

BOOK REVIEWS

THE FLUID STATE: INTERNATIONAL LAW AND NATIONAL LEGAL SYSTEMS, EDITED BY HILARY CHARLESWORTH, MADELAINE CHIAM, DEVIKA HOVELL AND GEORGE WILLIAMS (SYDNEY, AUSTRALIA: THE FEDERATION PRESS, 2005) 304 PAGES. PRICE AU\$125.00 (HARDCOVER) ISBN 1862875685.

The Fluid State is a collection of essays concerned with what the editors in their introductory chapter term the 'uneasy relationship' between international and national law.¹ The opening chapter stages this relationship in conventional constitutional terms, as one between two legal systems.² This constitutional approach provides the organising framework for the collection. Part 1 consists of three chapters concerned with the ways in which the creation of international law and engagement in foreign policy complicate the relationship between the legislature and the executive within states. The chapters in Part 2 focus on the role of the judiciary as a 'gatekeeper'³ determining the role that international law (both in the form of treaties and of customary international law) will play in domestic law. Part 3 explores the relationship between 'national politics' and the 'international sphere', understood as unstable yet distinct categories.⁴ Constitutionalism pervades the collection as a technique for placing these legal systems and their constituent authorities and rules into relation with each other. While in Parts 1 and 2 this technique is exercised in response to the challenge posed by international law to the architecture of domestic constitutional arrangements, in Part 3 it is exercised in response to the challenges that domestic politics and processes pose to the creation, interpretation and implementation of international law.

Yet the collection also works to question both the conventional representation of two stable legal systems interacting in predictable ways and the corresponding role of the legal practitioner as one who can determine the proper hierarchies between norms or sources of law, or decide on the proper relations between authorities. In their opening chapter, the editors suggest that 'the orthodox international and public law theories about how international and domestic law interact do not recognise the complexity, and sometimes contradictory nature, of the international/national legal interface'.⁵ Throughout the collection, the authors puzzle over the categories provided by public and international law for understanding the juridical questions posed by the organisation of modern political life around the notion of sovereign statehood.

¹ Hilary Charlesworth, Madelaine Chiam, Devika Hovell and George Williams, 'International Law and National Law: Fluid States' in Hilary Charlesworth et al (eds), *The Fluid State: International Law and National Legal Systems* (2005) 1, 1.

² Ibid.

³ 'Part 2: The Judiciary as Gatekeeper' in Hilary Charlesworth et al (eds), *The Fluid State: International Law and National Legal Systems* (2005) 82.

⁴ 'Part 3: National Politics and the International Sphere' in Hilary Charlesworth et al (eds), *The Fluid State: International Law and National Legal Systems* (2005) 186.

⁵ Charlesworth et al, above n 1, 2.

In this review, I want to trace the ways in which the turn to constitutionalism, together with innovative responses to the dissatisfaction that this turn provokes, can be seen as part of a larger pattern within contemporary public international law scholarship. This collection makes a valuable contribution to that contemporary scholarship in the strongly comparative approach it performs and develops. The participation of authors from Australia, Canada and New Zealand gives the collection a particular focus upon the ways in which the relation between international and national law has been understood over time by lawyers from Commonwealth countries. It is this attention to practice in Commonwealth countries, and thus to the legacies of British Empire, which I will suggest offers significant insights.

I CONSTITUTIONALISM AND INTERNATIONAL LAW

In its attention to the proper relation between international and national law, or between international and national institutions and processes, this collection is an example of a significant contemporary trend in legal and political scholarship. Institutional and political developments since the end of the Cold War have seen a revival of interest in constitutionalism as a response to the varied challenges posed to the notion of sovereign state authority by war, terrorism and economic globalisation, and to the demands made on states by humanitarian crises, the claims of those seeking asylum and human rights obligations.

The turn to constitutionalism manifests itself in international legal scholarship in the debate about whether and how international law is capable of functioning as a unified, coherent and comprehensive legal system. In doctrinal terms, this had led to a focus on developing legal techniques for dealing with the perceived fragmentation of the international legal system into myriad specialised (but not self-contained) regimes⁶ and for managing the conflict of norms which results,⁷ and to a search for the fundamental values that might be said to ground such a unified system.⁸ In institutional terms, the focus has been on discussing how to allocate functional responsibilities, authority, competencies or jurisdiction appropriately within and between international organisations,⁹ and between international organisations and their member states.¹⁰

⁶ See Martti Koskenniemi, Chair of the Study Group, International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc A/CN.4/L.682 (13 April 2006); Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-Contained Regimes in International Law' (2006) 17 *European Journal of International Law* 483.

⁷ See, eg, Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (2003).

⁸ Philip Allott, *The Health of Nations: Society and Law beyond the State* (2002) 342 ('[t]he idea of constitutionalism is a golden thread running through the better history of the human race'); Mattias Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 *European Journal of International Law* 907.

⁹ For a good example of this genre of analysis in the context of the United Nations, see Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (2nd ed, 2002) and my review of the commentary in Anne Orford, 'The Gift of Formalism' (2004) 15 *European Journal of International Law* 179.

¹⁰ Deborah Cass, 'The "Constitutionalization" of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade' (2001) 12 *European Journal of International Law* 39.

In *The Fluid State*, constitutionalism is explored from a nationalist rather than an internationalist perspective. In this collection, the goal of constitutionalism as a legal technique is understood in terms of determining the proper distribution of power and authority within states. The bulk of the chapters are concerned with the potential for international law to pose problems for *the* ‘ultimate lawmaker’,¹¹ understood from a nationalist viewpoint as the domestic parliament within a given state. Constitutionalism appears in this collection, as it does in international law more generally, as a response to a series of perceived threats or challenges to the existing order, in the form of war, economic globalisation, administrative detention and human rights violations.

The chapters in Part 1 are concerned with the relation between the executive and the parliament, and more specifically with whether the parliament as ‘lawmaker’ or democratic representative of the people can constrain or oversee the international activities of the executive. Of particular concern to the authors of these chapters are two internationalist aspects of executive activity: treaty negotiations and the protection of national security — whether through waging war on external enemies or detaining, interrogating or conducting surveillance upon enemies within the state. In his chapter, John Uhr explores the capacity of the Australian Parliament to scrutinise executive action in the areas of defence and security policy.¹² For Uhr, parliamentary activism in this area is a response to the growing tension over the ‘political management of Australian international affairs’.¹³ This tension is mirrored by the debates in the United Kingdom following the release of the Butler Report on the intelligence leading to the invasion of Iraq,¹⁴ and in the United States in the wake of the Report of the 9/11 Commission.¹⁵ While the US Congress has generally played — or has at least attempted to play — a very active role in monitoring and shaping US international relations, Uhr suggests that the Australian Parliament has, in the past, exercised little influence over Australian foreign and security policy.¹⁶ However, Uhr suggests that this is shifting, with the Parliament growing less deferential towards Executive prerogatives in the areas of treaty-making and the management of national security.¹⁷ Uhr points to ways in which the Parliament has increased its involvement in overseeing executive action, particularly ‘in relation to the hot issue of the “War on Terror”’, through the creative use of a range of legislative and parliamentary powers. Uhr also suggests that, in future,

¹¹ Joanna Harrington, ‘The Role for Parliaments in Treaty-Making’ in Hilary Charlesworth et al (eds), *The Fluid State: International Law and National Legal Systems* (2005) 34, 52.

¹² John Uhr, ‘Rethinking Legislative Powers: Parliamentary Responses to International Challenges’ in Hilary Charlesworth et al (eds), *The Fluid State: International Law and National Legal Systems* (2005) 18.

¹³ *Ibid* 22.

¹⁴ Lord Robin Butler, Chair of a Committee of Privy Counsellors, *Report of Intelligence on Weapons of Mass Destruction* (14 July 2004), House of Commons Doc 898.

¹⁵ Thomas Kean, Chair, National Commission on Terrorist Attacks upon the United States, *The 9/11 Commission Report* (2004).

¹⁶ For an account of the very limited role which the current US administration sees for the Congress in overseeing the exercise of power by the executive branch of government, see Jane Mayer, ‘The Hidden Power’, *The New Yorker* (New York, US), 3 July 2006, 44, available at <http://www.newyorker.com/fact/content/articles/060703fa_fact1> at 1 October 2006.

¹⁷ Uhr, above n 12, 20.

parliaments need to become ‘as internationally focused as executive institutions’.¹⁸ Uhr looks particularly to networks such as the Inter-Parliamentary Union based in Geneva as means through which such international focus might develop and democratic control over executive decisions increase.¹⁹

While Uhr is concerned with the broad sphere of executive decision-making in relation to international affairs, the chapters by Joanna Harrington²⁰ and Ann Capling²¹ focus on one particular area of executive action, that of treaty-making. Both Harrington and Capling are interested in exploring the role of parliaments in treaty-making, as a means of overcoming the ‘democratic deficit’ created through executive law-making by treaty. Harrington begins her chapter by referring to the role that wars have played in fostering attempts to assert control over treaty-making.²² She offers a useful reminder of the popular attempt prior to and during World War I to end the practice of creating secret treaties,²³ a goal which, as Harrington points out, was expressed in the first of US President Woodrow Wilson’s famous ‘Fourteen Points’ addressed to Congress on 8 January 1918.²⁴ For Harrington, it is desirable for parliaments to secure a role in treaty-making because of ‘the important fact that treaties are law’.²⁵ Harrington sees parliament as ‘the ultimate lawmaker’ which ‘should have the opportunity to review all treaties before their ratification’.²⁶ Her survey of parliamentary practice in the UK, Australia and Canada is designed to develop a model of best Commonwealth practice of parliamentary scrutiny of executive action in this area — finding the Australian model to be the most desirable and extensive.²⁷

In contrast, Ann Capling’s exploration of developments in Australian parliamentary scrutiny of executive treaty-making is far less sanguine, arguing that recent initiatives, such as the creation of the Joint Standing Committee on Treaties, are simply exercises in political management.²⁸ Capling focuses in particular on the role of the Parliament in scrutinising trade agreements. She argues that this process does nothing to increase true democratic involvement in such treaty-making, but instead privileges the interests of business and industry

¹⁸ Ibid.

¹⁹ Ibid 31.

²⁰ Harrington, above n 11, 34.

²¹ Ann Capling, ‘Can the Democratic Deficit in Treaty-Making Be Overcome? Parliament and the *Australia–United States Free Trade Agreement*’ in Hilary Charlesworth et al (eds), *The Fluid State: International Law and National Legal Systems* (2005) 57.

²² Harrington, above n 11, 35.

²³ Ibid 34–5. See also Vladimir Ilyich Lenin, ‘The Tasks of the Revolution’ in *Collected Works* (Yuri Sdobnikov and George Hanna trans, 1964 ed) vol 26, 59–68 [trans of: Сочинения]. In this article, first published in October 1917, Lenin calls for the Soviet Government to ‘publish and repudiate the secret treaties by which we have been bound up to the present time, those which were concluded by the tsar and which give Russian capitalists the promise of the pillaging of Turkey, Austria, etc’: at 62.

²⁴ Woodrow Wilson, ‘Fourteen Points’ (Speech delivered to Congress, Washington DC, US, 8 January 1918), available at <<http://usinfo.state.gov/usa/infousa/facts/democrac/51.htm>> at 1 October 2006.

²⁵ Harrington, above n 11, 55.

²⁶ Ibid 52.

²⁷ Ibid 55.

²⁸ Capling, above n 21, 60.

groups.²⁹ Capling decries the ‘partisan considerations’ that have shaped the decision of parliamentary committees not to question the priorities adopted by the Executive in the conduct of particular treaty negotiations, particularly that leading up to the adoption of the *Australia–United States Free Trade Agreement*.³⁰ Yet, to the extent that business and industry groups dominate domestic policy-making more generally, and that Parliament defers to the Executive in this respect, might this be as much a problem for the form of the state within liberal democracies as it is a problem particular to the effect of trade agreements on governance? Capling does not lose faith in the democratic form of the state as a result of her analysis, instead arguing for a stronger commitment on the part of governments in democratic systems to the principle that ‘international agreements are broadly supported by those whom they affect’.³¹

While the chapters in Part 1 are concerned with the relationship between the executive and the parliament in the making of international law and the protection of ‘national security’, the chapters in Part 2 are concerned with the role of the judiciary in incorporating or interpreting international law as part of the process of domestic adjudication. Wendy Lacey focuses upon the role played by unincorporated international conventions in domestic adjudication.³² She opens with a quote taken from an article co-authored by three Commonwealth academics, from Canada, the UK and New Zealand. These authors suggest that when courts in the common law world give effect to treaties that have not been incorporated by the parliament into domestic law, this has the potential to ‘amount to executive usurpation of the legislature’s monopoly of law-making authority, or to judicial usurpation of the same, or a combination of both’.³³ Lacey thus suggests a further complication in the constitutionalist engagement with international law, particularly international law involving human rights obligations.³⁴ Does a commitment to constitutionalism or formalism require respect for the ‘principle of legality’, that ‘parliament may only remove or interfere with fundamental rights and freedoms through express and unambiguous statutory language’?³⁵ Or does constitutionalism require the judiciary and the executive to respect the will of the majority as expressed through the principle of parliamentary sovereignty, such that the executive and the judiciary may not act to protect the rights of citizens, lest this amount to ‘usurpation of the legislature’s monopoly of law-making authority’.³⁶ Lacey traces the ways in which courts in Australia, the UK, Canada and New Zealand have sought to respond to this tension, and considers the role that the existence of bills of rights or unincorporated human rights treaties play in shaping the principles of interpretation adopted by courts across these jurisdictions. Perhaps because Australia is the only one of these jurisdictions not to have adopted a bill

²⁹ Ibid 67–77.

³⁰ Signed 18 May 2004, [2005] ATS 1 (entered into force 1 January 2005).

³¹ Capling, above n 21, 79.

³² Wendy Lacey, ‘The Judicial Use of Unincorporated International Conventions in Administrative Law: Back-Doors, Platitudes and Window-Dressing’ in Hilary Charlesworth et al (eds), *The Fluid State: International Law and National Legal Systems* (2005) 82.

³³ Ibid.

³⁴ Ibid.

³⁵ Ibid 85.

³⁶ Ibid 82.

of rights, and is also the jurisdiction in which the courts have shown most deference to the will of the parliament, Lacey concludes that counsel are more likely to be effective in persuading courts in Australia to protect fundamental rights and freedoms by making arguments ‘that are strongly premised on the principles recognised in Australian common law’, rather than by appealing to unincorporated human rights treaties as sources of authority.³⁷

The chapters by Kristen Walker and Andrew D Mitchell³⁸ and by Treasa Dunworth³⁹ explore the role that has been and should be played by customary international law in domestic law. While Walker and Mitchell develop a detailed map of the ways in which judicial and parliamentary receptivity to customary international law might be increased, Dunworth explores the ways in which the nuanced meanings of customary international law are lost when domestic judges seek to rely upon custom in their reasoning. Both chapters aim to clarify the rules and principles governing relations between international and national law, and between the branches of government within the state.

The overall picture painted by the chapters discussed to date is one in which constitutionalism as a system for determining the appropriate separation of powers of government is in tension with constitutionalism as a system for protecting fundamental rights and freedoms. The chapters suggest that both the judiciary and the parliament have a limited role in constraining the executive in terms of its role in foreign affairs or national security, even where this may include negotiating treaties or making decisions that infringe the rights, freedoms or security of people within the state. The sense the reader has from the chapters dealing with the Australian context in particular is of a tendency on the part of both the Parliament and the courts to exhibit considerable deference towards the Executive in respect of its actions. Similarly, these chapters suggest that the judiciary and the executive have a limited role to play in resisting the will of the parliament where it is expressed in the form of law, even where that law infringes fundamental values. While the chapters in Parts 1 and 2 are overtly motivated by the political consequences of this situation, they respond to it largely in formal terms. The overall impression conveyed by these chapters is of the domestic legal system ‘as a solid formal structure whose parts (rules, principles, institutions)⁴⁰ have, or should have, ‘stable relations with each other’.⁴¹ Where this is not the case, these chapters see it as the task of legal doctrine or political science ‘to (re-)create such relations’.⁴²

³⁷ Ibid 108.

³⁸ Kristen Walker and Andrew D Mitchell, ‘A Stronger Role for Customary International Law in Domestic Law?’ in Hilary Charlesworth et al (eds), *The Fluid State: International Law and National Legal Systems* (2005) 110.

³⁹ Treasa Dunworth, ‘Lost in Translation: Customary International Law in Domestic Law’ in Hilary Charlesworth et al (eds), *The Fluid State: International Law and National Legal Systems* (2005) 136.

⁴⁰ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2nd ed, 2005) 564.

⁴¹ Ibid.

⁴² Ibid.

II RESPONSIBILITY AND THE LIMITS OF CONSTITUTIONALISM

In the chapters I have discussed so far, constitutionalism, whether as balance of power or as a commitment to the rule of law, exists as a set of rules and procedures for determining relations between organs or arms of government and systems of laws. That set of rules and procedures has a meaning that does not depend upon the decision-making practices that take place within a given constituted national or international system. However, the chapters by Mayo Moran in Part 2,⁴³ and by Andrew Byrnes, Fleur Johns, Ann Kent and Janet McLean in Part 3,⁴⁴ undo this sense that rules, procedures or institutions can have determinate meanings outside the contexts in which they operate.

Mayo Moran takes issue with what she terms the ‘traditional’ and ‘critical’ views of legal adjudication, and in particular with the assumptions that both groups make about legal authority and the kinds of legal resources that judges can legitimately invoke. Moran argues that the traditional view ‘distinguishes sharply between binding and non-binding sources of law and consequently imagines the judge as either entirely free or completely constrained’.⁴⁵ Critics in the realist or critical legal studies mode have argued in response that judges are not fully constrained by binding legal rules but in fact exercise considerable discretion in choosing between available interpretations of legal texts. For Moran, this critical position is itself premised upon a positivist view of legal authority, in that the ‘account of adjudication forwarded by the critics tends to depict decision-making as entirely unconstrained by distinctively legal resources’.⁴⁶ Moran argues in contrast that judgment can still be ‘discernibly legal’ even if it is not constrained by rules.⁴⁷ Thus, she suggests, ‘judicial discretion may be shaped and constrained in ways not adequately captured by an account that assumes that the presence of certain kinds of sources “bind” the judge to reach a particular decision while their absence liberates her to do what she wants’.⁴⁸ In particular, Moran explores the ways in which constitutional values, and international human rights principles, exert ‘influential authority’ upon the judge.⁴⁹ The significance of influential authority, whether in the form of fundamental values or international principles, ‘is found in the demands it places on the task of justifying a legal conclusion’.⁵⁰ Moran argues that this task is much less constrained than the traditional picture would suggest, and yet much less unfettered than critical theorists would propose.⁵¹ Attention to the notion of influential authority thus offers ways for understanding the ‘legal resources’ that can be brought to bear on the task of reaching a decision and justifying it in

⁴³ Mayo Moran, ‘Influential Authority and the Estoppel-Like Effect of International Law’ in Hilary Charlesworth et al (eds), *The Fluid State: International Law and National Legal Systems* (2005) 156.

⁴⁴ ‘Part 3: National Politics and the International Sphere’ in Hilary Charlesworth et al (eds), *The Fluid State: International Law and National Legal Systems* (2005) 186.

⁴⁵ Moran, above n 43, 156.

⁴⁶ *Ibid* 157.

⁴⁷ *Ibid*.

⁴⁸ *Ibid* 158.

⁴⁹ *Ibid* 159.

⁵⁰ *Ibid*.

⁵¹ *Ibid* 160.

language.⁵² For Moran, the resources available to the judges of a court in determining how to exercise their ‘discretion’ and in justifying that exercise ‘spring from the jurisdiction of the adjudicating court and express its most basic norms’.⁵³ It makes a difference that a matter is brought before a court, rather than determined by some other body, ‘[f]or a court, especially in an egalitarian constitutional and international regime, is constrained in ways uniquely linked to the meaning of law in such a regime’.⁵⁴ The ideal of constitutionalism or of the rule of law is thus addressed to the ‘law-applier’, and to the way he or she ‘approaches the task of deciding in the narrow space between fixed textual understandings on the one side and predetermined functional objectives on the other without endorsing the proposition that the decisions emerge from a “legal nothing”’.⁵⁵

The chapter by Andrew Byrnes also attends to the responsibility of the lawyer: here, the lawyer as legal adviser to government.⁵⁶ Byrnes argues that the lack of formal constraint on the executive means that those advising the government on its obligations under international law have a particularly heavy responsibility to ensure that their advice, at the least, provides a comprehensive assessment of arguments concerning the legality of proposed state action. This theme of the responsibility of the lawyer in times of emergency is one which emerged in international legal scholarship in the aftermath of Iraq and has persisted in response to the conduct of the ‘war on terror’. To take one example from this literature, in the wake of the disclosure of the infamous ‘torture memos’ written by US Government lawyers to justify the detention and coercive interrogation of US detainees, Richard Bilder and Detlev Vagts wrote an editorial comment in the *American Journal of International Law* exploring the responsibility of government attorneys.⁵⁷ Bilder and Vagts point to the particular responsibility vested in lawyers advising the executive in situations where there exist few apparent formal constraints on executive power:

⁵² Ibid.

⁵³ Ibid 172.

⁵⁴ Ibid 173.

⁵⁵ Martti Koskeniemi, ‘Constitutionalism as a Mindset: Reflections on Kantian Themes about International Law and Globalisation’ (Paper presented at the Conference on ‘Critical Modernities: Politics and Law beyond the Liberal Imagination’, Cegla Center for Interdisciplinary Research of the Law, Tel Aviv University, 28–30 December 2005), available at <[http://www.valt.helsinki.fi/blogs/eci/Tel%20Aviv%20uusi%2005a\[1\].pdf](http://www.valt.helsinki.fi/blogs/eci/Tel%20Aviv%20uusi%2005a[1].pdf)> at 1 October 2006.

⁵⁶ Andrew Byrnes, “‘The Law Was Warful’: The Iraq War and the Role of International Lawyers in the Domestic Reception of International Law” in Hilary Charlesworth et al (eds), *The Fluid State: International Law and National Legal Systems* (2005) 229.

⁵⁷ Richard Bilder and Detlev Vagts, ‘Speaking Law to Power: Lawyers and Torture’ (2004) 98 *American Journal of International Law* 689. The particular memoranda upon which Bilder and Vagts focus in this comment is: Jay Bybee, ‘Application of Treaties and Laws to al Qaeda and Taliban Detainees’ in Karen Greenberg and Joshua Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (2005); Alberto Gonzales, ‘Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban’ in Karen Greenberg and Joshua Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (2005); Department of Defense, *Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations* (April 4 2003), available at <<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/index.htm>> at 1 October 2006.

government attorneys have a particular obligation to act responsibly in formulating advice or arguments regarding constitutional or international legal questions. For their opinions on such matters may often not be subject to definitive judicial or other impartial review; and even if government legal views are in theory subject to review, it is well known that national courts, other government agencies, and the Congress have traditionally been especially deferential to such opinions. Consequently, in practice there may be no 'safety net' other than these attorneys' own competence, care, integrity, and good faith; it is only these professional qualities that protect against legal advice or advocacy that might undermine the national interest in respect for law, or subvert or erode the international legal order.⁵⁸

Here, the notion of constitutionalism appears less as a programme for action than as a description of the sensibility or mindset that the rule of law requires of the lawyer.

For Fleur Johns, the categories of international and national are not givens.⁵⁹ Instead, both the international and the national are constituted and reconstituted in and through the processes discussed in earlier chapters, such as treaty negotiation or the production of documents by 'national' parliamentary committees set up to scrutinise executive action. Johns does not treat these as processes involving individuals reacting to a pre-existing state of affairs as representatives of pre-existing national or international communities. Instead, she argues that tasks such as seabed boundary delimitation and resource allocation are ongoing activities conducted in part through the work of parliamentary committees which see themselves as providing oversight or recommendations for the Australian Parliament to guide its relations to the Executive.⁶⁰

Ann Kent offers a sophisticated response to the claim that 'liberal democracies' are more likely to act lawfully in the conduct of their international relations.⁶¹ She compares the record of Australian and Chinese executive responses to compliance with international human rights treaties and particularly with the findings of human rights treaty monitoring bodies. In contrast to the theses developed by liberal theorists such as Anne-Marie Slaughter and Oona Hathaway, who suggest that liberal states are more likely to comply with their obligations under international law and to take their international commitments seriously, Kent shows that the Australian Executive has responded with far more cavalier disregard to findings of violation of human rights norms within its jurisdiction than has the Chinese Government.⁶² Kent notes that the range of responses adopted by Australian officials have included attacking the legitimacy of international monitoring bodies, refusing to allow in situ visits by human rights agencies, challenging the influence of non-governmental organisations on the views of human rights monitoring bodies, and stating publicly that the views

⁵⁸ Bilder and Vagts, above n 57, 693.

⁵⁹ Fleur Johns, 'International Law-National Law: Thinking through the Hyphen' in Hilary Charlesworth et al (eds), *The Fluid State: International Law and National Legal Systems* (2005) 188.

⁶⁰ *Ibid* 196-208.

⁶¹ Ann Kent, 'Influences on National Participation in International Institutions: Liberal v Non-Liberal States' in Hilary Charlesworth et al (eds), *The Fluid State: International Law and National Legal Systems* (2005) 251, 251-2.

⁶² *Ibid* 269-74.

of treaty-monitoring bodies will have no effect on Australian policy or law.⁶³ Thus the fact that the institutions of liberal democracy exist domestically is in itself indeterminate in terms of predicting whether that state will comply with its international obligations, even in areas such as human rights which might be understood to fit closely with domestic liberal values.

Finally, the chapter by Janet McLean suggests that the relationship between domestic and international public law is a legacy of the British Empire.⁶⁴ In particular, McLean argues that the form of the state which is the basis for public and international law is profoundly influenced by the 'legal implementation of colonisation'.⁶⁵ As she shows, the 'Colonial Crown merged the external and internal aspects of government' so that the external prerogative power was also the constituent power establishing the terms of internal governance in colonial territories.⁶⁶ I want to conclude by exploring the implications of McLean's arguments about this British imperial heritage for the constitutional project upon which *The Fluid State* is based. A useful illustration of this can be drawn from some of the judgments in *Al-Kateb v Godwin*,⁶⁷ a decision of the High Court of Australia concerned with the constitutionality or otherwise of indefinite administrative detention of asylum seekers under the *Migration Act 1958* (Cth). The majority judges held that the provisions of the *Migration Act* clearly authorised the detention of an unlawful non-citizen for an indefinite period if there was no real prospect of removing the non-citizen, and that this was not beyond the legislative power of the Commonwealth.⁶⁸ In his judgment, McHugh J suggested that constitutionalism requires of the judge only that he or she respect the formal separation of powers provided for under the *Constitution*. In contrast to the suggestion in the chapter by Moran that constitutionalism calls our attention to 'the difference that it makes when [a] court is engaged',⁶⁹ McHugh J did not accept that the judge has a unique role. He reasoned that it would make no difference if Parliament involved the judiciary in the decision to detain. Parliament could choose to 'achieve its object of keeping unlawful non-citizens from entering the Australian community' by making it a 'criminal offence with a mandatory sentence for a person to be in Australia as a prohibited immigrant' or, as here, Parliament could choose to enact legislation that authorises the Executive to detain an unlawful non-citizen for the purpose of deportation.⁷⁰ To suggest that the *Constitution* requires the involvement of the judiciary simply inserts one more step in a process which would still lead inevitably to the same result: 'The unlawful non-citizen would still be detained in custody.'⁷¹ If told to detain indefinitely by the Parliament, a judge will and should detain indefinitely:

⁶³ Ibid.

⁶⁴ Janet McLean, 'Problems of Translation: The State in Domestic and International Public Law and Beyond' in Hilary Charlesworth et al (eds), *The Fluid State: International Law and National Legal Systems* (2005) 210, 223–6.

⁶⁵ Ibid 224.

⁶⁶ Ibid.

⁶⁷ (2004) 219 CLR 562 ('*Al-Kateb*').

⁶⁸ Ibid 562–3.

⁶⁹ Moran, above n 43, 173.

⁷⁰ *Al-Kateb* (2004) 219 CLR 562, 585.

⁷¹ Ibid.

If the Parliament of the Commonwealth enacts laws that direct the executive government to detain unlawful non-citizens in circumstances that prevent them from having contact with members of or removing them from the Australian community, nothing in the *Constitution* — including Ch III [dealing with the judicial power of the Commonwealth] — prevents the Parliament doing so. For such laws, the Parliament and those who introduce them must answer to the electors, to the international bodies who supervise human rights treaties to which Australia is a party and to history. Whatever criticism some — maybe a great many — Australians make of such laws, their constitutionality is not open to doubt.⁷²

For McHugh J, constitutionalism requires compliance with the doctrine of separation of powers, and not any commitment to fundamental values:

It is not for courts, exercising federal jurisdiction, to determine whether the course taken by Parliament is unjust or contrary to basic human rights. The function of the courts in this context is simply to determine whether the law of the Parliament is within the powers conferred on it by the *Constitution*. The doctrine of separation of powers does more than prohibit the Parliament and the Executive from exercising the judicial power of the Commonwealth. It prohibits the Ch III courts from amending the *Constitution* under the guise of interpretation.⁷³

In contrast, the minority judgments explored constitutionalism as a mode of interpretation involving attention to fundamental values of the legal system within which the adjudicating court exists. Thus Kirby J held that '[i]ndefinite detention at the will of the Executive, and according to its opinions, actions and judgments, is alien to Australia's constitutional arrangements'.⁷⁴ He looked to 'notions that lie deep in the common law',⁷⁵ and to 'the international law of human rights'⁷⁶ as sources of authority grounding the 'judicial resistance to unlimited executive detention'.⁷⁷ According to Kirby J, 'judges of our tradition incline to treat unlimited executive detention as incompatible with contemporary notions of the rule of law'.⁷⁸ Similarly, Gleeson CJ found that the legislation was unconstitutional, and framed his judgment according to the principle of legality:

A statement concerning the improbability that Parliament would abrogate fundamental rights by the use of general or ambiguous words is not a factual prediction, capable of being verified or falsified by a survey of public opinion. In a free society, under the rule of law, it is an expression of a legal value, respected by the courts, and acknowledged by the courts to be respected by Parliament.⁷⁹

In these two sets of judgments, we can see two versions of constitutionalism. On the one hand, for the minority judges in *Al-Kateb*, the rule of law offers a culture of formalism, premised upon the commitment to legalism. We might see this as one aspect of the British imperial legacy. Yet the imperial rule of law was also dependent upon the maintenance of imperial rule through systematic recourse to martial law and emergency rule by the executive as a *legal* form in

⁷² Ibid 585–6.

⁷³ Ibid 595.

⁷⁴ Ibid 615.

⁷⁵ Ibid 620.

⁷⁶ Ibid 622.

⁷⁷ Ibid 620.

⁷⁸ Ibid.

⁷⁹ Ibid 577.

the British colonies. The particular practices that led the authors of *The Fluid State* to look to constitutionalism for an answer — amongst them administrative detention without trial, coercive interrogation, aggressive war and occupation of foreign territory — were all part of the imperial rule of law. As Nasser Hussain has shown, the jurisprudence of emergency and the role it plays in creating and maintaining a powerful executive are central aspects of the legal and political legacies of British colonialism.⁸⁰ Australian and other Commonwealth judges may choose either aspect of that imperial inheritance — formal deference towards executive power on the one hand, the rule of law as a constraint on executive power on the other.⁸¹ Both are evident in the judgments in *Al-Kateb* discussed here. The judgments of Gleeson CJ and of Kirby and McHugh JJ are all informed by constitutionalism — the constitutionalism of values for Gleeson CJ and Kirby J, the constitutionalism of the separation of powers for McHugh J. All are imbued with a respect for the gift of formalism. The strikingly different directions in which their formalism takes these judges supports the claim that '[w]hatever effects one's formalism or one's anti-formalism will have for one's legal practice ... can only be contextually determined'.⁸² The chapters gathered in *The Fluid State* provide a rich sense of the range of effects produced by 'the choice to refer to "law" in the administration of international matters',⁸³ when that choice is made in the face of the 'war on terror', human rights violations and economic globalisation. As the judgments in *Al-Kateb* illustrate, such a choice may not be politically innocent, but nor are its effects politically predetermined.

ANNE ORFORD*

⁸⁰ Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (2003) 139–44.

⁸¹ For the notion that inheritance involves a choice, see Jacques Derrida, 'The Deconstruction of Actuality' (Elizabeth Rottenberg trans, 2002 ed) [trans of: 'La déconstruction de l'actualité'] in Elizabeth Rottenberg (ed), *Negotiations: Interventions and Interviews, 1971–2001* (2002) 85, 110–11.

⁸² Koskeniemi, *From Apology to Utopia*, above n 40, 616.

⁸³ *Ibid.*

* Chair of Law and Director of the Institute for International Law and the Humanities, University of Melbourne.