

ACADEMIC NEWS

Domestic courts and international human rights law
The ongoing judicial conversation*

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Hondius Lecture, delivered by the Hon Justice Michael Kirby AC CMG in Utrecht on 26 October 2008. The Ewoud Hondius Lecture Series was established by Utrecht University School of Law in 2005 to honour professor Ewoud Hondius for his tireless efforts in adding a transnational dimension to the School and its curriculum.

1. Ewoud Hondius: The honorand

Hondius is a name honoured in the history of the Netherlands. A glance at the encyclopaedias records a mention of Joost de Hondt (Latinised as Jodocus Hondius), recorded in 1563 as the first man to bring a globe, representing the then known world, to England. The English derived many ideas for their global empire from the intrepid navigators of the Netherlands.

At about the same time Hendrick Hondius (born 1573) established himself as a respected engraver, specialising in the landscapes which the protestant Netherlands added to the *genre* of pictorial representation, in place of the portraits of the Holy Family more common before the Reformation. A little later, the work of Abraham Hondius (born 1625), a noted painter of his time, was recorded with great praise.

Before I knew Ewoud Hondius, I had the privilege of knowing his half brother, Frits Hondius. In 1978, I was elected to chair an expert group of the Organisation for Economic Co-operation and Development (OECD) in Paris. The group prepared its *Guidelines on Transborder Data Barriers and the Protection of Privacy*.¹ Those Guidelines were adopted by the council of the OECD. They were based, in part, upon pioneering work of the Council of Europe. Frits Hondius was the much respected international civil servant of that Council who had directed the Secretariat project on privacy (data protection). He came to the OECD to share his experience. We became firm friends. On a number of occasions I was his guest in Strasbourg. In later years, Frits Hondius played a leading role in developing the law on sustaining

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1 Organisation for Economic Co-operation and Development, *Transborder Data Barriers and the Protection of Privacy*, OECD, Paris, 1980. The guidelines have influenced national laws on privacy (data protection) in many countries including the Netherlands and Australia.

non-governmental (civil society) organisations. He realised how important such organisations were for the development and expression of fundamental human rights, not only in Europe but everywhere. I was greatly saddened when Frits Hondius died. However, by then I had met Ewoud Hondius in whose honour this lecture series has been established. So the precious link is maintained.

Ewoud Hondius was born in 1942. He was educated at the University of Leyden and at Columbia University in New York. He taught private law at Leyden between 1966 and 1980, coming to the University of Utrecht in 1980 where he quickly established his reputation as a leading expert in European private law. He is editor-in-chief of the *European Review of Private Law*. He founded the *Tijdschrift voor Burgerlijk Recht* (Journal for private law). He is a member of the Royal Netherlands Academy of Sciences and serves as a surrogate judge of the Amsterdam Court of Appeal.

Because of his keen interest in comparative law, and his knowledge of the approaches adopted to the law of private obligations in common law countries, Ewoud Hondius has spent part of his academic career teaching and researching in overseas law schools. It was when he spent an extended period in Sydney, Australia, that I first met him. Since then we have been associated on a number of occasions, notably in the XVIIth Congress of the International Academy of Comparative Law, which he helped organise at the University of Utrecht in July 2006. He invited me to serve as the Australian rapporteur on the theme of precedent law as it operates within the Australian judiciary. He became the editor of the reports of the rapporteurs, published as *Precedent and the Law*.²

In addition to procuring the reports of the rapporteurs, Professor Hondius published them in good time and wrote a perceptive introductory overview. This pointed to the differences between the role played by the law and practice of precedent in civil law and common law countries. It also described the way in which the two traditions are moving towards convergence. I agree with his analysis. Although addressed to the experience of comparative law (and not specifically international law) the report affords an opening text for this Hondius lecture. Propinquity has an inevitable tendency to occasion interaction and to influence the ideas and conduct of those who interact together. This is true not only in the field of comparative law, and specifically the law of precedent and the attention given to the decisions of prominent courts in the judicatures of all countries. Propinquity also affords an explanation of the growing impact of international law on the minds of judges within municipal legal systems. This is so although those systems (for the most part) continue to observe a dualist approach to the relationship between municipal and international law.

The interaction of these two systems, and the growing awareness amongst practitioners of each, affords a partial explanation for the way in which both comparative law and international law now tend to affect the content of municipal law. Thus, notions derived from the specialised English legal tradition of equity now have a tendency to seep into expositions of international law.³ Still more commonly and frequently principles and ideas expressed in international law, especially so far as that law expresses universal principles of human rights, now have a tendency to seep into the decisions of national courts when judges expound their own municipal law.

The thesis of this lecture is that this interaction is a natural outgrowth of contemporary circumstances. It is one of the many products of the rapid development of internationally

² Hondius, Ewoud (ed.), *Precedent and the Law – Reports to the XVIIth Congress*, International Academy of Comparative Law (Utrecht), 2007.

³ See, for example, the reasons of Judge Weeramantry in the International Court of Justice in the *Jan Mayen Case* (ICJ, Judgment of 14 June 1993, *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, [1993] ICJ Reports, p. 211).

available legal information. It is stimulated by developments of international human rights law that have occurred in the past 60 years. It is encouraged by a transnational judicial conversation which is both a healthy and useful feature of judicial life today.⁴

My purpose is to explore:

- how these developments are occurring;
- how they can be accommodated to the abiding features both of international and municipal law;
- how they can be reconciled with the problems that are often suggested by reference to this interaction of legal systems; and
- how we can predict the likely contours of the future.

2. An epiphany at Bangalore

Before 1988, I had a fairly orthodox, and therefore rather strict, view of the dualist separation between international and municipal law. In February of that year, in Bangalore, India, I attended a conference of judges organised by the Commonwealth Secretariat in London. The meeting was chaired by Justice P.N. Bhagwati, former Chief Justice of India, later Chairman of the United Nations Human Rights Committee.

Apart from judges of Commonwealth countries including India, Malaysia, Mauritius, Pakistan, Papua New Guinea, Sri Lanka, the United Kingdom, Zimbabwe and Australia, the meeting, exceptionally, was attended by a non-Commonwealth judge, the Hon. Ruth Bader Ginsburg (then a judge of the United States Court of Appeals for the District of Columbia Circuit). At the end of the meeting, the participating judges adopted a statement endorsing the so-called *Bangalore Principles on the Domestic Application of International Human Rights Norms*.⁵ At the time, Judge Ginsburg and I were judges of intermediate appellate courts. As chance would have it, we would later be elevated to our respective countries' final courts.

The *Bangalore Principles* did not challenge the dualist doctrine which is, in any case, somewhat different in the United States than in Commonwealth countries. They simply recognised 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, statutory or common law – was uncertain or incomplete.⁶ They accepted that, where municipal law was clear and inconsistent with the international obligations of the State concerned, national courts were required to give full effect to the local law, although they might draw the discrepancy to notice. Thus, the *Bangalore Principles* did not undermine dualism. Nor did they purport to authorise judicial incorporation of treaty or customary international law by the backdoor. They simply noted that occasionally, municipal courts might find assistance for their own intellectual tasks by having regard to the growing body of international law, particularly as that law expresses universal principles of human rights.

4 M.D. Kirby, 'Transnational Judicial Dialogue, Internationalisation of Law and Australian Judges', 2008 *Melbourne Journal of International Law* 9, no. 1, pp. 171-189.

5 Commonwealth Secretariat, *Report of Judicial Colloquium on the Domestic Application of International Human Rights Norms*, Bangalore, India, 1988, reprinted 'The Bangalore Principles on the Domestic Application of International Human Rights Norms', 1988 *Commonwealth Law Bulletin* 14, p. 1196. The Bangalore colloquium was followed by seven further meetings of the Commonwealth judges. Human rights decisions of Commonwealth courts are now shared widely through the *Commonwealth Law Bulletin*, the *Law Reports of the Commonwealth* and internet services offered by Interights, an international centre based in London (<www.interights.org>).

6 *Bangalore Principles*, *supra* note 5, Principle 4.

Fresh from this epiphany, I returned to my seat as President of the New South Wales Court of Appeal. Before too long, cases began to appear which seemed to present occasions for the application of the approach recommended in the *Bangalore Principles*.

3. Applying the international law domestically

In a sense, the easiest way in which a national court might refer to international human rights principles would be where (as in South Africa and other countries⁷) the national constitution authorises specific use of international law, for example in construing a national charter of rights or other domestic legal principles. Almost uniquely, Australia has no national general charter or bill of rights, whether constitutional or statutory. Nevertheless, cases were soon presented to me in which issues akin to questions of fundamental rights began to appear. The cases concerned common law exposition or interpretations of local written law, including statutes enacted by Parliament and contentious provisions of the Constitution itself.

An early instance of such a case, coming before me, was *Gradidge vs Grace Bros Pty Ltd*.⁸ The case concerned the right of a mute litigant to have legal argument, proceeding in her presence in open court, translated into the sign language so that she would understand what was being said. The trial judge, on the request of the defendant, had told the interpreter that interpretation was not required as counsel were engaged in legal argument. When the interpreter continued to interpret the argument, the judge instructed her to desist. She would not do so because of what she declared were her ‘professional and ethical obligations’.

No constitutional or statutory rule governed the issue. The common law simply gave a trial judge a discretion whether to permit or withhold interpretation.⁹ There was no relevant constitutional norm. I held that this was the type of occasion in which an Australian court might have regard to the basic principles expressed in Article 14 of the International Covenant on Civil and Political Rights (ICCPR) concerning the right to interpretation and to equality before the law and to fair and public hearings.¹⁰ These provisions had not been expressly incorporated into domestic Australian law by legislation. But I concluded that they could help Australian judges in their own exposition of what the common law of Australia required, given that Australia had ratified the relevant international treaty and that its provisions were, in this respect, reflective of the universal values upheld by the common law. The other participating judges agreed. There were many similar cases¹¹ endorsing the *Bangalore Principles*.

Although some judges regarded such references to international law as heretical, invocation of the approach endorsed in the *Bangalore Principles* received a boost in Australia in 1992. In that year, the final court, the High Court of Australia (before my appointment to it) in *Mabo vs Queensland (No. 2)*,¹² invoked a principle very close to that expressed in the *Bangalore Principles* to justify rejection of earlier judge-made principles of the common law which had rejected the recognition of the traditional land rights of Australia’s indigenous peoples, following the

7 Particular constitutional provisions requiring or encouraging reference to international law exists in the national constitutions of India, Papua New Guinea and South Africa. See M.D. Kirby, ‘International Law – The Impact on National Constitutions’, 2006 *American University International Law Review* 21, 2006, pp. 327-357.

8 (1988) 93 FLR 414 at 415-422 (NSWCA).

9 *Dairy Farmers’ Co-operative Milk Co vs Acquilina* (1964), 109 CLR 458, at 464 (HCA).

10 Article 14(1) and 14(3)(a) ICCPR.

11 See, e.g., *Young vs Registrar*, Court of Appeal (1993) 71 A Crim R 121; cf. M. Kirby, ‘The Australian Use of International Human Rights Norms: From Bangalore to Balliol – A View From the Antipodes’, 1993 *University of New South Wales Law Journal* 16, p. 363, at pp. 377-383.

12 (1992) 175 CLR 1.

acquisition of sovereignty over the land mass of Australia by the British Crown. In *Mabo*, Justice F.G. Brennan explained the unacceptability of the former statement of the Australian common law by reference to universal principles of human rights law:¹³

‘[The ICCPR] 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 universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration.’

This statement of principle has not been overruled or doubted in Australia since it was expressed in *Mabo*. Likewise, where local legislation whilst not specifically incorporating international law into Australian municipal law is obviously designed to give effect to international law, courts may have regard to the provisions of the treaty and of any jurisprudence that has developed in implementing the treaty, when expounding what the local legislation means. To a large extent, in Australia, these questions are not now controversial.

The real controversy in Australia, as in the United States of America, concerns the extent to which (if it all) judges, in interpreting the national Constitution, can take into account universal principles of human rights recognised by international law. Upon that question there have been sharp divisions of opinion within the High Court of Australia. Although, at present, the view that international human rights law can influence understandings of the Australian Constitution is probably a minority opinion, there is some evidence that judges of the Court, and of other Australian courts, are willing to examine the international law of fundamental rights (and comparative law to the same effect) not as yielding a *binding* legal rule but as offering a *contextual* consideration to inform the judicial decision-makers about the way in which they should interpret the contested national constitutional provision.

4. Divided constitutional opinions

In *Al-Kateb vs Godwin*,¹⁴ the High Court of Australia faced a claim for legal relief by a stateless Palestinian, Mr Ahmed Ali Al-Kateb. He had been born in Kuwait in 1976. In 2000 he arrived in Australia without a passport or visa. From his detention in an immigration facility, he applied for a protection visa, claiming to be entitled to this as a refugee under the Refugee Convention and Protocol, in accordance with the *Migration Act* 1958 (Australia). The application was refused by the primary official. That decision was upheld by the Australian Refugee Review Tribunal. Applications to the Federal Court of Australia, and by way of appeal to the Full Court of that court, for judicial review, failed. Mr Al-Kateb then told the Minister that he wished to be removed from detention in Australia. He asked to be returned either to Gaza or to Kuwait. He made that request in writing, addressed to the Minister. Under the Migration Act, this would normally have led to his being automatically and rapidly returned to his country of nationality, thereby terminating his loss of liberty in detention.

Removal did not take place in Mr Al-Kateb’s case because attempts by Australia to obtain the necessary cooperation were unsuccessful. Kuwait refused to receive him on the basis that,

¹³ (1992) 175 CLR 1 at 42.

¹⁴ (2004) 219 CLR 562.

despite his birth, he was not one of its nationals. Israel, which controlled access to Gaza, would not permit him to cross its territory. There was no other way to enter. The primary judge in the Federal Court of Australia found that all reasonable efforts to remove Mr Al-Kateb from Australia had failed and that there was no reasonable likelihood or prospect of removal in the foreseeable future.

The applicant had two arguments before the High Court. The first was statutory. He contended that, because the Migration Act postulated the possibility of (and effective right to) termination of loss of liberty by requests to the Minister for return to the place of nationality (and because this could not be effected as intended by that Act), the sections of the Act authorising contentious Executive detention could not apply. A precondition for its lawfulness had been removed. This was because of the strong presumption governing the interpretation of legislation, favourable to liberty. This is a strong common law presumption. That argument was rejected by a majority of the High Court of Australia, by a 4:3 majority.¹⁵ The majority concluded that the provisions of the *Migration Act* were relevantly clear. Indefinite detention of illegal aliens in Australia by the Executive Government was exactly what the Parliament had enacted.

The second argument advanced by Mr Al-Kateb was that, if the legislation was held to be clear, and could not be read down so as to comply with the common law presumption, it was invalid as contravening Chapter III of the Australian Constitution. That chapter, like Article III of the United States Constitution, assigns the federal judicial power to a separate branch of government, namely the judiciary. It does not permit the Executive Government effectively to impose unlimited punishment by loss of liberty upon people; nor does it authorise the Federal Parliament to permit that course. This argument was likewise rejected by a majority, the strongest reasons in favour of the appellant's constitutional contention being given by Justice W.M.C. Gummow.

In the course of my reasons, indicating why I supported the conclusion of Justice Gummow on the constitutional submission, I referred briefly to the need to construe the Australian Constitution in accordance with any relevant contextual considerations now available, including the international law of fundamental human rights.¹⁶ I pointed out that the contrary opinion of the majority 'has grave implications for the liberty of the individual in this country which this Court should not endorse'.

My reference to the principles of international law protective of personal liberty¹⁷ provoked a very strong passage of disagreement expressed in the reasons of my colleague, Justice M.H. McHugh. By reference to past authority of the High Court of Australia, he stated that

'this 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. (...) Eminent lawyers who have studied the question firmly believe that the Australia Constitution should contain a Bill of Rights which substantially adopts the rules found in the most important of the international human rights instruments (...). But, desirable as a Bill of Rights may be, it is not to be inserted in our Constitution by judicial decisions drawing on international instruments that are not even part of the law of this country. (...) It is even more difficult to accept that the Constitution's meaning is affected by rules created by the agreements and

15 McHugh, Hayne, Callinan and Heydon JJ; Gleeson CJ, Gummow and Kirby JJ dissenting.

16 (2004) 219 CLR 562 at 615-616 [145]-[148].

17 Notably Articles 7, 9 and 10 ICCPR; Article 31 Convention Relating to the Status of Stateless Persons; Article 9 Universal Declaration of Human Rights and Convention Against Torture and Other Cruel and Unusual Punishments.

practices of other countries. If that were the case, judges would have to have a “loose-leaf” copy of the Constitution. If Australia is to have a Bill of Rights, it must be done in the constitutional way – hard though its achievement may be – by persuading the people to amend the Constitution by inserting such a Bill.’¹⁸

In my reasons, I sought to answer Justice McHugh’s criticisms, both by reference to decisional authority and to legal principle. Most of the authorities cited by him predated the formation of the United Nations and the development of the treaty and other international law that now expresses the universal principles of human rights. So far as legal principle was concerned, I made it clear that it was not being suggested that international law applied as binding *rules* to oblige a judicial interpretation of the Australian Constitution to conform with its provisions. Instead, the principles and reasoning behind universal rules of human rights were available to influence legal understanding of national law, rather than to bind local judges.¹⁹ This approach operated in the same way as other legal texts are elucidated by reference to contemporary contextual considerations, so a national constitution, designed to operate indefinitely and from age to age, can be influenced by understandings derived from ‘principles expressing the rules of a “wider civilisation”’.²⁰

The debates in the Australian decision in *Al-Kateb* reflect similar, and equally sharp differences arising in the Supreme Court of the United States in cases such as *Atkins vs Virginia*,²¹ *Lawrence vs Texas*²² and *Roper vs Simmons*.²³ The only difference is that, in the United States court, the general view that I expounded in *Al-Kateb* has been substantially endorsed by a majority. In my own court, my view is a minority one.

Some indications of a growing willingness to have regard to international law in constitutional elaboration may be seen in decisions of the High Court of Australia that have followed *Al-Kateb*. I refer to *Koroitamana vs the Commonwealth*,²⁴ another case involving reference (in this case by the plurality) to the provisions of the Convention Relating to the Status of Stateless Persons, adopted in 1954 and also *Roach vs Electoral Commissioner*.²⁵

The decision in *Roach* concerned a challenge by a prisoner, convicted of an offence against State law, who was serving an effective term of six years imprisonment. The prisoner contested the validity of the provisions of the Commonwealth Electoral Act 1918 (Australia) which disqualified all persons serving sentences of imprisonment from voting in the then pending federal election of November 2007. Until an amendment, adopted by the Federal Parliament in 2006, there were, over the years, varying disqualifications from voting in federal elections affecting prisoners under sentence. However, it was the amendment in 2006 that disqualified all prisoners from voting, regardless of the duration of their sentences, or the remainder of their sentences, and irrespective of the nature and seriousness of the offence involved. Information provided to the Court showed that a substantial proportion of prisoners, who would be serving sentences on election day, were confined under orders committing them to imprisonment for relatively short periods. Some were imprisoned because they could not pay a monetary fine. There was no express constitutional guarantee of the right to vote; nor any other express

18 (2004) 219 CLR 562 at 592-595 [69], [73].

19 (2004) 219 CLR 562 at 624 [173].

20 (2004) 219 CLR 562 at 629 [190].

21 536 US 304, 347-348 (2002).

22 539 US 558, 586 (2003).

23 543 US 551 (2005).

24 (2006) 227 CLR 31.

25 (2007) 233 CLR 162.

constitutional norm of basic civil rights to which the prisoner could refer in support of her challenge.

Once again, the High Court of Australia was divided. However, on this occasion, a majority of the Court upheld the prisoner's arguments, in part.²⁶ The Court concluded that the 2006 amendment was invalid as beyond the constitutional power afforded to the Federal Parliament to define the franchise by legislation. The majority conclusion restored the disqualification that had existed prior to the 2006 amendment. This meant that prisoners serving sentences of less than three years could vote. Indeed, under the system of compulsory voting applicable to State, federal and territory elections in Australia, the prisoners were *obliged* to vote. The electoral commissioner was therefore required to afford them that facility. Two judges, dissenting, would have upheld the disqualification enacted by the Parliament.

In the reasons of the dissenting judges, sharp criticism was expressed about the majority reasoning in that decision, reminiscent in some ways of the opinion of Justice McHugh in *Al-Kateb*. Thus, Justice K.M. Hayne, in dissent, criticised the reference by the majority both to comparative law materials cited from Canada, South Africa and elsewhere and also to the decision of the European Court of Human Rights in *Hirst vs the United Kingdom (No. 2)*²⁷ concerning the compatibility of provisions of a similar United Kingdom statute with the First Protocol to the European Convention on Human Rights.²⁸ Justice Hayne said:

‘Any appeal to the decisions of other courts about the operation of other constitutional instruments or general statements of rights and freedoms is an appeal that calls for the closest consideration of whether there are any relevant similarities between the instruments that were examined and applied to those decisions and the particular provisions that this Court must consider. (...) There is no [such] similarity [nor any] “generally accepted international standards” (...).’²⁹

In his dissenting reasons, Justice J.D. Heydon was even more blunt. He said:

‘The plaintiff relied on the terms of, and various decisions about and commentaries on, certain foreign and international instruments (...). These instruments did not influence the framers of the Constitution, for they all postdate it by many years. It is highly improbable that it had any influence on them. The language they employ is radically different. (...) [T]he fact is that our law does not permit recourse to these materials. The proposition that the legislative power of the Commonwealth is affected or limited by developments in international law since 1900 is denied by most, though not all, of the relevant authorities – that is denied by 21 of the Justices of this Court who have considered the matter, and affirmed by only one.’³⁰

The reference to ‘only one’ is shown, by a footnote, to be a reference to several of my own judicial opinions in the High Court of Australia.

Despite these criticisms, which certainly drew to the attention of the judges in the majority in *Roach* the insistence on decisional orthodoxy asserted by the minority, each of the reasons of

26 Gleeson CJ, Gummow, Kirby and Crennan JJ; Hayne J and Heydon J dissenting.

27 (2005) 42 *European Human Rights Reports* 41.

28 (2007) 233 CLR 162 at 220 [163].

29 (2007) 233 CLR 162 at 221 [165]-[166].

30 (2007) 233 CLR 162 at 224-225 [181] (citations omitted).

the majority made reference both to comparative law materials involving the constitutions of other countries and international law materials, involving the suggested universal notions of human rights in international law.

The separate reasons of Chief Justice Gleeson³¹ and the joint plurality reasons of Justices Gummow, Crennan and myself³² each made specific reference to the decision in the *Hirst's Case* and to the discussion of basic principles in the reasoning of courts of high authority, specifically the Supreme Court of Canada in *Sauvé vs Canada (Chief Electoral Officer)*.³³ The actual decision of the majority in *Roach* was firmly anchored in the text, history and apparent purposes of the provisions of the Australian Constitution for the franchise of electors voting for the Federal Parliament. However, in elucidating that question, the judges in the majority did not hesitate to examine the consideration of analogous problems in earlier national and transnational decisions.

Obviously, the decisions of courts in other countries, and the reasoning that supported them, did not bind the Australian constitutional court in reaching its conclusion. No one suggested that it did. But neither did any rule of law, principle of due process or past practice forbid the Australian judges from looking at how their counterparts in other courts had addressed the issues of prisoner voting rights in the cases where those rights had been judicially examined. Fairly clearly, because of the risk that partisan, political or irrelevant considerations might influence all such legislative enactments on such topics, the courts concerned subjected exclusion from the franchise to various forms of strict scrutiny. In the Canadian, British and Australian cases, the legislative attempts to disqualify prisoners from voting were disapproved or struck down. The willingness of the Australian majority judges to maintain their invocation of comparative constitutionalism and the citation of international law analogies is perhaps evidence of the inevitable process of seepage of such constitutional reasoning into the opinions of municipal judges. This process occurs if only to provide an indication of the broad context of law or principle in which the local decision falls to be made.

5. Problems to be addressed

Especially in national constitutional adjudication, I do not suggest that the invocation of comparative constitutionalism and the principles of international law represent uncontroversial subjects, free of legitimate debate. The strength of the competing opinions on the topic, expressed in both the final courts of the United States of America and Australia, afford evidence enough of the strong feelings that the competing opinions enjoy amongst judges of great experience and undoubted integrity.

I acknowledged these feelings, and the arguments that lay behind them, in my Seventh Annual Grotius Lecture delivered at the annual meeting of the American Society of International Law in Washington in March 2005.³⁴ An entertaining statement of the competing cases can be found in the public conversation on the topic held between Justice Antonin Scalia and Justice Stephen Breyer of the United States Supreme Court.³⁵ Without diminishing in the slightest the several arguments advanced there, and elsewhere, it has always seemed to me that the best

31 (2007) 233 CLR 162 at 178 [16].

32 (2007) 233 CLR 162 at 203-204 [100]-[101].

33 (2002) 3 SCR 519.

34 M.D. Kirby, 'International Law – The Impact on National Constitutions', 2008 *American University International Law Review* 21, no. 3, pp. 327-364, at pp. 346-364.

35 'The Relevance of Foreign Legal Materials in US Constitutional Cases. A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer', 2005 *International Journal of Constitutional Law* 3, p. 519.

contentions to be deployed *against* the use of international law principles in constitutional adjudication are these:

1. *Democratic legitimacy*: The concern that, to the extent that judges introduce international norms into their decision-making although the state has not itself accepted those norms through its lawmaking process, they do so without requiring acceptance of those norms by a more representative branch of government, particularly the legislature. Thus judges who do this introduce principles to domestic law that lack even the modest effective element of democratic legitimacy that is involved in parliamentary law more generally or executive law made under parliamentary authority;³⁶
2. *Containing executive law*: The concern that the rules of international law, particularly treaty law, are made substantially in international, not national, bodies and, to the extent that national participation occurs, it does so through the Executive Government whose powers of lawmaking should not ordinarily be enlarged in domestic jurisdiction without the authority of the legislature;³⁷ and
3. *Predictability in law*: The concern that, to the extent that municipal judges refer to legal materials as ‘norms’, ‘principles’ or ‘contextual’ information, they obscure the fact that such coercive rules may actually be made binding on their own State, even if not incorporated. Moreover, the judges thereby introduce into *inter partes* adjudication, necessarily imprecise considerations in the determination of legal rights, more apt to the other branches of government than to the judicature which, in legal theory at least, is established to declare pre-existing rights and obligations not to create and then apply new ones.

There are, of course, answers to each of these concerns, a full exploration of which would far exceed the space available to me or the patience of the reader.

1. *Limited democracy in practice*: The so-called democratic deficit must not be overstated. The notion that every law, made by an elected government and legislature after an election, is considered and approved by the population governed by it, is a fiction of increasing unpersuasiveness in a modern, complex society governed by detailed regulation. In any case, many similar checks and provisions for accountability are afforded in the advance of universally applicable international law, reducing the risks of referring to such materials in the limited way upheld by the *Bangalore Principles*;
2. *Judicial lawmaking*: Whilst the lawmaking powers of the executive should not be unduly enhanced, nor should the executive Government be encouraged to believe that it can ratify treaties as mere formalities, with no intention whatever that they should have any effect. To the extent that treaty or other law comes to express universal assumptions of civilised countries, the necessity of the participation of the governments of many nation-States is an assurance against enhancing the power of the executive of one’s own State. In any case, the incorporation of international law principles is not restricted to the legislature as lawmaker. In our form of society, the executive and the judiciary itself are also lawmakers, albeit to a lesser and more controlled extent. The judges know the limitations that apply to their powers of lawmaking. Such limitations do not deny the existence of the judicial

³⁶ R. Provost, ‘Judging in Splendid Isolation’, 2008 *American Journal of Comparative Law* 56, no. 1, 2008, pp. 125-172, at p. 125.

³⁷ *Ibid.*, at p. 126.

- function in creating new legal rules, relevantly by reference to universal principles of international human rights law; and
3. *Judicial leeways of choice*: The notion that judges merely ‘apply’ pre-existing law without any creative role on their own part, is a fiction long since exposed by legal philosophy, specifically by Dean Roscoe Pound in the United States and by Professor Julius Stone in Australia. Certainly in common law countries (but not only there) the judicial role in declaring, adjusting and re-expressing the common law; in construing ambiguous parliamentary law; and in interpreting the necessarily opaque provisions of a national constitution involves a creative element. So much is now rarely denied by informed observers. The proper concern is addressed to the circumstances of legitimate judicial creativity not to the existence of such a role at all on the part of judges. Especially by judges of appellate courts and particularly judges of a final national court. Inescapably such judges have their own responsibilities in enlarging past legal understandings of the law. It is preferable that such responsibilities should be acknowledged and not denied. Only then will attention be addressed to the truly concerning issues, namely, the occasions for creativity, the limits that restrict it and the circumstances in which, and means by which, it is rendered legitimate.

6. The HiiL initiative

These considerations bring me, in conclusion, to the circumstances that occasion my visit to the Netherlands, affording me the opportunity to pay this public tribute to Ewoud Hondius at his own university.

An important initiative in which Ewoud Hondius and I have lately been associated is the establishment of The Hague Institute for the Internationalisation of Law (HiiL). This is an independent body, substantially funded by the government of the Netherlands, based in The Hague, established to promote consideration of the process of ‘transjudicialism’ as it is emerging in many countries. The HiiL has convened two international conferences at the conference centre associated with the International Court of Justice in The Hague. The second such conference took place in October 2008 and I was privileged to attend it.

There were three streams of dialogue at the second HiiL conference. The first concerned the proper occasions for *coherence* in law and the circumstances where *diversity* in legal rules and approaches was not only legitimate but also desirable, so as to reflect the diversity of human cultures, manifested, in turn, in diverse legal cultures.

The second stream examined the issue of the legitimacy of judges in drawing upon unincorporated international law in resolving disputes before them in municipal courts. This stream explored the compatibility of the transnational judicial conversation with the doctrine of the separation of powers and with the theory of democratic accountability for lawmaking in society. How, in the current age, can these features of contemporary constitutionalism be reconciled with the growth and penetration of international law in domestic jurisdiction?

The third stream examined the methodology that should be adopted, assuming it to be accepted that a transnational judicial dialogue with impact upon municipal judicial decision-making is desirable, is likely to continue and even to expand. How and in what circumstances should the decisions utilise the materials of international law? What procedures can be introduced to ensure fairness to the parties affected and to their lawyers? What role should non-governmental organisations play in the spread of knowledge concerning, and the shape of, international human rights law? How should legal and judicial education be developed to accommodate these developments?

The successive streams of the HiiL conference brought together the *when, why* and *how* questions, with the separate streams reporting to the final plenary of the conference. In due course, it is anticipated that the HiiL will provide a full report on its conference. Given the controversy and importance of the issues, it is likely that this report will play a part in shaping the future debates about these topics, not only in the Netherlands but also in other countries far away.

An indication of the currency of the topics discussed in the HiiL conference may be seen in the publication in the *International Herald Tribune*, shortly before the HiiL meeting took place, of a significant commentary collecting opinions on the transnational judicial conversation that now takes place, including between judges of the final courts of many nations. One of the views expressed in the article was that the global influence of the Supreme Court of the United States is ‘waning’. This development was attributed in the article to recent trends towards intellectual isolationism on the part of the United States court, rendering many of its decisions of diminished value to other final national courts throughout the world.³⁸

Of course, municipal courts do not exist, as such, to secure an intellectual influence upon the reasoning of courts of other legal systems. In law and institutionally, it suffices that they should discharge their own municipal functions. To the extent that a national court were to set out to pursue an agenda of intellectual influence beyond its own borders, it would exceed its proper functions. To some degree, national constitutional law, being the expression of the history and basic values of each nation, will reflect elements that are distinctive and not necessarily appropriate for export.

As against this, the rapid expansion of international law in recent decades, and especially of the international law of human rights, has produced in every country, at roughly the same time, shared ideas which need somehow to be considered by the national legal system, even if ultimately rejected by it. Views differ concerning the extent to which, in practice, international human rights law has seeped into municipal law, through decisions of national courts. Professor Graham Hudson, examining the contrasting developments in the highest courts of Canada and South Africa, where new constitutional provisions have afforded a platform to import international law reasoning by analogy, argues that the impact, in practice, on actual court decisions has actually been modest in both countries:

‘[T]here is no perceptible difference between the two jurisdictions; in neither jurisdiction does international law exert a significant, regular or predictable impact on judicial reasoning. I conclude that there is no available evidence to support the belief that Canadian judicial practice would change if the Canadian law of reception were formalised. I conclude further that this has implications for underlying theory and, in particular, the theories concerning how the domestic impact of international law can be augmented and towards what ends, those seemingly sociological, are decidedly formalistic and positivist in orientation. I suggest that these theories would be improved if more attention were paid to strictly non-legal and informal variables which influence judges’ subjective attitudes towards international legal authority.’³⁹

38 A. Liptak, ‘US Supreme Court’s global influence is waning’, *International Herald Tribune*, 17 September 2009, p. 9.

39 G. Hudson, ‘Neither Here nor There: The (Non-)Impact of International Law on Judicial Reasoning in Canada and South Africa’, 2008 *Canadian Journal of Law and Jurisprudence* 21, p. 321.

By way of contrast, Judge Thomas Buergenthal of the International Court of Justice is more optimistic and positive about the influence of seepage from international law into municipal law, particularly in matters concerning the universal values of international human rights law:

‘When the first volume of the *American Journal of International Law* was published in 1907, human beings qua human beings had no rights under international law. Today international law accords individuals a plethora of internationally guaranteed human rights. But because so much international human rights law has come into force and so many intergovernmental institutions are being created to give effect to it, one might be led to believe that the system as a whole is functioning well and that it is effective in protecting rights of human beings the world over. That is certainly not true! Although the international human rights system as it exists today is undeniably functioning better than many would have believed possible 20 or 30 years ago, it has not prevented the massive violations that have been, and continue to be, committed in many parts of the world. Equally, though, the system in place today – and here I refer not only to the formal institutions and legal norms, but also to the work done by NGOs and various human rights bureaucracies both national and intergovernmental – has saved lives, improved the human rights conditions in many countries, and is succeeding in forcing an increasing number of governments to take their human rights obligations more seriously than before. This is progress regardless of how one defines it.’⁴⁰

According to Judge Buergenthal, the major factor contributing to the growing impact of international human rights law has been the ‘massive corpus of human rights legislation promulgated and published over recent years; the growing importance attached to the issue of human rights in the international community; and the global electronic communications explosion that brings human rights violations to notice wherever they occur’.

It is in this global environment that national courts operate today. To suggest that they should somehow ignore the reality, influence and language of international human rights law is akin to suggesting that judges of an earlier time should have ignored the advent of the printing press and of the liberation of minds that accompanied that explosion of knowledge which occurred when communication of ideas passed from the calligraphy of monks to Gutenberg’s invention.

Judges in international, regional and municipal courts live and work in the world that they know and are part of. In that world, today, they cannot ignore the rapid, contemporary expansion of international law. Unless incorporated, it does not bind them as legal norms (save possibly in peculiar circumstances such as crimes of universal jurisdiction).⁴¹ But this does not mean that municipal judges will ignore the advent of international law, particularly where that law expresses the universal values of civilised nations. Those values are now part and parcel of the background against which municipal judges perform their daily work. Necessarily and properly, that background is available to inform reasoning by analogy in giving expression to national law, at least where that action may properly be taken with due dialogue with the parties and their representatives and full explanation and justification of the course observed.

40 T. Buergenthal, ‘The Evolving International Human Rights System’, 2006 *American Journal of International Law* 100, no. 4, p. 783, at p. 807.

41 M.D. Kirby, ‘Universal Jurisdiction and Judicial Reluctance: A New “Fourteen Points”’, chapter 12, in: S. Macedo (ed.), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law*, 2004, p. 240, at p. 259.

The HiiL has played a distinctive and most valuable service in subjecting this transnational development to systematic and public scrutiny and analysis. In doing this, it has continued the role that The Hague, in the Netherlands, for a very long time has played in promoting the principled expansion of the rule of law in the international community, the spread of legality to the previously lawless relations between States and the provision of protection for vulnerable individuals, other sentient beings and the biosphere more generally.

7. The timelines of transparent analysis

I honour the University of Utrecht. For centuries, long before even the modern discovery of my country including by the great Netherlands navigators of the Golden Age, it has been promoting knowledge and learning about international law. I salute Ewoud Hondius, whose leading work as a comparativist has earned him worldwide recognition and praise. It is a good fortune that he is engaged in these subjects. I welcome the initiative of the HiiL and its conference that has just concluded. Above all, I acknowledge the people of the Netherlands for their engagement, beyond purely national and selfish and economic interests, in the phenomenon of globalism and the transnational judicial conversation that is part of globalism. That conversation has commenced and is certain to continue and to expand. We do well to analyse its imperfections and to place its continuance on a transparent, thoroughly debated and principled foundation.