

A TALE OF TWO SYSTEMS: THE USE OF INTERNATIONAL LAW IN CONSTITUTIONAL INTERPRETATION IN AUSTRALIA AND SOUTH AFRICA

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[The use of international law in constitutional interpretation has sparked heated debate between judges on the High Court of Australia, most recently in the Court's decision in Al-Kateb v Godwin. This article examines the attitudes, anxieties and assumptions that appear to underlie High Court decision-making on the issue. This examination is undertaken in light of the work of the Constitutional Court of South Africa. The work of this Court provides a useful comparison to the extent that the South African legal system has been restructured to enable a close engagement with international law. The South African experience of the last decade provides an informed basis and a developing body of case law against which to assess concerns regarding the Australian legal system's relationship with international law.]

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The claim that the *Constitution* should be read consistently with the rules of international law has been decisively rejected by members of this Court on several occasions. As a matter of constitutional doctrine, it must be regarded as heretical.¹

[W]ith every respect to those of a contrary view, opinions that seek to cut off contemporary Australian law (including constitutional law) from the persuasive force of international law are doomed to fail. They will be seen in the future much as the reasoning of Taney CJ in *Dred Scott v Sandford*,² Black J in *Korematsu [v United States]*³ and Starke J in *Ex parte Walsh*⁴ are now viewed: with a mixture of curiosity and embarrassment ... The fact is that it is often helpful for national judges to check their own constitutional thinking against principles expressing the rules of a 'wider civilization'.⁵

I INTRODUCTION

The use of international law in constitutional interpretation has sparked heated debate in legal systems governed by a written constitution.⁶ For example, in a case before the United States Supreme Court, considering the constitutionality of the execution of mentally disabled offenders, Scalia J described his colleague Steven J's reference to the critical views of the 'world community' as deserving a 'Prize for the Court's Most Feeble Effort to fabricate "national consensus"'.⁷ In the High Court of Australia, the issue produced unusually strong opposing responses in the recent decision in *Al-Kateb v Godwin*,⁸ as the dicta set out above from McHugh and Kirby JJ demonstrates. The decision concerned whether the *Australian Constitution* permits the indefinite detention of a person refused permission to remain in Australia, who could not be deported because he was effectively 'stateless'. A majority of the Court found that it does. Given the clear international legal prohibition against arbitrary detention in human rights treaties to which Australia is party, one issue in the case was whether international law could assist in the interpretive exercise. Disagreement on the use of international

¹ *Al-Kateb v Godwin* (2004) 208 ALR 124, 140 (McHugh J).

² 60 US 393 (1856).

³ 323 US 214 (1944).

⁴ [1942] ALR 359, 360.

⁵ *Al-Kateb v Godwin* (2004) 208 ALR 124, 173 (Kirby J).

⁶ See, eg, recent publications such as 'Symposium: Agora: The *United States Constitution* and International Law' (2004) 98 *American Journal of International Law* 42; Gib van Ert, *Using International Law in Canadian Courts* (2002); Vincent Kronenberger, 'A New Approach to the Interpretation of the *French Constitution* in respect to International Conventions: From Hierarchy of Norms to Conflict of Competence' (2000) 47 *Netherlands International Law Review* 323; Karen Knop, 'Here and There: International Law in Domestic Courts' (2000) 32 *New York University Journal of International Law and Politics* 501; Gérard La Forest, 'The Expanding Role of the Supreme Court in International Law Issues' [1996] *Canadian Yearbook of International Law* 89, 97-8; Eric Stein, 'International Law in Internal Law: Toward Internationalization of Central-Eastern European Constitutions?' (1994) 88 *American Journal of International Law* 427; Gennady Danilenko, 'The New *Russian Constitution* and International Law' (1994) 88 *American Journal of International Law* 451; D J Devine, 'The Relationship between International Law and Municipal Law in light of the *Constitution* of the Republic of Namibia' (1994) 26 *Case Western Reserve Journal of International Law* 295; Antonio La Pergola and Patrick Del Duca, 'Community Law, International Law and the *Italian Constitution*' (1985) 79 *American Journal of International Law* 598.

⁷ *Atkins v Virginia*, 536 US 304, 347 (2002) (Rehnquist CJ and Thomas J, agreeing).

⁸ (2004) 208 ALR 124.

law in constitutional interpretation also emerged in other High Court decisions handed down around the same time, such as in *Re Woolley; Ex parte Applicants M276/2003 (by their next friend GS)*⁹ and *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji*.¹⁰

These are not the first cases in which members of the High Court have commented on the use of international law in constitutional interpretation.¹¹ Rather, they are one further chapter in a larger debate about the use of international law in legal interpretation generally.¹² Nevertheless, until these recent judgments, the issue had neither achieved such prominence nor attracted such passionate responses. The cases illustrate the anxiety of some judges about the potential effect of international norms on the domestic legal system, as well as the pressure that a supposedly closed domestic legal system like Australia's is under from the 'external' influence of international law. The recent cases also suggest an unfortunate new turn in that views on the relationship between the international and domestic legal systems are becoming more polarised, and the debate more rhetorical. The danger is that this will produce simplistic and reactive responses to international law, in which arguments are put for its wholesale rejection or adoption, rather than more nuanced approaches that account for the merits and demerits of international law as an interpretive tool.

A judge's use of international law is likely to reflect his or her broader approach to constitutional interpretation. As has been noted:

Judges will approach extrinsic materials, such as international law, differently depending on whether they favour rigidly applying the *Constitution* as originally drafted and intended or, at the other extreme, updating the instrument for societal change consistent with a vision of the *Constitution* as a 'living force'.¹³

However, most constitutional lawyers and judges now acknowledge that political, social and economic developments since 1900 can be taken into account in constitutional interpretation,¹⁴ thereby making it difficult to explain the uneasiness that the use of international law attracts. It seems that the use of international law can attract a degree of anxiety,¹⁵ and even hostility, that extends beyond allegiance to a particular interpretative theory.

⁹ (2004) 210 ALR 369, 402–3 (McHugh J), 425 (Kirby J).

¹⁰ (2004) 208 ALR 201, 206–7 (McHugh J), 208 (Kirby J). See also *Singh (an infant) (by her next friend Singh) v Commonwealth* (2004) 209 ALR 355, 429 (Kirby J) ('Singh'); *Baker v The Queen* (2004) 210 ALR 1, 36–8 (Kirby J).

¹¹ See, eg, *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 657–8 (Kirby J); *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 417–19 (Kirby J); *AMS v AIF* (1999) 199 CLR 160, 180 (Gleeson CJ, McHugh and Gummow JJ).

¹² See Hilary Charlesworth et al, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25 *Sydney Law Review* 423, 446–63.

¹³ Amelia Simpson and George Williams, 'International Law and Constitutional Interpretation' (2000) 11 *Public Law Review* 205, 226.

¹⁴ As McHugh J acknowledged in *Al-Kateb v Godwin* (2004) 208 ALR 124, 143:

Many constitutional lawyers — probably the great majority of them — now accept that developments inside and outside Australia since 1900 may result in insights concerning the meaning of the *Constitution* that were not present to earlier generations. Because of those insights, the *Constitution* may have different meanings from those perceived in earlier times.

¹⁵ Charlesworth et al, above n 12.

In this article, we explore the approach of the High Court to the use of international law in constitutional interpretation. A number of scholars have already written on this subject. There is thus no need to replicate their thorough analysis.¹⁶ Rather, we take a different tack in examining the assumptions and perceptions about international law that underlie judicial approaches to constitutional interpretation. We evaluate these perceptions and assumptions by comparing them with the approach taken by the Constitutional Court of South Africa. In focussing on the South African position, we take the view that sometimes more can be learnt from a constitutional system that takes a different approach to an issue than from a nation that appears to be more similar. South Africa is a particularly useful comparator because of the extent to which its legal system has been restructured to incorporate a close engagement with international law. For example, the *South African Constitution* contains an injunction requiring courts to consider international law when interpreting the South African Bill of Rights contained in Chapter 2 of the *South African Constitution*.¹⁷ South Africa's enforced engagement with international law over the last decade provides an informed basis and a developing body of case law against which to assess concerns regarding the Australian legal system's relationship with international law.

In Part II, we explore the constitutional systems of Australia and South Africa and set out some key differences and similarities. Although often descriptive, this material is important to the comparative exercise, as well as for readers from Australia, South Africa and other nations who are not familiar with both constitutional systems. It ensures that the comparison is undertaken in context and not simply on the basis of a shallower contrasting of the text of judgments. In Parts III and IV, we examine, respectively, the approaches of the High Court and the Constitutional Court to the use of international law in constitutional interpretation. In the case of Australia, we also identify assumptions and perceptions about international law that underlie the approach taken by different judges. We then draw our conclusions in Part V.

II COMPARING CONSTITUTIONS

A *Origins*

The Constitutions of Australia and South Africa reflect the vastly different social and political contexts from which they emerged. The 1901 *Australian Constitution* was drafted at two Constitutional Conventions held over 1891 and 1897–98. It was supported in referenda of the Australian people held over 1899 and 1900, and then enacted by the British Parliament as s 9 of the

¹⁶ David Jackson, 'Internationalisation of Rights and the Constitution' in Geoff Lindell, Cheryl Saunders and Robert French (eds), *Reflections on the Australian Constitution* (2003) 105; Simpson and Williams, above n 13; Kristen Walker, 'International Law as a Tool of Constitutional Interpretation' (2002) 28 *Monash University Law Review* 85; George Williams, 'Globalisation of the Constitution — The Impact of International Norms' in Geoff Lindell, Cheryl Saunders and Robert French (eds), *Reflections on the Australian Constitution* (2003) 192. The area has also been tackled in other nations: see above n 6 and accompanying text.

¹⁷ *South African Constitution* s 39(1)(b).

Commonwealth of Australia Constitution Act 1900 (Imp) 63 & 64 Vict, c 12. As John Quick and Robert Garran note, early Australian history was characterised by ‘the separate progress of widely distant coast settlements, and their endeavours to become self-sufficient and to obtain independent self-governing institutions.’¹⁸ The key role of the *Australian Constitution* was to bring these settlements together ‘to constitute the Commonwealth of Australia’ and ‘to unite in one indissoluble Federal Commonwealth under the Crown’.¹⁹ Hence, it served to lay the foundations of nationhood, created the institutions and tiers of government and divided power between them.

The drafting Conventions were not representative of the broader community, given the (not surprising for the time) absence of women and Aboriginal people.²⁰ As enacted, the *Australian Constitution* neither expresses the responsibilities of government towards the people nor contains a Bill of Rights. Further, it still embodies certain archaic attitudes inherited from the time of its drafting, such as the ‘race’ power in s 51(xxvi), which granted federal Parliament power to make laws for ‘[t]he people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws’.²¹ In the words of Edmund Barton, the Leader of the 1897–98 Convention, Australia’s first Prime Minister and an original member of the High Court, this power was enacted to enable the Parliament ‘to regulate the affairs of the people of coloured or inferior races who are in the Commonwealth.’²² While the exclusion of indigenous people from the power was removed in 1967 (along with a discriminatory reference in s 127 that prevented indigenous peoples from being included in any ‘reckoning [of] the numbers of the people of the Commonwealth’²³), the *Australian Constitution* has never been amended to provide that the race power can only be used for the benefit, rather than the detriment, of a particular race. This power and other provisions show how the focus of the *Constitution* has never been upon the rights of citizens, but on the interaction of the institutions and tiers of government. As expressed by Lois O’Donoghue, former Chairperson of the Aboriginal and Torres Strait Islander Commission:

[The *Constitution*] says very little about what it is to be Australian. It says practically nothing about how we find ourselves here — save being an

¹⁸ John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 79.

¹⁹ *Australian Constitution* Preamble.

²⁰ ‘It was for the most part the big men of the established political and economic order, the men of property or their trusted allies, who moulded the federal Constitution Bill’: L F Crisp, *Australian National Government* (4th ed, 1978) 14. Cf Helen Irving, ‘Fair Federalists and Founding Mothers’ in Helen Irving (ed), *A Woman’s Constitution?: Gender & History in the Australian Commonwealth* (1996) 1.

²¹ *Australian Constitution* s 51(xxvi), amended by *Constitution Alteration (Aboriginals) Act 1967* (Cth).

²² *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 27 January 1898, 228–9 (Edmund Barton).

²³ *Australian Constitution* s 127, repealed by *Constitution Alteration (Aboriginals) Act 1967* (Cth).

amalgamation of former colonies. It says nothing of how we should behave towards each other as human beings and as Australians.²⁴

As an instrument contained in an Imperial statute, the original authority for the *Australian Constitution* was generally seen as being derived from the British Parliament.²⁵ However, in more recent times, it has become widely accepted that the will and authority of the Australian people, while always an additional political (if not legal) basis of the *Australian Constitution*'s authority, is now, following Australia's acquisition of independence, the sole basis of this authority. While the date at which this occurred remains unclear, Mason CJ stated in *Australian Capital Television Pty Ltd v Commonwealth* that the passage of the *Australia Acts 1986* (Cth) 'marked the end of the legal sovereignty of the Imperial Parliament and recognized that ultimate sovereignty resided in the Australian people.'²⁶ Similarly, as Deane J said in *Theophanous v Herald & Weekly Times Ltd*, '[t]he present legitimacy of the Constitution as the compact and highest law of our nation lies exclusively in the original adoption (by referenda) and subsequent maintenance (by acquiescence) of its provisions by the people.'²⁷ Such dicta are consistent with the amendment process in s 128 of the *Constitution*, which requires any change to the *Constitution* to be approved by the Australian people voting at a referendum.

The *South African Constitution* stands in stark contrast. That *Constitution* can only be understood in the context of the devastating impact of the system of apartheid in South Africa, the collapse of which paved the way for the drafting of the *Constitution*. In this system, the degradation of a majority of the population was achieved not in spite of, but by means of, the legal system established by the former *South African Constitution*. As Mahomed DP stated in one of the early judgments of the South African Constitutional Court, '[t]he legitimacy of law itself was deeply wounded as the country haemorrhaged dangerously in the face of this tragic conflict which had begun to traumatise the entire nation.'²⁸

Following the 1990 decriminalisation of the African National Congress, the South African Communist Party, the Pan Africanist Congress and other liberation movements, lengthy negotiations between the National Party government, these groups and other organisations led to the drafting of an *Interim Constitution*. This *Constitution* was approved by the South African Parliament on 22 December 1993 and came into force on 27 April 1994, the day of South Africa's first democratic election. The newly elected Parliament, sitting as a Constitutional Assembly, was then charged with the drafting of a final constitution. This process was inclusive, extending to hundreds of public meetings, an extensive radio and television campaign, and the publication of a free monthly newsletter by the Constitutional Assembly, *Constitutional Talk*, which reviewed in detail the

²⁴ As cited in Frank Brennan, *Securing a Bountiful Place for Aborigines and Torres Strait Islanders in a Modern, Free and Tolerant Australia* (1994) 18.

²⁵ Geoff Lindell, 'Why is Australia's *Constitution* Binding? — The Reasons in 1900 and Now, and the Effect of Independence' (1986) 16 *Federal Law Review* 29, 30.

²⁶ (1992) 177 CLR 106, 138 (citations omitted).

²⁷ (1994) 182 CLR 104, 171.

²⁸ *Azanian Peoples Organization v President of the Republic of South Africa* [1996] 4 SALR 671, 676 ('AZAPO').

submissions, committee activities and debates in the Assembly.²⁹ Over 2.5 million submissions were received from the public.³⁰

The *Interim Constitution* imposed two main obstacles to the adoption of the final *Constitution*. First, the text had to be adopted by two-thirds of the Constitutional Assembly or else put to a national referendum.³¹ Secondly, the Constitutional Court of South Africa was required to certify that the text complied with 34 Constitutional Principles contained in a schedule to the *Interim Constitution*.³² Although a first draft was adopted by 87 per cent of the Constitutional Assembly, the Constitutional Court found fault with a number of provisions and referred it back. After these had been remedied, the Constitutional Court gave approval on 4 December 1996. The new *South African Constitution* — the *Constitution of the Republic of South Africa Act 108 of 1996* — was signed by President Nelson Mandela on 10 December 1996. The ceremony took place on Human Rights Day at Sharpeville, the scene of the 1960 massacre of 69 demonstrators. The final *Constitution* came into force on 7 February 1997.

The *South African Constitution* is aimed not just at the creation of a new constitutional order, but at the fundamental transformation of the old legal system.³³ The *Interim Constitution* had described itself as

a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of color, race, class, belief or sex.³⁴

While this epilogue was removed from the final 1996 *Constitution*, its Preamble maintains the focus on transformation:

We, the people of South Africa,
Recognise the injustices of our past;
Honour those who suffered for justice and freedom in our land;
Respect those who have worked to build and develop our country; and
Believe that South Africa belongs to all who live in it, united in our diversity.
We therefore, through our freely elected representatives, adopt this *Constitution*
as the supreme law of the Republic so as to
Heal the divisions of the past and establish a society based on democratic
values, social justice and fundamental human rights;

²⁹ Heinz Klug, 'Historical Background' in Matthew Chaskalson et al (eds), *Constitutional Law of South Africa* (1998) 2–15.

³⁰ Constitutional Assembly (June 1995) *Constitutional Talk: The Official Newsletter of the Constitutional Assembly* 1, cited in Hoyt Webb, 'The Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law' (1998) 1 *University of Pennsylvania Journal of Constitutional Law* 205, 206.

³¹ *Interim Constitution* s 73.

³² *Interim Constitution* s 71.

³³ See, eg, the judgment of Mahomed J in *S v Makwanyane* [1995] 3 SALR 391, 487–98.

³⁴ *Interim Constitution* s 251.

Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;

Improve the quality of life of all citizens and free the potential of each person; and

Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

May God protect our people.

Nkosi Sikelel' iAfrika. Morena boloka setjhaba sa heso.

God seën Suid-Afrika. God bless South Africa.

Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika.³⁵

South Africa's constitutional document does more than establish a governmental framework. It seeks to entrench what has been described as 'an objective, normative value system',³⁶ including a wide-ranging Bill of Rights. As described by O'Regan J in the recent case of *Kaunda v President of the Republic of South Africa*:

The leitmotif of our *Constitution* is thus the promotion and protection of fundamental human rights. ... Our *Constitution* thus asserts as a foundational value the need to protect and promote human rights. This value informs all the obligations and powers conferred by the *Constitution* upon the state. The importance of that foundational value is to be understood in the context of a growing international consensus that the promotion and protection of human rights is part of the responsibility of both the global community and individual states, and that there is a need to take steps to ensure that those fundamental human rights recognised in international law are not infringed or impaired.³⁷

The *South African Constitution* can be amended by Parliament alone. Amendments must be introduced into the National Assembly, the first house of the National Parliament. Essentially, two-thirds of the National Assembly need to pass the Bill to amend the *Constitution*. In addition, amendments that affect the 'Founding Provisions' in s 1, which includes the Bill of Rights, the National Council of Provinces and other provincial matters, require the support of six of the nine provinces in the National Council of Provinces, the second house of the National Parliament.

The *South African Constitution's* delivery of a nation from apartheid differs markedly from the *Australian Constitution's* peaceful construction of a new federation. Sir Anthony Mason, Chief Justice of the High Court from 1987 to 1995, has questioned whether the limited scope of the *Australian Constitution* derives from the fact that '[a] crisis such as a War of Independence, a Civil War or a proposed union of separate communities in a federation is required to kindle

³⁵ *South African Constitution* Preamble.

³⁶ *Carmichele v Minister of Safety and Security* [2001] 4 SALR 938, 961 (Ackermann and Goldstone JJ).

³⁷ (2004) CCT 23/04 [220]–[221].

the statesmanship, vision and sense of purpose essential to the success³⁸ of constitutional drafting. Without such a motivating force and a driving sense of the injustices that can be perpetrated by government, it is not surprising that the *Australian Constitution* is so different from its South African counterpart.

B *Judicial Review and Constitutional Interpretation*

Both the High Court and the Constitutional Court are seen as the ‘guardians’ of their respective Constitutions. This rests upon their power to strike down legislative or other actions that are inconsistent with the *Constitution*. While the *Australian Constitution* does not expressly confer a power of judicial review, the power forms an important assumption of the system and the High Court has asserted such a role. As Fullagar J stated in *Australian Communist Party v Commonwealth*, ‘in our system the principle of *Marbury v Madison*³⁹ is accepted as axiomatic’.⁴⁰ This is reflected in s 30 of the *Judiciary Act 1903* (Cth), which, in accordance with s 76 of the *Australian Constitution*, provides that ‘the High Court shall have original jurisdiction: (a) in all matters arising under the *Constitution* or involving its interpretation’.

The *South African Constitution* is more explicit in setting out the role of the courts. Section 167 provides that the Constitutional Court ‘is the highest court in all constitutional matters’, which are defined as ‘any issue involving the interpretation, protection or enforcement of the *Constitution*’. Section 172(1)(a) also states:

When deciding a constitutional matter within its power, a court ... must declare that any law or conduct that is inconsistent with the *Constitution* is invalid to the extent of its inconsistency.

While both the High Court of Australia and the South African Constitutional Court possess a power of judicial review, they have approached the task of constitutional interpretation very differently.⁴¹ While there is no one interpretive approach to which Australian judges subscribe, Justice Selway of the Federal Court of Australia has argued extra-judicially, we believe correctly, that the judges of the High Court tend fundamentally to be ‘textualists’, in that they rely on the text of the *Constitution* as the primary interpretative tool.⁴² Given this and the original enactment of the *Constitution* in an Imperial statute, it is not surprising that judges have found that constitutional interpretation should follow the rules of statutory interpretation. Higgins J, while noting the special nature of the *Australian Constitution*, stated that ‘we are to interpret the words of the *Constitution* on the same principles of interpretation as we apply to any ordinary

³⁸ Sir Anthony Mason, ‘The Role of a Constitutional Court in a Federation: A Comparison of the Australian and United States Experience’ (1986) 16 *Federal Law Review* 1, 1–2.

³⁹ 5 US (1 Cranch) 137 (1803).

⁴⁰ (1951) 83 CLR 1, 262.

⁴¹ Of course, there are also very significant variations in approach between the individual judges of each court.

⁴² Justice B M Selway, ‘Methodologies of Constitutional Interpretation in the High Court of Australia’ (2003) 14 *Public Law Review* 234, 239.

law'.⁴³ Most famously, in 1920 in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*, Knox CJ, Isaacs, Rich and Starke JJ cited authority in favour of the proposition that '[t]he duty of the Court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction.'⁴⁴ This approach has not been confined to the early years of the Court.⁴⁵ In 2004, in *Singh*, McHugh J stated that

[b]ecause the *Constitution* is contained in a statute of the Imperial Parliament and the people of the Commonwealth have agreed to be governed under the *Constitution*, it seems obvious that the best guides to its interpretation are the general rules of statutory interpretation.⁴⁶

Even given such an approach, judges of the High Court of Australia often acknowledge that the *Constitution* is 'a statute of a special kind'.⁴⁷ As Dixon J stated, 'it is a *Constitution* we are interpreting, an instrument of government meant to endure and conferring powers expressed in general propositions wide enough to be capable of flexible application to changing circumstances.'⁴⁸ This was expressed most eloquently by Alfred Deakin, then Attorney-General and later Prime Minister, who said on 18 March 1902, in speaking to the Judiciary Bill 1902 (Cth) that came to establish the High Court:

[The] *Constitution* was drawn, and inevitably so, on large and simple lines, and its provisions were embodied in general language, because it was felt to be an instrument not to be lightly altered, and indeed incapable of being readily altered; and, at the same time, was designed to remain in force for more years than any of us can foretell, and to apply under circumstances probably differing most widely from the expectations now cherished by any of us.⁴⁹

Deakin considered that the High Court would have a special role in ensuring that the *Constitution* remained relevant to future generations:

[The High Court] is one of the organs of Government which enables the *Constitution* to grow and to be adapted to the changeful necessities and circumstances of generation after generation that the High Court operates. Amendments achieve direct and sweeping changes, but the court moves by

⁴³ *A-G (NSW) v Brewery Employees' Union of New South Wales* (1908) 6 CLR 469, 611–12. See also *Tasmania v Commonwealth* (1904) 1 CLR 329, 358–60 (O'Connor J).

⁴⁴ (1920) 28 CLR 129, 142–3 ('*Engineers Case*'). The authority cited was *Vacher & Sons Ltd v London Society of Compositors* [1913] AC 107, 118 (Lord MacNaghten).

⁴⁵ This approach can be seen as consistent with the view that the *Constitution* now owes its authority to the Australian people. Geoff Lindell has argued that 'the original agreement of the Australian people to its adoption was for its adoption in the form in which it emerged, namely, as a British statute; and thus to be interpreted in the way in which such instruments were interpreted at that time': Lindell, above n 25, 44.

⁴⁶ (2004) 209 ALR 355, 372 (citations omitted). See also Gleeson CJ, finding that there is 'no reason to doubt that interpretative principles of the same kind as those set out in s 15AB [of the *Acts Interpretation Act 1901* (Cth)] are also relevant to the *Constitution*, making due allowance for the nature of the *Constitution* as an instrument of government and not an ordinary statute': at 363.

⁴⁷ *Victoria v Commonwealth* (1971) 122 CLR 353, 394 (Windeyer J) ('*Payroll Tax Case*').

⁴⁸ *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29, 81.

⁴⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1902, 10 965 (Alfred Deakin).

gradual, often indirect, cautious, well considered steps, that enable the past to join the future, without undue collision and strife in the present.⁵⁰

Most High Court judges have taken a cautious approach to the adaptation of the *Australian Constitution* to political, social and economic developments. While the *Australian Constitution* has been interpreted over the course of a century to recast many of the original understandings of how the Australian federal system works, judges have been reluctant to bring about change in other areas, such as in regard to promoting interpretations supportive of the human rights of the Australian people.⁵¹ In general, the judges have not seen their role as interpreters of the *Australian Constitution* as being a transformative one, but as being constrained by the precepts of a cautious legalism.

In contrast, the Constitutional Court of South Africa actively engages in a transformative process. The change to the South African constitutional system in the 1990s has been accompanied by a similar, if contested, change in perceptions of the judicial role. The view of the South African courts during the apartheid era is represented in the 1992 decision in *Bongopi v Council of the State, Ciskei*,⁵² and is indicative of the more legalistic attitude that prevailed in the judiciary at that time:

This Court has always stated openly that it is not the maker of laws. It will enforce the law as it finds it. To attempt to promote policies that are not to be found in the law itself or to prescribe what it believes to be the correct public attitudes or standards in regard to those policies is not its function.⁵³

More recent judgments of the Constitutional Court reflect how its role has expanded beyond the enforcement of the terms of the *South African Constitution* to the enforcement of its spirit, the epicentre of which is the protection of fundamental rights. In their entry on 'Interpretation' in *Constitutional Law of South Africa*, Janet Kentridge and Derek Spitz expressed this through a distinction between the *Constitution* and ordinary legislation:

Unlike an ordinary statute, [the *Constitution*] is not the voice of the people speaking through the legislature. Rather, it is the embodiment of a social pact which acknowledges that democracy is something more than mere majority fiat; that there are areas into which the majority may not trespass. These areas are the domain of rights and the gatekeepers of this domain are the courts. The courts, when interpreting the *Constitution*, are determining the way in which a commitment to a set of fundamental values translates and applies in a specific context.⁵⁴

⁵⁰ Ibid 10 967–8 (Alfred Deakin).

⁵¹ George Williams, *Human Rights under the Australian Constitution* (1999) 228–34.

⁵² [1992] 3 SALR 250.

⁵³ Ibid 265 (Pickard CJ).

⁵⁴ Janet Kentridge and Derek Spitz, 'Interpretation' in Matthew Chaskalson et al (eds), *Constitutional Law of South Africa* (1998) 11–12.

Shortly after the entry into force of South Africa's *Interim Constitution*, in the 1995 case of *S v Williams*,⁵⁵ Langa J espoused his view of the changing role of the courts in the maintenance of South Africa's legal system:

Courts do have a role to play in the promotion and development of a new culture 'founded on the recognition of human rights', in particular with regard to those rights which are enshrined in the *Constitution*. It is a role which demands that a court should be particularly sensitive to the impact which the exercise of judicial functions may have on the rights of individuals who appear before them; vigilance is an integral component of this role, for it is incumbent on structures set up to administer justice to ensure that, as far as possible, these rights, particularly of the weakest and the most vulnerable, are defended and not ignored. One of the implications of the new order is that old rules and practices can no longer be taken for granted; they must be subjected to constant re-assessment to bring them into line with the provisions of the *Constitution*.⁵⁶

In *S v Makwanyane*, Mokgoro J referred to the decline of the more legalistic approach of the apartheid era.⁵⁷ He observed that the new *South African Constitution* had changed the Court's interpretive task into one that 'frequently involves making constitutional choices by balancing competing fundamental rights and freedoms.'⁵⁸ He considered that this could 'only be done by reference to a system of values extraneous to the constitutional text itself, where these principles constitute the historical context in which the text was adopted and which help to explain the meaning of the text.'⁵⁹

Support has been expressed among South African judges for an approach, described by Chaskalson P, 'which, whilst paying due regard to the language that has been used, is "generous" and "purposive" and gives expression to the underlying values of the Constitution.'⁶⁰ This is tied to the perceived role of the *Constitution* in the 'transformation' of South Africa from the 'grossly unacceptable features of the past to a conspicuously contrasting "future founded on the recognition of human rights, democracy and peaceful co-existence"'.⁶¹

III CONSTITUTIONAL INTERPRETATION AND INTERNATIONAL LAW IN AUSTRALIA

A *The Australian Constitution and International Law*

The text of the *Australian Constitution* neither mentions international law nor the role such norms should play in the interpretive process. While earlier drafts of the *Constitution* incorporated greater reference to the relationship between

⁵⁵ [1995] 3 SALR 632.

⁵⁶ *Ibid* 635–6 (Langa J) (citations omitted).

⁵⁷ [1995] 3 SALR 391, 498.

⁵⁸ *Ibid*.

⁵⁹ *Ibid*.

⁶⁰ *Ibid* 403. See also *Soobramoney v Minister of Health Kwazulu-Natal* [1998] 1 SALR 765, 772–3 (Chaskalson P).

⁶¹ [1995] 3 SALR 391, 488 (Mahomed J). See, eg, *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* [2004] 4 SALR 490, 521–3 (Ngcobo J); *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* [2001] 1 SALR 545, 558–9 (Langa DP).

international treaties and the domestic legal system, these were removed from the version that was enacted.⁶² This reflected the drafters' reluctance to suggest that Australia was entitled to enter into treaties on its own behalf⁶³ (the treaty-making power then being the prerogative of the Imperial Crown), and a perception that international law was not law, but a discretionary set of norms that states could neglect at will.⁶⁴ The most important reference to international law in the *Australian Constitution* is found in s 51(xxix), which grants the Commonwealth Parliament the power to pass laws with respect to 'external affairs'. It has been interpreted by the High Court to enable the Parliament to pass laws that implement any obligation that the federal executive assumes under an international treaty or convention.⁶⁵

Given that the *Constitution* is silent on the use of international law in its interpretation, the issue has been left to the judiciary to resolve. A definitive position has not emerged. A review of the judgments of the High Court of Australia reveals a number of often divergent approaches. It is possible to identify at least five sometimes overlapping views:

- 1 international law may not be used in the interpretation of the *Constitution*;⁶⁶
- 2 the *Constitution*, in the event of an ambiguity, should not be presumed to be consistent with international law;⁶⁷
- 3 the legislative powers of the Commonwealth in s 51 of the *Constitution* should not be read down to conform to international law;⁶⁸
- 4 international law may be used in the interpretation of the *Constitution*;⁶⁹
- 5 the *Constitution*, in the event of an ambiguity, should be presumed to be consistent with international law.⁷⁰

These views and the underlying case law have been analysed by other authors.⁷¹ One position that has garnered a great deal of support — to the extent

⁶² Charlesworth et al, above n 12, 428–31.

⁶³ Quick and Garran, above n 18, 770.

⁶⁴ *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 9 September 1897, 240 (Edmund Barton).

⁶⁵ *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dam Case*').

⁶⁶ See, eg, *Al-Kateb v Godwin* (2004) 208 ALR 124, 140 (McHugh J): 'courts cannot read the *Constitution* by reference to the provisions of international law that have become accepted since the *Constitution* was enacted in 1900'.

⁶⁷ See, eg, *Western Australia v Ward* (2002) 213 CLR 1, 390–1 (Callinan J).

⁶⁸ See, eg, *Horta v Commonwealth* (1994) 181 CLR 183, 195 (The Court): 'there is simply no basis either in s 51(xxix) or in any other provision of the *Constitution* for the plaintiffs' submission that the legislative power conferred by s 51(xxix) must be confined within the limits of "Australia's legislative competence as recognised by international law".'

⁶⁹ See, eg, *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 611–12 (Deane J): 'It is reinforced by the provisions of international conventions concerned with the recognition and protection of fundamental human rights.' Deane J cited the *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/RES/217A (III) (1948) art 11(2); *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222, art 7 (entered into force 3 September 1953) ('*ECHR*'); *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 123, art 9 (entered into force 18 July 1978).

⁷⁰ See, eg, *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 418 (Kirby J): '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' (citations omitted).

that it would be difficult to overrule — is that the legislative powers of the Commonwealth are not to be read down to conform to international law. The rationale underlying this principle, first expressed by Dixon J in *Polites v Commonwealth*,⁷² was explained by McHugh J in *Al-Kateb v Godwin* as follows:

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. The rationale for the rule and its operation is inapplicable to a *Constitution* — which is a source of, not an exercise of, legislative power. The rule, where applicable, operates as a statutory implication. But the legislature is not bound by the implication. It may legislate in disregard of it. If the rule *were* applicable to the *Constitution*, it would operate as a restraint on the grants of power conferred. The Parliament would not be able to legislate in disregard of the implication.⁷³

The approach that has generated the most debate is Kirby J's 'interpretive principle', which has extended to incorporate the position most in favour of the use of international law in view five, above.⁷⁴ His Honour first expressed this in a judicial context in *Newcrest Mining (WA) Ltd v Commonwealth*:

international law is a legitimate and important influence on the development of the common law and constitutional law, especially when international law declares the existence of universal and fundamental rights. To the full extent that its text permits, Australia's *Constitution*, as the fundamental law of government in this country, accommodates itself to international law, including in so far as that law expresses basic rights. The reason for this is that the *Constitution* not only speaks to the people of Australia who made it and accept it for their governance. It also speaks to the international community as the basic law of the Australian nation which is a member of that community.⁷⁵

Kirby J then applied this approach to support his conclusion that s 51(xxix) of the *Australian Constitution*, which requires that the Commonwealth provide 'just terms' in any acquisition of property, applies to laws passed by the Commonwealth for the territories under s 122. Although other judges reached the same conclusion, Kirby J was alone in relying on international law. More recently, he has suggested that international law may assist in clarifying what will amount to 'just terms' in relation to a particular Commonwealth acquisition.⁷⁶

Kirby J also applied his interpretative principle in his dissent in *Kartinyeri v Commonwealth*.⁷⁷ His Honour referred to the prohibition in

⁷¹ See above n 16.

⁷² (1945) 70 CLR 60, 78. The notion that the Commonwealth Parliament can pass laws that are inconsistent with international law was unanimously reaffirmed in *Horta v Commonwealth* (1994) 181 CLR 183.

⁷³ (2004) 208 ALR 124, 141–2 (emphasis in original).

⁷⁴ Justice Michael Kirby, 'Domestic Implementation of International Human Rights Norms' (1999) 5 *Australian Journal of Human Rights* 109, 121.

⁷⁵ (1997) 190 CLR 513, 657–8.

⁷⁶ *Commonwealth v Western Australia* (1999) 196 CLR 392, 461.

⁷⁷ (1998) 195 CLR 337, 390–1.

international law of ‘detrimental distinctions on the basis of race’⁷⁸ and applied this to support his conclusion that the federal Parliament’s race power ‘does not extend to the enactment of laws detrimental to, or discriminatory against, the people of any race (including the Aboriginal race) by reference to their race.’⁷⁹ Kirby J justified his approach by noting that the High Court had already allowed the use of international law in the resolution of ambiguity in the common law or a statute. His Honour argued that use of an international law interpretative principle

does not involve the spectre, portrayed by some submissions in these proceedings, of mechanically applying international treaties, made by the Executive Government of the Commonwealth, and perhaps unincorporated, to distort the meaning of the *Constitution*. It does not authorise the creation of ambiguities by reference to international law where none exist. It is not a means for remaking the *Constitution* without the ‘irksome’ involvement of the people required by s 128.⁸⁰

Kirby J also defined the circumstances when reference might be had to international law principles:

There is no doubt that, if the constitutional provision is clear and if a law is clearly within power, no rule of international law, and no treaty (including one to which Australia is a party) may override the *Constitution* or any law validly made under it. But that is not the question here ... Where there is ambiguity, there is a strong presumption that the *Constitution*, adopted and accepted by the people of Australia for their government, is not intended to violate fundamental human rights and human dignity ... In the contemporary context it is appropriate to measure the prohibition by having regard to international law as it expresses universal and basic rights.⁸¹

Kirby J’s interpretive principle has not received the support of any of the other High Court judges. Indeed, his continuing reliance upon it may have been what provoked the exchange between himself and McHugh J in *Al-Kateb v Godwin*.⁸² In that case, in the face of the strongly conflicting judgment of McHugh J, Kirby J wrote an equally forceful judgment in support of the principle. His Honour acknowledged that the principle he asserted was not yet accepted by a majority of the Court, but referred to it as ‘another step in the process of evolution’ in the understanding of the *Constitution*.⁸³ In responding to the criticism of McHugh J, Kirby J engaged in a more detailed discussion than in previous judgments of the normative basis of the principle.

His Honour’s judgment sets out three bases for the principle. First, his Honour tied it to a purposive approach to constitutional interpretation. His Honour justified this approach on the basis that ‘domestic courts when deciding cases to which international law is relevant, are exercising a form of international

⁷⁸ Ibid 418 (citations omitted).

⁷⁹ Ibid 411.

⁸⁰ Ibid 417–18 (citations omitted).

⁸¹ Ibid 418 (citations omitted).

⁸² *Al-Kateb v Godwin* (2004) 208 ALR 124, 140 (McHugh J), 173 (Kirby J).

⁸³ Ibid 167.

jurisdiction⁸⁴ and accordingly should give effect to interpretative principles defensive of the rights upheld by international law. Second, his Honour referred to the need for a contextual approach to interpretation. In this regard, his Honour noted the impact on the *Australian Constitution* of developments in the international legal framework since 1945; in particular, ‘the legal expressions of human rights and fundamental freedoms, founded in the notions of human dignity and the principle of justice recognised in the *Charter of the United Nations*’.⁸⁵ Third, his Honour reiterated the position expressed in *Newcrest Mining (WA) Ltd v Commonwealth* that the *Constitution* speaks not only to the people of Australia but also to the international community.⁸⁶

The remainder of the five views set out above have yet to be the subject of careful reasoning, and indeed are sometimes expressed with more rhetorical than analytical force. In this, they demonstrate how judicial approaches to the issue of international law in constitutional interpretation can be affected by attitudes, anxieties and assumptions about international law. In the next section we examine these before testing them against the experience of the South African legal system. The task is made difficult by the fact that many of the Australian judgments on the issue often contain little detailed exposition of why a position has been taken.

B Attitudes, Anxieties and Assumptions

1 International Law Is Pervasive and Vague

This concern has several strands. It includes a perception that the body of international law has expanded to such an extent that its use might overwhelm any domestic system that allowed itself to be influenced by it. This conjures a picture of carefully crafted domestic norms and decades of legal development being swept away by a tidal wave of international law. Another perception is that international law is a chaotic set of values that will interfere with the order and discipline of the domestic legal structure. In *Al-Kateb v Godwin*, McHugh J spoke with concern about the ‘widespread nature of the sources of international law under modern conditions’.⁸⁷ The pervasive scope of international law is also made all the more threatening by the perceived amorphousness of its principles. Hence, Callinan J in *Western Australia v Ward* described international law as ‘vague and conflicting’.⁸⁸ In *AMS v AIF*, Gleeson CJ, McHugh and Gummow JJ refused to apply international instruments in statutory interpretation because they were, ‘as to some of their provisions, aspirational rather than normative’.⁸⁹

⁸⁴ *Ibid* (citations omitted).

⁸⁵ *Ibid* 168 (citations omitted).

⁸⁶ (1997) 190 CLR 513, 658.

⁸⁷ (2004) 208 ALR 124, 141.

⁸⁸ (2002) 213 CLR 1, 389.

⁸⁹ (1999) 199 CLR 160, 180.

2 *International Law Is Not Relevant to the Domestic Legal Context*

Another perception of international law is that it is ill-adapted to the domestic context and, as a result, is not a relevant influence on the domestic legal system. In *Al-Kateb v Godwin*, McHugh J said:

those who propose that the *Constitution* should be read so as to conform with the rules of international law are forced to argue that rules contained in treaties made by the executive government are relevant in interpreting the *Constitution*. It is hard to accept, for example, that the meaning of the trade and commerce power can be affected by the Australian government entering into multilateral trade agreements. It is even more difficult to accept that the *Constitution's* meaning is affected by rules created by the agreements and practices of other countries.⁹⁰

In *Western Australia v Ward*, Callinan J rejected judicial use of international law on the basis that international law is not adaptable to the domestic context.⁹¹ He stated that the proposition that international law demands that Australian law be moulded in a particular way without regard to the conditions in this country is 'unacceptable'. He considered that acceptance of such a proposition 'would be to deny that Australian courts have long shaped the law for the peculiar circumstances of this country, without the need to resort to shifting prescriptions often designed for different times, places and circumstances.'⁹²

Similarly, the view is often expressed that international law is not relevant to the Australian people, as it is a body of principles applicable to states and not their citizens. In one of the earliest cases discussing the role of international law in constitutional interpretation, Starke J rejected the influence of international law to the interpretation of the legislative powers of the Commonwealth because the Australian government was sovereign in relation to matters within its territorial boundaries:

International law or the law of nations is a law for the intercourse of States with one another and not a law for individuals ... The law of nations, as I understand it, concedes that all persons or things within the territory of a State fall under its territorial supremacy and are subject to its jurisdiction, legislative, administrative and judicial ... [T]o limit the constitutional power of sovereign States or their subordinate authorities [by the law of nations] denies the supremacy of those States within their own territory, which is contrary to the principles of the law of nations itself.⁹³

Similar comments, but from a different viewpoint, were made by Callinan J in *Western Australia v Ward*. He rejected the use of international law in constitutional interpretation on the basis that the *Constitution* speaks only to the Australian people and not to the international community:

The provisions of the *Constitution* are not to be read in conformity with international law. It is an anachronistic error to believe that the *Constitution*, which was drafted and adopted by the people of the colonies well before

⁹⁰ (2004) 208 ALR 124, 144–5.

⁹¹ (2002) 213 CLR 1, 389.

⁹² *Ibid.*

⁹³ *Polites v Commonwealth* (1945) 70 CLR 60, 75.

international bodies such as the United Nations came into existence, should be regarded as speaking to the international community. The *Constitution* is our fundamental law, not a collection of principles amounting to the rights of man, to be read and approved by people and institutions elsewhere. The approbation of nations does not give our *Constitution* any force, nor does its absence deny it effect. Such a consideration should, therefore, have no part to play in interpreting our basic law.⁹⁴

A contrary view regarding international law's relevance to the Australian people has been put by Mason CJ and Deane J in *Minister for Immigration and Ethnic Affairs v Teoh*,⁹⁵ and by Kirby J in *Newcrest Mining (WA) Ltd v Commonwealth*.⁹⁶

3 *Use of International Law Oversteps the Bounds of the Judiciary*

One of the main arguments relied upon by McHugh J in *Al-Kateb v Godwin* against the use of international law in constitutional interpretation is that it would overstep the legitimate role of the judiciary.⁹⁷ His Honour viewed the use of international law in this context as amounting to an amendment of the *Constitution* in disregard of the amendment procedure in s 128.⁹⁸ McHugh J drew a distinction between 'rules of international law' and 'political, social and economic developments since 1900'.⁹⁹ His Honour acknowledged that the latter 'may result in insights concerning the meaning of the *Constitution* that were not present to earlier generations.'¹⁰⁰ However:

Rules are too specific to do no more than provide insights into the meanings of the constitutional provisions. Either the rule is already inherent in the meaning of the provision or taking it into account alters the meaning of the provision.¹⁰¹

Conversely, Kirby J concluded that the 'principles of international law' are an appropriate influence on the meaning of constitutional provisions.¹⁰² His Honour acknowledged that '[t]hey do not *bind* as other "rules" do. But the principles they express can *influence* legal understanding.'¹⁰³ His Honour rejected McHugh J's suggestion that his approach was inconsistent with s 128 of the *Constitution*, contending that, beyond the process of formal amendment, the High Court has a role of adapting the *Constitution* to changing times where this is proper and compatible with constitutional text and legal principle.¹⁰⁴

4 *International Law Requires Special Expertise*

A final concern hinted at in the judgment of McHugh J is the need for special expertise when using international law in constitutional interpretation. His

⁹⁴ (2002) 213 CLR 1, 390–1 (emphasis in original) (citations omitted).

⁹⁵ (1995) 183 CLR 273, 287.

⁹⁶ (1997) 190 CLR 513, 657–8.

⁹⁷ (2004) 208 ALR 124, 145.

⁹⁸ *Ibid* 142–3.

⁹⁹ *Ibid* 143.

¹⁰⁰ *Ibid*.

¹⁰¹ *Ibid* 144.

¹⁰² *Ibid* 169.

¹⁰³ *Ibid* 168 (emphasis in original).

¹⁰⁴ *Ibid* 169.

Honour expressed discomfort with the contemporary scope of international law, stating ‘[g]one are the days when the rules of international law were to be found in the writings of a few well-known jurists.’¹⁰⁵ In commenting on the interpretive presumption that legislation is consistent with international law, his Honour said:

Given the widespread nature of the sources of international law under modern conditions, it is impossible to believe that, when the parliament now legislates, it has in mind or is even aware of all the rules of international law. Legislators intend their enactments to be given effect according to their natural and ordinary meaning. Most of them would be surprised to find that an enactment had a meaning inconsistent with the meaning they thought it had because of a rule of international law which they did not know and could not find without the assistance of a lawyer specialising in international law or, in the case of a treaty, by reference to the proceedings of the Joint Standing Committee on Treaties.¹⁰⁶

The discomfort felt by many Australian judges, and indeed senior barristers, about international law is understandable. Much contemporary international law has been created after they finished their legal studies (which might not in any event have included subjects on the international legal order). In addition, few Australian lawyers have practised in the area (although the number is now increasing). In these circumstances, a lack of familiarity with a source of law that appears to be monolithic in scope and of a different nature than traditional domestic legal materials perhaps explains, although does not excuse, the reluctance of Australian judges to use international law in constitutional interpretation.

IV CONSTITUTIONAL INTERPRETATION AND INTERNATIONAL LAW IN SOUTH AFRICA

A *The South African Constitution and International Law*

The *South African Constitution* expressly incorporates international law into the domestic legal system in four main ways:

- 1 self-executing provisions of international treaties approved by the National Parliament form part of the law of South Africa unless inconsistent with the *Constitution* or an Act of Parliament;¹⁰⁷
- 2 customary international law forms part of the law of South Africa unless inconsistent with the *Constitution* or an Act of Parliament;¹⁰⁸
- 3 when interpreting legislation, courts ‘must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.’¹⁰⁹

¹⁰⁵ Ibid 141.

¹⁰⁶ Ibid.

¹⁰⁷ *South African Constitution* s 231(4).

¹⁰⁸ *South African Constitution* s 232.

¹⁰⁹ *South African Constitution* s 233.

This principle has been held to ‘apply equally to the provisions of the Bill of Rights and the *Constitution* as a whole’;¹¹⁰

- 4 when interpreting the Bill of Rights in the *Constitution*, ‘a court, tribunal or forum ... must consider international law’.¹¹¹

The *South African Constitution* therefore establishes a framework for using international law in constitutional interpretation. First, when interpreting the Bill of Rights, courts must consider international law. Second, when interpreting the Bill of Rights and the *Constitution* as a whole, courts must prefer any reasonable interpretation that is consistent with international law over any alternative interpretation that is inconsistent with international law. Third, to the extent that the *Constitution* is inconsistent with international law, the *Constitution* will prevail. In *S v Makwanyane*, Chaskalson P took a broad view of international law for these purposes, finding that ‘international law would include non-binding as well as binding law.’¹¹²

As Sachs J acknowledged in *S v Basson*, the extent of the relationship between international law and domestic law ‘is a relatively new area in our jurisprudence’.¹¹³ Nevertheless, the South African Constitutional Court has been grappling with the issue since the Court’s creation in 1995. It is possible to draw conclusions from a decade of case law about the impact of international law on the interpretation of the *South African Constitution*. In particular, we consider whether Australian attitudes, anxieties and assumptions about international law are warranted after examining the impact of international law on a legal system required to engage with it.

B *The Impact of International Law*

1 *Limited Use of International Law*

The injunction that international law ‘must’ be considered in interpreting the Bill of Rights might suggest that international law would be pervasive in the decisions of the South African Constitutional Court. To test this we have examined all of the decisions of that Court.¹¹⁴ Our survey reveals that the Court has actually made only limited use of international law in constitutional interpretation, whether in regard to the Bill of Rights or other contexts. As Table 1 demonstrates, of the 228 cases decided by the Constitutional Court over

¹¹⁰ *Kaunda v President of the Republic of South Africa* (2004) CCT 23/04 [33] (Chaskalson CJ).

¹¹¹ *South African Constitution* s 39(1)(b). This is stronger than the equivalent provision in the *Interim Constitution*, which had provided in s 35(1) that, in interpreting the Bill of Rights, ‘a court of law shall ... where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter’.

¹¹² [1995] 3 SALR 391, 413 (citations omitted).

¹¹³ *S v Basson* (2004) CCT 30/03 [121].

¹¹⁴ All decisions — substantive and procedural — of the Constitutional Court are included: Constitutional Court of South Africa <<http://www.concourt.gov.za/>>. The exceptions are five decisions where the Court was certifying the Constitutions of the Republic (twice) and those of regional governments of the Western Cape (twice) and Kwazulu-Natal. The 28 decisions in 2000 do not include the mere publication of the orders of the Court in one case: see <<http://www.concourt.gov.za/files/grootboom/grootboom.pdf>>. However, the subsequently published reasons and orders are included.

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the decade from 1995 to the end of 2004,¹¹⁵ international law received detailed consideration in only 32 (or 14 per cent) of all cases. It was referred to in passing (usually by setting out the text of certain relevant treaty provisions without further analysis) in slightly more cases, namely 51 (or 22 per cent). Even if the cases are limited to those dealing with Bill of Rights issues,¹¹⁶ as in Table 2, international law only received detailed consideration in 22 per cent of the cases and was referred to in 33 per cent of cases. In the non-Bill of Rights cases listed in Table 3, international law was only given detailed consideration in 2 per cent of cases and referred to in 7 per cent of cases.

Table 1: Use of International Law in All Cases Decided by the Constitutional Court¹¹⁷

Year	Number of Cases Decided	International Law Referred To	Detailed Consideration
1995	14	5 (36%)	4 (29%)
1996	24	6 (25%)	4 (17%)
1997	17	6 (35%)	2 (12%)
1998	21	5 (24%)	2 (10%)
1999	19	3 (16%)	2 (11%)
2000	28	7 (25%)	7 (25%)
2001	26	4 (16%)	3 (12%)
2002	32	8 (25%)	4 (13%)
2003	25	2 (8%)	0
2004	22	5 (23%)	4 (18%)
Total	228	51 (22%)	32 (14%)

¹¹⁵ The tables are current to and include the case of *Radio Pretoria v Chairperson of the Independent Communications Authority of South Africa* (2004) CCT 38/04, decided on 8 December 2004.

¹¹⁶ Decisions of the Court are characterised as Bill of Rights cases where they deal with a substantive question relating to ch 2 of the *Constitution*. This includes decisions where a question relating to the Bill of Rights has been raised and dealt with at some length in the course of a procedural discussion (for example, the Court has considered the merits of a ch 2 submission in considering jurisdiction or in laying down rules for appeals to the Court); where there has been a substantive discussion of ch 2 in the course of the Constitutional Court developing the common law; and that are of a procedural character in relating to the scope of the Bill of Rights, such as whether it applies to actions arising before the commencement of the *Constitution*.

¹¹⁷ Two judgments are in Afrikaans: *Beyers v Elf Regters van die Grondwetlike Hof* [2002] 6 SALR 630 (included as a non-Bill of Rights case with no reference to international law); *S v Julies* [1996] 4 SALR 313 (included as a Bill of Rights case with no reference to international law).

Table 2: Use of International Law in Bill of Rights Cases Decided by the Constitutional Court

Year	Number of Cases Decided	International Law Referred To	Detailed Consideration
1995	11	5 (45%)	4 (36%)
1996	16	6 (38%)	4 (25%)
1997	13	5 (38%)	2 (15%)
1998	13	4 (31%)	2 (15%)
1999	11	3 (27%)	2 (18%)
2000	18	6 (33%)	6 (33%)
2001	13	4 (31%)	3 (23%)
2002	16	7 (44%)	4 (25%)
2003	12	2 (17%)	0
2004	14	3 (21%)	3 (21%)
Total	137	45 (33%)	30 (22%)

Table 3: Use of International Law in Non-Bill of Rights Cases Decided by the Constitutional Court

Year	Number of Cases Decided	International Law Referred To	Detailed Consideration
1995	3	0	0
1996	8	0	0
1997	4	1 (25%)	0
1998	8	1 (13%)	0
1999	8	0	0
2000	10	1 (10%)	1 (10%)
2001	13	0	0
2002	16	1 (7%)	0
2003	13	0	0
2004	8	2 (25%)	1 (13%)
Total	91	6 (7%)	2 (2%)

The relatively limited use of international law in constitutional interpretation has led to criticism of the Constitutional Court for failing to have greater regard to such material.¹¹⁸ Particularly notable is the Court's decision in *AZAPO*, in which the constitutionality of the *Promotion of National Unity and Reconciliation Act 34 of 1995* (SA) (granting amnesty from both criminal prosecutions and civil claims to members of the apartheid police responsible for killing anti-apartheid activists) was challenged. John Dugard has remarked that international law 'received short shrift' in the case:

The Court considered only the question whether the provisions of the 1949 *Geneva Conventions* requiring prosecution for 'grave breaches' were applicable (which it held were not applicable to the South African situation), but made no attempt to examine whether the customary law rules relating to genocide, torture, war crimes and particularly crimes against humanity required prosecution of offenders. As apartheid has been labelled as a crime against humanity by the General Assembly and the 1973 *International Convention on the Suppression and Punishment of the Crime of Apartheid*, and seems to fall squarely within the accepted definitions of this crime, it is surprising that no attempt was made to address the question whether customary international law requires the prosecution of those who commit this crime, particularly in respect of systematic murder, torture and disappearances which were crimes under South African law before 1990.¹¹⁹

A different perspective can be gained by having regard to the case law considering a particular right, for example, the right to equality in s 9 of the *South African Constitution* (previously s 8 of the *Interim Constitution*). It has been said that 'the dominant theme of the *Constitution* is the achievement of equality',¹²⁰ with the right to equality described as lying 'at the very heart of the *Constitution*'¹²¹ and considered as fundamental to signalling 'a ringing and decisive break with a past which perpetuated inequality and irrational discrimination and arbitrary governmental and executive action.'¹²² Of all the constitutional provisions, the right to equality is therefore perceived as one of the most fundamental to the development and transformation of the new South African legal order. Such a right to equality potentially enhances the need to have regard to international jurisprudence in this context, if only to lend legitimacy to its development. Certainly, the concepts of 'equality' and 'non-discrimination' are used in a number of international instruments,¹²³ and are widely discussed in

¹¹⁸ See, eg, Richard Blake, 'The World's Law in One Country: The South African Constitutional Court's Use of Public International Law' (1998) 115 *South African Law Journal* 668, 669, 684.

¹¹⁹ John Dugard, 'International Law and the South African Constitution' (1997) 8 *European Journal of International Law* 77, 90–1 (citations omitted).

¹²⁰ *Re Gauteng School Education Bill of 1995* [1996] 3 SALR 165, 189 (Sachs J).

¹²¹ *Fraser v Children's Court, Pretoria North* [1997] 2 SALR 261, 272 (Mahomed DP).

¹²² *S v Mhlungu* [1995] 3 SALR 867, 873–4 (Mahomed J).

¹²³ See, eg, *Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value*, opened for signature 29 June 1951, 165 UNTS 303 (entered into force 23 May 1953); *ECHR*, opened for signature 4 November 1950, 213 UNTS 222, art 14 (entered into force 3 September 1953); *Convention concerning Discrimination in respect of Employment and Occupation*, opened for signature 25 June 1958, 362 UNTS 31 (entered into force 15 June 1960); *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966,

international legal jurisprudence, reports and texts. It is interesting, then, that of the 26 cases decided to the end of 2004 by the Constitutional Court that consider the right to equality in any detail, international law is referred to in only eight of them,¹²⁴ with two of these cases giving international law the barest passing reference.¹²⁵

The reasons for this say much about how international law is deployed by the Constitutional Court, even in regard to a right as open-textured as that of equality. Most of the references to international law in equality cases occurred in early decisions in regard to the right. It can be gleaned that the use of international law may be more evident in the initial decisions on an area of the law or when new approaches are taken to the area, but may be less useful as the interpretive approach to a right achieves consistency and is then applied to produce increasingly fine distinctions across a number of cases.

Moreover, the case law on equality demonstrates that international law is most often useful as a source of normative guidance on basic principles, rather than on the careful accommodations and balancing that needs to be undertaken between rights and other public policy values. With its high level of abstraction and minimal case law, international law jurisprudence is not well suited to the task of close factual analysis and the ascertaining of fine distinctions in a particular domestic context that is frequently the work of a constitutional court. O'Regan J commented on this in one of the earliest cases on the right to equality, *Brink v Kitshoff*.¹²⁶ After a brief survey of international conventional law on equality, her Honour said:

This cursory consideration of the international conventions and the foreign jurisprudence makes it clear that the prohibition of discrimination is an important goal of both national governments and the international community. However, it also illustrates that the various conventions and national constitutions are differently worded and that the interpretation of national

999 UNTS 171, arts 2(1), 3, 26 (entered into force 23 March 1976) ('ICCPR'); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3, arts 2(2), 3, 7, 10, 13(2) (entered into force 3 January 1976) ('ICESCR'); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195, arts 2, 5 (entered into force 4 January 1969); *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 123, arts 8, 17, 23, 24, 27 (entered into force 18 July 1978); *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13, arts 2, 3, 7–16 (entered into force 3 September 1981); *African Charter on Human and Peoples' Rights*, opened for signature 27 June 1981, OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982), arts 3, 13, 15, 18, 19, 22 and 28 (entered into force 21 October 1986); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, arts 2, 28, 31, 40(2) (entered into force 2 September 1990).

¹²⁴ *Brink v Kitshoff* [1996] 4 SALR 197; *Prinsloo v Van der Linde* [1997] 3 SALR 1012; *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1999] 1 SALR 6; *Hoffman v South African Airways* [2001] 1 SALR 1; *Minister of Finance v Van Heerden* [2004] 6 SALR 121; *Bhe v Magistrate, Khayelitsha* [2005] 1 BCLR 1; *Volks NO v Robinson* [2000] 2 SALR 198; *Re Gauteng School Education Bill of 1995* [1996] 3 SALR 165.

¹²⁵ *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1999] 1 SALR 6; *Minister of Finance v Van Heerden* [2004] 6 SALR 121. For example, Moseneke J merely records at 132–3, fn 26: '[t]he importance of equality (although specifically in relation to gender) has also been recognised in the regional and international sphere'. See Elize Delpont, 'Women in Africa' in Christof Heyns (ed), *Human Rights Law in Africa* (2004) vol 1, 845–9.

¹²⁶ [1996] 4 SALR 197.

constitutions, in particular, reflects different approaches to the concepts of equality and non-discrimination. The different approaches adopted in the different national jurisdictions arise not only from different textual provisions and from different historical circumstances, but also from different jurisprudential and philosophical understandings of equality.¹²⁷

In a subsequent case, *Prinsloo v Van der Linde*,¹²⁸ Ackermann, O'Regan and Sachs JJ noted in a similar vein that '[e]ven a cursory summary of international experience indicates that there are no universally accepted bright lines for determining whether or not an equality or non-discrimination right has been breached.'¹²⁹

In general, the case law reflects a much greater reference to the decisions of the constitutional courts of other nations engaged in the same task than to international law. A good illustration of where South African courts have found comparative rather than international law of more use is in the area of defamation law as it interacts with the *South African Constitution*, and in particular the right to freedom of expression in s 16. In setting down basic rights such as freedom of expression, as in art 19(2) of the *ICCPR*, international law is only of limited assistance because it gives no more guidance than the text of the right itself, as expressed in the *South African Constitution*. Even commentary and other international materials on the right provide little help in the difficult task of balancing freedom of speech and the concepts of reputation and personal dignity. Hence, it is not surprising that the South African courts have made little or no reference to international law in this area, but have instead made considerable use of comparative precedents. In *Khumalo v Holomisa*,¹³⁰ for example, the Constitutional Court referred to decisions from nations including Australia,¹³¹ Canada,¹³² the United Kingdom,¹³³ and the United States,¹³⁴ but not at all to international law.

In summary, judges seem to consider international law on an ad hoc basis rather than having thorough regard to international law in each case. In some cases, this suggests a failure to pay due regard to the constitutional injunction to consider international law. For example, there is no apparent reason why the Court should have undertaken a detailed consideration of international law in *Volks NO v Robinson*,¹³⁵ but not in the earlier case of *Du Toit v Minister of Welfare and Population Development*,¹³⁶ when both cases dealt with the interpretation of equality in the context of unfair discrimination on grounds of marital status. Then again, in many cases, international law may have had little to offer. The use of norms and principles from any non-textual source by a final

¹²⁷ Ibid 216.

¹²⁸ [1997] 3 SALR 1012.

¹²⁹ Ibid 1022.

¹³⁰ [2002] 5 SALR 401.

¹³¹ *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104.

¹³² *Hill v Church of Scientology of Toronto* [1995] 2 SCR 1130.

¹³³ *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534.

¹³⁴ *New York Times Co v Sullivan*, 376 US 254 (1964).

¹³⁵ (2005) CCT 12/04.

¹³⁶ [2000] 2 SALR 198.

court of appeal, whether based on an originalist or other perspective, can seem ad hoc and often attracts the tag of ‘cherry-picking’ as comparative sources are seen only to be deployed or referred to when they provide assistance. It is interesting that Kriegler J of the Constitutional Court has actively discouraged frequent use of foreign authorities, including international law, calling for only considered and careful resort to such authorities:

I wish to discourage the frequent — and, I suspect, often facile — resort to foreign ‘authorities’. Far too often one sees citation by counsel of, for instance, an American judgment in support of a proposition relating to our *Constitution*, without any attempt to explain why it is said to be in point. Comparative study is always useful, particularly where courts in exemplary jurisdictions have grappled with universal issues confronting us. ... The prescripts of section 35(1) of the [*Interim*] *Constitution* are also clear: where applicable, public international law in the field of human rights must be considered, and regard may be had to comparable foreign case law. But that is a far cry from blithe adoption of alien concepts or inapposite precedents.¹³⁷

2 Translation to the Domestic Context

The requirement that international law be used in interpreting the *South African Constitution* evokes fears that the application of the *Constitution* might be subject to the dictates of the international community and not to local conditions. Of course, this would be a misreading of the injunction in the *Constitution*, which requires only that courts ‘must consider international law’.¹³⁸ After such consideration, international law can be rejected as a normative guide where it does not produce an outcome that is the correct one for the circumstances facing South Africa. Indeed, this is how the Constitutional Court has approached the matter.

The decisions of the Court reveal a discerning acceptance, rather than a wholesale adoption, of international law. Hence, after stating the need for ‘due regard to our legal system, our history and circumstances, and the structure and language of our own *Constitution*’, Chaskalson P in *S v Makwanyane* stated: ‘We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it.’¹³⁹ Even where legislation needs to be read in conformity with the *Constitution*, the Constitutional Court has said that ‘[s]uch an interpretation should not, however, be unduly strained’.¹⁴⁰ Sachs J has set out a qualified approach to the constitutional injunction in s 39(1) (then s 35(1) of the *Interim Constitution*). His Honour regards it as requiring the Court to give ‘due attention to such [international] experience with a view to finding principles rather than to extracting rigid formulae, and to look for rationales rather than rules.’¹⁴¹

¹³⁷ *Bernstein v Bester* [1996] 2 SALR 751, 811–12. Section 35(1) of the *Interim Constitution* is now found in a modified form in the *South African Constitution* s 39(1).

¹³⁸ *South African Constitution* s 39(1) (emphasis added).

¹³⁹ [1995] 3 SALR 391, 415 (citations omitted).

¹⁴⁰ *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors* [2001] 1 SALR 545, 559 (Langa DP).

¹⁴¹ [1995] 4 SALR 631, 662.

Consistently with these statements, the judgments of the Constitutional Court do not exhibit the ‘blithe adoption of alien concepts or inapposite precedents’ cautioned against by Kriegler J in *Bernstein v Bester*.¹⁴² Returning to our earlier example, the right to equality has been developed with careful attention to its unique domestic context. As the Court stated in *Brink v Kitshoff*:

Our history is of particular relevance to the concept of equality. The policy of apartheid, in law and in fact, systematically discriminated against black people in all aspects of social life. Black people were prevented from becoming owners of property or even residing in areas classified as ‘white’, which constituted nearly 90% of the landmass of South Africa; senior jobs and access to established schools and universities were denied to them; civic amenities, including transport systems, public parks, libraries and many shops were also closed to black people. Instead, separate and inferior facilities were provided. The deep scars of this appalling programme are still visible in our society. It is in the light of that history and the enduring legacy that it bequeathed that the equality clause needs to be interpreted.¹⁴³

In *Prinsloo v Van der Linde*,¹⁴⁴ the Constitutional Court recognised the need to strike a careful balance between obtaining value from international consideration of fundamental principles and attention to one’s own domestic context. Ackermann, O’Regan and Sachs JJ surmised that

[i]n relation to the text and context of the interim Constitution, it would ... seem that a simplistic transplantation from other countries into our equality jurisprudence of formulae, modes of classification or degrees of scrutiny might create more problems than it solved.¹⁴⁵

However, their Honours further acknowledged that

[a]t the same time, South Africa shares patterns of inequality found all over the globe, so that any development of doctrine relating to [the right to equality] would have to take account both of our specific situation and of the problems which our country shares with the rest of humanity.¹⁴⁶

In *S v Makwanyane*, the Court was called upon to determine whether the death penalty was inconsistent with the *Constitution*.¹⁴⁷ Chaskalson P had regard to the *ICCPR* and to decisions of the United Nations Human Rights Committee. His Honour noted that a consensus had not emerged at international law to prohibit the death penalty and that provisions of the *ICCPR* ‘specifically [allow] the imposition of the death sentence under strict controls “for the most serious crimes” by those countries which have not abolished it’.¹⁴⁸ Nevertheless, his Honour also noted that art 6(6) of the *ICCPR* provides that ‘[n]othing in this article shall be invoked to delay or to prevent the abolition of capital punishment

¹⁴² [1996] 2 SALR 751, 812.

¹⁴³ [1996] 4 SALR 197, 217 (O’Regan J).

¹⁴⁴ [1997] 3 SALR 1012.

¹⁴⁵ *Ibid* 1022–3 (Ackermann, O’Regan and Sachs JJ).

¹⁴⁶ *Ibid* 1023.

¹⁴⁷ [1995] 3 SALR 391.

¹⁴⁸ *Ibid* 425.

by any State Party to the present Covenant'.¹⁴⁹ Accordingly, his Honour concluded that:

what is clear from the decisions of the Human Rights Committee of the United Nations is that the death penalty is regarded by it as cruel and inhuman punishment within the ordinary meaning of those words, and that it was because of the specific provisions of the International Covenant authorising the imposition of capital punishment by member States in certain circumstances that the words had to be given a narrow meaning.¹⁵⁰

Therefore, the Court found that capital punishment was inconsistent with the *Constitution* in spite of the fact that no international prohibition existed in relation to the practice. This decision was reached against the backdrop of, among other things, a detailed and careful understanding of the textual and political limitations affecting the international legal position.

The Court carried out a similar inquiry into the 'emerging *consensus* of values in the civilised international community' when considering the constitutionality of corporal punishment in *S v Williams*.¹⁵¹ In considering the approach that the South African constitutional regime should take on this issue, the leading judgment of the Court (written by Langa J) had regard to the

growing consensus in the international community that judicial whipping, involving as it does the deliberate infliction of physical pain on the person of the accused, offends society's notions of decency and is a direct invasion of the right which every person has to human dignity.¹⁵²

The Court noted that 'this consensus has found expression through the Courts and Legislatures of various countries and through international instruments.'¹⁵³ While the Court gave precedence to the need for its decision to 'reflect our own experience and contemporary circumstances as the South African community',¹⁵⁴ it considered that 'there is no disputing that valuable insights may be gained from the manner in which the concepts are dealt with in public international law as well as in foreign case law.'¹⁵⁵

In *Government of the Republic of South Africa v Grootboom*,¹⁵⁶ the Constitutional Court was asked to consider the right of access to adequate housing in s 26 of the *Constitution*. International law relevant to the Court's interpretation of this right included art 11(1) of the *ICESCR* and general comments issued by the United Nations Committee on Economic Social and Cultural Rights ('CESCR'). The lead judgment of Yacoob J in *Government of the Republic of South Africa v Grootboom* recognised that '[t]he relevant international law can be a guide to interpretation but the weight to be attached to

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

¹⁵¹ [1995] 3 SALR 632, 640, quoting *Ex parte A-G (Namibia): Re Corporal Punishment by Organs of State* [1991] 3 SALR 76, 86 (emphasis in original).

¹⁵² *Ibid.* 644 (emphasis in original).

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.* 640.

¹⁵⁵ *Ibid.*

¹⁵⁶ [2001] 1 SALR 46.

any particular principle or rule of international law will vary.¹⁵⁷ In determining the weight to be given to the international legal definition of the right, the Court pointed to important differences between the relevant provisions of the *ICESCR* and the *Constitution*.¹⁵⁸ A key issue was whether the Court should adopt the ‘minimum core obligation’ approach of the CESCR in its interpretation of the right to adequate housing. Following an analysis of the approach, Yacoob J held that ‘we do not have sufficient information to determine what would comprise the minimum core obligation in the context of our *Constitution*’ and that ‘[i]t is not in any event necessary to decide whether it is appropriate for a court to determine in the first instance the minimum core content of a right.’¹⁵⁹ The Court did, however, adopt CESCR’s interpretation of the meaning of ‘progressive realisation’ as used both in s 26(2) of the *Constitution*¹⁶⁰ and in art 2(1) of the *ICESCR*.¹⁶¹ It found that

[t]he meaning ascribed to the phrase is in harmony with the context in which the phrase is used in our Constitution and there is no reason not to accept that it bears the same meaning in the Constitution as in the document from which it was so clearly derived.¹⁶²

3 *Respect for the Separation of Powers*

International law is sometimes perceived as being less a system of law and more a system of contestable values. This can give rise to concerns that the use of international law by courts might blur the separation of powers between the judiciary and the legislature. Along similar lines, it is sometimes argued, such as by McHugh J as set out above, that the interpretation of the *Constitution* by reference to international values is undemocratic because it can lead to an effective amendment of the *Constitution* by the courts when this is the role of the people or, in South Africa’s case, the National Parliament. These concerns are relevant not only in regard to international law but whenever judges interpret a constitution and especially when they make reference to non-textual materials.

The judgments of the Constitutional Court reveal how its judges have been careful to avoid overstepping the bounds of their judicial role (even given the different conceptions of the judicial role in South Africa as compared with Australia), and indeed pay substantive regard to the separation of powers. Unlike

¹⁵⁷ Ibid 63.

¹⁵⁸ Ibid 64.

¹⁵⁹ Ibid 66. See also the Court’s discussion of ‘minimum core obligation’ in *Soobramoney v Minister of Health, Kwazulu-Natal* [1998] 1 SALR 765 and *Minister of Health v Treatment Action Campaign* [2002] 5 SALR 721.

¹⁶⁰ Section 26(2) of the *South African Constitution* provides that ‘[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.’

¹⁶¹ *ICESCR*, opened for signature 16 December 1966, 993 UNTS 3, art 2(1) (entered into force 3 January 1976) states:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

¹⁶² [2001] 1 SALR 46, 70 (Yacoob J).

the legislature, the Court does not see itself as representative of the public or majority will. Its role is entirely separate, though equally valid. As Chaskalson P acknowledged in *S v Makwanyane*, the Court is charged with the protection of those who cannot secure their rights through the democratic process:

The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us that all of us can be secure that our own rights will be protected. ... This Court cannot allow itself to be diverted from its duty to act as an independent arbiter of the *Constitution* by making choices on the basis that they will find favour with the public.¹⁶³

This approach informs the Court's use of international law and its approach to constitutional interpretation more generally.

The Court also perceives a distinction between law reform and incremental development of the law. In the context of the common law, Ackermann and Goldstone JJ adopted the view, in *Carmichele v Minister of Safety and Security*, that

[i]n a constitutional democracy such as ours it is the Legislature and not the courts which has the major responsibility for law reform ... The Judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.¹⁶⁴

The same approach has been taken in regard to the *Constitution*. In *S v Jordan*,¹⁶⁵ the Court was called upon to consider the constitutionality of legislation criminalising acts of prostitution, finding such laws to be valid by a majority of 6:5. Ngcobo J, writing for the majority, took a firm line:

In a democracy those are decisions that must be taken by the Legislature and the government of the day, and not by courts. Courts are concerned with legality, and in dealing with this matter I have had regard only to the constitutionality of the legislation and not to its desirability. Nothing in this judgment should be understood as expressing any opinion on that issue.¹⁶⁶

In *Government of the Republic of South Africa v Grootboom*,¹⁶⁷ *Soobramoney v Minister of Health, Kwazulu-Natal*¹⁶⁸ and *Minister of Health v Treatment Action Campaign*,¹⁶⁹ one of the reasons put forward by the Court for refusing to adopt the concept of 'minimum core' obligations developed by the CESCRC was that it would involve the courts in decisions and balancing

¹⁶³ [1995] 3 SALR 391, 431 (citations omitted).

¹⁶⁴ [2001] 4 SALR 938, 954, adopting the words of Iacobucci J of the Supreme Court of Canada in *R v Salituro* [1991] 3 SCR 654, 670.

¹⁶⁵ [2002] 6 SALR 642.

¹⁶⁶ *Ibid* 655.

¹⁶⁷ [2001] 1 SALR 46.

¹⁶⁸ [1998] 1 SALR 765.

¹⁶⁹ [2002] 5 SALR 721.

exercises most appropriately engaged in by the legislature. As the Court held in *Minister of Health v Treatment Action Campaign*:

It should be borne in mind that in dealing with such matters the Courts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum-core standards called for by the first and second *amici* should be, nor for deciding how public revenues should most effectively be spent. There are many pressing demands on the public purse. ... Courts are ill-suited to adjudicate upon issues where Court orders could have multiple social and economic consequences for the community.¹⁷⁰

In essence, the Constitutional Court sees its role as bounded by two imperatives: first, to enforce the terms and spirit of the *Constitution*, and, second, to respect the freedom of the legislature to act within its constitutional limits. Interestingly, South Africa's legal culture, even given its use of international law, continues to be referred to as comparatively conservative. As Karl Klare has remarked:

US lawyers are often struck by their South African colleagues' relatively strong faith in the precision, determinacy and self-revealingness of words and texts. Legal interpretation in South Africa tends to be more highly structured, technicist, literal and rule-bound than in the States, whereas US legal culture is much more policy-oriented and consequentialist. South African lawyers appear more prepared than their US counterparts to deduce relatively specific conclusions from general and abstract premises, with fewer intermediate steps than the Americans would look for. There is a bit more reverence for law among South African lawyers and, I might add, South African politicians. Even through the long nightmare of apartheid, with its baroquely legalized system of oppression, many among the victims and within the opposition kept alive a distinct faith that law could somehow purify and cure the society's evils.¹⁷¹

4 *A Developing Expertise*

During the apartheid era, public international law was a neglected branch of the law in South Africa. It was rarely the subject of litigation and, when it was, judges displayed a limited understanding of its principles.¹⁷² A state law adviser at the South African Department of Foreign Affairs noted in 1999 that public international law had been relegated to a secondary role in the field of legal training. He went on:

The unprecedented status that public international law has gained as a result of the constitutional changes in South Africa presents great challenges and opportunities to the legal fraternity. Judges, practitioners, and academicians will have to ground themselves in the principles of international law, especially international human rights law, and ensure that they keep up to date with

¹⁷⁰ Ibid 740 (Chaskalson CJ, Langa DCJ, Du Plessis, Skweyiya AJJ, Ackermann, Goldstone, Kriegler, Madala, Ngcobo, O'Regan and Sachs JJ).

¹⁷¹ Karl Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal of Human Rights* 146, 168.

¹⁷² Neville Botha, 'The Coming of Age of Public International Law in South Africa' 18 *South African Yearbook of International Law* 37, 38; John Dugard, 'The South African Judiciary and International Law in the Apartheid Era' (1998) 14 *South African Journal of Human Rights* 110.

developments in these fields in South Africa as well as in foreign jurisdictions.¹⁷³

As discussed earlier,¹⁷⁴ examination of international law in the Constitutional Court is, at times, cursory and does not regularly extend beyond a depiction of the relevant international treaty provisions. Very occasionally, errors creep into the Court's depiction of the international legal position. In *AZAPO*, the Court considered the application of the *Geneva Conventions*¹⁷⁵ and their Additional Protocols¹⁷⁶ to the struggle against apartheid. The Court referred to the distinction between international and non-international conflicts, correctly distinguishing them on the basis that it is unlikely that there is an international legal obligation to prosecute for crimes committed during the latter type of conflict. However, the Court's depiction of the apartheid struggle as a non-international conflict can be questioned. The Court drew a

distinction between the position of perpetrators of acts of violence in the course of war (or other conflicts between States [to which the Geneva Conventions apply] or armed conflicts between liberation movements seeking self-determination against colonial and alien domination of their countries [to which Additional Protocol I applies]), on the one hand, and their position in respect of violent acts perpetrated during other conflicts which take place within the territory of a sovereign state in consequence of a struggle between the armed forces of that state and other dissident armed forces operating under responsible command, within such a state on the other [to which Additional Protocol II applies].¹⁷⁷

The Court compared South Africa's situation with the latter category, which had implications for the question of whether an amnesty should be applied to perpetrators of violence. The Court thereby overlooked reference to the fact that *Additional Protocol I* in the former category also applies to 'armed conflicts in which peoples are fighting ... against racist regimes in the exercise of their right

¹⁷³ Andre Stemmet, 'The Influence of Recent Constitutional Developments in South Africa on the Relationship between International Law and Municipal Law' (1999) 33 *International Lawyer* 47, 72.

¹⁷⁴ See above Part IV(B).

¹⁷⁵ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); *Geneva Convention Relative to the Protection of Civilian Person in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950).

¹⁷⁶ *Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, opened for signature 8 June 1977, 1124 UNTS 3 (entered into force 7 December 1978); *Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, opened for signature 8 June 1977, 1124 UNTS 609 (entered into force 7 December 1978).

¹⁷⁷ *AZAPO* [1996] 4 SALR 672, 689.

to self-determination',¹⁷⁸ which would bring struggles against the apartheid regime within the scope of international armed conflicts to which an obligation to prosecute would apply. Of course, South Africa was not a party to *Additional Protocol I* at the time, which would introduce further complications, but these are not solved by misclassifying the conflict.

Errors in analysis of international law (or of any law for that matter) are only found in exceptional cases, and the decision in *AZAPO* may be the only prominent example. Other judgments by the Constitutional Court reflect sophisticated and thorough discussion of the international legal position. For example, the Court's recent judgment in *Kaunda v President of the Republic of South Africa*¹⁷⁹ contained a detailed analysis of the nature and scope of diplomatic protection at international law and the limitations on extraterritorial action. As judges become more familiar with international legal sources and principles, the richness of the discussion of international law will deepen and situations where it can (and cannot) assist in the domestic context will become clearer. This will benefit not only the development of the domestic legal framework but the field of international law as well.

V CONCLUSION

In formal terms, the *South African Constitution* requires a greater engagement with international law than the *Australian Constitution*. There are some important reasons for this. The experiences of South Africans during the apartheid era made the drafters of the new *Constitution* aware of the need to entrench protection of fundamental human rights. As Sachs J said in *S v Makwanyane*, 'the more that life had been cheapened and the human personality disregarded, the greater the entrenchment of the rights to life and dignity.'¹⁸⁰ Further, the rejection by the international community of the apartheid regime also saw South Africa reduced to pariah status. Compliance with international law therefore now takes on heightened significance for South Africa. As O'Regan J noted in *Kaunda v President of the Republic of South Africa*, 'our *Constitution* recognises and asserts that, after decades of isolation, South Africa is now a member of the community of nations, and a bearer of obligations and responsibilities in terms of international law.'¹⁸¹

Another reason for South Africa's greater reliance on international law is the need to fundamentally reconstruct the South African legal system. In this, international law and comparative law are particularly important. As Mokgoro J explained in *S v Makwanyane*, the constitutional injunction requiring reference to international law

seems to acknowledge the paucity of home-grown judicial precedent upholding human rights, which is not surprising considering the repressive nature of the

¹⁷⁸ *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, opened for signature 8 June 1977, 1125 UNTS 3, art 1 (entered into force 7 December 1978).

¹⁷⁹ (2004) CCT 23/04.

¹⁸⁰ [1995] 3 SALR 391, 520.

¹⁸¹ (2004) CCT 23/04 [222].

past legal order. It requires courts to proceed to public international law and foreign case law for guidance in constitutional interpretation, thereby promoting the ideal and internationally accepted values in the cultivation of a human rights jurisprudence for South Africa.¹⁸²

The different South African context and constitutional text are important reasons why the extent of and way in which international norms are used will differ between that nation and Australia. However, these differences are inadequate to explain many of the Australian anxieties about the use of international law in constitutional interpretation and the wholesale rejection of the use of such material in that context by most High Court judges.

Indeed, the South African case law suggests that many of the Australian concerns are not sustainable or at least need revision. The work of the Constitutional Court demonstrates that, even in a system where consideration of international law can be mandatory, this should not deflect a court from interpreting a constitution in a way that responds to local needs. That Court has not lost sight of the fact that it is the *South African Constitution* it is applying. International law is accepted as relevant to the interpretative process where it assists in developing the domestic legal system to better serve the nation. Indeed, this makes sense in a world where the national interest can often now only be understood in the context of an increasingly interdependent world.

The South African cases also demonstrate that international law is often not useful, let alone determinative. After all, international law is merely one more tool of interpretation and need only be deployed where it sheds new light on an issue. In its day-to-day work, a final court, whether it be in Australia or South Africa, is usually likely to gain more benefit from comparative precedents than from international law. International law can be set out at a level of abstraction that is not useful for the precise work of accommodating the text of a constitution to varying facts over a series of cases. Indeed, the High Court already makes extensive use of comparative precedents in all areas of the law.¹⁸³ This makes its reluctance to use international law, in the few constitutional cases in which it might assist, anomalous. After all, the difficulties (ranging from questions of expertise to the translation of legal norms from one context to another) of using precedents from other legal systems may even be greater than those that arise in using international law. Yet such difficulties are rarely acknowledged by the High Court.

Even if the High Court were to become more open to the use of international law in constitutional interpretation, this would likely have little impact upon its work. Our survey of all of the judgments of the Constitutional Court shows that almost all references to and detailed consideration of international law have taken place in respect of the South African Bill of Rights. In the 228 decisions the court has made over the past decade, it has only referred to international law in 51 cases and given it detailed consideration in 32 cases. Almost all of these cases involved the Bill of Rights. Indeed, in the non-Bill of Rights cases,

¹⁸² [1995] 3 SALR 391, 499.

¹⁸³ Bruce Topperwien, 'Foreign Precedents' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 280.

international law was referred to only six times and given detailed consideration only twice (out of a total of 91 cases). The case law on specific rights, such as the right to equality, also demonstrates how international law may have little impact and may even be rejected as a guide.

The *Australian Constitution* lacks a Bill of Rights and contains only a few scattered express guarantees of personal liberty.¹⁸⁴ In these circumstances, the use of international law is likely to remain rare in its interpretation. Fears that international law could swamp the constitutional law of Australia are misplaced. Like other sources of non-textual guidance, international law may occasionally prove to be useful. Its use is only likely to be controversial where a judge is creative in drawing links between international law in areas such as human rights and trade law and the *Constitution* in order to achieve especially ‘progressive’ or ‘conservative’ outcomes. This may give rise to concerns about whether a judge has overstepped proper institutional bounds in interpreting the *Constitution*. However, this would no more be the case than with regard to the use of other non-textual tools of interpretation employed, for example, to give meaning to the idea of the *Constitution* as a ‘living force’.¹⁸⁵ In such cases, the issue lies not with the interpretive tool but with the end to which it is put.

Over time, as a result of the cases in which international law is used, Australian judges could develop greater expertise in the area and a stronger appreciation of the merits and demerits of international law as an interpretive tool. This could enable judges to move beyond understandings of international law as a discretionary set of norms governing inter-state relations that can be neglected at will, a view that can be traced back to the time that the *Constitution* was drafted.¹⁸⁶ South Africa’s constitutional context has allowed its judges to take a more contemporary approach to the international legal order. Many South African judges now recognise that, particularly in the area of human rights, it is the citizens of a state rather than the international community that are the beneficiaries of international law. As Ngcobo J stated in *Kaunda v President of the Republic of South Africa*:

The ratification of the *African Charter [on Human and Peoples’ Rights]* and the *ICCPR* are an unequivocal commitment by the government to the promotion and protection of fundamental international human rights and to do so in co-operation with other nations. Indeed ratification of international human rights instruments is a positive statement by the government to the world and to South African nationals that it will act in accordance with these instruments if

¹⁸⁴ Williams, above n 51, 47–50.

¹⁸⁵ *Theophanous v Herald & Weekly Times Ltd* (1994) 102 CLR 104, 173 (Deane J).

¹⁸⁶ See, eg, *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 9 September 1897, 240 (George Reid), where it was stated that:

The treaties made by her Majesty are not binding as laws on the people of the United Kingdom, and there is no penalty for disobeying them. Legislation is sometimes passed to give effect to treaties, but the treaties themselves are not laws, and indeed nations sometimes find them inconvenient, as they neglect them very seriously without involving any important legal consequences.

See also *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 316 (McHugh J).

any of the fundamental human rights enshrined in the international instruments it has ratified are violated.¹⁸⁷

International law, when used in constitutional interpretation, is neither a panacea nor a threat. Australia can gain from developing a more discerning and nuanced approach to international law in the area of constitutional interpretation. Appropriate use of international law is not about uncritical acceptance and must account for the fact that international law, like any legal system, is far from a complete set of norms. Indeed, one of the positive consequences of domestic engagement with international law is that domestic courts can assist in the further development of these norms. Just as international law can influence domestic law, so too is international law often assisted in its development by domestic law. This two-way street is something that South African courts are actively part of and Australian courts less so.

Greater use of international law might also bring into sharper relief some important questions about the *Australian Constitution*. For example, the *Constitution*, likely alone among national constitutions in the world today, expressly provides that a parliament may legislate about matters of 'race'.¹⁸⁸ In *Kartinyeri v Commonwealth* in 1998, the High Court divided without resolving whether this power can still be used, as originally intended, to pass laws that adversely discriminate against people on the basis of their race.¹⁸⁹ To take another, more recent, example of a constitution at odds with international and comparative legal norms, in *Al-Kateb v Godwin* the Court found that the indefinite detention of a person refused a visa is not inconsistent with the *Australian Constitution*.¹⁹⁰ These and other areas suggest that Australia's 1901 *Constitution* requires some transformation of its own. Of course, international law alone is not the right tool to achieve this. The transformation is largely a task for the federal Parliament and the Australian people. The use of international law cannot dictate constitutional outcomes, but it may inform them. As the South African experience demonstrates, the appropriate use of international law in constitutional interpretation has much to offer as an interpretative tool without the realisation of the fears perceived by some.

¹⁸⁷ (2004) CCT 23/04 [162] (citations omitted).

¹⁸⁸ *Australian Constitution* s 51(xxvi).

¹⁸⁹ (1998) 195 CLR 337.

¹⁹⁰ (2004) 208 ALR 124. Cf the decisions in the United Kingdom (*R v Governor of Durham Prison; Ex parte Hardial Singh* [1984] 1 WLR 704 and *A v Secretary of State for the Home Department* [2005] 2 WLR 87), the United States (*Zadvydas v Davis*, 533 US 678 (2001)) and Hong Kong (*Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97).