

Globalisation, the Law and Australian Sovereignty: Dangerous Liaisons*

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Introduction

Globalisation is a word on everybody's lips. It has been examined from every conceivable angle, from trade policies and economics to the environment and personal relations. Surprisingly, however, the global dimension is all too often ignored in discussion about Australian law.

In one sense, talk of globalisation and national legal systems may seem an oxymoron. Globalisation is all about the move to internationalism, interdependence and common links, the repudiation of national and local particularities, the meaninglessness of borders and the challenging of state sovereignty. Law, particularly public and constitutional law, is all about the structures of a national or local polity, specifying the institutions and doctrines that make up the framework of a country or state. It celebrates sovereignty, particularity, self-sufficiency and isolation. Globalisation could, thus, be seen to be the antithesis of public law or, indeed, its nemesis, sounding the end of peculiar, entrenched systems of governance and bringing some type of global uniformity to the way we are ruled.

But national legal systems can no longer be thought of in isolation from international developments, however hard some wish this were the case. The subtitle of this talk is 'Dangerous Liaisons'. I have used the title of the 18th century novel of Laclos (and the striking film by Stephen Frears) because it captures the idea of a series of dangers: the thrill of romance, the threat of seduction, the peril of rejection. There are connections between the corrupting figures of Valmont, the evil but charming seducer, and Mme de Merteuil, his sophisticated accomplice, and

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the way some critics of the increasing internationalisation of Australian public law present international law. Australian sovereignty is cast in the role of *Presidente de Tourvel*, the innocent and beautiful object of *Valmont's* seduction.

The dangerous aura that international law has acquired in Australia has produced in turn what I regard as a dangerous obsession with cutting Australia adrift from international law-making, particularly in the area of human rights. But I also want to suggest that the liaison between Australian public law and globalisation is dangerous in a more positive sense: it unsettles and challenges many of the rigidities and limitations of Australian law.

In a speech last year to the National Press Club, Mr Downer said that 'we all fall into one of two camps. You are either a globaphobe or a globophile.'¹ I think that this dichotomy is too stark to be accurate. At least in the arena I know best, the law, we see a complex and shifting attitude to globalisation, depending on the subject matter. My point is that we should neither embrace globalisation in a grand passion nor should we peremptorily spurn its advances. Rather we need to develop a mature and reflective relationship between the Australian legal system and the global order.

In this talk I want to explore some of the tensions in the relationship between globalisation and public law in an Australian context. I think that the tensions are becoming more and more acute and that much more attention should be devoted to this by both international and public lawyers. I will illustrate these tensions by looking at some examples of the High Court's and the Commonwealth Parliament's responses to legal globalisation and the way they move between romantic and licentious images of the international legal order. My conclusion is that, as we cannot avoid the pressures towards globalisation, we must develop creative ways of responding to and harnessing these forces. In other words, we must turn the liaison into a permanent and productive relationship.

Globalisation is one of those modern buzz words that is used in many different ways. It is most often used in an economic context, meaning that markets are sloughing off their attachment to national or regional boundaries. It is also often associated with technological advances in communications that make boundaries seem inconsequential. I am using it here in a different sense to refer to the effects of international law on national legal systems, in particular Australia.

At federation of course the relationship between international law and the Australian Constitution was not in issue. International law was then basically concerned with relations between countries in a fairly literal way: it dealt with principles of boundary drawing, of diplomatic relations, of war and peace. Moreover, at federation Australia was not considered a full international citizen—in George Reid's words, it was a 'colony within an empire'²—and most of its engagement with international law was vicariously conducted through the United Kingdom. The only point of engagement between the international and national contemplated in the Constitution was section 51 (xxix), which gives the Commonwealth government legislative power with respect to 'external affairs'.

¹ 'Globalisation or globalophobia: does Australia have a choice?' *Foreign Affairs and Trade Record*, March 1998, p. 5.

² Quoted by J. Crawford in B. Opeskin & D. Rothwell (eds), *International Law and Australian Federalism*, Carlton, Vic., Melbourne University Press, 1997, p. 327.

Over the last century there have been enormous changes in both Australian international status and in international law. Australia is now an active, independent member of the international community, and the focus of international law has been transformed from one on inter-state relations to (in Sir Ninian Stephen's words) 'penetrate[] formerly sacrosanct national borders [to] concern[] itself with domestic affairs and individual human rights within nation States.'³

These developments have forced an engagement between the national and international legal orders in Australia that has been full of suspense and drama. The liaison can be dated to the election of the Whitlam Labor government in 1972 when the new government generated a flurry of treaty signing, particularly of human rights treaties. The interest in international law has continued ever since, with some waxing and waning.⁴

Judicial responses to globalisation

The domestic ramifications of this international activity became apparent when the Commonwealth government relied on the external affairs power in the Australian Constitution to translate the treaty obligations into law. In the early 1980s, the High Court had to deal in *Koowarta*⁵ and *Tasmanian Dams*⁶ with challenges to the use of this power to implement international agreements. Its response, by narrow majorities, was to read the external affairs power in a broad way, to include international agreements and also principles of customary international law.

How were images of the international constructed and employed in these cases? Members of the majorities typically painted international law in romantic terms. It was something every self-respecting nation would want to embrace. Fulfilling the matchmaker's adage that 'opposites attract', international law was presented as making up for some of the deficiencies in the Australian legal system. Thus in *Koowarta*, Justice Murphy referred to Australia's tradition of discrimination against the Aboriginal people and viewed the implementation of the international prohibition on racial discrimination as a necessary step in Australia's expiation of its history.⁷

There is also romance in the reference to international institutions engaging in a type of cosmopolitan democracy, identifying norms that have global legitimacy. For example, in *Koowarta* Justice Stephen quoted the stirring words of the preamble to the UN Charter, of 'we the peoples' ... faith in fundamental human rights, in the dignity and worth of the human person, in equal rights of men and women.'⁸ Justice Mason talked of the community of nations' opposition to racial discrimination on idealistic and humanitarian grounds as well as the threat it

³ N. Stephen, 'Foreword' to B. Opeskin & D. Rothwell (eds), *International Law and Australian Federalism*, op. cit.

⁴ James Crawford gives a useful overview of the relationship in *International Law and Australian Federalism*, op. cit.

⁵ *Koowarta v Bjelke Peterson*, 1982, 153 CLR, p. 168.

⁶ *The Commonwealth v Tasmania*, 1983, 158 CLR, p. 1.

⁷ *Koowarta*, pp. 239-40.

⁸ *ibid*, p. 218.

posed to friendly relations among nations.⁹ Justice Murphy also presented the United Nations as a concerted international response to massive human rights violations: ‘there was an increasing consciousness ... that people had responsibility for the well-being of others everywhere, irrespective of national barriers which were unnaturally dividing humanity.’¹⁰

So, too, in *Tasmanian Dams*, Justice Murphy went into considerable detail about the establishment of UNESCO, and its work,¹¹ and he provided a select list of other world heritage properties around the world.¹² To give a full context, he also listed the seven wonders of the ancient world!¹³ Overall, his view seemed to be that there was a natural marriage of international and domestic law which was being put asunder by an obsession with sovereignty.

Majority judges in High Court decisions on the external affairs power were also influenced by the need for Australia to be seen to be taking its international obligations seriously in order for it to be able to hold its head high on the international stage. Justice Murphy’s famous warning in the *Seas and Submerged Lands Act Case* that Australia would be seen as an ‘international cripple’ if it did not engage more at the international level¹⁴ was repeated and endorsed by Justice Deane in *Tasmanian Dams*:

Australia would, in truth, be an ‘international cripple’ if it needed to explain to countries with different systems of law and completely different domestic rules governing the enforceability of agreements, that the ability of its national government to ensure performance of ‘obligations’ under an international convention would depend on whether those obligations were or were not held to be merely illusory.¹⁵

Similarly, Justice Mason said in *Koowarta*:

[i]t is important that the Commonwealth should retain its full capacity through the external affairs power to represent Australia, to commit it to participation in these developments when appropriate and to give effect to obligations thereby undertaken.¹⁶

The prospect of the Commonwealth being unable to legislate to implement its international obligations, said Justice Mason, was ‘altogether too disturbing to contemplate. [It would be] a

⁹ *ibid*, p. 235.

¹⁰ *ibid*, p. 239.

¹¹ *Tasmanian Dams Case*, pp. 176–7.

¹² *ibid*, pp. 172–3.

¹³ *ibid*, p. 174.

¹⁴ *NSW v The Commonwealth*, 1975, 135 CLR, p. 503.

¹⁵ *Tasmanian Dams Case*, at p. 262.

¹⁶ *Koowarta*, at p. 229.

certain recipe for indecision and confusion, seriously weakening Australia's stance and standing in international affairs.'¹⁷

The concern with the keeping of commitments and promises has echoes of the solemnity of marriage vows. The majority judges interpreted the Constitution to support Australia's international obligations, ensuring that the national sphere did not undermine these international vows.

The minorities' approach in *Koowarta* and *Tasmanian Dams* presented contradictory images of the international order. From one perspective, it was pale and wan, full of vague commitments that can have no punch in the Australian legal system. This is particularly evident in the discussion of whether the World Heritage Convention at issue in *Tasmanian Dams* contains binding obligations. Chief Justice Gibbs in particular dissected the provisions of the Convention to conclude that they imposed few binding obligations.¹⁸ From yet another minority perspective, international law was a seductive influence that had the potential to corrupt the federal basis of the Australian polity. Thus Chief Justice Gibbs warned in *Koowarta* that if the protection of human rights qualifies as an external affair:

[t]he distribution of powers made by the Constitution could, in time, be completely obliterated; there would be no field of power which the Commonwealth could not invade, and the federal balance achieved by the Constitution could be entirely destroyed.¹⁹

The image is of international law as predator, ravishing the pure federal fabric of the Australian Constitution.²⁰

I will look briefly at two other cases where international law has encountered Australian law, generating predictions of great danger: the development of the common law on native title in *Mabo* and the interpretation of administrative law principles in *Teoh*.

In a much-quoted passage in *Mabo*, Justice Brennan said that:

¹⁷ *ibid*, p. 225.

¹⁸ *Tasmanian Dams Case*, at pp. 79–96.

¹⁹ *Koowarta*, at p. 198.

²⁰ By 1996, in *Victoria v. The Commonwealth*, a last ditch attempt by the states to challenge the use of the external affairs power to implement industrial relations reforms, the High Court upheld the broad understanding of 'external affairs' by a 6–1 majority. The Court rebuffed the argument that the meaning of 'external affairs' was limited by its meaning at federation:

It would be a serious error to construe para (xxix) as though the subject matter of those relations to which it applied in 1900 were not continually expanding. Rather, the external relations of the Australian colonies were in a condition of continuing evolution and, at that time, were regarded as such. Accordingly, it is difficult to see any justification for treating the content of the phrase 'external affairs' as crystallised at the commencement of federation or as denying it a particular application on the ground that the application was not foreseen or could not have been foreseen a century ago. *138 ALR*, 1996, p. 143.

The expectations of the international community accord in this respect [opposing racial discrimination] with the contemporary values of the Australian people. ...

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 in unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule.²¹

These are bold statements of a close relationship between international and domestic law. But Justice Brennan also said:

this Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency.²²

It was not entirely clear what principles form part of the skeleton of Australian law, but Justice Brennan's concern with its preservation is a potentially significant limitation on *Mabo's* embrace of international law.

The *Mabo* view of international law is then a relatively coy one (and in any event it was not determinative of the issue). In some contexts (particularly human rights) international law can influence the development of the common law. It cannot, however, alter the fundamental structure of Australian law.

The 1995 *Teoh* case (discussed by Elizabeth Evatt in the last lecture in this series, a version of which is published in this issue) sparked alarm because of its account of the relationship between international and domestic law. At issue was the significance of Australia's ratification of the Convention on the Rights of the Child for administrative decision-makers. Australia has not implemented CROC in Australian law. As in *Mabo*, the majority of the High Court held that a ratified, non-implemented treaty could be used as a guide to the development of the common law. Although the decision has been attacked as radical and improper by various commentators, from an international lawyer's perspective, it is very modest. For example, Chief Justice Mason and Justice Deane said of the technique of relying on an unimplemented treaty to develop the common law:

A cautious approach to the development of the common law by reference to international conventions would be consistent with the approach which the courts have hitherto adopted to the development of the common law by reference to statutory policy and statutory materials. Much will depend upon the nature of the relevant provision, the extent to which it has been accepted by the international

²¹ 175 CLR, 1992, p. 42.

²² *ibid*, p. 29.

community, the purpose which it is intended to serve and its relationship to the existing principles.²³

Since leaving the High Court, Sir Anthony Mason has commented that he sees a conservative approach to engaging with international law (as in *Teoh*) as the appropriate one.²⁴ This approach accepts international law, not to impose new, imported values on Australian law, but as an expression of existing common law principles or community values. This account reduces the dangers of the liaison of international and Australian law, by making the former subordinate to the latter.

The broadest judicial account of the relationship of international law to Australian law is then found in the cases on section 51 (xxix). This is unsurprising, perhaps, because this is the only clear constitutional recognition of the liaison. In other areas, the High Court has little romance about international law. International law is useful as an adjunct to the common law in some circumstances, but it is not an equal partner in the relationship. Indeed the majority of judges in the recent High Court decision in the *Hindmarsh Island Case* saw little scope for international law in interpreting constitutional provisions. An argument was made by Doreen Kartinyeri that section 51(xxvi) of the Constitution (the races power which allows Commonwealth to legislate with respect to people of a special race) should be read in light of international standards of non-discrimination. Only one judge, Justice Kirby, accepted this proposition. He referred to an interpretative principle that, where the Constitution is ambiguous, the High Court ‘should adopt the meaning which conforms to the principle of universal and fundamental rights rather than an interpretation which would involve a departure from such rights.’ He went on to say:

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. ... The Australian Constitution ... 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.²⁵

For this reason Justice Kirby held that section 51 (xxvi) of the Constitution cannot be interpreted to permit detrimental and adverse discrimination in Australian law on the basis of race. The majority judges by contrast found that the meaning of section 51 (xxvi) was not ambiguous, and that therefore the principle did not apply. To a respectful observer, this is a very disappointing approach at the end of the twentieth century. Why should international principles be held at arms length? Why should we interpret our Constitution in light of what we now understand as racist assumptions made by the founding fathers? As the great American jurist, Erwin Griswold, once said, if we interpret our constitution like a last will and testament, it will become one.

In his 1997 Deakin lecture, my former colleague, Greg Craven, identified ‘internationalism’ as a profound influence on a constitutionally and ethically bankrupt High Court. He noted human rights treaties in particular as dangerous, prompting the High Court to insert similar guarantees into the Australian Constitution. Internationalism is used, in Craven’s view, as ‘an immensely

²³ 183 CLR, 1995, p. 315.

²⁴ A. Mason, ‘International law as a source of domestic law’ in Opeskin & Rothwell (eds), op. cit., p. 210.

²⁵ *Kartinyeri v The Commonwealth*, 1 April, 1998: 166.

powerful rhetorical and moral weapon with which to justify judicial incursions into the content of the Constitution by way of the creation of individual rights.’ The seductions of the international, according to Greg Craven, have swept the High Court into illegitimate law-making, indeed into ‘judicial imperialism in a constitutional context.’ It is fair to say that this understanding is widely held also by politicians. For example, Mr Howard in one of his ‘Headland’ speeches in 1995 referred to the ‘illicit’ use of the external affairs power to implement international law into Australian law, implying some form of wanton behaviour by the High Court.

I think that the threat of international law to the Australian legal system is much exaggerated. As we have seen, the High Court has been very cautious in its embrace of international law; it has kept its gloves and hat on at all times. Greg Craven’s criticisms of internationalism are linked to his particular ‘originalist’ theory of constitutional interpretation: that the intentions of the Founding Fathers should be given primacy in interpreting the words they drafted almost a hundred years ago. Whatever power this theory may have with respect to other aspects of the Constitution, it can have none with respect to the place of international law. The events of this century have totally altered the scope and relevance of international law to the Australian legal system. To ignore international developments because the Founding Fathers did not contemplate them would make our Constitution lose its practical and moral force.

The view that the international legal order introduces undesirable principles into the Australian system, wantonly corrupting Australian federalism, is perhaps a natural response to change, a nostalgia for a simple, limited world. But it is not a useful or programmatic approach in that it offers no principle, except that of avoidance and abstention (just say ‘no’), to guide engagement with the international.

Legislative and executive responses to globalisation of law

If the Australian High Court has offered a range of emotions—embrace, coyness, spurning—in accepting international law as part of Australian law, what of the overtly political arms of government, unconstrained by the need to provide principled reasons for their actions? What images of the international are invoked in Australian political discourse?

I will briefly examine two different aspects of the liaison between Australian and international law.

i Anti-Teoh legislation

The *Teoh* decision was greeted with dismay by the then Labor government, which quickly issued a statement repudiating its effect. The Evans/Lavarch statement, echoing Justice McHugh’s dissent, sounded very odd to the ears of an international lawyer:

Entering into an international treaty is not reason for raising any expectation that government decision-makers will act in accordance with the treaty if the relevant provisions of that treaty have not been enacted into domestic Australian law.

At international law, entry into a treaty raises precisely the expectation that it will be implemented and the 1995 Joint Statement seems to be announcing a divorce of the international and the Australian legal order in a quite disingenuous way. It seems to assume that international legal obligations are undertaken in a frivolous way, simply to impress the international community. Legislation was introduced to implement the message of the Joint Statement, it was reported on favourably by the Senate Legal and Constitutional Committee, but it was eventually allowed to lapse, partly because of a significant public outcry.

After some mixed messages, the content of the Evans/Lavarch statement was reiterated last year by Mr Downer and Mr Williams. A new version of draft legislation to undo *Teoh* was introduced, the Administrative Decisions (Effect of International Instruments) Bill 1997. It was referred to the Senate Legal and Constitutional Legislation Committee where it was supported by Coalition members. Interestingly, the Labor members of the Committee appeared to have lost their enthusiasm for the anti-*Teoh* legislation partly because the fears of administrative chaos post-*Teoh* had not been realised.

The Committee's report was short on analysis. It set out the many criticisms made in submissions on the draft legislation in some detail but then simply concluded without explanation that the criticisms were misplaced. The anti-*Teoh* legislation was presented as an aspect of the Coalition's law and justice policy which stated:

Australian laws, whether relating to human rights or other areas, should first and foremost be made by Australians, for Australians. ... [W]hen Australian laws are to be changed, Australians and the Australian political process should be at the beginning of the process, not at the end.²⁶

The legislation was claimed to provide administrative certainty in the face of the doubt engendered by the *Teoh* importation of international law; and its role is also to 'maintain the proper role of parliament'—to allow it to act as the gatekeeper for the introduction of international legal principles. The substance of international law principles were not addressed. It seems that international law (particularly on human rights) has a suspect air—a rather threatening, dangerous flood of un-Australian values.

ii Direct recourse to human rights treaty bodies

As Elizabeth Evatt noted in her speech, in 1991, Australia accepted the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) and in 1993 parallel mechanisms for individual complaint under the Convention on the Elimination of All Forms of Racial Discrimination and the Convention against Torture. These procedures allow individuals within Australian jurisdiction to make a complaint to the relevant treaty-monitoring body that Australian law breaches the provisions of the relevant treaty, if they have exhausted all available domestic remedies. The procedures impose the most direct potentially dangerous liaison between the Australian and international legal order. What has happened in practice?

²⁶ Liberal and National Parties' Law and Justice Policy, February 1996, p. 25.

Only two cases against Australia have yet survived to be decided on their merits, *Toonen* (1994) and *Mr A* (1997). Elizabeth Evatt discussed these cases, and the Australian government's reaction to them, in her lecture and I will not cover this ground again. While I think that the outcomes of the cases,²⁷ particularly the terse and in my view inadequate Australian response to the *Mr A Case*, are very disappointing from an international human rights perspective, I want to deal more with the criticism of the processes themselves, to the effect that the right of individual communication undermines Australian sovereignty.

This criticism has been made by many politicians, particularly by Senator Rod Kemp²⁸ and by Mr Howard. In a speech in 1993 to the Samuel Griffith Society, Mr Howard said of Australia's acceptance of the right of individual communication to a UN treaty monitoring committee:

There can be no argument with proper redress for human rights infringements. But surely it is within our own wit, competence, dignity and self-respect as a nation to provide for the resolution of those matters once and for all within the borders of our own country. Such examples of sovereignty thrown away make a mockery of calls for Australia to become a republic in the name of achieving national independence.²⁹

Two aspects of this type of criticism are worth noting. First it presents engagements with the international human rights treaty regime as dangerous in the sense of diminishing national dignity and self-respect. But this analysis does not take the fact that Australia has freely agreed to participate in the system into account, nor the fact that the right of individual communication is only available when national remedies are inadequate. Second, it is striking that those who are concerned about a diminution in Australian sovereignty by individuals having recourse to international human rights mechanisms are also those who are strongly opposed to Australia developing its own human rights mechanisms, such as a bill of rights. It seems that the real object of their anxieties may be more the implications of effective protection of human rights than the preservation of a pure Australian sovereignty.

²⁷ The Australian government's response to the Human Rights Committee's decision in *Toonen* that Tasmania's criminalisation of homosexuality was a violation of article 17 of the ICCPR was to enact the *Human Rights (Sexual Conduct) Act* 1994. The HRC had recommended repeal of the Tasmanian law, but even when politely asked to do so, the Tasmanian government declined. The Commonwealth legislation is very limited. It singles out one aspect of article 17 for protection, indeed the narrowest possible definition raised on the particular facts of *Toonen*:

Sexual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy within the meaning of Article 17 of the ICCPR (section 4 (1)).

The legislation has also been criticised for not being directly inconsistent with the Tasmanian law—it would have required a court challenge to establish that the Tasmanian laws were 'an arbitrary interference with privacy'. In the event, of course, the Tasmanian Parliament eventually repealed the laws.

²⁸ See for example *The Bulletin*, 11 October 1994, p. 19.

²⁹ J. Howard, 'Mr Keating's mirage on the hill: how the republic, like the cheshire cat, came and went', in *Upholding the Australian Constitution: Proceedings of the Third Conference of the Samuel Griffith Society*, 1992, p. 133.

Conclusion

I have argued that the liaison between international law and Australian law has been dangerous in a number of senses. First, even the quite modest embrace of international law by the Australian High Court has attracted considerable wrath. Second, this false perception of danger has in turn caused a more real danger of a rather half-baked Australian chauvinism with respect to international developments, illustrated by the anti-Teoh legislation and the charges that use of human rights treaties threatens Australian sovereignty.

This argument may have some superficial appeal, and plausibility, but it does not survive thoughtful reflection. At international law, states are sovereign in the sense that they determine their own political and economic systems. But, the notion of absolute sovereignty has no purchase in a world of sovereign states. As Henry Burmester, the Acting Solicitor-General, has said:

States do not exist in splendid isolation. Just as individuals in a society are not completely free to act in whatever way they like, so states as members of the international community of nations are constrained by international law in the way they can behave. ...

[T]he very concept of the equality of states at least implies that sovereign rights of each state are limited by the equally sovereign rights of others. ... [S]overeignty in its original sense of 'supreme power' is not merely an absurdity but an impossibility in the world of states which pride themselves upon their independence from each other and concede to each other a status of equality before the law.³⁰

There is of course broad acceptance of international law in many areas, such as international postal and aviation conventions. It is striking that the international appears particularly dangerous and threatening in the context of human rights. Many commentators and politicians who criticise the imposition of 'foreign' social and political rights through globalisation embrace its economic creeds and dogmas. It has been said that 'national sovereignty has long been a thing of the past when it comes to many areas of business regulation.'³¹ My colleague Anne Orford has pointed this out, noting that governments tend to be attracted to internationalist discourse in the context of the world economy, indeed linking modernity to the international, but they often reject internationalist discourse in areas such as human rights which more radically challenge governmental power.³² Indeed there is the paradox that, as international law increases in breadth, touching more aspects of our lives, the forces unleashed by globalisation within states—the move

³⁰ H. Burmester, 'National sovereignty, independence and the impact of treaties and international standards', *Sydney Law Review*, vol. 17, 1995, pp. 127, 131.

³¹ J. Braithwaite, 'Sovereignty and globalisation of business regulation' in P. Alston & M. Chiam (eds), *Treaty-Making and Australia*, Annandale, NSW, Federation Press, 1995, p. 115.

³² A. Orford, 'Locating the international: military and monetary interventions after the Cold War', *Harvard International Law Journal*, vol. 38, 1997, p. 443.

to privatisation of public functions for example—provide a strong resistance to internationally based guarantees of rights.³³

The current debates about the OECD's Multilateral Agreement on Investment (MAI) are a good example of the differing approaches to globalisation. While Mr Howard is concerned that human rights treaties may undermine Australian sovereignty, senior members of his government have supported the MAI, whose provisions are considerably more intrusive than human rights treaties. The MAI not only restricts the ability of governments to act in certain areas such as human rights and labour and environmental standards, but it also restricts action to favour local industries and to support areas such as health, social services and education. The Australian government has indicated that it will exclude some policy areas from the scope of the treaty for some time at least, but these 'reservations' will be subject to the 'roll back' requirements of the MAI. Opponents of the MAI have been derided for being 'globaphobes' and for wanting to turn the clock back. Whatever the particular merits or problems of the MAI, we need to ask our politicians for a principled basis for distinguishing between the danger levels of globalisation of human rights principles on the one hand and globalisation of trade and investment rules on the other. We cannot compartmentalise international trade and investment agreements from international human rights standards. If there is an MAI, we should have a parallel agreement requiring multi national corporations to observe human rights standards.

Critics of globalisation have pointed to the problems globalisation poses for the protection of human rights. Human rights is low on the agenda of global capitalism. But, as John Braithwaite has pointed out, 'there can be paradoxes of sovereignty where globalisation is associated with an increase rather than a decrease in sovereignty, properly conceived as the capacity of citizens to understand decisions that will affect their lives and to raise their voices in a way that influences those decisions.'³⁴ He encourages civil society to enhance the voices of weaker players in the world system, for example by building international movements of citizens concerned with the environment, health and human rights to create an enhanced citizen sovereignty.

One way to discriminate among the many senses of globalisation is suggested by Richard Falk's distinction between 'globalisation from above' and 'globalisation from below'.³⁵ 'Globalisation from above' means the expansion of the international division of labour, the growing influence of multinational corporations and the influence of Western dominated financial institutions, such as the World Bank and the World Trade Organisation. The aim of 'globalisation from below', by contrast, is the creation of a global civil society, giving priority to such values as human rights and environmental protection.

How can we make the dangerous liaison between international law and Australian law a more productive partnership? How can Australia usefully participate in 'globalisation from below'? One way to achieve this is through a clear statement of the relationship between international and Australian law. The new South Africa Constitution provides an interesting example. Section 232 states that:

³³ P. Alston, 'The myopia of the handmaidens: international lawyers and globalization', *European Journal of International Law*, vol. 8, 1997, p. 435.

³⁴ Braithwaite, *op. cit.*, p. 125.

³⁵ R. Falk, 'The making of global citizenship' in J. Brecher et al (eds), *Global Visions: Beyond the New World Order*, Boston, South End Press, 1993, p. 39.

Customary international law is law in the Republic unless it is inconsistent with the Constitution or an act of Parliament.

And section 233:

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

Another way to participate in globalisation from below would of course be the introduction of some form of bill of rights. This would 'take much of the heat out of the issue' of internationalisation 'by providing a set of equivalent standards which are likely to pre-empt international scrutiny.'³⁶ It is striking in Australia that the strongest critics of internationalisation tend also to provide the greatest resistance to the introduction of Australian guarantees of rights. Perhaps the introduction in February 1998 by the Blair government of a Human Rights Bill (launched under the rubric of 'Bringing Britain's Rights Home') will inspire Australian politicians. Or perhaps Australia needs, as the UK, to be found in breach of an international human rights instrument fifty times (the European Convention on Human Rights in the case of the UK) before it will act.³⁷

The current debate about native title is an example of the problems of cutting ourselves off from international law. The government has been very critical of any appeal to international fora or to international law. And yet reference to international standards makes some of the flaws in the current proposals very clear.

I think that we can draw at least two important lessons from the international law relevant to indigenous peoples. The first is that we should respect cultural diversity and see it as an enrichment of our society, rather than a threat to homogeneity. Members of ethnic, religious and linguistic minority groups, and members of indigenous peoples in particular, have the right to develop their identity and institutions and these rights cannot be left to the mercy of the political majority of the day.

The second lesson is that the notions of equality and non-discrimination require substantive rather than merely formal or procedural equality. This means that simply treating everyone the same may not be adequate in particular contexts. As Ronald Dworkin has pointed out, equal treatment is not the same thing as treating everyone as equals. Treating everyone as equals involves a much more complex and nuanced approach than 'identical' treatment.

This requires, as international law reminds us, respect for the dignity and survival of minority cultural identity, for the indigenous relationship with land and for indigenous peoples' right and duty to develop their culture. As Tony Anghie has said, '[c]ulture is not merely some ornamental aspect of an individual's existence that can readily be dispensed with or displayed on ceremonial

³⁶ J. Crawford, *op. cit.*, p. 335.

³⁷ In October 1997, the European Court of Human Rights found Britain in breach of the ECHR for the fiftieth time. *Guardian Weekly*, 2 November 1997, p. 10.

occasions, but [is] integral to the self-concept and social functioning of individuals and the communities of which they form a part.’³⁸

I do not mean to suggest that international law provides all, or even the best, answers to complex issues of cultural diversity. My argument is rather that it provides a set of norms that have achieved some measure of international acceptance—a type of global vocabulary—that are a useful addition to fraught public debates on cultural difference. In this context, international law challenges the limitations of Australian law and political discourse in a dramatic and useful way.

In Laclos’ book, *Dangerous Liaisons*, the wicked seducer Valmont is killed in a duel and his accomplice, Mme de Merteuil, is condemned to a miserable life, her machinations exposed, disfigured by smallpox. One of the innocent objects of their machinations retires to a convent, the other dies of grief. The dangerous liaisons of international law and Australian law do not need to have such an unhappy fate. Close relationships always contain an element of danger. They make us vulnerable to one another and they expose our weaknesses. But at the same time, they can be a source of great strength and make us braver and wiser than we would otherwise be.

I am not suggesting that the relationship of international law and Australian law should be a takeover of the former by the latter. The substance of international standards needs to be debated—there may be many that, after discussion and reflection, we cannot accept. But we should not reject through the smokescreen of sovereignty the possibility of real engagement with global standards, particularly in the area of human rights.

In the next century, the international legal order will become more and more significant in our lives. Our public and constitutional law will be impoverished and undermined by isolation from international developments. We should embark on the liaison with international law with decorum rather than indiscriminate or blind passion and be prepared for a demanding but potentially fulfilling relationship.



Question — I guess I am going to make a statement of assumption before I ask you a question, if that is OK. My understanding of the Constitution is that to make law in Australia, a bill must go through both houses of Parliament, whereas with international law that does not seem to be a requirement; the government of the day can just sign up to it, which might be viewed by some as questionable under the Constitution. I wonder if it would be beneficial for Australia to have to have international treaties ratified by both houses of Parliament and therefore the High Court could feel more confident in its adoption of international law when going forward. Do you feel any tension in the way international law becomes law in Australia, compared to how our Constitution says laws should be made?

Professor Charlesworth — I need to take issue with one of your assumptions there. Under Section 61 of the Australian Constitution, strictly speaking, the executive has the power to enter into treaties. They do not become part of Australian law until they are enacted fully by

³⁸ A. Anghie, ‘Human rights and cultural identity: new hope for ethnic peace?’ *Harvard International Law Journal*, vol. 33, 1992, pp. 341, 352.

Parliament. It is not as though, even in theory—and I will discuss the recent changes to the treaty-making process in a minute—even under the old status quo, international law ever became immediately part of Australian law. There are quite a number of international treaties that Australia has signed and ratified, which courts say we simply cannot look at because they have not been separately enacted as part of Australian law.

The Labor government commissioned a report, the *Trick or Treaty Report*, and a major initiative was announced by Mr Downer shortly after the Coalition came to power, that there were going to be changes to the Australian treaty-making process to address the so-called democratic deficit, even though, from a legal systems perspective, treaties did not automatically become part of Australian law. There was this sense, nevertheless, that we did not want the executive going off making treaties pell mell, signing us on to treaties even if they had no direct effect. Quite an elaborate system was put into place to try to alter this sense that it was up to the executive to do it. You may be aware that there are various processes now operating; the Senate Standing Committee on Treaties is one example of Parliament keeping a scrutinizing role on the executive's ability to enter into treaties. There is a Joint Standing Committee on Treaties where the states also have a role. So there are a significant number of developments in the last two years which have tried to democratise the process.

But, first of all, a review process is always there when the government puts through legislation to implement a treaty. Just take the Race Discrimination Act, for example. Gough Whitlam signed on to that very early in his time as Prime Minister. It was all very well for him to sign on to that but it was not part of Australian law, directly. So in order to get the Race Discrimination Act through, he had to get it through the House of Representatives, he then took it to the Senate and it was significantly amended by the Senate. So the Parliament is not excluded from the treaty-making process and the new treaty-making system actually enhances the role of the Senate in the scrutinizing process. To take the MAI for example; last week the Treaties Committee in its interim report on the MAI said we need more information, we are not really happy about this, we do not want to say whether or not we consider it in the national interest until we have got more information. So I think that there are mechanisms already in place to resolve a lot of those tensions that you have identified.

Harry Evans — Can I just add to that there is a bill in the Senate which was introduced by the Democrats to actually provide that treaties not be ratified until their ratification is approved by both houses of Parliament.

Question — You spoke about the requirement of article 2 of the Optional Protocol to the ICCPR, that is, that all domestic remedies should be exhausted or shown to be inadequate before an appeal or a communication can be made to the Human Rights Committee by an Australian individual. Using the example of the Toonen case, could you make any comment on any problems that you see and how that is evidenced, or how that is shown by the communicant, and also any comment on what remedies are considered to be appropriate to be considered by the communicant, for example, judicial, legislative, administrative or political remedies. As we discussed, a lot of what has happened in human rights law in Australia has been as a result of political pressure, or as a result of political actions. Would you have any opinion on the validity of political remedies such as suggesting that there was an effective remedy available to Mr Toonen in Tasmania, and that was to exert political pressure on his state Parliament to have the law changed, the other states in Australia having all changed their laws regarding sexual discrimination. Can you make any comment on why the Human Rights Committee may not have considered that to be an appropriate, effective or available remedy?

Professor Charlesworth — The Toonen case, for those of you who were not at Elizabeth Evatt’s marvellous lecture,³⁹ was a case brought by Nicholas Toonen, a gay activist in Hobart. He said that there was then, in the Tasmanian criminal code, prohibition on male homosexuality even between consenting adults. His argument was that that violated his right to privacy under Article 17 of the Civil and Political Covenant.

Now, as the questioner has pointed out, you cannot just say, look, I see that my rights on the Civil and Political Covenant have been violated, I am off to Geneva tomorrow. The Committee in Geneva or New York will not even look at your communication, that is the official term, until you have said, I have exhausted every domestic remedy. In other words, the international complaint processes, the Human Rights Committee in that case, does not operate as a so-called fourth level of appeal. You have to completely go through your national legal system. Now in Nicholas Toonen’s case it was really easy because what was the Australian domestic remedy? It was a state law criminalising homosexuality. We have no bill of rights, therefore, what avenues did he have? In fact, Nicholas Toonen in his complaint devoted a large section to all the political things he had done. He had lobbied politicians, he had gone to the federal government, he had a whole catalogue of everything he had done. But, in Australia, the requirement of exhausting domestic remedies, in some cases, is not particularly onerous because we have no domestic remedies and that is, I think, yet another reason why we need a bill of rights, because it looks rather ridiculous to say it is terribly easy to fulfil that requirement in a number of cases. Now he did put this part in his communication, but it is fair to say that that was not, strictly speaking, necessary, because the Australian government did not say, oops, you have forgotten the following domestic remedies.

Sometimes what happens in these cases is, the country against which the communication has been made will come back and say, this person stopped at the magistrates court level. They took their case to the magistrates court, they then gave up. We insist that they appeal it all the way through to the highest court in the land. And the Human Rights Committee has said, if there is an available judicial remedy you must pursue it, unless there is a direct contrary precedent against you. They are not expecting you to go all the way up to the High Court with an utterly hopeless case; they will accept if there is a direct precedent against you. But they do not expect you to exhaust political remedies. There has been some debate about whether you should be required to take it to administrative remedies, like an ombudsman, but generally the Human Rights Committee has said it is only available domestic remedies, mainly judicial ones.

You say what was the significance, how persuaded was the Committee by the fact that every other Australian state had changed its laws regarding sexual discrimination. I think the Committee did briefly refer to the fact that Tasmania was the only Australian state that criminalised male homosexuality. It is hard to know how much weight they gave that, but certainly it would suggest that one of Tasmania’s defences of the law was, this is part of our culture. Our community finds this behaviour abhorrent, we should be able to criminalise it. And certainly the fact that all the other Australian states did not criminalise male homosexuality undercut the Tasmanian government’s arguments, unless they wanted to argue for a specific Tasmanian culture and that was relatively hard to do.

³⁹ See page 29, this issue.

Question — I suppose the point I am trying to make is that, could it not also be construed as an equally persuasive argument for allowing the political process to take the natural course it had taken in every other state in Australia? For example, when the law was first changed in South Australia, no one said every other state in Australia does not have these laws therefore South Australia should go back to the way they were. What I am suggesting is, would it not be equally easy to say, every other state in Australia has taken this legislative or political measure, Tasmania will follow.

Professor Charlesworth — I think that since what was communicated to the Committee by the Tasmanian Government was, we will never ever change these laws, they are part of the fabric of our society, the Human Rights Committee would have been optimistic to have said that, although, of course, in the event, last year, without a lot of fanfare, Tasmania did, in the end, repeal its laws. So perhaps, it is a chicken and egg; who knows how much the change was a result of international pressure. But the Tasmanian government was fairly intransigent at the time, at least in its written submissions on this issue.

Question — Dr Charlesworth, I want to divert to something that is of a different order from the matter that you dealt with in the last question, and refer you to an interesting aspect of globalisation which is occurring, almost without notice, in Australia, but nevertheless does have some fairly powerful human rights connotations. It is the abandonment that has occurred around the world, almost entirely now, of compulsory voting. There is no doubt that some, and probably all, the countries that have jettisoned compulsory voting have done so with an eye to the Covenant on Civil and Political Rights, and especially its Article 25. Now a very good example was given as far back as 1982 in Austria, where the central government legislated to stop three Austrian provinces from putting people in gaol for not voting, even if they had not paid their fines. The Philippines changed its constitution in 1988, I think it was, precisely so that compulsory voting could never be reintroduced. They had experience of the corrupt ways in which Marcos used electoral compulsion. Now Australia has become the only country left which still goes to the barbaric extent of imprisoning people, most of whom turn out to be Aborigines, for the purely political offence of not voting. I wonder, have you got a view on the prospects for change in the law, flowing from change in the attitude of Australian's politicians, on this matter? The politicians, of course, are the only beneficiaries, not the nation, from electoral compulsion.

Professor Charlesworth — What I would say is, that would make a really interesting case to take under the optional protocol to the ICCPR. I think that would be quite interesting.

Question — Because you have mentioned that first, could I just interpose on that question. I raised that very prospect quite some years ago, with a friend of mine sadly now departed, who was a senior officer in the Attorney-General's Department, and he said you will need to be a multi-millionaire to do it because the politicians will ensure that you spend all your money on very expensive silk, you will never get there, you will never exhaust the domestic remedies.

Professor Charlesworth — I think there would be quite a good argument that there are very few domestic remedies in that context, so I do not think exhaustion of domestic remedies would be a massive requirement, and, of course, using the individual complaints procedure does not require a silk. It is a so-called postcard procedure in that it is simply always done on paper and you can send your complaint off to Geneva and it is considered there and there is no time for oral argument. But there is a very interesting general comment of the Human Rights Committee, the treaty body that Elizabeth Evatt is a member of, very recently,

explaining that Committee's views on Article 25, and I think the Committee does not see Article 25 as inconsistent with compulsory voting. It is quite an interesting interpretation, and if this is a particular interest of yours it may be something that you want to read. It is just a two and a half page document, which sets out the Committee's views on that and they do not see any necessary inconsistency there.

Question — Professor Charlesworth, when you talk about our attitudes to globalisation, and frankly I prefer the old term—international cooperation—which is not as provocative in that particular relation to law, it is important to bear in mind that when the Covenant first came into being in the late sixties, the world was a very different place. Australia stood out in front and we could scorn attempts to bring about the kind of democracy we already had. We need to bear in mind that that has changed very significantly in recent years. Our level of democracy, in terms of the implementation of basic human rights, has actually declined significantly, particularly in relation to Europe, which of course is bound by the European Covenant on Human Rights, incidentally under which Britain was taken to the European Court of Human Rights on fifty occasions. But I think we need to bear in mind that things have changed a bit and because, I think, of this diffident attitude towards globalisation or international cooperation, or the real implementation of international instruments, Australia has in fact lost ground. I think we are moving towards a crisis point. At last, as you have mentioned, we have ourselves appeared before the UN in the last three years. And if we continue in the same direction that process could become even more serious.

Professor Charlesworth — I can only say I agree with you. That was really the thrust of a lot of what I was trying to say, that we cannot hide our heads in the sand and just adopt a superior attitude; we are fine and everybody else has got the problems. I think we have to acknowledge that there is a significant human rights problems here in Australia. While generally we are pretty good, there are quite large areas where we are quite behind. And Elizabeth Evatt made the point in her lecture that Australia is so overdue with its third report under the Civil and Political Covenant that it is has been actually lapped by the fourth report. That is something for which there is really no excuse. So yes, I take the point of your comment very much.

Question — Professor Charlesworth, to what extent, if at all, are Australians and their environment protected from the potential adverse affects of the multi-lateral agreement on investment by existing human rights and environmental treaties, conventions and so on; and if they are not, to what extent—and if there is a limit to that extent—would that support the case for the current government's approach to a proper democratic examination of our treaties before they are put into full effect? I am thinking of ones like the current land mines treaty from the Ottawa treaty. Isn't there a case then for supporting that approach so that the Joint Standing Committee on Treaties, the National Interests Analysis and access by NGOs to comment on all those factors come into play?

Professor Charlesworth — Just to take the MAI and to what extent, if the Australian government were to become a party to it, we are protected by human rights treaties, one of the problems I guess in this respect is that under international treaty law it is like legislation. Later treaties, if they are inconsistent with prior treaties, are seen to take precedence. That is by and large, there are some exceptions—unless you can argue that the earlier treaty rule forms part of the so called *jus cogens*, the preemptory norms of international law. So I think that there are significant problems with the MAI's inconsistency with human rights standards. I think we

would all be less worried about the MAI if there was a companion agreement which committed the multinational corporations to observe human rights standards. As I mentioned, the Australian government has announced that it will not accept all of these provisions; it wants to put in some sort of form of reservations. However, the MAI itself says that once you have accepted it you can never add more reservations, and in any event you are committed to slowly roll back those that you have accepted. So it is very little guarantee I think.

To return to the Joint Standing Committee on Treaties and the treaty reforms that came up before in the first question; there is going to be, I understand, an official or internal review of the whole new treaty processes and how they have worked. I think some things have been quite successful and I think some things have been less successful, but I agree with you that in principle the idea that there should be the possibility of public involvement in these processes is very important. To that extent I certainly support the government's initiative and the work of the Joint Standing Committee on Treaties which I think has proved to be not just an empty mouthpiece of government, but an interestingly independent body, and I think we all have to try and support that in its work. So I generally am in favour of those systems, they allow much more input by NGOs, and the work of the Joint Standing Committee shows that that input is taken quite seriously, and that is an extremely valuable development.