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LAW AND USES OF INTERNATIONAL THOUGHT

***“INTERNATIONAL INFLUENCES ON DOMESTIC LAW: NEITHER JINGOISTIC
EXCEPTIONALISM NOR BLIND SERVILITY”***

The Hon John Basten

Judge of the NSW Court of Appeal

This contribution to this evening's broad topic is restricted, so as to complement Professor Triggs' talk.¹ I propose a few remarks on the influence of foreign jurisprudence on domestic case law.² The title is tendentious, but a little provocative: it carries a rhetorical implication. Who could not see a role for international thought in domestic judicial reasoning? The Canadian comparative constitutional lawyer, Sujit Choudhry has written:³

“To cite comparative jurisprudence is to demonstrate an educated, cosmopolitan sensibility, as opposed to a narrow, inward-looking, and illiterate parochialism.”

Who would not wish to believe they were in the former class rather than the latter?

Perhaps those sentiments were missed by some who heard prospective US Chief Justice John Roberts tell the Senate confirmation hearing into his nomination:

“[A]s a general matter ... [there are] a couple of things that cause concern on my part about the use of foreign law as precedent

¹ Helpful research assistance in the preparation of this paper was provided by Julian Gruin.

² Much serious thinking has been devoted to this topic by judges and scholars around the world. Markesinis B and Fedtke Jew, *Judicial Recourse to Foreign Law: A New Source of Inspiration?* (2006, UCL Press) provides an excellent, succinct and accessible discussion of basic principles and practical applications, with commentary from a panel of distinguished judges. See also Slaughter A-M, *A New World Order* (2004, Princeton UP).

³ Choudhry, S “Migration as a New Metaphor in Comparative Constitutional Law” in *The Migration of Constitutional Ideas* (Camb UP, 2006) at p 4.

The first has to do with democratic theory. ... [J]udges of course are not accountable to the people, but we are appointed through a process that allows the participation of the electorate, the President who nominates judges is obviously accountable to the people. The senators who confirm judges are accountable to the people. In that way the role of the judge is consistent with the democratic theory. If we're relying on a decision from a German judge about what our Constitution means, no President accountable to the people appointed that judge, and no Senate accountable to the people confirmed that judge; and yet he's playing a role in shaping a law that binds the people in this country. I think that's a concern that has to be addressed.

The other part of it that would concern me is that relying on foreign precedent doesn't confine judges. It doesn't limit their discretion the way relying on domestic precedent does. Domestic precedent can confine and shape the discretion of the judges.

In foreign law you can find anything you want. If you don't find it in the decisions of France or Italy, it's in the decisions of Somalia or Japan or Indonesia or wherever. As somebody said in another context, looking at foreign law for support is like looking out over a crowd and picking out your friends. ... And that actually expands the discretion of the judge. It allows the judge to incorporate his or her own personal preferences, cloak them with the authority of precedent because they are finding precedent in foreign law, and use that to determine the meaning of the Constitution. I think that's a misuse of precedent, not a correct use of precedent."⁴

To foreign (that is non-US) ears these comments may seem to be tainted by an appearance of disdain for other judicial systems and a belief in US exceptionalism. To US ears, they are more likely to carry overtones of originalism as a mode of constitutional interpretation. However, they reflect a debate in the US, which seems to generate as much heat as light, that is focused largely on questions of constitutional interpretation. That now has echoes across the Atlantic, as the UK Court of Appeal and Supreme Court (and formerly the House of Lords) grapple with the *Human Rights Act 1998* (UK) and the European Convention on Human Rights.⁵

⁴ Confirmation hearing on the nomination of John G Roberts Jr to be Chief Justice of the United States before the Senate Com on the Judiciary, 109th Cong 200 (2005) at 200-201, in a summary form found in Tushnet, M, "When is knowing less better than knowing more? Unpacking the controversy over Supreme Court reference to non-US law" 90 Minn L Rev 1275-1276 (2005-2006).
⁵ *Convention for the Protection of Human Rights and Fundamental Freedoms* (Rome, 1950).

In 2008, Lord Robert Reed⁶ noted a “growing academic literature on comparative law in UK courts”, but suggested more reflection was required on the part of the judiciary.⁷

Lord Reed identified the value of first identifying the purposes to which foreign law might properly be put. That may seem a trite reminder, but its application avoids a number of false issues and focuses on the practical, instead of the ethereal. He identified three potential purposes with differing implications: namely,

- (i) a search for authority;
- (ii) foreign experience as empirical fact, and
- (iii) a source of ideas.

He recognised that these are heuristic devices and that in practice the categories tend to overlap. But that is not entirely so and arguably greater efforts should be made to clarify the purposes of such reference in a particular situation.

This analysis is not markedly different from one provided by Kiefel J, speaking extrajudicially in 2005, in the following terms:⁸

“A comparative approach to the law of different systems has a number of uses. It is essential in the process of standardisation of areas of law and it may be useful to assist domestic law in areas where difficulty has been experienced in identifying guiding principles or legal rules. I would add a third possible benefit. In my view the process of comparison itself serves to elucidate what concepts and values truly shape our own laws.”

The first of Lord Reed’s categories, authority (or precedent, being the word used by Roberts CJ) is no longer a common purpose for reference to any foreign law; not even Privy Council decisions have been accorded the status of binding authority in

⁶ A member of the Inner House of the Scottish Court of Session.

⁷ Reed, R, “Foreign Precedents and Judicial Reasoning: the American Debate and British Practice” (2008) 124 LQR 253 at 254; see also McCrudden C, “Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights” (2000) 20 (4) Oxford J of Leg Studies 499.

⁸ Kiefel S, “English, European and Australian Law: Convergence or Divergence” (2005) 79 ALJ 220 at 227).

Australia for the last 30 years.⁹ Although as late as 1943 one can find affirmations of blind servility in following the House of Lords right or wrong, regardless of the fact that it did not stand within the judicial hierarchy of Australian courts, that era is now long past.¹⁰ It is now almost fifty years since the Court, led by Dixon CJ, abandoned that approach in *Parker v The Queen*.¹¹ More in keeping with current views is the statement in *Cook v Cook*.¹²

“The history of this country and of the common law makes it inevitable and desirable that the courts of this country will continue to obtain assistance and guidance from the learning and reasoning of United Kingdom courts just as Australian courts benefit from the learning and reasoning of other great common law courts.”

Just two and a half years earlier, Sir Anthony Mason, who had been party to the joint judgment in *Cook*, stated in a paper presented to the First Annual Conference of the Australian Bar Association:¹³

“There is an increasing tendency on the part of the High Court, in common with other courts of appeal, to look for the development of the common law elsewhere. If a principle has been accepted and adopted in the United Kingdom, Canada, New Zealand and the United States, it is a matter of obvious significance to us. Unfortunately, research of this kind takes time.”

His Honour reiterated the point that the search should be for “universal and unqualified acceptance” except where a judgment may offer “an illuminating exposition of principle, such as the judgments of Justices Holmes, Cardozo, Brandeis and Learned Hand provide”.

The decision of an external court is, however, only ‘authority’ to be followed when a local choice of law rule requires its application. It is then treated as a fact to be proved by expert evidence, a comparison to which further thought should be given.

⁹ See, eg, *Viro v The Queen* [1978] HCA 9; 141 CLR 88.

¹⁰ See *Piro v W Foster & Co Ltd* [1943] HCA 32; 68 CLR 313. Further references are to be found in Pyke J and MacAdam A, *Legal Institutions and Method*, (3rd ed, 2007) at 722-749.

¹¹ [1963] HCA 14; 111 CLR 610 at 632-633.

¹² [1986] HCA 73; 162 CLR 376 at 390.

¹³ The Hon A F Mason, “The Role of Counsel and Appellate Advocacy” (1984) 58 ALJ 537 at 539.

Secondly, there may be limited difference between the second two of Lord Reed's categories. What he had in mind in referring to "empirical fact" was the success or otherwise of a legal solution being proposed to a problem, which had been identified and tried elsewhere, in circumstances where the consequences could be assessed. In *Tabet v Gett*¹⁴ the High Court considered whether the loss of a chance of a better outcome, in a medical negligence case, constituted compensable damage, where the chance was assessed as less than probable. Reference was made both in the Court of Appeal and in the High Court to overseas authorities adopting such an approach. Was it possible, however, to evaluate empirically the proposed change in approach? The answer is not really; any change would probably have had more profound consequences in terms of the coherence of legal principles, than practical effects which could be identified. Although he made reference to overseas authority, Gummow ACJ (with whom Hayne and Bell JJ agreed) was more concerned with the issue of legal coherence. Crennan J was concerned with the consequences of a change which might include "the prospect of thereby encouraging defensive medicine, the impact of that on the Medicare system and private medical insurance schemes and the impact of any change to the basis of liability on professional liability insurance of medical practitioners", a consequentialist concern, but not based on foreign experience.¹⁵ There is no doubt that the Court was conscious of the different approach adopted in some US states and in civil law countries.¹⁶ Kiefel J used a Massachusetts case to illustrate how the new approach might operate in practice.¹⁷

It is difficult to find examples of foreign law providing possibilities which can be empirically assessed. At a somewhat abstract level, as noted by Justice Kiefel in her 2005 paper, the House of Lords considered the position of lawyers in Continental legal systems in addressing the scope of the immunity from action for negligence for solicitors and barristers.¹⁸ Lord Steyn, while noting that there were differences in the operation of both courts and advocates in European Union countries, remarked that "the fact that the absence of an immunity has apparently caused no practical

¹⁴ [2010] HCA 12; 84 ALJR 292.

¹⁵ At [102].

¹⁶ See, eg, Kiefel J at [125]-[139].

¹⁷ At [132]-[139].

¹⁸ *Arthur J S Hall & Co (a firm) v Simons* [2002] 1 AC 615.

difficulties in other countries in the European Union is of some significance”.¹⁹ He also took into account the limited extent of the immunity in the USA. His Lordship continued:

“In Canada an advocate had no immunity from an action in negligence before *Rondel v Worsley*²⁰ In Canada trial lawyers owe a duty to the court. After a detailed and careful review the court found there was no evidence that the work of Canadian courts was hampered in any way by counsel's fear of civil liability. ... I regard the Canadian empirically tested experience as the most relevant. It tends to demonstrate that the fears that the possibility of actions in negligence against barristers would tend to undermine the public interest are unnecessarily pessimistic.”

Lord Hoffmann also referred to the Canadian experience in reaching a similar conclusion. Lord Hope of Craighead referred to the Canadian experience, but did not appear to consider it of empirical significance, treating it rather as part of the comparative jurisprudence generally.²¹ Other members of the House did not deal with the comparative jurisprudence by reference to any empirical assessment which might be obtained from it.

The third of Lord Reed's purposes for referring to foreign law, namely as a source of ideas, might be thought uncontroversial. Foreign law is frequently used for this purpose.²²

Can a better characterization be proposed? As Professor Cheryl Saunders has fairly noted, the usage of foreign law is so varied as to make almost impracticable a typology sufficiently precise to be useful:²³

“It may be used to assist to frame the question; to identify options or more generally to survey the field; to support a step in the argument; to suggest an answer; to test a hypothesis; to confirm a conclusion; or to explore the consequences of a particular result.”

¹⁹ At 681.

²⁰ [1969] 1 AC 191: see *Demarco v Ungaro* (1979) 95 D.L.R. (3rd) 385.

²¹ At 721-722.

²² Kiefel J provides a number of examples in the High Court: *op cit*, p 230.

²³ Saunders, C “Comparative Constitutional Law in the Courts: Is there a Problem?” (2006) 59 *Current Legal Problems* 91 at 98-99.

In the Court of Appeal in *Gett* we looked, briefly, at overseas material, but to what end? I think it was largely to reassure ourselves that we had not missed an obvious solution and, perhaps, also to obtain reassurance that others had recognised the same concerns that we had identified.

The most common area of debate about the use of comparative law is that area rather vaguely defined as human rights law. It may involve general law principles (as in *Mabo (No 2)*), statute law (as in the interpretation of anti-discrimination and equal opportunity laws in the various Australian jurisdictions) or it can involve constitutional principles (as in the US and now the UK).

No doubt the most likely vehicle for obtaining instruction from foreign case law is the general or “common law in Australia”, to adopt the language of the *Judiciary Act 1903* (Cth), s 80. An example in this regard is *Mabo (No 2)*.²⁴ No doubt it was inevitable and uncontroversial that, in determining the effect of the introduction of imperial law into a colony, the High Court would have regard to authority from other parts of the British Commonwealth. Further, in a well-known, but more controversial passage, Brennan J stated:²⁵

“Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the *Optional Protocol to the International Covenant on Civil and Political Rights* brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which,

²⁴ *Mabo v State of Queensland [No 2]* [1992] HCA 23; 175 CLR 1.

²⁵ At 42-43.

because of the supposed position on the scale of social organization of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.”

This passage reveals a number of factors at work. First, it is unusual though by no means unknown, conformably with judicial method, to rely on an amorphous concept such as “the contemporary values of the Australian people”:²⁶ reliance on the “expectations of the international community” is less common; but if such a concept can be found in an international Covenant to which Australia has acceded, reliance is anchored in an executive act of the Australian government. (When and why this is permissible is sometimes a matter of contention.) At least the use of such material is not an arbitrary exercise of selectivity, as suggested by the somewhat dismissive (or perhaps rhetorical) remarks of Roberts CJ quoted earlier.

Secondly, it is clear that an international instrument is not a precedent: but it is a legitimate, important, or even powerful, influence. Thirdly, Brennan J identified a particular area of operation, namely “universal human rights”. That may be a more legalistic conceptual exercise than the search, for example, for principles underlying a liberal democratic political tradition, even if described as constitutional principles. Fourthly, and perhaps intriguingly, the effect of reliance upon such material was not merely to bring the common law into line with such international standards and fundamental values, but to do so retrospectively by reference to the effect of the introduction of the common law upon the exercise of sovereignty over the various parts of the Australian landmass between 1789 and various dates thereafter into the 1820s and, possibly, in the case of Murray Islands, 1895.²⁷

In the area of constitutional law, in the words of Professor Cheryl Saunders, courts outside the United States tend to use foreign case law “readily, naturally and for a variety of purposes”.²⁸ Cheryl Saunders makes her point by reference to three decisions concerning the implied freedom of political communication, namely *Lange*

²⁶ That is not to say that contemporary community values are not a standard applied under domestic law: they clearly inform concepts such as negligence and defamation; the comment relates to their use.

²⁷ 175 CLR at 30.

²⁸ Saunders, C “The Use and Misuse of Comparative Constitutional Law” 13 *Ind J Global Legal Stud* 37 (2006) at 37.

v Australian Broadcasting Corporation,²⁹ *Theophanous v Herald & Weekly Times Ltd*³⁰ and *Australian Capital Television Pty Ltd v The Commonwealth*.³¹ Those examples may be multiplied many times. A further example may be found in the Court's discussion of the meaning of "religion", particularly in relation to Scientology, in *The Church of the New Faith v The Commissioner of Pay-Roll Tax (Vic)*.³² That was not in terms a constitutional case, but the Court was conscious of the fact that a definition of religion would affect the scope and operation of s 116 of the Constitution.³³ As noted by Mason ACJ and Brennan J (a year before Sir Anthony's ABA speech).³⁴

"Of course, when Australian courts are engaged in clarifying concepts important to Australian law, they may be aided by appropriate citation from the judgments of courts outside the Australian hierarchy if there is no binding or sufficiently persuasive Australian authority."

Their Honours referred to a number of decisions from the United States, not only of the Supreme Court, in searching for an appropriate principle to define what is and what is not a religion. Other members of the Court adopted a similar approach.³⁵

Perhaps more surprisingly, there are readily available examples of overseas case law being referred to in the construction of Australian statutes. Anti-discrimination or equal opportunity laws provide a ready source of such examples. That was because there were well-understood overseas precedents on which Australian statutes were founded. As has been explained in the leading text on Australian anti-discrimination law, by Rees, Lindsay and Rice, the laws passed in most Australian jurisdictions have been "based on templates developed in Britain in the 1970s".³⁶ The British developments in turn drew upon such sources as the *Civil Rights Act of 1964 (US)*, *Title VII*, which adopted concepts of disparate treatment and disparate impact, the

²⁹ [1997] HCA 25; 189 CLR 520.

³⁰ [1994] HCA 46; 182 CLR 104.

³¹ [1992] HCA 45; 177 CLR 106.

³² [1983] HCA 40; 154 CLR 120.

³³ At p 130 (Mason ACJ and Brennan J).

³⁴ At p 131.

³⁵ The Court was constituted by Mason ACJ, Murphy, Wilson, Brennan and Deane JJ.

³⁶ Rees N, Lindsay K, Rice S, *Australian Anti-Discrimination Law; Text, Cases and Materials* (2008, Federation Press) at 2.2.1.

latter category being commonly known in this country as “indirect discrimination”. The distinction between treatment and effect is of course by no means novel, but the concept of practices which were “fair in form, but discriminatory in operation” and subject to “[t]he touchstone of business necessity” derives from the US Supreme Court decision of *Griggs v Duke Power Company*,³⁷ to which many Australian decisions have referred.

Further, the proposition that sexual harassment was a form of sex discrimination was first authoritatively established in this country in what must be one of only a handful of tribunal decisions published in the New South Wales Law Reports, *O’Callaghan v Loder*,³⁸ a judgment of Justice Jane Mathews.³⁹ A perusal of her Honour’s reasons reveals numerous references to overseas authority, perforce, in the absence of local authority.

It is almost impossible to resist the conclusion that Australian courts generally are entirely comfortable with reliance upon overseas authority and do not have much difficulty in placing reliance appropriately. Although we are not unique in this regard, we are likely to succumb neither to grandiose views of Australian exceptionalism, nor to unbecoming servility. Perhaps we once were at risk in relation to the latter, at a time when the ties to the ‘mother country’ (how quickly has that language become not merely unfashionable but embarrassing) were strong, or at least were accorded significant respect. However, it is now more than 10 years since the High Court held that the United Kingdom was “a foreign power” for the purposes of s 44(i) of the Constitution.⁴⁰ The devolution (and evolution) of sovereignty in Australia has had large practical consequences through the whole of the administration of justice. Fifty, and even forty years go, law students in Australia were expected to know what the English Court of Appeal had said on matters of importance in the general law. Nowadays, references to the House of Lords and the Supreme Court remain frequent, though no doubt less commonplace than in the past.

³⁷ 401 US 424 (1971).

³⁸ [1983] 3 NSWLR 89.

³⁹ Then a judge of the District Court and a judicial member of the Equal Opportunity Tribunal.

⁴⁰ *Sue v Hill* [1999] HCA 30; 199 CLR 462.

The willingness to refer to decisions from foreign jurisdictions is a function of three factors. First, and most basically, ready access, which includes language, electronic availability and research resources. Secondly, it requires a degree of expertise to assess and appraise such decisions in their own legal culture. Thirdly, it requires self-confidence in the capability of one's own legal system to accommodate foreign ideas. The English courts continue to demonstrate their cosmopolitanism in this regard. A recent and sophisticated example of these factors at work may be seen in the House of Lords in *Stone & Rolls Ltd (In liq) v Moore Stephens*.⁴¹ (The case concerned a claim in negligence brought against auditors by a company, which had been used as a vehicle for fraud by an individual who was its sole directing mind and shareholder.) Reference was made in the various opinions to decisions of the Canadian Supreme Court,⁴² the Court of Appeal of Singapore,⁴³ to Cardozo CJ⁴⁴ and to the US Court of Appeals for the 2nd and 3rd Circuits⁴⁵ and, notably in the dissenting opinion of Lord Mance,⁴⁶ to Street CJ in *Kinsela v Russell Kinsela Pty Ltd (In liq)*⁴⁷ and, in some detail, to Giles J (then in the Equity Division) in *Segenhoe Ltd v Akins*.⁴⁸

In *Gray v Thames Trains Ltd*,⁴⁹ a passenger who was the victim of a train disaster, and whose life subsequently fell apart, sued the company responsible for the accident in negligence, for loss resulting from his subsequent criminal conduct. Much assistance was obtained from Canada, New Zealand and New South Wales authorities, particularly the judgments of Samuels JA⁵⁰ and of Kirby P (in dissent),⁵¹

⁴¹ [2009] UKHL 39; [2009] 1 AC 1391 at 1447.

⁴² At [7], [47], [50], [54], [128], [165].

⁴³ At [24], [27], [180], [219].

⁴⁴ At [202].

⁴⁵ At [163], [164], [200], [239].

⁴⁶ At [232], and [253]-[254] and Annex.

⁴⁷ (1986) 4 NSWLR 722.

⁴⁸ (1990) 1 ACSR 691 (NSWSC).

⁴⁹ [2009] UKHL 33; [2009] 1 AC 1339.

⁵⁰ With which Handley JA agreed.

⁵¹ At [40]-[41].

in *State Rail Authority of New South Wales v Wiegold*,⁵² and of Sheller JA⁵³ in *Hunter Area Health Service v Presland*.⁵⁴

The continuing mutual exchange of ideas in relation to legal principle is an undoubted strength of the common law tradition. However, one may join Lord Robert Reed in his concern that we do not articulate with sufficient care the criteria by which, and the procedural manner in which, we rely upon international authorities for assistance. A transparent process and an understanding of the circumstances in which it may be undertaken is important for litigants, the resolution of whose disputes may turn on such matters.

To this somewhat comforting picture, three riders should be added. First, the dangers of arbitrary selectivity are not to be disregarded. In part that is because Sir Anthony Mason's category of universal and unqualified acceptance is so rare as to be an endangered species. By comparison, the category of highly persuasive writing is far more susceptible to the problems of arbitrary selection. Sir Anthony gave examples of distinguished American judges, but they were no more than examples and the selection was not intended to be restricted to the United States. His remarks were, however, in contrast to the somewhat rhetorical comment of Roberts CJ, intended to restrict the search to countries within the common law tradition.

A second rider; where foreign authority is relied upon, it is not proved in the way that foreign law is proved, when the court is required to apply it. Third, there is, as Sir Anthony recognized, a cost in unearthing foreign authority and providing it to the court: it is rarely one which the parties wish to bear. But if the court relies upon its own resources, without the assistance of counsel, there is a real risk that an erroneous understanding will be developed.

These particular dangers may perhaps be reduced by two countervailing considerations. First, we tend to know what we do not know. We have been brought up in a common law tradition which places considerable emphasis on history,

⁵² (1991) 25 NSWLR 500.

⁵³ Santow JA agreeing, Spigelman CJ dissenting.

⁵⁴ [2005] NSWCA 33; 63 NSWLR 22; in *Gray* at [42], [67], [80], [81], 93, [99], [101].

context and purpose.⁵⁵ We know that other jurisdictions operate differently and we should be sufficiently wary not to rely upon assumptions as to how the law operates in another country, about whose legal system we are ill-informed. Secondly, because the common law tradition underpins a wide range of jurisdictions which conduct their legal business in English, we can venture into as many jurisdictions as, in practice, we will want to, without running the risk of losing our way completely.

Different issues may arise in the future. Without minimising the powerful influence of the global inter-relatedness of economic, social and political currents, domestic law is also affected by significant localising influences. One reason that there is diminishing reference to English law in Australian judgments is that the rising volume of legislation often requires us to seek answers closer to home. So powerful is that force that we tend to resist even looking across State boundaries for assistance. We have been recently reminded by the High Court that intermediate courts of appeal across the country should be applying a common law in Australia and should be aware of and following each other's decisions. To assist in that exercise, we now have a Court of Appeal website to establish an electronic collection of references to important cases of other intermediate courts of appeal. (It also contains reference to selected overseas decisions.) That is in part a recognition of the need to make the task of reference easier as the volume of available material increases.

A further localising factor is indeed a reflection of Australian exceptionalism, of a peculiar kind. Now that the UK has acceded to, and domesticated, the European Convention on Human Rights, we are a lonely outpost in a world governed by human rights legislation. That is not to say we do not have human rights protections: we do, now that the Commonwealth and all State and Territory jurisdictions have enacted equal opportunity laws. However, we do not have a national human rights law affecting the interpretation and application of our domestic law generally. I am not suggesting that we necessarily should have such a law, but I am suggesting that UK authorities will appear to have diminishing relevance and, indeed, there may be a

⁵⁵ See, eg, Saunders C, "Administrative Law and Relations between Governments: Australia and Europe Compared" (2000) 28 Fed L Rev 263, 289-290.

tendency to avoid them, until we understand the changed legal culture from which they emanate.

In conclusion, I return to the remarks with which I opened. Any suggestion that Chief Justice Roberts' statement to the Senate confirmation hearing into his nomination revealed a form of American exceptionalism would be misconceived. The fact that he spoke only of the use of foreign law as "precedent" was no doubt deliberate, and rendered his comments largely anodyne. (One suspects that touching the cap to acknowledge the role of the senators before whom he was appearing was politically astute.) However, his final comments about finding "anything you want" in foreign law were directed to what we would see as a paper tiger. The countries he nominated were not countries in the common law tradition. It is probably fair to say that his remarks were directed to a universalist or natural law theory of human rights, which may have adherents in the United States, but which has little (perhaps too little) influence in the domestic courts of this country.

On the other hand, it is decades since this country followed English decisions as a matter of ingrained habit. Accordingly, I feel confident that we suffer from neither jingoistic exceptionalism, nor blind servility. I join Lord Robert Reed in his concern that we do not articulate with sufficient care the criteria by which, and the procedural manner in which, we rely upon international authorities for assistance. If this seems an inconclusive result, I can only plead that it is not dissimilar to that reached by Justice Dyson Heydon in his thought-provoking contribution to this series when considering how "legislative facts" could properly be taken into account and how they should be demonstrated in an appellate court.⁵⁶ So in this area, circumstances are too varied to allow of prescriptive answers. Guidelines as to the use of foreign case law may develop through greater self-consciousness in its application.

⁵⁶ Heydon JD, "Law and the Uses of Expertise" (speech delivered at the 'Constituting Law: Law's Dependence on Social Values' series, NSW Bar Association, 27 April 2010).

More than 90 years ago, Justice Benjamin Cardozo remarked, in the context of the public policy exception to the enforcement of foreign law, words which may be understood in a wider context:⁵⁷

“We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home... The courts are not free to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors, unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep rooted tradition of the common weal.”

We can admire, if we cannot emulate, the simple elegance of such a statement, a product of earlier times.

⁵⁷ *Loucks v Standard Oil Co of New York*, 224 NY 99, 120 NE 198, 201 (NY CA) (1918).