cases from the jurisdictions considered here (Canada, India, New Zealand, South Africa and the United States), the judges considering international law were issued by the majority; in some they were in dissent. A full analysis is beyond the scope of this article.

internationalism, worldliness, or constitutionalism. Yet there are clues. The internationalist position is unlikely to be adopted, because of the normative and institutional questions raised in tying the fate of the Constitution to international law. The position of worldliness is more likely, as Australian judges take part in the transjudicial conversation and treat international law as no more threatening than, and just as useful as, comparative law. The position of constitutionalism, based heavily on the protection of international human rights, may be spurred first by developments in the common law and in legislative protections of rights, within Australia's states and territories and, possibly, federally.

Marking the new millennium (and the first century of the Australian Constitution), Justice Kirby suggested that, in former times, 'we saw issues and problems through the prism of a village or nation state, especially if we were lawyers. Now we see the challenges of our time through the world's eye'.<sup>158</sup> He regularly explored, in his extrajudicial contributions, global advances, such as in technology, transport and trade, and global problems, such as pandemics, climate change and overpopulation.<sup>159</sup> Yet Kirby J's world was a judicial world. He saw the world through the judge's eye — and it was not as a distant planet. Instead, he saw a world of laws, a world of opinions, and a world of rights and wrongs that, while indeed encircling the globe, are still very much a part of it.

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<sup>158</sup> Kirby, *Through the World's Eye*, above n 3, xxv.

<sup>159</sup> *Ibid.*