MUNICIPAL COURTS AND THE INTERNATIONAL INTERPRETIVE PRINCIPLE: *AL-KATEB V GODWIN*

THE HON MICHAEL KIRBY AC CMG*

This article examines the decision in Al-Kateb v Godwin (2004) 219 CLR 562. It revisits the suggested 'heresy' that international human rights law may influence the interpretation of the Australian Constitution and other legal texts. Accessing universal human rights law, including in constitutional adjudication, was endorsed in the Bangalore Principles on the Domestic Application of International Human Rights Norms 1988. The author suggests that interpreting statutory language in this way is not dissimilar to the common-law principle of interpreting statutes so as to uphold basic rights. But should an analogous approach be permissible in deciding the meaning of constitutional language? Although arguably invoked by the majority of the High Court in Mabo v Queensland [No 2] (1992) 175 CLR 1, in the context of declaring the common-law, so far this approach has not been accepted for constitutional elaboration in Australia. But should this be so in the age of global problems and internationalism?

I THE CHARTER AND THE *UDHR*

Often when I visit Australian law schools, students will ask me: 'What is your favourite decision?' Or it might be: 'What is the decision you would change if you could?' Normally, I avoid an answer by declaring my love for all of my decisions, just as my father would answer a similar question about his favourite child. Work in the High Court of Australia is so intense, so frequently contestable and significant, that it is difficult to single out one case, or even a cluster of cases, for special affection. However, for the purposes of the present article, I will concede that a decision delivered on 6 August 2004, *Al-Kateb v Godwin* ('*Al-Kateb*'),[1] stands out from others. This is because of its importance for Australian law in its relationship with international law, but also for the perspective that it provides as to how international law applies to our own people under the law that governs them, not excluding the *Australian Constitution*.

* Justice of the High Court of Australia (1996–2009).

1 (2004) 219 CLR 562 ('*Al-Kateb*'). See also *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (2004) 219 CLR 664.

When the Second World War was coming to a close, fearsome events were unfolding, revealing the impact of the war, not only on military personnel, but globally on civilian populations and especially minorities. The *Covenant of the League of Nations*[2] had largely proved a failure, suggesting the need, for human survival, of the establishment of a new body, the United Nations ('UN'), and a new world legal order. In August 1941, President Franklin D Roosevelt and Prime Minister Winston Churchill identified important principles of universal human rights that they saw as being at stake in the war. They adopted the *Atlantic Charter*.[3] In the UN Declaration of January 1942,[4] they included amongst the Allied war aims the attainment of universal human rights.

As the Second World War edged towards its conclusion, two particular developments occurred that indicated the urgency of the moment. These were the discoveries of widespread genocide, including the Holocaust and crimes against humanity, and the detonation of atomic bombs over Hiroshima and Nagasaki in Japan. These events encouraged the victorious Allies to create a new and stronger world body with its foundations in the principles of universal human rights; international peace and security; justice; and economic equity between nations.

Originally, it was intended to include a statement of fundamental rights in the *Charter of the United Nations* ('*UN Charter*') itself.[5] However, time ran out for achieving that objective.[6] A major factor in the new world order was to be the demand for the liberation of colonial peoples and an end to racial discrimination. Ironically, years earlier at Versailles in 1919, Japan had made a demand for the reform of the 'white world'.[7] Australia, through the voice of its Prime Minister, WM Hughes, opposed any such initiative. In securing the adoption of article 15(8) of the *Covenant of the League of Nations*, Australia helped enshrine a prohibition on the League from interfering in the internal affairs of member states. By the same token, in 1945 it was recognised that, unless the human rights accepted by civilised nations were included in the fundamental principles of the UN and in consequent global practice, wars and destruction would be likely to continue and even to escalate having regard to the new weapons. Thus, a drafting committee of the UN Commission on Human Rights, acting under the UN Economic and Social Council

---

2 United Kingdom, *The Covenant of the League of Nations with a Commentary Thereon* (Cmd 151, 1919); Sir Frederick Pollock, *The League of Nations* (Stevens and Sons, 1920) 86.

3 *Declaration of Principles, known as the Atlantic Charter*, *Issued by the Prime Minister of the United Kingdom and the President of the United States of America*, declared 14 August 1941, 204 LNTS 384. There was no formal document: Joseph P Lash, *Roosevelt and Churchill, 1939–41: The Partnership that Saved the West* (Norton, 1976) 447–8.

4 *Declaration by United Nations with Related Documents*, signed 1 January 1942, 204 LNTS 381, art I.

5 Jan Herman Burgers, 'The Road to San Francisco: The Revival of the Human Rights Idea in the Twentieth Century' (1992) 14(4) *Human Rights Quarterly* 447, 471, 474; Paul Gordon Lauren, 'First Principles of Racial Equality: History and the Politics and Diplomacy of Human Rights Provisions in the United Nations Charter' (1983) 5(1) *Human Rights Quarterly* 1, 8–9, 13.

6 Annemarie Devereux, *Australia and the Birth of the International Bill of Human Rights 1946–1996* (Federation Press, 2005) 14; Herbert V Evatt, *The Task of Nations* (Duell, Sloan and Pearce, 1949) 209, 235.

7 Carl Bridge, 'Australia, Britain and the British Commonwealth', in Alison Bashford and Stuart Macintyre (eds), *The Cambridge History of Australia* (Cambridge University Press, 2013) vol 2 518, 523–4.

('ECOSOC'), chaired by Eleanor Roosevelt, widow of President Franklin D Roosevelt, was established to prepare the *Universal Declaration of Human Rights* ('*UDHR*').[8]

The *UDHR* was adopted at the 3rd session of the General Assembly of the UN, convened in Paris on 10 December 1948. At that time, Australia's Minister for External Affairs, HV Evatt, was the Assembly's President. Dr Evatt had been a past Justice of the High Court of Australia. He had resigned from the Court in 1940 and was elected to the Federal Parliament to play a part in the prosecution of the war and as a leader in the Curtin wartime government of Australia. Dr Evatt welcomed the *UDHR* as a step forward in a large evolutionary process. As he put it, it was 'the first occasion on which the organized community of nations had made a declaration of human rights and fundamental freedoms. … [M]illions of people, men, women and children all over the world, would turn to it for help, guidance and inspiration'.[9] So it has proved. The *UDHR* became the most famous and most frequently translated statement of fundamental values ever issued by the UN or any other body. Its impact on the world has been profound.

Eventually, the *UDHR* was elaborated and supplemented by a body of detailed UN treaty law. Countries such as Australia participated in, and supported, the development of such law. Although no international court was established with jurisdiction to define and enforce these statements of universal human rights, three developments occurred that spread widely and deeply the principles contained in the *UDHR*. These were the contemporaneous attainment of freedom from historical imperial rule, secured by many countries of the world following the post-war collapse of imperial power; the adoption of machinery by the UN to investigate breaches and to secure compliance with universal human rights; and the creation of regional treaties, institutions and courts for the enforcement of human rights in Europe, the Americas and Africa, analogous, in terms and effect, with the developing UN treaty law.

The only significant part of the world's surface lacking a court with regional human rights jurisdiction was Asia and the Pacific, including Australasia. However, that did not leave those countries completely untouched by these developments. Most of them became parties to the majority of the enforceable UN human rights treaties expressed in largely common form. Many were also subject to human rights protections expressed in their own newly adopted post-independence constitutions, likewise adopting language that was substantially in common form.

Towards the close of the 20th century, an initiative was taken that was designed to persuade countries, mainly anglophone countries, to address the gap that was developing between the terms of municipal law and the growing body of the international law of human rights. As Professor TRS Allan put it in 1985: 'Modern Anglo-American constitutional theory is preoccupied with one central problem. The problem consists of devising means for the protection and enhancement of

---

8 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/RES/217(III) (10 December 1948).

9 *Continuation of the Discussion on the Draft Universal Declaration of Human Rights: Report of the Third Committee (A/777)*, UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/PV.183 (10 December 1948) 934.

individual human rights in a manner consistent with the democratic basis of our institutions'.[10]

This article is about a practical and principled means for resolving this preoccupation in the context of the global move towards universal human rights.

II THE BANGALORE PRINCIPLES ON HUMAN RIGHTS LAW

To address the disharmony in law and practice between universal principles and local legal rules, and to bring municipal courts into greater harmony with the growing body of international human rights law, a conference was called in Bangalore (now Bengaluru) in India. The conference took place between 24–26 February 1988. The convenor of the conference was Justice PN Bhagwati, a former Chief Justice of India. The participants included chief justices or other senior judges from Australia, Pakistan, Papua New Guinea, Mauritius, Britain, Sri Lanka, Malaysia, India, Zimbabwe and the United States of America.

Two judges in attendance at Bangalore were not members of the final national court of their countries. They were Judge Ruth Bader Ginsberg (later and still a Justice of the Supreme Court of the United States) and myself (later a Justice of the High Court of Australia).

At the conclusion of the meeting, the participants accepted a summary of the conference outcome proposed by the convenor based on the participants' discussions. These conclusions became known as the *Bangalore Principles on the Domestic Application of International Human Rights Norms 1988* ('*Bangalore Principles*'). Amongst the conclusions stated by the participants were the following:

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

10 TRS Allan, 'Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism' (1985) 44(1) *Cambridge Law Journal* 111, 111.

the domestic law – whether constitutional, statute or common law – is uncertain or incomplete.

5. This tendency is entirely welcome 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.

…

7. It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes – whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law. …[11]

At the time of the meeting in Bangalore, I was the President of the Court of Appeal of the Supreme Court of New South Wales. When I returned from Bangalore to my judicial duties in Australia, I discovered many circumstances where, to resolve ambiguity or to fill a gap in the common or statute law, resort could usefully be had to the growing body of international jurisprudence on human rights. In small and large cases I found that it was sometimes useful to turn to the basic principles of universal human rights. I collected a number of these cases, as illustrations, in articles describing how useful the *Bangalore Principles* could sometimes be for a working judge.[12]

Two years after Bangalore, and in a context where the *Bangalore Principles* were gaining attention in Australia, the High Court of Australia decided a most important case, *Mabo v Queensland [No 2]* ('*Mabo*').[13] The case concerned the entitlement of Indigenous peoples to recognition of native title to their traditional lands. Such recognition had been denied for 150 years both in Australian judicial decisions and in decisions of the Judicial Committee of the Privy Council when it was part of the Australian judicial hierarchy. There was no express federal constitutional provision to which the Aboriginal peoples could appeal in advancing their claims. However, their counsel argued that the Court could, and should, re-express the common law of Australia, including by reference to applicable principles of international human rights law.

---

11 President MD Kirby, 'The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms' (1988) 62(7) *Australian Law Journal* 514; PN Bhagwati, 'Report of Judicial Colloquium on the Domestic Application of International Human Rights Norms, Bangalore, India: Chairman's Concluding Statement' (26 February 1988) ('*Bangalore Principles*') is an Appendix to that article. See also Note, 'The Bangalore Principles on "The Domestic Application of International Human Rights Norms"' (1988) 14(3) *Commonwealth Law Bulletin* 1196; Justice PN Bhagwati, *My Tryst with Justice* (Universal Law Publishing, 2013) 172–82.

12 Justice MD Kirby, 'The Impact of International Human Rights Norms: A "Law Undergoing Evolution"' (1996) 22(3–4) *Commonwealth Law Bulletin* 1181, 1189–91. See also President Michael Kirby, 'The Australian Use of International Human Rights Norms: From Bangalore to Balliol – A View from the Antipodes' (1993) 16(2) *University of New South Wales Law Journal* 363. For a good example of its use, see *Gradidge v Grace Bros Pty Ltd* (1988) 93 FLR 414, 415–23 (Kirby P) ('*Gradidge*').

13 (1992) 175 CLR 1 ('*Mabo*').

Counsel's submission, expressed soon after the adoption of the *Bangalore Principles*, was accepted by the majority of Australians, including judges and lawyers following the decision of Australia's highest court. In the *Mabo* decision, express reference was made by the High Court of Australia to UN treaty law and to the entitlement, then recently conferred on Australians, to communicate individual complaints to the UN Human Rights Committee concerning any alleged non-compliance of Australian law with the *International Covenant on Civil and Political Rights* ('*ICCPR*').[14] This caused Justice Brennan (with the concurrence on this point of Chief Justice Mason and Justice McHugh), in the leading opinion in *Mabo*, to say of the *ICCPR*, so enhanced, that it

> brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of international human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration.[15]

In many countries, at least common law countries, there was no particular problem in paying attention to legal reasoning expressed in courts outside the country in question. International law has come to influence domestic legal disputes in Australia in many ways.[16] This has occurred, in part at least, because of traditions of analogous and contextual reasoning adopted by the judiciary in common law countries. Those traditions were nurtured in the era of inter-jurisdictional comparisons in Privy Council appeals. Even in the United States of America, after the *Bangalore Principles*, particular Justices of the Supreme Court reached out to analogous principles that could be derived from international human rights law and the decisions of overseas courts, including in constitutional litigation, on analogous problems. The relevant United States cases included *Atkins v Virginia*,[17] *Lawrence v Texas*,[18] and *Roper v Simmons*.[19] Justice Scalia, joined by some other Justices, disapproved strongly of this use of international jurisprudence, including so far as it was derived from international human rights law and cited in the context of municipal constitutional reasoning.[20] In the *Bangalore Principles*, no relevant differentiation was drawn between constitutional and other branches of the law. They were all part of the body of law binding in the national jurisdiction. They were thus apt to a common approach and

14 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

15 *Mabo* (1992) 175 CLR 1, 42 (Brennan J).

16 A recent illustration is *Australian Competition and Consumer Commission v PT Garuda Indonesia [No 9]* (2013) 212 FCR 406, 414 [36]–[37] (Perram J).

17 536 US 304 (2002) ('*Atkins*').

18 539 US 558 (2003) ('*Lawrence*').

19 543 US 551 (2005) ('*Roper*').

20 See *Atkins*, 536 US 304, 347–8 (2002); *Lawrence*, 539 US 558, 586 (2003); *Roper*, 543 US 551, 622–4 (2005).

to like processes of reasoning, whether the law in question was common law, statutory law or constitutional law.

In 1997, by which time I had been appointed to the High Court of Australia, that Court came to consider the interpretation of the 'races' power in the *Australian Constitution*. This power permitted of the Federal Parliament to make laws '*with respect to* … the people of any race *for whom* it is deemed necessary to make special laws'.[21] The question arose, in relation to the legislation whose validity was challenged in that case, as to whether this power was confined to the making of laws only *for the benefit and protection* of persons of a particular race, or whether it also extended to laws that should be characterised as being for the disadvantage or detriment of persons of a particular race on the grounds of their race.

In *Newcrest Mining (WA) Ltd v Commonwealth* ('*Newcrest*'), I said, adapting *Mabo*: 'Where the *Constitution* is ambiguous, this Court should adopt that meaning which conforms to the principles of fundamental rights rather than an interpretation which would involve a departure from such rights'.[22] In *Kartinyeri v Commonwealth*, I further expressed that

> [t]here is no doubt that, if the constitutional provision is clear and if a law is clearly within power, no rule of international law, and no treaty (including one to which Australia is a party) may override the *Constitution* or any law validly made under it. … 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. … Likewise, the *Australian Constitution*, which is a special statute, does not operate in a vacuum. It speaks to the people of Australia. But it also speaks to the international community as the basic law of the Australian nation which is a member of that community.[23]

This approach to constitutional interpretation was not endorsed by the majority of the High Court in *Newcrest*. Indeed, it was this application of the *Bangalore Principles* that led to one of the controversies that presented for decision of the High Court of Australia in *Al-Kateb*. That case concerned the power of the Australian executive government to detain indefinitely a stateless person who, as an alien, had entered Australia unlawfully. More specifically, the issue was whether the *Migration Act 1958* (Cth) ('*Act*') should be read down so as to avoid such a consequence or whether the *Constitution* itself reserved indefinite detention, contended for in the case, to those offences for conviction of which imprisonment was ordered by a court, in the application of the constitutional judicial power. The Justices of the High Court of Australia divided on the outcome. Although the reasoning differed amongst the minority, the lawfulness of the detention was narrowly upheld 4:3.[24]

---

21 *Australian Constitution* s 51(xxvi) (emphasis added).
22 (1997) 190 CLR 513, 657 ('*Newcrest*').
23 (1998) 195 CLR 337, 418 [166].
24 McHugh, Hayne, Callinan and Heydon JJ; Gleeson CJ, Gummow J and Kirby J dissenting.

III A NARROW HOLDING BECOMES BROADER

Come forward 20 years after *Newcrest* was decided. In 2019, on a visit to Columbia University in New York, a decade after my resignation from the High Court of Australia, I met a former associate (law clerk) who had worked with me on the *Al-Kateb* case, Sarah Knuckey. She is now an Associate Professor teaching law at Columbia University. She remembered working on my drafts as they were produced in *Al-Kateb*. We talked of the days on which the opinions of the other Justices came in, following distribution from other judicial chambers; and how sharp differences emerged in successive drafts.

Amongst the first draft reasons to arrive were the separate reasons of Chief Justice Gleeson and of Justice Gummow. They each insisted that, because the power of the executive to detain a person was subject to a statutory obligation to release that person and restore their liberty after that person elected to return to their place of nationality,[25] the *Act* should not be interpreted to permit indefinite detention.

In Mr Al-Kateb's case, his country of birth was Kuwait. However, that country would not grant him citizenship, nor would it take him back. His place of nationality, through his parents, was Palestine, where he had lived before travelling to Australia. However, Israel would not permit him to enter and transit Israel so that he could secure access to Palestine. There was no other foreseeable way by which Mr Al-Kateb could be returned to Palestine. There was no suggestion that Israel might alter its approach.

Chief Justice Gleeson and Justice Gummow concluded that the assumption adopted in the applicable legislation was that, at most, a short-term detention would follow an election, by a person in the position of Mr Al-Kateb, to return to the country of nationality. Such an interpretation was one supportive of individual liberty. It was thus the interpretation that it was natural and appropriate for an Australian court to adopt or to prefer if there were any doubt. Whereas in Mr Al-Kateb's case, such return was effectively impossible in the foreseeable future, the statutory assumption of the legislative scheme was not fulfilled. The *Act* could not therefore operate as the Parliament had intended. Any wider interpretation of the *Act* to overcome this difficulty would breach fundamental interpretive principles. It would do this by permitting indefinite detention by the executive without specific authorisation and scrutiny by the judiciary.[26]

At that point, Justice McHugh distributed his reasons. They were likewise originally very brief. In interpreting the power of detention, in a way that would be consistent with implications derived from Chapter III of the *Australian Constitution*, Justice Gummow had quoted Blackstone as stating '[t]he confinement of the person, in any wise, is an imprisonment',[27] before continuing,

---

25 *Migration Act 1958* (Cth) ss 198(1), (2).

26 *Al-Kateb* (2004) 219 CLR 562, 574 [10] (Gleeson CJ), 606–7 [116] (Gummow J).

27 Ibid 612 [137], quoting William Blackstone, *Commentaries on the Laws of England: Book the First* (Thomas Tegg, 17th ed, 1830) vol 1, 136–8 [136]–[137].

> and one which, subject to certain exceptions, is usually only permissible if consequent upon some form of judicial process. It is primarily with the deprivation of liberty that the law is concerned, not with whether the deprivation is for a punitive purpose.[28]

This point was also encapsulated in the statement in the Supreme Court of the United States in *Hamdi v Rumsfeld* by Justice Scalia (with the concurrence of Justice Stevens). Justice Scalia also made reference to Alexander Hamilton writing in the *Federalist Papers* when he said '[t]he very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive'.[29]

This line of argument was not embraced by Justice McHugh or later the plurality of the Australian High Court in Mr Al-Kateb's case, to treat as inapplicable the provisions of the *Act* relied on by the Commonwealth. That left the question, that interested me, whether the majority's preferred interpretation would be conformable with the basic assumptions and requirements of the *Australian Constitution*.

It was at this stage that I embarked upon writing my own reasons in *Al-Kateb*. Those who read those reasons today will see that I started out substantially agreeing with the reasons given by Gummow J.[30] On that basis, the provisions permitting detention of Mr Al-Kateb on an assumption of the availability of removal did not apply, in terms, to the appellant's case. Accordingly, it did not sustain Mr Al-Kateb's continued indefinite detention.[31]

Following the receipt of Justice McHugh's reasons, I turned more directly to whether a constitutional basis existed to deal with the offending law: not only on the basis of the interpretation of the statute, but also, more fundamentally, on the basis of the ambit of the constitutional power relied upon to support its validity. This reasoning led me to the *Bangalore Principles* and to the need to interpret the *Australian Constitution*, so far as would be appropriate and proper, to conform with any identified basic norms of international law expressing universal human rights.[32] I offered this reasoning as an additional, and more fundamental, ground for supporting the conclusion and orders that I favoured. So far, my reasons were still extremely brief. Expressed in such terms, the decision would have been short and relatively unmemorable.

No sooner were my reasons containing this additional proposition circulated to the other judicial chambers, than they stimulated a strong response from Justice McHugh. He declared that my reasoning was 'heretical'.[33] This was because the international law, to which I had referred, was inadmissible for the task of constitutional interpretation. The relevant principles of international human rights law and the *ICCPR* were not adopted, let alone ratified by Australia or enacted by it, at the time of the adoption of the *Australian Constitution*. The *ICCPR* was

---

28 *Al-Kateb* (2004) 219 CLR 562, 612 [137].

29 *Hamdi v Rumsfeld*, 542 US 507, 554–5 (2004), citing *The Federalist*, No. 84 reproduced in George W Carey and James McClellan (eds), *The Federalist* (Liberty Fund, 2001) 444.

30 *Al-Kateb* (2004) 219 CLR 562, 614 [144].

31 Ibid 615 [145]–[146].

32 Ibid 617–8 [152]–[154].

33 Ibid 589–90 [63].

therefore wholly immaterial to the constitutional analysis of the case. Specifically, McHugh J asserted that '[t]his Court has never accepted that the Constitution contains an implication to the effect that it should be construed to conform with the rules of international law'.[34]

He accepted that

> [m]any constitutional lawyers – probably the great majority of them – now accept that developments inside and outside Australia since 1900 may result in insights concerning the meaning of the Constitution that were not present to earlier generations. … And, because of political, social or economic developments inside and outside Australia, later generations may deduce propositions from the words of the *Constitution* that earlier generations did not perceive.[35]

But, he criticised my line of reasoning as heretical. If it were accepted,

> judges would have to have a "loose-leaf" copy of the *Constitution*. If Australia is to have a Bill of Rights, it must be done in the constitutional way – hard although its achievement may be – by persuading the people to amend the *Constitution* by inserting such a Bill.[36]

Justice Hayne and Justice Heydon substantially supported what Justice McHugh had written.[37] The reasons of Justice Callinan were to like effect.[38] Justice Heydon, in a later decision, was to criticise my use of the *Bangalore Principles* in constitutional reasoning in the most robust terms of any Justice in *Roach v Electoral Commissioner* ('*Roach*').[39]

IV IMPORTANT CRITICISM AND FRESH THINKING

A Source in the Constitutional Text

I concede that important points have been raised in criticism of my 'interpretive principle' so far as it attempted to introduce the *Bangalore Principles* into Australian judicial practice. Insofar as that attempt involved the use of reasoning by analogy from principles of international law in a case involving elaboration of declarations of the common law, I accept that the task is easier.[40] The latter was the challenge presented to the High Court of Australia in *Mabo*.[41] It is also easier to utilise international human rights law in a case attempting to resolve ambiguities in a statute.

---

34 Ibid 591 [66].

35 Ibid 592–3 [69].

36 Ibid 595 [73].

37 Ibid 643 [239]–[239] (Hayne J), 662–3 [303] (Heydon J).

38 Ibid 661–2 [297]–[298] (Callinan J).

39 (2007) 233 CLR 162, 224–5 [181] ('*Roach*').

40 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 138 (Mason CJ); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 171 (Deane J); GJ Lindell, 'Why is Australia's *Constitution* Binding?: The Reasons in 1900 and Now, and the Effect of Independence' (1986) 16(1) *Federal Law Review* 29.

41 (1992) 175 CLR 1, 42 (Brennan J).

The same might also be said for cases involving consideration of the practice and procedure in a court.[42] There, statutory provisions such as rules of court might apply alongside principles of the common law. But those would generally be expressed in broad, facultative language. Court decisions about the use of judicial powers could readily adapt to large principles of international law dealing with universal human rights. I accept that it is more difficult, at least in Australia, to apply the approach of analogous reasoning where the language in question is found in the *Australian Constitution*. That language is notoriously succinct; general in expression; subject to 120 years of judicial elaboration and application; and extremely difficult to change by the process of parliamentary vote and referendum.

The difficulties of applying the *Bangalore Principles* to the text of the *Australian Constitution* were the focus of much of the critical language in which Justice McHugh and other members of the majority expressed their responses to my reasons in their opinions in *Al-Kateb*. Justice McHugh insisted that the starting point of all interpretation of the *Constitution* must be the text of the document. Certainly, there is nothing specific in that text that permits, encourages or authorises a mode of reasoning similar to that expressed in the *Bangalore Principles*. On the contrary, insofar as the *Australian Constitution* makes any express reference to international law, it does so in the grant of legislative power to the Federal Parliament to make laws with respect to 'external affairs'.[43] Assuming that it would be legitimate for the Federal Parliament to authorise (as other national constitutions and statutes have done) reference to using international law in ascertaining its meaning,[44] the Australian Parliament has so far held back. Moreover, it has done so in a legal context that, for centuries, has applied a 'dualist' approach to that status of international law. That approach has traditionally held that rules of international law do not take effect of their own force. They require the action of a lawmaker with power (usually a legislature) to bring the principles of international law into the municipal legal system.

Because this was the principle against the background of which the *Australian Constitution* was created and expressed in the 1890s and brought into force in 1901, it must be conceded that to adopt a different approach would require persuasive reasons. Such a different approach should not be taken lightly. Justice McHugh, and other Justices of the High Court of Australia, clearly regard these arguments as fatal to applying the *Bangalore Principles* to constitutional elaboration. I do not. However, I concede that they control and limit the use that may be made of international law in ascertaining any universal principles that can be invoked as a contextual consideration to influence the task of interpretation.

B Contrary Doctrine of the Court

The arguments advanced by Justice McHugh (and in other cases, other Justices[45]) rely, in part, on expressed 'doctrine' of the Court in earlier decisions. In

42 *Gradidge* (1988) 95 FLR 414, 422 (Kirby P).
43 *Australian Constitution* s 51(xxix).
44 *Constitution of India* art 51(c): 'The State shall endeavour to … foster respect for international law …'.
45 See *Roach* (2007) 233 CLR 162, 224–5 [181] n 181.

part, they also rely on arguments deriving from the respective content and character of constitutional law and international law. So far as 'doctrine' is concerned, it must be accepted that many holdings and obiter dicta appear in earlier decisions of the High Court of Australia apparently hostile to the invocation of international law to cast light on the meaning and operation of the *Australian Constitution*. This is a reason for exercising care and hesitation in invoking this aspect of the *Bangalore Principles*. However, it is not necessarily fatal to arguments suggesting that the High Court of Australia should adopt a new, different and fresh approach to constitutional reasoning.

In giving meaning to the *Constitution*, the High Court of Australia has not treated itself as bound forever to the earlier decisions of previous Justices. Whilst the Court will strive for consistency in approach, as an attribute of judicial integrity, new times will occasionally provide new insights, even on fundamental matters. The clearest instance of such a radical change occurring was in 1920, when the Court overthrew the 'implied immunities' and 'reserved state powers' doctrines of the *Constitution* and substituted a completely new approach to elucidating the meaning of grants of legislative power to the Federal Parliament.[46] This was a far more radical change to constitutional interpretation than any that I have advocated. Yet it was made. It has endured. It affects virtually every decision about the meaning of legislative power under the *Constitution* over the past 100 years. It was influenced by contextual considerations somewhat similar in character to those that now support regard being had to the international context in which the *Constitution* must today be interpreted and applied.

If one looks beyond the judicial reasons advanced in the *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* ('*Engineers' Case*') (criticised for defects of argument and logic at the time and ever since),[47] the reasons beyond the constitutional text for the change adopted were derived from the rapidly changing context of the world in which the Commonwealth had to function and operate. These considerations were connected with a view held by the participating Justices that the ambit of federal legislative power should be enlarged at a necessary cost to residual state legislative powers. Fundamentally, this was because of the needs of the newly emerging Australian nation. Those needs had been reinforced, not long before the *Engineers' Case* decision, by the demands and dangers of the Great War and the necessities that it revealed. They were obviously felt most keenly by Justice Isaacs, the principal author of the *Engineers' Case* approach. That was so probably because of his family's background as immigrant refugees from Russian Poland. The new Commonwealth had to take its place in a world of a growing number of new nations and acute perils. These extra-textual ('contextual') considerations were seen to be of greater significance to the interpretation of the text of the *Constitution* than the textual considerations, concerning the pre-Federation collection of colonies with their direct historical links to the United

46 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 141 (Knox CJ, Isaacs, Rich and Starke JJ) ('*Engineers' Case*').

47 Geoffrey Sawer, *Australian Federalism in the Courts* (Melbourne University Press, 1967) 129–30.

Kingdom. These reasons for the shift of approach in the *Engineers' Case* were not spelt out expressly by the Justices, but they could scarcely have failed to influence the approach to interpretation taken by the new generation of High Court Justices. Justice Isaacs in particular supported the need for the courts to be 'living organs of a progressive community'.[48] He read widely in social and economic literature and supported his reasoning with reference to such writing, as well as copious legal authority.[49]

A parallel series of national and international forces applied after 1945 to call for a similar change to constitutional interpretation in Australia by reference to the developing context of international law. Suggesting that such a change was forbidden because of the 'intentions' of the original founders of the *Australian Constitution* is an unpersuasive argument given the very many instances where new interpretations have been adopted. Indeed, this was precisely how the constitutional document was bound to be understood over time by virtue of its character as a national constitution.[50]

C Multiplicity of International Law

Another argument, emphasised by Justice McHugh in *Al-Kateb*, specific to the invocation of international law, was the historical fact that most of the contents of international law, and certainly as that law concerns universal human rights, did not exist when the *Australian Constitution* was adopted.[51] How, then, the critics of the *Bangalore Principles* ask, could the provisions of international law, later adopted, affect the meaning of the language of a constitutional provision adopted years earlier?

This approach to limiting constitutional meaning to the 'intentions' of the founders is one that I would reject. Moreover, it is not one that has generally been adopted by the High Court of Australia, certainly in recent decades. The very nature of the *Constitution*, as a law under which other laws are made decades later, demands an ambulatory capability to expand so as to apply to new political, social, technological and global phenomena.

There are countless illustrations of this flexibility. They include, recently, the willingness of the High Court to give new meaning to the word 'marriage' in the *Australian Constitution*.[52] Permitting the concept of 'marriage' to expand to include the marriage of same-sex partners was certainly not an understanding or intention that the founders of the Australian Commonwealth would have held in 1901. Expanding the meaning, as was decided in 2013, does not require adoption of a 'loose-leaf' constitution.[53] It simply requires analysis of, and resort where

48 *Wright v Cedzich* (1930) 43 CLR 493, 515 (emphasis omitted).

49 Zelman Cowen, 'Issacs, Isaac Alfred' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 359, 360.

50 *Victoria v Commonwealth* (1971) 122 CLR 353, 395–6 (Windeyer J) ('*Payroll Tax Case*'). See also *Brownlee v The Queen* (2001) 207 CLR 278, 305 [79] (Kirby J).

51 *Al-Kateb* (2004) 219 CLR 562, 589 [62].

52 *Australian Constitution* s 52(xxi). See *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441.

53 *Al-Kateb* (2004) 219 CLR 562, 595 [73] (McHugh J).

necessary to, contextual considerations that help to elaborate the application of the meaning of the text beyond what would have been the understanding or intention of the founders at the time it was first written.

A variant of the last argument has, perhaps, more force. This is the fact that international law today, including the international law of universal human rights, is a large and very complex body of treaties, protocols, declarations, rulings, guidelines and other expositions. It includes 'about 900 treaties' to which Australia and other countries are parties.[54] However, the *Bangalore Principles*, and my own 'interpretive principle', do not require, relevantly, that the text of the *Australian Constitution* must be read including the minutiae of specific international rules. All that is required is that 'principles' and 'values' of universal human rights, as upheld by civilised nations, may where appropriate influence the interpretation of the *Australian Constitution*, at least where this does not contradict the clear meaning of the text but leaves an ambiguity or uncertainty to be resolved.

The latter was the approach explained in the context of common law elaboration by the reasoning of Justice Brennan in *Mabo*. Likewise, only in this way would international law play any part in the interpretation of our *Constitution*. The principles and values can only be invoked as a legitimate influence on the development of the common law and constitutional law 'when international law declares the existence of universal and fundamental rights'[55] and where invoking it is 'compatible with the implications of Ch III of the federal *Constitution*'.[56] Viewed in this way, the 'interpretive principle' is a much more modest proposal than the target of Justice McHugh's criticism in *Al-Kateb* took it to be. This is also why the so-called 'democratic deficit' does not forbid access to the principles and values of universal human rights. Any more than this consideration would prohibit reference to basic rights upheld by the common law when construing provisions of the *Constitution* expressed in general terms.

D Varied Versions of the Principle

I accept the criticism that, in judicial and extrajudicial expression of the principle, and doubtless in this article, I have not always used the same language, nor always been entirely consistent in explaining the 'interpretive principle'.[57] No doubt a similar criticism was voiced in relation to the evolving arguments of Justice Isaacs (and Justice Higgins) explaining the competing principle of constitutional interpretation which they advocated between 1907–19, ultimately with success, in the *Engineers' Case* of 1920.[58] The arguments advanced by Isaac

54 Ibid 590 [65] (McHugh J).

55 *Newcrest* (1997) 190 CLR 513, 657 (Kirby J).

56 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 126 [207] (Kirby J). See also *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 417–18 [166] (Kirby J).

57 Luke Beck, 'What is Kirby's Interpretive Principle Really About?' (2013) 87(3) *Australian Law Journal* 200, 201, suggesting three different meanings.

58 See, eg, *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087, 1161 (Isaacs J) ('*Baxter*').

Isaacs and HB Higgins as counsel in the *Railway Servants' Case*,[59] shortly before their appointments to the High Court, foreshadowed their approaches that were later to evolve into the one that has prevailed since 1920.[60]

Justice Isaacs enjoyed life tenure as a Justice of the High Court. He served on to the Court from 1906 to 1931, when he resigned as Chief Justice to become Governor-General. He thus enjoyed a total term of office of 25 years' service on the Court. Perhaps, if I had been vouchsafed an equal term of office, I might have had the time and opportunity, over many cases, to clarify and sharpen the 'interpretive principle' mentioned in my writing. The fundamental concept I have advocated by reference to the phenomenon of international law and globalism is as relevant to interpretation of the *Australian Constitution* today (by reference to the international community today) as was the 'interpretive principle' of Justices Isaacs and Higgins in the early decades of the 20th century (nation building and enhancement of the new nation's legislative powers – something different in kind from an amalgam of British colonies with a few shared powers).

E Sovereignty of the People and Democracy

The *Bangalore Principles* certainly require fresh thinking on the part of lawyers, especially those educated in Australia in the era of the positivist, common law tradition. For many years, including my own youthful encounters with the law, it was commonly asserted that the reason why the *Australian Constitution* was binding on the people of Australia was because it had been enacted, during the British Empire, by the Imperial Parliament at Westminster. The writ of that Parliament was sovereign and supreme throughout the Empire. Ergo, it was binding on all Australians and certainly all British subjects everywhere.

Subsequently, looking afresh at the *Australian Constitution*, it came to be viewed by later generations of citizens, lawyers, constitutional scholars and High Court Justices as an expression of the will of the electors of Australia who had initially adopted it at referendums conducted in the last years of the 19th century.[61] The people of Australia were thus the 'sovereign', the ultimate source of constitutional power, even though, at the time, most of them (and the lawyers and judges who served them) did not realise that this was so.

The insight that re-expressed in this way the basic foundation of the *Australian Constitution* combined constitutional language, historical facts and more modern political values. Those considerations afforded a substantially different context for the interpretation and derivation of the meaning of the *Australian Constitution*. That process was further accelerated by successive statutes that terminated appeals from the Australian courts to the Judicial Committee of the Privy Council,

---

59 *Federated Amalgamated Government Railway and Tramway Services Association v NSW Railway Traffic Employees Association* (1905) 4 CLR 488, 513 (O'Connor J) ('*Railway Servants' Case*').

60 Cf *Baxter* (1907) 4 CLR 1087; *Re the Income Tax Acts [No 4]* (1904) 29 VLR 748, 750 (Isaacs KC) (during argument).

61 *Kirmani v Captain Cook Cruises Pty Ltd [No 1]* (1985) 159 CLR 351, 441–2 (Deane J); *Breavington v Godleman* (1988) 169 CLR 41, 123 (Deane J); *Leeth v Commonwealth* (1992) 174 CLR 455, 486 (Deane and Toohey JJ); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 138 (Mason CJ); *McGinty v Western Australia* (1996) 186 CLR 140, 230 (McHugh J).

including in most constitutional cases.[62] Those changes reinforced the home-grown character of the *Constitution*, as interpreted by the successive Justices of the High Court.

F Contemporary Context of International Law

When Australian judges and lawyers were released from the thinking that had earlier controlled Australia's constitutional interpretation from colonial times, one can begin to appreciate the wisdom and realism of Justice Brennan's reasoning in *Mabo*. International law, especially the international law of 'fundamental human rights', is bound in today's world to have an impact on contemporary Australian law, including constitutional law. To the Australian lawyer today, it can seem absurd to reach, without questioning, into English judicial opinions dating back to the 12th century to help determine what the law of Australia says and means; but not to permit reference to be made to the values inherent in the growing body of international law, particularly as that law expresses universal principles of human rights that are basic to the community of today.

No other intellectual discipline would limit its reasoning to medieval and imperial thinking, or reject the powerful impact of modern realities concerning the content of their discipline, including where the law extends to universal human rights law affecting human beings, wherever they may be in the world. Computer scientists, biochemists, bridge builders, nuclear physicists, and political scientists all regularly re-examine their discipline in the context of the world as it is today, not as it was long ago. So, it should also be in the context of law – especially constitutional law, which is inevitably a mixture of legal texts, evolving values, and social and political realities.

So far, my view that the *Bangalore Principles* apply to Australian judicial reasoning on the meaning of the *Australian Constitution* has not been accepted by Australia's highest court.[63] One day I am confident that it will be accepted as embracing the unremarkable notion that the *Australian Constitution* should be read in the emerging context of the principles of international law. Australia's *Constitution* operates today in the context of the world as it is; not as it was in the era of James Cook or Arthur Phillip, nor the very different imperial age when the *Constitution* was drafted and accepted by the Australian people as their basic law.

G Municipal Courts and International Jurisdiction

A special way of thinking about this conundrum was suggested by the late Professor Ian Brownlie of Oxford University, a leading expert on international

62 Ultimately by the *Australia Act 1986* (Cth) s 11; *Australia Act 1986* (UK) s 11. See also *Sue v Hill* (1999) 199 CLR 462, 491–3 (Gleeson CJ, Gummow and Hayne JJ). But see *A-G (WA) v Marquet* (2003) 217 CLR 545, 602 [172], 610–3 [196]–[203] (Kirby J).

63 *Roach* (2007) 233 CLR 162, 225 [181] (Heydon J). Cf, however, Kristen Walker, 'International Law as a Tool of Constitutional Interpretation' (2002) 28(1) *Monash University Law Review* 85, 95; RS French, 'Oil and Water? International Law and Domestic Law in Australia' (Brennan Lecture, Bond University, 26 June 2009) 9, discussed in Beck (n 57).

law.[64] Because the judges of the common law tradition have always enjoyed 'leeways of choice'[65] in construing constitutions, statutes and other positive law and in elaborating and updating the common law, it is open to them to reach beyond their own municipal law to international law. At least, this is permissible as that law expresses the universal values of civilised nations, just as the *Bangalore Principles* asserted.

This facility is not afforded so as to override clear and binding rules of municipal law to the contrary, but so that the judges will perform the tasks of elaborating the common law; of construing municipal legislation; and of interpreting a national constitution in the context afforded by the comprehensive body of the law of today. That context includes the language and values of universal human rights law. This is not a 'backdoor' way of allowing courts impermissibly to ratify treaties or other sources of international law; nor to permit them to apply such treaties to influence contemporaneous constitutional interpretation.[66] It is simply a way of recognising the availability and importance of this aspect of the legal *context* for the meaning and operation of municipal law. That context now includes that of international law expressing universal values of human rights.

Of course, municipal jurisdiction might be sufficient to authorise the use of the 'interpretive principle' in the sense of exercising the power of the municipal court to decide the case. However, if the development of a new form of international jurisdiction were acknowledged as one consequence of the rapid expansion of international law in recent times (especially the international law of human rights), that development could attract attention to any 'deeper truths'[67] revealed by international law. Such an enlargement in legal thinking might come about as a consequence of the domestic courts' new role, conferred as a result of the growing engagement of Australian law with international law.

V THE ATTEMPT TO RE-ARGUE *AL-KATEB*

By 2013, the composition of the High Court of Australia had changed completely from the membership of the Court at the time of the decision in *Al-Kateb*. None of the Justices who participated in *Al-Kateb* remained members of the Court by that time. Only one Justice (Kiefel CJ) was still a member of the Court

---

64 Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 5th ed, 1998) 584. See also Michael Kirby, 'International Law: The Impact on National Constitutions' (2006) 21(3) *American University International Law Review* 327, 361–2; Malcolm N Shaw, *International Law* (Cambridge University Press, 5th ed, 2003) 149.

65 See Martin Krygier, 'Julius Stone: Leeways of Choice, Legal Tradition and the Declaratory Theory of Law' (1986) 9(2) *University of New South Wales Law Journal* 26.

66 Hugh M Kindred, 'The Use and Abuse of International Legal Sources by Canadian Courts: Searching for a Principled Approach' in Oonagh E Fitzgerald et al (eds), *The Globalized Rule of Law: Relationships between International and Domestic Law* (Irwin Law, 2006) 5, 17–22. See also Stephen Donaghue, 'Balancing Sovereignty and International Law: The Domestic Impact of International Law in Australia' (1995) 17(2) *Adelaide Law Review* 213, 214: 'lack of rigour'.

67 *Love v Commonwealth* (2020) 94 ALJR 198, 257 [289] (Gordon J), referring to the large leap in reasoning evident in *Mabo* and in that case.

as it existed at the time of my resignation in 2009. It is therefore unsurprising that attempts should have been made to re-argue the correctness of the decision in *Al-Kateb* before the Court as now differently constituted.

There have been several attempts at re-argument of the correctness of *Al-Kateb*. The most direct was *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* ('*Plaintiff M76*').[68] In that case, a challenge was made to the purported power of unlimited executive detention granted in the *Act*, as interpreted in *Al-Kateb*. French CJ, Kiefel and Keane JJ held that the detention of a Sri Lankan national, seeking refugee status, on the basis of an adverse security assessment might be invalid as no country other than Sri Lanka would agree to receive the detainee and the Minister did not propose to remove her to Sri Lanka against her will. It was in this context that arguments were advanced that the provisions of the *Act*, permitting potentially indefinite detention until removal, did not apply in terms or were otherwise constitutionally invalid.

Three Justices, Crennan, Bell and Gageler JJ, found a way through the arguments of the Plaintiff to avoid a necessity to overrule the ratio decidendi of *Al-Kateb*.[69] Additionally, Chief Justice French held that the case was not an occasion 'which warrants consideration of the correctness of the decision of this Court in *Al-Kateb v Godwin*'.[70] Justice Hayne repeated his reasoning in *Al-Kateb*, and was hostile to any change. He concluded that nothing in Chapter III of the *Australian Constitution* limits the powers given to make laws with respect to aliens and migrants 'in a way which precludes the enactment of the [detention provisions] … and their continued valid application to the plaintiff'.[71] He added: 'Whether it is thought to be a good law or a bad law, a fair law or an unfair law, or a law that is consistent with basic tenets of common humanity is a matter for the Parliament and "the people of the Commonwealth", not for the courts'.[72]

This reasoning effectively excluded the courts in Australia from constitutional assessments that are occurring in the judiciary of virtually every other civilised country.[73] With respect, it is not one that should be embraced by the courts of Australia. If such a rule exists, it is not desirable. It should be reconsidered.

68 (2013) 251 CLR 322 ('*Plaintiff M76*').
69 Ibid 370–71 [142]–[145].
70 Ibid 335 [4]. See also ibid 344 [31].
71 Ibid 367 [130].
72 Ibid.
73 Many courts have accepted that international law may influence municipal law. See the thousand-page text of Professor Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (Cambridge University Press, 2002) 102, 112, 163. Cf *Dietrich v The Queen* (1992) 177 CLR 292, 360–1 (Toohey J); *Tavita v Minister of Immigration* [1994] 2 NZLR 257; *Baker v Minister of Citizenship and Immigration* [1992] 2 SCR 817. See also Sir AF Mason, 'The Influence of International and Transnational Law on Australian Municipal Law' (1996) 7(1) *Public Law Review* 20, 23; Sir Anthony Mason, 'International Law as a Source of Domestic Law' in Brian R Opeskin and Donald R Rothwell, *International Law and Australian Federalism* (Melbourne University Press, 1997) 210, 214. Cf *Gloucester Resources Ltd v Minister for Planning* [2019] NSWLEC 7, [530]–[548] (Preston CJ).

VI INTERNATIONAL PERSPECTIVES ON *AL-KATEB*

Following my departure from the High Court of Australia, the Australian National University established a lecture series in international law, named after me. The series has attracted distinguished lecturers, some of whom have referred to my applications of the *Bangalore Principles* and to my 'interpretive principle', including in *Al-Kateb*.

The first lecture in the series was given in the year of my retirement, 2009, by Professor (now Judge) James Crawford.[74] He described the years of my service on the High Court. He contrasted the approaches taken by me and by the other Justices of the High Court concerning international law in their decisions. He compared these with the judicial reasoning of the House of Lords in the United Kingdom. James Crawford observed:

> With the notable exception of Kirby J, the judges of the High Court have been more reluctant than their contemporaries in the House of Lords to deal with international law issues. In a few cases their reluctance looks like recalcitrance.[75]

In 2019, Sir Kenneth Keith, then recently retired from his post as a Judge of the International Court of Justice, delivered the lecture. He was more forthcoming, perhaps because already enjoying freedom from the constraints applicable to serving judges. In his lecture,[76] he disclaimed an 'overall assessment' of Australian attitudes to international human rights law since 2009. However, he said:[77]

> If I may express a view on [*Al-Kateb*], I do prefer our honorand's position on the place of international law in the interpretation of legislation and indeed of constitutions. Support for its constitutional role is to be found, for instance, in early Australian and New Zealand cases relating to the power to make law for the mandate territories they were administering or in a New Zealand case relating to trans-Tasman shipping.[78] Consider too the US experience – a constitution, in Cardozo's words, states principles for an expanding future, not rules for the passing hour.[79] With respect, I do not see that position as heretical as one of his colleagues charged.[80] It is orthodox. Nor should I attempt to address the recent *Economist* article referring to Australia's surprising disregard for free speech,[81] nor to the disadvantageous treatment of New Zealand citizens resident in Australia, nor to attitudes to and actions taken in relation to refugees. I would however like to mention that one of the *Tampa*[82] children, welcomed to New Zealand in 2001 under

74 James Crawford, 'International Law in the House of Lords and High Court of Australia 1996–2008: A Comparison' (2009) 28 *Australian Year Book of International Law* 1, 5. Cf James Crawford and WR Edeson, 'International Law and Australian Law' in KW Ryan (ed) *International Law in Australia* (Law Book, 2nd ed, 1984) 71, 78.

75 Crawford (n 74) 5. See also Hilary Charlesworth et al, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25(4) *Sydney Law Review* 423.

76 KJ Keith, 'New Zealand, Australia and International Human Rights 1919–2019' (2020) 37 *Australian Year Book of International Law* 3.

77 Ibid 16.

78 *Re Award of Wellington Cooks and Stewards' Union* (1906) 26 NZLR 394.

79 Benjamin N Cardozo, *The Nature of the Judicial Process* (Yale University Press, 1921) 23.

80 *Al-Kateb* (2004) 219 CLR 562, 589 [63] (McHugh J).

81 'Australia's Surprising Disregard for Free Speech', *The Economist* (online, 15 June 2019) <https://www.economist.com/asia/2019/06/15/australias-surprising-disregard-for-free-speech>.

82 This is a reference to the '*Tampa Case*': *Ruddock v Vadarlis* (2001) 115 FCR 229. Special leave was refused by the High Court of Australia: *Vadarlis v MIMA* [2001] HCATrans 625. The decision of the

an agreement rapidly reached between John Howard and Helen Clark, has just received a Fulbright award to attend Columbia University to study diplomacy. …

Sir Kenneth Keith went on to reflect on the reaction to international human rights law amongst most Australian judges:[83]

> Our honorand in the foreword to a major 2012 volume on *Contemporary Perspectives on Human Rights Law in Australia* praises [the book] for the remarkable image it gives of the enjoyment of human rights in Australia at that time.[84] But, he continues, it is a land that is seriously ambivalent about the desirable means of protecting those rights notwithstanding its earlier notable contributions. The ambivalence, even hostility, can, he says, be well understood by those born in Australia before the Second World War. He sets out sources of that hostility. Those attitudes, he continues, were taught at law schools from the 1950s to the 1980s. Many still adhere to those beliefs as, he acknowledges, he once did. The lack of, or limited, legislative and judicial action in Australia evidences that continuing position, as does the Government's largely negative reaction to the 2009 National Human Rights Consultation Committee's *National Human Rights Consultation Report*[85] …

In drawing lessons from his lecture, Sir Kenneth Keith urged greater willingness on the part of Australian judges and lawyers to acknowledge earlier narrow inclinations than is now generally apparent:

> One [should] be willing to acknowledge errors in one's thinking. I have mentioned the honorand, Sir Owen Woodhouse and Sir Geoffrey Palmer. To them may be added senior judges and lawyers in the UK. I too had changed my mind by the mid-1970s as a result, thinking of that young *Tampa* man, of receiving a Fulbright and other awards, and studying great judgments of the United States Supreme Court of the 1960s at an outstanding law school.[86]

The second point made was:[87]

> 'In law context is everything', said Lord Steyn in 2011 [sic].[88] In this country judges may be helped, when interpreting legislation by the inclusion of references to 'context' in Interpretation Acts … Chief Justice French in 2011 said of the provision in the Victoria Charter, allowing the courts interpreting it to consider international law and related decisions, that the provision did not authorise a Court to do something that they could not already do.[89]

In support of that proposition, Sir Kenneth Keith cited a paper by the present Chief Justice of the High Court, Kiefel CJ, and a book by Professor Cheryl Saunders, *The Constitution of Australia: A Contextual Analysis*[90]:

> [She includes] an important sub-title, I would have thought, although she does include a note of caution … The New Zealand courts have used international law in

---

Federal Court (with Black CJ dissenting) held that the Australian Government could not unlawfully detain persons who were rescued on the high seas by MV Tampa (a Norwegian vessel).

83 Keith (n 76) 17.

84 Michael Kirby, 'Foreword' in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Lawbook, 2012) v–x.

85 National Human Rights Consultation Committee, Parliament of Australia, *National Human Rights Consultation* (Report, September 2009).

86 Keith (n 76) 19.

87 Ibid.

88 *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, 548 [28].

89 *Momcilovic v The Queen* (2011) 245 CLR 1, 36 [18].

90 Cheryl Saunders, *The Constitution of Australia: A Contextual Analysis* (Hart Publishing, 2011).

> resolving constitutional issues. They use it as part of the common law for instance when interpreting treaties which have been incorporated into national law or resolving disputes about foreign state immunity. They do that by reading the legislation or common rule in its international context. Nothing here of legislative intention, of implication, of ambiguity, of timing of the statute and the international rule. In my experience as a judge, those constructs are not useful.[91]

A last lesson, derived from the topic of his lecture, led Sir Kenneth Keith to refer to the importance of legal education and legal practice. In the constant battle to broaden young, and not so young, legal minds, I can confirm this point. For practitioners and litigants before a court suddenly to face invocation by a judge or advocate or party of an unincorporated treaty or principle of international law could occasion surprise. Potentially, this might be seriously unfair as a matter of procedure if this were done without due notice to the court and other parties. However, the citation of an old, even long forgotten, English judicial authority does not cause anything like the same resentment or protest from traditional lawyers in Australia. What is more important for the present and future of the Australian legal system today?[92] Is it analogous reasoning from the writings of ancient English jurists in days long gone by?[93] Or is it more likely to be the reasoning of contemporary judges in busy international and regional courts or tribunals giving life and meaning to the values and broad principles of universal human rights law?

Of course, the High Court of Australia and any other national court, is not bound in law to apply such reasoning as if it were already a normative part of the nation's municipal law. It only becomes part of municipal law, relevantly, when a legislature enacts it or an Australian judge incorporates it for assistance by the well-worn common law technique of analogous reasoning. We need to remind contemporary Australian judges and lawyers about the precious utility of these techniques of reasoning. And of the lessons of context for the understanding of the meaning of contemporary laws, common law, statute law and constitutional law alike.[94]

---

91 Keith (n 76) 19–20.

92 TH Bingham, '"There is a World Elsewhere": The Changing Perspectives of English Law' (1992) 41(3) *International and Comparative Law Quarterly* 513, 519 ff; Shane S Monks, 'In Defence of the Use of Public and International Law by Australian Courts' (2002) 22 *Australian Year Book of International Law* 201, 222–3.

93 Cf *Jago v District Court of New South Wales* (1988) 12 NSWLR 558, 569 (Kirby P): 'A more relevant source of guidance [than English precedents of hundreds of years ago] … may be the modern statements of human rights in international instruments, prepared by experts, adopted by organs of the United Nations, ratified by Australia and now part of international law'. Penelope Mathew, 'International Law and the Protection of Human Rights in Australia: Recent Trends' (1995) 17(2) *Sydney Law Review* 177, 192.

94 In issue in *Al-Kateb* was long-term personal loss of liberty. The presumption that the legislature would not intend to abrogate or curtail human rights and freedoms (of which personal liberty is the most basic) was conceded by French CJ and Kiefel and Keane JJ in *Plaintiff M76* (2013) 251 CLR 322, 381 [189].

VII COURTS EXERCISING INTERNATIONAL JURISDICTION

This is where the novel point made by the late Professor Ian Brownlie, mentioned earlier in this article,[95] may be especially relevant to Australian judges and lawyers. Ian Brownlie pointed to the fact that no specific international court was created by the UN for the explicit task of providing authoritative interpretations and orders enforcing international human rights law.[96]

Of course, the International Court of Justice was created by the *UN Charter*. However, it has a limited and precisely defined jurisdiction. Other international courts (including the International Criminal Court and the International Criminal Tribunals) and human rights bodies (including the UN Human Rights Committee under the *ICCPR*) have been created by the UN. The UN has also established the Office of the High Commissioner for Human Rights and 'special procedures' to assist member countries to investigate and conform to the human rights treaty obligations that most of them have accepted.

It is extremely unlikely that the nation states today would agree to create a new, large and expensive bureaucracy of international courts and tribunals for the authoritative elucidation of national human rights questions. Instead, international law mostly continues to utilise municipal courts and judges in the elaboration of international human rights law. Over time, this practice will increasingly build up a body of international jurisprudence. It will do so by analogous reasoning in a way especially familiar to Australian lawyers because this is what has long happened in the municipal courts of the common law tradition.

There is a further point. At the time of Australia's Federation, one of the relatively few novel ideas of the *Australian Constitution* was that of permitting state courts to exercise federal jurisdiction.[97] If we think of Australian courts, say in *Al-Kateb*, as an instance of a municipal court exercising a kind of international jurisdiction, this is not such an unusual idea, at least for Australian lawyers. If we were to wait until the nation states of the world erected a large global tribunal of courts for human rights cases, we would wait until the *Greek Kalends*. The needs of clarifying and utilising international human rights law are important for the attainment of the first stated objective of the UN under the *UN Charter* (the achievement of universal human rights). This truly is a 'deeper truth' of Australian law today. Our courts have the power and opportunity to give it substance.

It is instructive to notice the extent to which the *Bangalore Principles* are being applied in decisions worldwide, in constitutional and non-constitutional litigation, and in countries large[98] and small.[99]

---

95 See above Part IV(G).

96 Brownlie (n 64) 584.

97 *Australian Constitution* s 73(ii).

98 One area where universal human rights has been regularly invoked is in judicial proceedings invalidating criminal laws against homosexual conduct. See *Naz Foundation v Delhi* [2009] 4 LRC 838, 881–6 [93]–[104]; *Johar v Union of India* [2020] 1 LRC 1, 44 [126]–[127], 50–2 [149]–[158] (Misra CJI).

99 Further cases on homosexual offences applying international human rights law: *Jones v A-G (Trinidad and Tobago)* (High Court of Trinidad and Tobago, Rampersad J, CV2017-00720, 12 April 2018);

Reference to international human rights law on topics analogous to those before the High Court of Australia in *Al-Kateb* continue to occur in many countries. It sometimes occurs in unexpected places.

In 2020, two prisoners in Zambia succeeded in an appeal against a decision of the High Court of Zambia declining relief on a complaint about serious overcrowding and poor food in the Lusaka Central Prison.[100] The prisoners complained that the conditions adversely affected their status of HIV infection. That status was known to the prison authorities and was not unusual in Zambia. The 'right to health', mentioned in the *Zambian Constitution* was a directive principle of state policy. It did not expressly confer individual rights, directly operative in law. However, Chief Justice of Zambia, Irene Mambilima, reversed a High Court of Zambia decision refusing relief to the prisoners. The Chief Justice granted relief for reasons that were joined in by her two colleagues. In doing so, she observed that there was a 'growing trend of indirect judicial protection of the right to food through the interconnection of that right with other rights'.[101] She held that the 'right to life' expressed in the *Zambian Constitution* should be given a wider interpretation so that it included 'a right to a dignified life'.[102] She held that the access by the prisoners to suitable food was necessary to sustain a 'dignified human life'.[103] So, she ordered the Zambian Government to make that food available to the appellants. The 'growing trend'[104] to which the Zambian judges referred was the trend set in motion by the *Bangalore Principles*.

The Zambian court decision is by no means an isolated one. It was rendered in a country whose legal system follows the same positivist, common law, dualist system as that of Australia. True, the *Zambian Constitution* provides a general charter of basic rights whereas the *Australian Constitution* does not. However, the provisions in the *Zambian Constitution* were not directly and explicitly applicable to the case in hand. They were only rendered so by a process of judicial reasoning. That reasoning was consistent with the *Bangalore Principles* and the process of judicial reasoning that the *Bangalore Principles* endorsed. In doing so, the Supreme Court of Zambia was helping to give effect to international human rights law as the High Court of Australia did in *Mabo*, but as was refused in *Al-Kateb*.

One day the interpretive principle, applied by me in *Al-Kateb* and in other cases (or some variation of it), will be accepted in Australia. It will then be regarded as unremarkable and orthodox. Future judges and lawyers looking back will be surprised by the response that my reasoning in *Al-Kateb* created at the time, as well as by the lengthy interval that Australian judges and lawyers took to catch up with the rest of the civilised world.

Motshidiemang v A-G (Botswana) (High Court of Botswana, Leburu J for Leburu, Tafa and Dube JJ, MAHGB-000521-16, 11 June 2019); *A-G (Belize) v Orozco* (Court of Appeal of Belize, Awich, Ducille and Campbell JJ, 30 December 2019).

100 *Mwanza v A-G* [2019] ZMSC 33 (9 December 2019) (Supreme Court of Zambia).

101 Ibid [13.14].

102 Ibid [13.17].

103 Ibid.

104 Ibid [13.14].

As a matter of Australian legal doctrine, the holding of the majority in the High Court of Australia in *Al-Kateb* must still be applied by Australian judges and lawyers until overruled and reversed. They must do so for the legal principle for which the majority reasoning stands.[105] However, there are other holdings of the High Court of Australia.[106] And there is persuasive reasoning from elsewhere that beckons us to a different conclusion. That call will eventually be heeded by the Australian courts. This article seeks to explain why.

105 Explained in *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395, 417–18 [56] (Kirby J).

106 Such as *Mabo* (1992) 175 CLR 1, 44 (Brennan J).