AUSTRALIA'S GROWING DEBT TO THE EUROPEAN COURT OF HUMAN RIGHTS*

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An interesting recent development in judicial reasoning in Australia has been the growing recourse by judges to decisions and reasons of the European Court of Human Rights. The author points to the use of a decision of that court by the High Court of Australia in the prisoners' voting rights case of 2007: Roach v Electoral Commissioner. *He then examines the citation of reasons of the European Court of Human Rights in Australia from early days in the 'free speech' cases up to the present time. The citations have ranged from cases on the right to fair trial, migration law, family law and a range of other topics. With the enactment of human rights statutes in Australia, this use by Australian courts of decisions of the European Court of Human Rights is bound to expand.*

I INTRODUCTION

The European Court of Human Rights has the primary responsibility for deciding the meaning and application of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.[1] The *Convention* was adopted to confer rights upon individuals against the sovereign states who were parties to it.[2] It grew out of the resolve of the states in the Council of Europe, originally in the western part of a then divided continent, to respond effectively to post-war revelations about the barbarous atrocities of the war, the Holocaust and the misuse of state power involving millions of individuals.[3]

The birth pangs of the *Convention* were not easy. At The Hague in May 1948, its proponents adopted a 'message to Europeans' declaring a desire for 'a Court of Justice with adequate sanctions to ensure the implementation of this Charter'.[4] In the United Kingdom, the Attlee government showed, at most, a grudging support for the *Convention*. It sought to water down its provisions and to make the right of petition to the proposed Commission of Human Rights conditional and the

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1 *European Convention for the Protection of Human Rights and Fundamental Freedoms,* opened for signature 11 April 1950, 213 UNTS 222 (entered into force 3 September 1953) (*'Convention'*).

2 Anthony Lester and David Pannick, *Human Rights Law and Practice* (2nd ed, 2004) 5.

3 Ibid 4–5.

4 Ibid 6.

jurisdiction of the proposed court optional.[5] Officials in the United Kingdom were sceptical, as English law long had been, about statements of fundamental rights. When Jowitt LC consulted the senior judiciary about the *Convention*, they shared his hostility to the right of petition and to the jurisdiction of the European Court of Human Rights over British disputes.[6]

Nevertheless, the United Kingdom was the first state to ratify the *Convention* in March 1951. The *Convention* came into force on 23 September 1953. At first there was no British acceptance of a right of individual petition to the Court, or of the Court's jurisdiction in individual cases. Nor was there any legislation to alter domestic law, still less to incorporate *Convention* rights into United Kingdom law.[7] Until the 1970s, the *Convention* was described as 'a sleeping beauty',[8] at least so far as the British constitutional and legal system was concerned. The first case in which the European Court found a breach of the *Convention* by the United Kingdom was *Golder v United Kingdom*.[9] The first case in which the Court held that a House of Lords decision had breached the *Convention* concerned an injunction restraining the Sunday Times from publishing an article about the thalidomide tragedy, which their Lordships had upheld on the basis that publication was prejudicial to the fair trial of pending civil proceedings.[10]

Gradually, the number of such cases increased. British lawyers and courts became accustomed to referring to them and to considering the *Convention*, where relevant, lest the case in hand be taken to the Commission, and later the Court, in Strasbourg. In his Hamlyn Lectures in 1974,[11] Lord Scarman called for incorporation of the *Convention* into the municipal law of the United Kingdom. His call gradually attracted the support of leading lawyers and judges.[12] Early attempts to achieve incorporation did not succeed. However, in a partial reflection of events that were later to occur in Australia, the Labour Government, elected in 1997, committed itself to considering a Human Rights Bill. The measure attracted some support from eminent Conservative backbenchers. A formidable body of jurists on the cross-benches also lent their approval, including the Lord Chief Justice, Lord Bingham of Cornhill, Lord Scarman, Lord Wilberforce, Lord Ackner, Lord Cooke of Thorndon and (as a recent convert) Lord Donaldson of Lymington. However, the Bill was opposed by the Conservative party leadership as well as by sections of the media.[13] In November 1998, the *Human Rights Act*

5 Ibid 6–7.

6 Ibid 7.

7 Ibid.

8 Ibid 9.

9 (1975) 1 EHRR 524 ('*Golder*').

10 *Sunday Times v United Kingdom* (1979) 2 EHRR 245 ('*Sunday Times Case*'). By a narrow majority, the Court favoured an interpretation consistent with the right of free expression.

11 Lord Scarman, 'English Law: The New Dimension' in *The Hamlyn Lectures* (1974); cf Michael Kirby, 'Law Reform, Human Rights and Modern Governance: Australia's Debt to Lord Scarman' (2006) 80 *Australian Law Journal* 299, 310–1.

12 Lester and Pannick, above n 2, 5, 11–4.

13 Ibid 14.

1998 (UK) was enacted. Substantially, this incorporated the *Convention* into the law of the United Kingdom with effect from 2 October 2000.

Coinciding with these events, changes also occurred in Strasbourg in 1998 pursuant to *Protocol 11 to the Convention*.[14] This 'effected a thorough-going reform of our system'.[15] The European Court of Human Rights is now a court for 45 states in a 'continent of forty-one languages in which complaints can be brought to the Court'.[16] The number of applications to the Court now totals about 40 000 a year. At any time there are nearly 90 000 cases pending.[17]

New techniques and resources are being introduced to enhance the efficiency of the Court and to help dispose of its backlog of cases.[18] As with the backlog of appeals and applications to the High Court of Australia, a clear solution would be a simplified triage system, whereby applications could be dealt with on the papers. The very nature of a jurisdiction established for the protection of basic human rights is that it often requires urgent attention to cases.

The European Court of Human Rights in Strasbourg is the world's largest and busiest human rights court with a jurisdiction extending over some 800 million people.[19] Unlike the European Court of Justice in Luxembourg, the reasoning of the Strasbourg court appeals more to judges and lawyers of the common law tradition, as its opinions adopt a discursive style and appear less dogmatic, more individual, less conclusory and more transparent. Dissenting opinions are inevitable in this field of jurisprudence, and are common in the Strasbourg court.

By its reasons, the European Court of Human Rights pays attention to local law and thus engages in a 'conversation' with the courts (especially final courts) of member states. By its carefully reasoned decisions over nearly half a century, the Court has 'given shape and meaning to human rights ... in virtually every area' of the discipline.[20]

14 *Protocol 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 11 May 1994, ETS 155 (entered into force 1 November 1998).

15 Judge Jean-Paul Costa, *Speech by the President of the European Court of Human Rights* (Speech delivered at the Solemn Hearing of the European Court of Human Rights on the Occasion of the Opening of the Judicial Year, Strasbourg, 19 January 2007) European Court of Human Rights <http://www.echr.coe.int/NR/rdonlyres/55448041-3A60-44B6-83F6-1C34B381AC09/0/2007Costa_Opening_Judicial_Year.pdf> at 10 December 2008.

16 Luzius Wildhaber, 'The European Court of Human Rights: The Past, the Present, the Future' (2007) 20 *National Journal of Constitutional Law* 183, 196.

17 Michael O'Boyle, 'On Reforming the Operations of the European Court of Human Rights' (2008) 1 *European Human Rights Law Review* 1.

18 A 2005 report by Lord Woolf of Barnes following a management study of the Court recommended many organisational changes, many of which have been implemented: Lord Woolf et al, *Review of the Working Methods of the European Court of Human Rights* (2005) European Court of Human Rights <http://www.echr.coe.int/Eng/Press/2005/Dec/LordWoolfsReviewOnWorkingMethods.pdf> at 10 December 2008.

19 Georg Ress, 'The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order' (2005) 40 *Texas International Law Journal* 359, 363 and Mark E Villiger, 'The European Court of Human Rights' (2001) 91 *American Society of International Law Proceedings* 79.

20 Villiger, above n 19, 80.

II THE AUSTRALIAN DEBT: THE INFLUENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS ON THE DEVELOPMENT OF AUSTRALIAN LAW

Australia is not a party to the *Convention*, nor is it subject to the jurisdiction of the European Court of Human Rights. Until recently,[21] no jurisdiction in Australia had adopted general provisions for the protection of fundamental human rights, though some relevant provisions exist in the *Australian Constitution*.[22] The federal Attorney-General, Robert McClelland, has announced that the Australian Labor government, elected in 2007, intends to examine this issue in its first term.[23]

The increasing number of references to the jurisprudence of the European Court in decisions of United Kingdom courts, especially since 2000 when the *Human Rights Act 1998* (UK) came into force, has inevitably been noticed by Australian courts. This is unsurprising given the continuing significance for Australian law of analogies borrowed from Britain. The introduction in various Australian jurisdictions of legislation for the general protection of human rights is likely to enhance still further the attention that is given to decisions of the European Court of Human Rights. My purpose is to demonstrate the already substantial Australian debt to the reasoning of the European Court of Human Rights. I will illustrate the wide range of areas in which decisions of the Court have been cited in local judicial reasons. I will suggest that, in the present environment, this process is likely to continue and expand.

A *A Recent Illustration: The Prisoners' Voting Case*

The most recent extended reference by the High Court of Australia to the reasoning of the European Court of Human Rights occurred in interesting and hotly contested circumstances.

In *Roach v Electoral Commissioner*,[24] the High Court was concerned with amendments to the *Commonwealth Electoral Act 1918* (Cth) enacted in 2006. The amendments had the effect of disenfranchising from voting in federal elections electors who were serving sentences of imprisonment regardless of the duration of their sentences and whether for offences against federal, state or territory laws.

Previously, the disenfranchisement of prisoners in Australia had applied only to prisoners serving custodial sentences of three years or longer. By majority, the High Court held that the 2006 amendments were invalid under the *Australian Constitution*; that a substantial reason was required to disqualify an eligible elector from voting; and that the new provisions, in making no distinction between short and long term prisoners or relative culpability, were incompatible with the

21 See *Human Rights Act 2000* (ACT) and *Charter of Human Rights and Responsibilities Act 2006* (Vic).

22 See especially *Australian Constitution* s 51(xxxi) (acquisition of property); s 80 (jury trial); s 92 (freedom of intercourse); s 116 (religious tests); s 117 (non-discrimination).

23 *West Australian*, 21 December 2007, 1.

24 (2007) 233 CLR 162 ('*Roach*').

constitutional concept of universal suffrage as it had evolved in Australia. The amending provisions were thus struck down. In effect, the previous form of the legislation was revived.

In each of the majority opinions in *Roach*, the Justices of the High Court referred to the decision of the European Court in *Hirst v United Kingdom (No 2)*.[25] There, the European Court of Human Rights held, by majority, that a blanket ban on voting by *all* convicted prisoners in the United Kingdom violated art 3 of *Protocol 1 to the Convention*.[26] In his reasons in *Roach*, Gleeson CJ explained how the majority in *Hirst* had concluded that the blanket ban 'was arbitrary ... and lacked proportionality ... even allowing for the margin of appreciation to be extended to the legislature'.

It was, of course, impossible to apply such jurisprudence 'directly' to the meaning of the *Australian Constitution*. Yet Gleeson CJ pointed out that '[e]ven so, aspects of the reasoning are instructive'.[27] By analogy, the 2006 amendments were seen as 'abandoning any attempt to identify prisoners who have committed serious crimes'.[28] They were thus viewed as 'breaking the rational connection necessary to reconcile the disenfranchisement with the constitutional imperative of choice by the people'.[29]

Hirst was also referred to in the joint majority reasons of myself, Gummow and Crennan JJ. Those reasons likewise acknowledged the differences between the questions raised for consideration by the European Court of Human Rights and the High Court of Australia respectively.[30] Nevertheless, the joint reasons pointed to the way in which the decision in *Hirst* had impacted upon the consideration of a like question in the Supreme Court of Canada, decided in accordance with the *Canadian Charter of Rights and Freedoms*.[31] In justifying the acceptability of a disqualification for prisoners serving three years of imprisonment or more, the joint reasons concluded that such provisions were not 'necessarily inconsistent, incompatible or disproportionate in the relevant sense'.[32]

The dissenting Justices in *Roach* (Hayne and Heydon JJ) rejected the relevance of the reasoning of the European Court to what was ultimately a question about the requirements of the *Australian Constitution*. Hayne J rejected the relevance of any 'generally accepted international standards' in elucidating the demands

25 (2005) 42 EHRR 41 ('*Hirst*'). The decision of the Grand Chamber of the European Court was delivered by a vote of twelve judges to seven. The reasons in *Hirst* were earlier referred to in *ABC v O'Neill* (2006) 227 CLR 27, 112.

26 *Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 20 March 1952, 213 UNTS 262 (entered into force 18 May 1954).

27 *Roach* (2007) 233 CLR 162, 179.

28 Ibid 182–3.

29 Ibid.

30 Ibid 203–4.

31 Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK). The reference was to *Sauvé v Canada (Chief Electoral Officer)* [2002] 2 SCR 519 (SC Canada).

32 *Roach* (2007) 233 CLR 162, 203–4.

of the *Australian Constitution*.[33] Heydon J was even more emphatic on this point.[34] He referred to the strong statements to like effect by McHugh J in *Al-Kateb v Godwin*.[35] He stated, somewhat sharply, that 21 of the Justices of the High Court of Australia who had previously considered the matter had rejected the proposition that international law could affect or limit the meaning of the *Australian Constitution*. He stated, moreover, that only one Justice had decided otherwise; that Justice being myself.[36]

A number of factors make it inevitable, even in constitutional cases, that Australian judges will draw upon relevant international sources, particularly where those sources are as thoughtfully and persuasively reasoned as decisions of the European Court of Human Rights. These include the discursive form of reasoning followed by courts in Australia, the importance typically assigned to contextual developments deemed to be relevant, the process of judicial reasoning by analogy and the habit among Australian judges of transparently revealing intellectual stimuli.

The recent use by the High Court of Australia of the decision in *Hirst*, despite the dissenting opinions of Hayne and Heydon JJ, may therefore be significant. This is especially so if and when Australian human rights legislation raises analogous questions for judicial decision. It seems inevitable[37] that busy Australian judges, faced with problems upon which the European Court has already passed elaborate reasons, will look to that court's reasons for guidance in applying Australian law to the case in hand. As proved by *Hirst*, such decisions may be especially useful (although in no way binding or determinative) in identifying material considerations of legal principle and legal policy applicable to the case.[38]

B *An Early Example: The Law of Attainder*

One of the earliest significant references by the High Court of Australia to the jurisprudence of the European Court occurred in the 1978 decision in *Dugan v Mirror Newspapers Ltd*.[39] At issue was whether Darcy Dugan, a prisoner serving a commuted death sentence, could sue the Sydney Daily Mirror for defamation. The Daily Mirror argued that Dugan had no civil right to sue in tort. It submitted that the ancient English law of attainder and 'corruption of the blood' had been absorbed into Australian law when Great Britain acquired sovereignty over the

33 Ibid 220–1.

34 Ibid 193–4.

35 (2004) 219 CLR 562, 589–93 ('*Al-Kateb*').

36 *Roach* (2007) 233 CLR 162, 225, citing *Newcrest (WA) v The Commonwealth* (1997) 190 CLR 513, 651–3; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337, 417–9 and *Al-Kateb* (2004) 219 CLR 562, 622–3.

37 This was the word used by Brennan J in an analogous discussion regarding the impact of the *International Covenant on Civil and Political Rights* on Australian common law: See *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 42.

38 Cf *William Smith v K D Scott (Electoral Registration Officer)* (2007) SC 345; [2007] CSIH 9 (Scottish Registration Appeal Court), applying *Hirst* to the electoral law of Scotland.

39 (1978) 142 CLR 583 ('*Dugan*').

Australian continent after 1788. This had stripped Darcy Dugan of his civil rights because of his status as a convicted capital felon.

In a majority decision, the High Court upheld this argument. It accepted that the law of attainder had been received from English law. It was therefore part of Australian law, at least until it was overridden by a law validly enacted by an Australian Parliament.

The lone dissenter in the High Court in *Dugan* was Murphy J. In his reasons, Murphy J referred to international materials and opinions. He concluded that the civil death doctrine violated 'universally accepted standards of human rights'.[40] Specific reference was made by him to the decision of the European Court of Human Rights in *Golder*.[41] That decision had concerned the interpretation of art 6 of the *Convention*. Murphy J cited with approval the Strasbourg court's acknowledgement that:

> In civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts ... The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally 'recognised' fundamental principles of law: the same is true of the principle of international law which forbids the denial of justice. Article 6(1) must be read in the light of these principles.[42]

After considering the 'overwhelming weight of evidence against the doctrine' of attainder and corruption of the blood and the removal of access to the courts to assert ordinary civil rights, Murphy J ultimately concluded that it 'does not accord with modern standards in Australia'. He found that attainder and corruption of the blood should not be recognised as part of the existing Australian common law.[43] But his was a lone voice.

Murphy J's comments in *Dugan v Mirror Newspapers Ltd* are characteristic of the way in which the High Court of Australia has come to make use of the jurisprudence of the European Court in more recent times. An examination of decisions referring to the jurisprudence of the European Court of Human Rights illustrates the progressive way in which such materials have been cited by an increasing number of Australian judges to support attempts to develop and strengthen the protection of human rights and freedoms in Australia.

Of course, such attempts have not always reflected the opinion of the majority of Justices on the High Court of Australia. *Dugan v Mirror Newspapers Ltd* was an early example of this. Yet gradually, the power of the exposition engaged in by the European Court, and the persuasiveness of its reasoning, have encouraged Australian judges, and therefore Australian advocates, to look to Strasbourg and to invoke its holdings where they seem relevant.

40 Ibid 607 (Murphy J).

41 *Golder* (1975) EHRR 524, 527.

42 Ibid 533.

43 *Dugan* (1978) 142 CLR 583, 608 (Murphy J).

C *The Development of the Implied Freedom of Political Communication*

One of the most important human rights developments in Australian law over the past 20 years has been the recognition of an implied constitutional right to freedom of political communication. This implied 'right' was initially identified by the High Court in *Australian Capital Television Pty Ltd v Commonwealth*.[44] In that case, Mason CJ explained that the fundamental importance of freedom of political communication in modern systems of representative government had already been recognised by overseas courts in various jurisdictions.[45] He specifically referred, amongst other courts, to the European Court of Human Rights and to its pronouncements on the right of free political expression in cases such as *Handyside v United Kingdom*,[46] the *Sunday Times Case* and *Lingens v Austria*.[47]

The influence of the *Convention* and its interpretation by the European Court of Human Rights on the development of the implied constitutional right to freedom of political communication in Australia is demonstrated in several of the leading Australian cases in this area.[48] In Australia, the implied 'right' has been held to derive textually as an implication arising from ss 7 and 24 of the *Australian Constitution*. The requirement that parliamentary representatives be 'directly chosen by the people' has been interpreted as carrying with it the requirement that the constitutionally-mandated choice be an informed one. It has been held, therefore, that the choice to be made by electors should not be limited by any impermissible restrictions on access to relevant political information. To emphasise the essential importance of free public discussion in sustaining a modern representative democracy, Brennan J in *Nationwide News* referred to decisions of the European Court such as *The Observer and The Guardian v United Kingdom*.[49] He said:

> [I]t would be a parody of democracy to confer on the people a power to choose their Parliament but to deny the freedom of public discussion from which the people derive their political judgments.[50]

The High Court has accepted that the implied constitutional right to freedom of political communication is not an Australian equivalent of art 10 of the *Convention*, which creates an express right to freedom of speech, and which has

44 (1992) 177 CLR 106 ('*ACTV*').

45 Ibid 140 (Mason CJ).

46 (1976) 1 EHRR 737, 754 ('*Handyside*').

47 (1986) 8 EHRR 407, 418 ('*Lingens*').

48 *ACTV* (1992) 177 CLR 106, 140 (Mason CJ), 157–9 (Brennan J); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 29 (Mason CJ), 47 (Brennan J) ('*Nationwide News*'); *Theophanous v Herald & Weekly Times* (1994) 182 CLR 104, 130 (Mason CJ, Toohey and Gaudron JJ) ('*Theophanous*'); *Leask v Commonwealth* (1996) 187 CLR 579, 593–5 (Brennan CJ), 606 (Dawson J), 615 (Toohey J) ('*Leask*').

49 (1991) 14 EHRR 153, 178 ('*The Observer*'). In his reasons in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 305, Callinan J contrasted the European Court's views with his own.

50 *Nationwide News* (1992) 177 CLR 1.

been interpreted broadly by the European Court of Human Rights.[51] Indeed, the implied right identified in *ACTV* is more limited in character, and is constrained by the terms and structure of the *Australian Constitution.* Its operation has been confined to political communications necessary to ensure the efficacy of democratic parliamentary government. There are therefore considerable differences between the scope of the protected rights to freedom of speech recognised in Europe and Australia.

These differences led Brennan J in *Theophanous* to suggest that the assistance to be gained from the 'article 10 cases' in determining the scope and application of the Australian freedom of political communication is extremely limited.[52] Nevertheless, in the same case, Mason CJ, Toohey and Gaudron JJ recognised that, whilst the Australian guarantee was not the precise equivalent of the broad guarantee provided under art 10 of the *Convention* or the First Amendment of the *United States Constitution*,

> that circumstance is not a reason for concluding that the United States and European approaches are irrelevant or inappropriate to our situation.[53]

D *The Doctrine of Proportionality in Australian Constitutional Law*

The Australian 'freedom of speech' cases have also been central to the development of the concept of proportionality and its application to Australian constitutional law. In this, the influence of the European Court of Human Rights has also been directly evident.

The concept of proportionality has its origins in European, specifically German, constitutional law. This foundation was noted by Gummow J (then of the Federal Court of Australia) in *Minister for Resources v Dover Fisheries Pty Ltd*:

> The concept of 'reasonable proportionality' as a criterion for assessment of validity in constitutional and administrative law appears to have entered the stream of the common law from Europe and, in particular, from the jurisprudence of the Court of Justice of the European Communities and the European Court of Human Rights.[54]

The concept of proportionality provides a formula for balancing competing principles and ensuring that measures adopted by governments are reasonably proportionate to, and harmonious with, the ends sought to be achieved. The European Court of Human Rights employed the concept appropriately in cases such as *Handyside* and the *Sunday Times Case* to determine whether breaches of

51 See, eg, *Lingens* (1986) 8 EHRR 407 and *Oberschlick v Austria* (1995) 19 EHRR 389.

52 *Theophanous* (1994) 182 CLR 104, 162–3 (Brennan J).

53 *Theophanous* (1994) 182 CLR 104, 130 (Mason CJ, Toohey and Gaudron JJ). See also the application of the European Court's decision in *Golder* (1975) 11 EHRR 524, 535–6 in *APLA Ltd v Legal Services Commission (NSW)* (2005) 224 CLR 322, 442.

54 (1993) 116 ALR 54, 64 (Gummow J) ('*Dover Fisheries*').

the *Convention* had been proved. The Court used the concept of proportionality to determine whether restrictions on rights guaranteed under the *Convention* were valid, by considering whether such restrictions were 'proportionate' to a legitimate aim being pursued.

In Australia, the test of proportionality is derived chiefly from the jurisprudence of the European Court of Justice and the European Court of Human Rights.[55] The relationship between the Australian and European concepts of proportionality was expressly acknowledged by the late Selway J, a greatly respected judge of the Federal Court of Australia:

> [T]here are considerable differences between the test as applied in European law and the test applied in Australia, although the application of the proportionality test in Australia in respect of guarantees, immunities and limitations upon power does bear a striking similarity with the use of the test in European law.[56]

Selway J traced the development of a 'reasonable proportionality' test in Australia to cases in the 1930s. However, he noted that it was not until the 1980s that the notion of proportionality was explicitly discussed and its constitutional significance recognised.[57] Since that time:

> [I]n Australia the proportionality doctrine has taken root and, indeed, extended its reach into the heartland of federal constitutional law.[58]

Certainly, 'proportionality' is a concept more understandable and useful than the one conventionally used in Australian constitutional discourse – 'appropriate and adapted'; a test so obscure that I try to avoid it.[59] The proportionality test has become part of the central test applied by the High Court in determining the validity of an alleged violation of an express or implied constitutional freedom or guarantee. The concept has been employed in this manner in cases considering, for example, the express guarantee of freedom of interstate trade under s 92 of the *Australian Constitution*;[60] the express prohibition on legislative discrimination

55 *Leask* (1996) 187 CLR 579, 615 (Toohey J); *Dover Fisheries* (1993) 116 ALR 54, 64 (Gummow J); Sir Anthony Mason, 'Trends in Constitutional Interpretation' (1995) 18 *University of New South Wales Law Journal* 237, 246; Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21 *Melbourne University Law Review* 1, 2; Timothy H Jones, 'Legal Protection for Fundamental Rights and Freedoms' (1994) 22 *Federal Law Review* 57, 77.

56 Bradley Selway, 'The Rise and Rise of the Reasonable Proportionality Test in Public Law' (1996) 7 *Public Law Review* 212, 212.

57 Ibid 213–4.

58 *Dover Fisheries* (1993) 116 ALR 54, 64 (Gummow J).

59 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 266–70 ('*Mulholland*').

60 *Castlemaine Tooheys Ltd v State of South Australia* (1990) 169 CLR 436, 473 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ) and *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520 ('*Lange*').

against the residents of other states under s 117 of the *Australian Constitution*;[61] and the implied right to freedom of political communication already mentioned.[62]

By using the concept of proportionality to test legitimate restrictions on guaranteed human rights, the High Court has essentially mirrored the use of the concept by the European Court of Human Rights in cases such as *Handyside* and the *Sunday Times Case*. This point was made by Brennan CJ in *Leask*.[63]

The precise scope of the concept of proportionality in Australian constitutional law, particularly in terms of its use as a test of characterisation, has been the subject of considerable debate amongst Australian judges and lawyers.[64] However, the use of proportionality as a means of determining the legitimacy of restrictions on constitutional freedoms, immunities and guarantees – a use which mirrors the application of the concept by the European Court of Human Rights – is now fairly well established. In applying the concept of proportionality in this manner, the Australian courts have expressly drawn upon the jurisprudence of the European Court of Human Rights. This process is bound to continue in the coming years. As I have already mentioned, the concept of proportionality has been used on many occasions in place of the traditional but ungainly and opaque criterion of 'appropriate and adapted'; a trend that was evident in *Roach*,[65] as well as many other decisions.[66]

A related concept, derived from the European Court of Human Rights, is that of the 'margin of appreciation'. In cases such as *The Observer*,[67] the European Court of Human Rights recognised that, when applying the test of proportionality, it was necessary to allow a 'margin of appreciation' to the lawmakers of the relevant state in determining the means to be used to achieve a particular purpose which falls within a constitutional power, but which also has the effect of inhibiting, to some degree, a constitutional guarantee or freedom. This 'margin of appreciation' has been described as a 'foundational aspect' of the jurisprudence of the European Court of Human Rights.[68]

61 *Street v Queensland Bar Association* (1989) 168 CLR 461, 510–2 (Brennan J), 570–4 (Gaudron J).

62 *ACTV* (1997) 177 CLR 106, 142–4 (Mason CJ), 157–60 (Brennan J); *Theophanous* (1994) 182 CLR 104, 150–2 (Brennan J), 178–9 (Deane J); *Cunliffe v Commonwealth* (1994) 182 CLR 272, 300 (Mason CJ), 323–6 (Brennan J), 339–40 (Deane J), 387–8 (Gaudron J) ('*Cunliffe*'); *Leask* (1996) 187 CLR 579, 593–5 (Brennan CJ), 606 (Dawson J), 614–6 (Toohey J) and *Mulholland* (2004) 220 CLR 181, 266–8.

63 (1996) 187 CLR 579, 594 (Brennan CJ).

64 For an examination of the history and developments relating to this topic, see, eg, Kirk, above n 55; Selway, above n 56; H P Lee, 'Proportionality in Australian Adjudication' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 126.

65 (2007) 233 CLR 162, 203–4.

66 See, eg, *Lange* (1997) 189 CLR 520, 567 and *Mulholland* (2004) 220 CLR 181, 226–70.

67 *The Observer* (1991) 14 EHRR 153, 178.

68 Kirk, above n 55, 56.

In cases such as *Leask*,[69] *Cunliffe*[70] and *ACTV*,[71] Brennan CJ drew directly from the European Court of Human Rights in suggesting that a parliamentary 'margin of appreciation' was also applicable in Australia. Whilst this concept remains a 'controversial importation' into Australian constitutional law,[72] the influence of the European Court of Human Rights is apparent in discussions about its application in Australia. The concept of a 'margin of appreciation' is attended by a number of difficulties, including the fact that it is unclear in expression, somewhat vague in purpose and liable to allow departure from basic norms on grounds that are necessarily imprecise. On a continent as diverse as Europe, the concept may be an inescapable necessity. In Australia, however, a country with relatively few basic internal differences, the notion seems less attractive.

E *The Right to Fair Trial*

The European Court of Human Rights has also influenced developments in Australian criminal procedure, most notably in cases considering the right to fair trial. The *Australian Constitution* does not contain an express right to fair trial in a form equivalent to the general guarantee provided by art 6 of the *Convention*. Indeed, the only express constitutional protection relating to trials (besides the guarantee of judicial tenure contained in s 72(ii) of the *Australian Constitution*) is to be found in s 80, which provides a right to trial by jury for all indictable federal offences. However, s 80 has been given a narrow interpretation by the High Court,[73] which has repeatedly held that, if a criminal charge is not tried on indictment (a formal document initiating the trial process), s 80 of the *Australian Constitution* does not apply. In this way, the constitutional guarantee of a trial by jury may be easily bypassed.

There has been some judicial support for the concept of an implied constitutional right to fair trial arising from the text, structure and purposes of Chapter III of the *Australian Constitution*, which deals with the judicature and the vesting of the judicial power of the Commonwealth in the courts.[74] However, the existence of a broad implied constitutional right to fair trial has not yet been accepted by a majority of the High Court of Australia.[75] The content, scope and nature of any such implied right remains the subject of considerable legal debate.

Despite the lack of an express right to fair trial or due process or an Australian equivalent of art 6 of the *Convention*, the right of an accused person to a fair trial according to law has been recognised as a fundamental element of Australian

69 (1996) 187 CLR 579, 595 (Brennan J).

70 (1994) 182 CLR 272, 325 (Brennan J).

71 (1992) 177 CLR 106, 159 (Brennan J).

72 *Mulholland* (2004) 220 CLR 181, 252 (Kirby J).

73 See, eg, *R v Archdall and Roskruge; Ex parte Carrigan and Brown* (1928) 41 CLR 128; *Kingswell v The Queen* (1985) 159 CLR 264 and *Cheng v The Queen* (2000) 203 CLR 248.

74 *Dietrich v The Queen* (1992) 177 CLR 292, 326 (Deane J), 362 (Gaudron J) ('*Dietrich*').

75 Cf *Ebner v Official Trustee in Bankruptcy* (2001) 205 CLR 337, 363 (Gaudron J), 373 (Kirby J).

criminal law.[76] The precise elements of this right have never been exhaustively listed, such that it falls to the court in each case where an infraction is pleaded to develop, express and apply this concept. Brennan J once referred to this continual process of elaboration as 'the onward march to the unattainable end of perfect justice'.[77] At the very least this march is generally in a forward direction. In Australia, it is not a retreat.

There are obvious differences between Australian and European law in relation to the right to fair trial, particularly in terms of the context in which the guarantee must be considered. As a result, decisions of the European Court of Human Rights relating to art 6 of the *Convention* cannot be directly applied in Australia. Nevertheless, the High Court has made reference on many occasions to the general approach taken by the European Court of Human Rights in relation to art 6, as well as to the specific elements of the right as explained by the Strasbourg court. Recent examples are the High Court cases of *Mallard v The Queen*,[78] *Antoun v The Queen*[79] *and Strong v The Queen.*[80]

One clear example of the influence of the European Court of Human Rights in this regard is the case of *Dietrich v The Queen*.[81] That case concerned the extent of an indigent accused's entitlement to the provision of legal representation in a trial relating to a serious criminal offence. The High Court, by majority, allowed Mr Dietrich's appeal. It held that the right to fair trial could be violated where an indigent person, accused of a serious crime, was not able to secure legal representation through no fault of his or her own.

A notable aspect of the decision was the High Court's willingness to consider international developments in this area. In *Dietrich*, specific consideration was given to a number of decisions of the European Court of Human Rights. In their joint reasons in *Dietrich*, Mason CJ and McHugh J expressly noted the approach taken by the European Court of Human Rights in cases such as *Monell and Morris v United Kingdom*[82] and *Granger v United Kingdom.*[83] They stated that:

76 See, eg, *Dietrich* (1992) 177 CLR 292, 299–300 (Mason CJ and McHugh J); *McKinney v The Queen* (1991) 171 CLR 468, 478; *Jago v District Court (NSW)* (1989) 169 CLR 23, 29 (Mason CJ), 56 (Deane J), 72 (Toohey J), 75 (Gaudron J) ('*Jago*'); Sir Anthony Mason, 'Fair Trial' (1995) 19 *Criminal Law Journal* 7; K P Duggan, 'Reform of the Criminal Law with Fair Trial as the Guiding Star' (1995) 19 *Criminal Law Journal* 258 and James Jacob Spigelman, 'The Truth Can Cost Too Much: The Principle of a Fair Trial' (2004) 78 *Australian Law Journal* 29, 30.

77 *Jago* (1989) 168 CLR 23, 54 (Brennan J).

78 (2005) 224 CLR 125, 154–5, citing *Edwards v United Kingdom* (1992) 15 EHRR 417 and *Fitt v United Kingdom* (2000) 30 EHRR 480.

79 (2006) 80 ALJR 479, 506 (on the right to trial before a manifestly impartial tribunal), referring to *Ferrantelli v Italy* (1996) 23 EHRR 266; *Incal v Turkey* (1998) 29 EHRR 221; *Stafford v United Kingdom* (2002) 35 E HRR 1121 and *Beaumartin v France* (1994) 19 EHRR 485.

80 (2005) 224 CLR 1, 33 (on limitations on preventive or additional detention), referring to *Winterwerp v Netherlands* (1979) 2 EHRR 387 and *Johnson v United Kingdom* (1997) 27 EHRR 296.

81 (1992) 177 CLR 292 ('*Dietrich*').

82 (1987) 10 EHRR 205, 225.

83 (1990) 12 EHRR 469, 480–2.

> [T]he European Court of Human Rights has approached the almost identical provision in the *European Convention on Human Rights* by emphasising the importance of the particular facts of the case to any interpretation of the phrase 'when the interests of justice so require'. As will become clear, that approach is similar to the approach which, in our opinion, the Australian common law must now take.[84]

Many signs, therefore, point to Australian judges continuing to refer to decisions of the European Court of Human Rights in developing what is meant by a 'fair trial' in the Australian common law context. Those decisions assist in defining the elements of the right to fair trial, and in making them more precise. The continuing influence of the European Court of Human Rights in this context was expressly acknowledged by Duggan J of the Supreme Court of South Australia in extra curial remarks. That experienced Australian judge said that:

> It is to be expected that the future content of a 'fair trial' in Australia will be influenced at least to some extent by international conventions, the views of the European Court and the reactions to those views by the English courts.[85]

F *Applying International Standards in Migration Law*

The approach taken by the European Court of Human Rights in protecting the fundamental rights of migrants, particularly refugees, has also directly influenced the approach taken in a number of Australian migration cases. This has occurred most notably in cases considering the *Convention Relating to the Status of Refugees*[86] *and its 1967 Protocol*,[87] to both of which Australia is a signatory. In such cases, the Australian courts have given considerable attention to the interpretation of those instruments by the European Court of Human Rights.

The policy of mandatory detention of alien arrivals in Australia who have no entry visa has been a controversial political issue, particularly in recent years. In considering the legal issues relating to questions of detention, Australian courts have repeatedly referred to decisions of the European Court of Human Rights concerning art 5(1) of the *Convention*, which provides a right to liberty and security of the person. In cases such as *Chahal v United Kingdom*[88] and *Amuur v France*,[89] the European Court of Human Rights took a broad approach to this guarantee. Article 5(1) has been held to require not only that no individual be

84 *Dietrich* (1992) 177 CLR 292, 307 (Mason CJ and McHugh J) (citations omitted).

85 K P Duggan, above n 76, 271.

86 *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) ('*Refugees Convention*').

87 *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) ('*Protocol*').

88 (1996) 23 EHRR 413 ('*Chahal*').

89 (1996) 22 EHRR 533.

deprived of their liberty unless this is done according to law, but also that the law itself, and its application to the individual case, must not be arbitrary.

In *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri*,[90] the Full Court of the Federal Court of Australia, including Black CJ – the patron of the *Fiat Justicia* Lectures – concluded, by analogy, that cases in the European Court of Human Rights about mandatory detention, such as *Chahal*, provided support for the view that a similarly broad interpretation applied in relation to art 9(1) of the *International Covenant on Civil and Political Rights*.[91] This, in turn, was held to affect the interpretation of s 196 of the *Migration Act 1958* (Cth) relating to the mandatory detention of aliens. The Full Court of the Federal Court concluded that the *Migration Act 1958* (Cth) should be read, as far as its language permits, in conformity with Australia's international obligations under the *ICCPR*.[92]

The conclusions reached in *Al Masri* in relation to the specific issue of indefinite detention were effectively rejected by a majority of the High Court of Australia in the subsequent decisions of *Al-Kateb*[93] and *Minister for Immigration and Multicultural Affairs v Al Khafaji*.[94] In *Al-Kateb*, the High Court was called upon to determine the legality of indefinitely detaining two unlawful non-citizen stateless persons under the *Migration Act 1958* (Cth), in circumstances where those persons were likely to be detained for the indefinite future. A 4-3 majority of the High Court held that such detention was within the Act and that the Act was constitutionally valid. Remembering the fact that there were three dissenters (myself included), the decision in *Al Masri* remains significant as an illustration of an Australian court examining the decisions of an international human rights court and using such decisions to help reinforce human rights protections in Australia by interpreting Australian legislation in general conformity with the approach taken in those decisions.

Australian judges have also looked to the approach taken by the European Court of Human Rights in considering the obligation of nation states to safeguard and protect applicants under the *Refugees Convention* and *Protocol*. In cases such as *Minister for Immigration & Multicultural Affairs v Respondents S152/2003*,[95] *Applicants M160/2003 v Minister for Immigration & Multicultural & Indigenous Affairs*[96] and *VRAW v Minister for Immigration & Multicultural & Indigenous*

90 (2003) 126 FCR 54 ('*Al Masri*').

91 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

92 Australia is a party to the *ICCPR*, having ratified it on 13 August 1980. Australia is also a party to the *First Optional Protocol*, permitting individual communications to the Human Rights Committee for alleged breaches.

93 See also *Rehrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486, 530, referring to *Kurt v Turkey* (1998) 27 EHRR 373.

94 (2004) 219 CLR 664 ('*Al Khafaji*').

95 (2004) 222 CLR 1, 12 (Gleeson CJ), 23 (Hayne and Heydon JJ), 23 (McHugh J).

96 (2005) 219 ALR 140, 151 (Finkelstein J).

Affairs,[97] reference was made to the standard applied by the European Court of Human Rights in *Osman v United Kingdom*.[98]

In *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs*,[99] both Gummow J[100] and I[101] referred to the European Court's reasons in *König v Federal Republic of Germany*.[102] There are other recent cases of the same kind.[103] The approach taken in these decisions has not been to suggest that the European Court's decisions provide Australian courts with a definitive guide as to what constitutes 'international standards', but rather to suggest that those decisions identify issues that are likely to be relevant to this area of common international law and which Australian judges should consider.

G *The Impact of Human Rights in the Family Law Context*

The cases collectively referred to as the '*Re Kevin* decisions'[104] provide another example of the international character of human rights jurisprudence today and the positive contribution made by the European Court of Human Rights to the understanding of human rights in Australia.

The issue in the '*Re Kevin* decisions' was whether a marriage between a woman and a post-operative female-to-male transsexual person was valid under the statutory and constitutional provisions relating to 'marriage' under Australian law. In declaring the marriage to be valid, Chisholm J, at first instance, conducted a comprehensive review of the legal position in other countries with respect to a transsexual person's acquired gender and any subsequent marriage. This included a review of relevant decisions of the European Court of Human Rights. In relation to the decisions of the European Court of Human Rights, discussed in his decision, Chisholm J concluded that:

> These decisions are not directly relevant to the present case. ... Nevertheless, the cases provide useful glimpses of developments and trends in thinking in Europe. There is a great deal of common ground among the various international human rights instruments. Overall, I think that these decisions indicate that failure to recognise the sex of post-operative transsexuals raises serious issues of human rights, such that the question arises whether the failure can be permitted on the basis of the

97 [2004] FCA 1133 (Unreported, Finkelstein J, 3 September 2004) [18].

98 (1998) 29 EHRR 245 ('*Osman*').

99 (2005) 228 CLR 470 ('*NAIS*').

100 Ibid 478–9.

101 Ibid 505. See also *NAIS* (2005) 228 CLR 470, 494–5, referring to other decisions including *Silva Pontez v Portugal* (1994) 18 EHRR 156.

102 (1978) 2 EHRR 170.

103 See, eg, *Applicant NABD of 2002 v Minister for Immigration, Multicultural and Indigenous Affairs* (2005) 79 ALJR 1142, 1162, referring to *Kokkinas v Greece* (1993) 17 EHRR 397 ('*Kokkinas*'); *Murphy v Ireland* (2004) 38 EHRR 13.

104 *Attorney-General (Cth) v 'Kevin and Jennifer'* (2003) 172 FLR 300 ('*Kevin and Jennifer*') and *Kevin v Attorney-General (Cth)* (2001) 165 FLR 404 ('*Kevin v Attorney-General*').

> margin of appreciation allowed to States under the Convention. It is clear that a decision in favour of the applicants would be more in accord with international thinking on human rights than a refusal of the application.[105]

In affirming the decision of Chisholm J on appeal, the Full Court of the Family Court of Australia also provided a detailed examination of relevant international case law, referring extensively to the approach taken by the European Court of Human Rights on analogous questions. The Full Family Court stated that it agreed generally with the submission of the Australian Human Rights and Equal Opportunity Commission that Australian courts 'should and do give weight to the views of specialist international courts and bodies such as ... the European Court of Human Rights'.[106] Whilst the Court acknowledged that decisions of the European Court of Human Rights were not determinative (as they were not binding as a matter of law on Australian courts), it held that those decisions were nevertheless 'helpful' in considering the principal issues that were before the Court.[107] The Court had no hesitation in examining those decisions and giving them weight in reaching their own decision. This alone is an important advance in Australia on the position that obtained a decade earlier.

The Full Family Court recognised that differences between the legal fundamentals in Europe and Australia would necessarily limit the relevance of decisions of the European Court of Human Rights in the Australian context. To that end, the Court stated that:

> We appreciate that these are decisions by a Court as to the interpretation of a Convention to which Australia is not a party and must be read with this in mind. Nevertheless, as Johnson J pointed out in *Bellinger,* it provides a startling confirmation of the degree of international isolation that this country would adopt if [the contrary position] is found to represent the law.[108]

The Australian government did not seek special leave to appeal to the High Court against the *Re Kevin* decision. In the end, the government, which had strongly contested the transsexual's marriage right, accepted the Family Court's decision.

Significantly, the *Re Kevin* cases also indicate that the exchange of ideas and knowledge between Australian courts and the European Court of Human Rights is not all in the one direction. The decision of Chisholm J in *Kevin v Attorney-General* was cited with approval by the Grand Chamber of the European Court in *I v United Kingdom*[109] and in *Christine Goodwin v United Kingdom.*[110] In those decisions, the European Court of Human Rights found that the legal status and treatment of transsexual persons in the United Kingdom was contrary to arts

105 *Kevin v Attorney-General* (2001) 165 FLR 404, 449–50.

106 *Kevin and Jennifer* (2003) 172 FLR 300, 349 (Nicholson CJ, Ellis and Brown JJ).

107 Ibid 354.

108 Ibid 353.

109 (2003) 36 EHRR 53.

110 (2002) 35 EHRR 18.

8, 12, 13 and 14 of the *Convention*. In response to those decisions, the United Kingdom Parliament enacted the *Gender Recognition Act 2004* (UK). Ms Rachael Wallbank, who appeared as counsel in the *Re Kevin* decisions, has expressed the view that:

> The legal nexus between the *Gender Recognition Act 2004* and the *Re Kevin* decisions really highlights the international interdependence of reform efforts in respect of the human rights of people with transsexualism.[111]

H *Further Examples of the Influence of the European Court of Human Rights on Australian Law*

There are many other examples of decisions of the European Court of Human Rights being cited in Australian decisions, and of approaches taken by that Court being considered by Australian judges with a view to informing themselves about the relevant issues. In recent years, the range of cases in which the High Court has referred to decisions of the European Court of Human Rights has included the following:

- In *Grollo v Palmer*,[112] the High Court noted that other countries had taken the same view as it had about the desirability of judicial supervision of warrants to authorise the secret surveillance of suspects in criminal cases. The Court cited the decision of the European Court of Human Rights in *Klass v Federal Republic of Germany*[113] as an illustration of the various human rights considerations that informed its view.[114]
- In *Applicant A v Minister for Immigration and Ethnic Affairs*,[115] McHugh J accepted as correct the approach taken by Zekia J of the European Court of Human Rights in *Golder* in relation to art 31 of the *Vienna Convention on the Law of Treaties*,[116] stating that it was the approach that 'should be followed in this country'.[117]
- The relatively strict approach taken by the European Court of Human Rights towards questions of apparent and actual judicial bias and the requirements of judicial impartiality and judicial independence was referred to by the High Court in cases such as *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka*[118] *and Johnson v Johnson*.[119] In those cases, the approach

111 Rachael Wallbank, '*Re Kevin* in Perspective' (2004) 9 *Deakin Law Review* 461, 480.

112 (1995) 184 CLR 348.

113 (1978) 2 EHRR 214, 235.

114 (1995) 184 CLR 348, 367–8 (Brennan CJ, Deane, Dawson and Toohey JJ).

115 (1997) 190 CLR 225 ('*Applicant A*').

116 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

117 *Applicant A* (1997) 190 CLR 225, 253–4 (McHugh J).

118 (2001) 206 CLR 128, 152 (Kirby J).

119 (2000) 201 CLR 488, 501–2 (Kirby J).

taken by the European Court of Human Rights was said to reinforce the principles recognised in Australian law.

- In *Applicant NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*,[120] my dissenting reasons endorsed the approach taken by the European Court of Human Rights to the interpretation of art 9 of the *Convention* in decisions such as *Kokkinakis* and *Metropolitan Church of Bessarabia v Moldova*.[121] That case considered the right to religious freedom under the *Refugees Convention* and *Protocol* and its application in Australia.
- In *D'Orta-Ekenaike v Victoria Legal Aid*,[122] a case concerning whether advocates before Australian courts enjoyed immunity from suit for negligence, the joint reasons of Gleeson CJ and Gummow, Hayne and Heydon JJ,[123] and my own to contrary effect,[124] referred to the decision of the European Court of Human Rights in *Osman*. Elsewhere I also made reference to other decisions concerning equality before, and accountability to, the law.[125] In *Baker v The Queen*[126] *and Fardon v Attorney-General*,[127] both of which were concerned with the extension, post-sentence, of incarceration for perceived danger, I made reference to decisions of the European Court of Human Rights.[128] In *Forge v Australian Securities and Investments Commission*,[129] an appeal concerned with the validity of appointing temporary state judges, I invoked several decisions of the European Court of Human Rights which were relevant to that issue.[130] In *Thomas v Mowbray*,[131] proceedings concerned with the validity of federal counter-terrorism legislation, I again invoked decisions of the European Court of Human Rights relevant to preventive orders.[132] Although my own references to decisions of that Court are more frequent than those of other judges, the trend to citation by others has increased greatly in recent years.

Nor are judicial references of this kind confined to the High Court of Australia. References to decisions of the European Court of Human Rights can also be found in many decisions of other Australian courts. Recent examples include the following:

120 (2005) 79 ALJR 1142, [121]-[123] (Kirby J).

121 (2002) 35 EHRR13, [118].

122 (2005) 223 CLR 1 ('*D'Orta-Ekenaike*').

123 Ibid 26.

124 Ibid 98, 105–6.

125 *D'Orta-Ekenaike* (2005) 223 CLR 1, 99, referring to *Holy Monastries v Greece* (1994) 20 EHRR 1; *Devlin v United Kingdom* (2001) 34 EHRR 1029 and *A v United Kingdom* (2002) 36 EHRR 917.

126 (2004) 223 CLR 513, 551.

127 (2004) 223 CLR 575, 645.

128 Including *Stafford v United Kingdom* (2002) 35 EHRR 32.

129 (2006) 228 CLR 45, 127–8.

130 Including *Langborger v Sweden* (1989) 12 EHRR 416 and *Finlay v United Kingdom* (1997) 34 EHRR 221.

131 (2007) 233 CLR 307, 423.

132 *Hashman v United Kingdom* (2000) 30 EHRR 241, [17].

- In *R v Wei Tang*,[133] the Court of Appeal of the Supreme Court of Victoria made reference to *Siliadin v France*[134] in attempting to determine the definition of 'slavery'. *Siliadin* considered the definition of slavery as expressed originally in the *Convention to Suppress the Slave Trade and Slavery*.[135] In *Tang*, a brothel operator had been charged with slavery-related offences under the *Criminal Code Act* 1995 (Cth). The definition of 'slavery' in that domestic statute was in terms similar to the definition contained in the *Slavery Convention*. Recently, the High Court reversed the Court of Appeal's decision, but several Justices referred to *Siliadin*.[136]
- In *Ragg v Magistrates' Court of Victoria & Corcoris*,[137] Bell J of the Supreme Court of Victoria was called upon to deal with the principle of 'equality of arms' (in the context of the requirements of a fair trial). He credited the European Court of Human Rights as originally stating this principle.[138] He cited a list of relevant authorities from that Court, including *Foucher v France*[139] and *Jespers v Belgium*[140] in the course of exploring the origins of the principle and applying it to the case in hand.
- In *Ruddock v Vadarlis*,[141] Black CJ, in dissent, cited the European Court of Human Rights in *Amuur v France*[142] in support of his views that Australian law sustained the provision of relief to those rescued by the Tampa on the high seas.
- In *Bropho v Human Rights & Equal Opportunity Commission*,[143] the Full Court of the Federal Court of Australia referred to the decision of the European Court of Human Rights in *Handyside* to illustrate the general principle that freedom of expression protects not only inoffensive speech but also speech that offends, shocks or disturbs.
- In *The Queen v Astill*,[144] a central issue for the New South Wales Court of Criminal Appeal was the admissibility of hearsay evidence in a manslaughter trial. The importance, in terms of procedural fairness, of the opportunity to cross-examine a witness was discussed by reference to *Unterpertinger v*

133 [2007] VSCA 134 (Unreported, Maxwell P, Buchanan and Eames JJA, 27 June 2007) [34] ('*Tang*').

134 (2006) 43 EHRR 16 ('*Siliadin*').

135 *Convention to Suppress the Slave Trade and Slavery*, opened for signature 25 September 1926, 60 LNTS 253 (entered into force 9 March 1927) ('*Slavery Convention*').

136 *R v Tang* (2008) 82 ALJR 1334, 1345 (Gleeson CJ; Heydon, Crennan and Kiefel JJ agreeing).

137 [2008] VSC 1 (Unreported, Bell J, 24 January 2008) [46]–[49], [53]–[65].

138 Ibid [48].

139 (1998) 25 EHRR 234.

140 (1983) 5 EHRR 305.

141 (2001) 110 FCR 491 ('*The Tampa Case*').

142 (1992) 22 EHRR 533.

143 (2004) 135 FCR 105.

144 (1992) 63 A Crim R 148, 157 (Kirby P).

Austria.[145] This was a case in which the European Court of Human Rights held that a conviction violated art 6 of the *Convention*.

- In *Smith v The Queen*,[146] art 3 of the *Convention* and related decisions of the European Court of Human Rights were considered, together with other international materials, in the context of examining the prohibition against cruel and unusual punishments and the prohibition against excessive fines as universal human rights.
- In *Australian Meat Industry Employees' Union v Belandra Pty Ltd*,[147] North J in the Federal Court of Australia considered, in some detail, the approach taken by the European Court of Human Rights in interpreting art 11 of the *Convention*. This was done in the context of interpreting the Australian *Workplace Relations Act 1996* (Cth) and more specifically, the meaning of provisions intended to protect workers against discrimination on the basis of trade union membership.
- In *McCrea v Minister for Customs & Justice*,[148] North J considered the decision of the European Court of Human Rights in *Soering v United Kingdom*.[149] That case concerned the power of the Minister for Customs and Justice to surrender the applicant to Singapore in circumstances where the applicant was charged with criminal offences punishable in Singapore by the death penalty. Although North J ultimately concluded that such comparative jurisprudence was of little assistance in determining the central question in the case, which pertained to the construction of s 22(3)(c) of the *Extradition Act 1988* (Cth), he accepted that such materials were relevant in so far as they were indicative of a recent international trend of opposition to the death penalty. There are many like decisions of intermediate courts and single judges in Australia.

III AN ERA OF HUMAN RIGHTS

The role to be played by international materials in the development of Australian law is still a matter of debate and controversy in some circles.[150] In particular, the idea that the *Australian Constitution* should be read consistently with the rules of international law has been described as 'heretical'.[151] I do not accept that view, but it is one held in some legal circles in Australia, including by judges of the highest standing. That difference of opinion found some resonance in the High Court's decision in *Roach*, and particularly in the reasons of Heydon J, which contained the following passage:

145 (1986) 13 EHRR 175.

146 (1991) 25 NSWLR 1, 14, 15 (Kirby P).

147 [2003] FCA 910 (Unreported, North J, 29 August 2003) [192]–[197], [217].

148 [2004] FCA 1273 (Unreported, North J, 6 October 2004).

149 (1989) 11 EHRR 429.

150 The opposing viewpoints in this debate were considered at some length in *Al-Kateb* (2004) 219 CLR 562, 589–95 (McHugh J), 622–30 (Kirby J).

151 *Al-Kateb* (2004) 219 CLR 562, 589 (McHugh J).

> [T]hese instruments can have nothing whatever to do with the construction of the Australian Constitution. These instruments did not influence the framers of the Constitution, for they all postdate it by many years. It is highly improbable that it had any influence on them. The language they employ is radically different. One of the instruments is a treaty to which Australia is not and could not be a party. Another of the instruments relied on by the plaintiff is a treaty to which Australia is a party, but the plaintiff relied for its construction on comments by the United Nations Human Rights Committee ... the fact is that our law does not permit recourse to these materials. The proposition that the legislative power of the Commonwealth is affected or limited by developments in international law since 1900 is denied by most, though not all, of the relevant authorities – that is, denied by 21 of the Justices of this Court who have considered the matter, and affirmed by only one.[152]

Certainly, there are considerations that limit the application of unincorporated international law by domestic judges. A judge in a municipal court must be obedient to the *Australian Constitution* from which, ultimately, he or she derives jurisdiction, powers and legitimacy. Consistently with this obligation, judges cannot give priority to international law that has not been made part of the domestic legal system over and above the clear requirements of national laws.[153] It is possible, however, to respect this limitation whilst still acknowledging the useful and persuasive role that can be played by international materials. The decisions of tribunals such as the European Court of Human Rights can enhance judicial thinking by exposing judges to the way that other experienced lawyers have approached similar issues. At the very least, their reasoning may disclose relevant considerations of legal policy and legal principle that need to be considered and evaluated for their local relevance. Shutting ourselves off from the experiences and knowledge of others serves only to restrict us in the continued pursuit of justice. Efforts to isolate individual countries such as Australia and the United States of America from the persuasive force of international law are 'doomed to fail'.[154]

The jurisprudence of the European Court of Human Rights has had a very important impact within Australia. This is reflected most clearly in the references made by Australian courts to decisions of that Court. References to such decisions have been increasing in recent years. This is a trend that seems likely to continue and to expand as Australia moves towards enacting statutory charters of fundamental rights.

152 *Roach* (2007) 81 ALJR 1830, 1805 (citations omitted).

153 *Minister for Immigration & Multicultural & Indigenous Affairs v B* (2004) 219 CLR 365, 425 (Kirby J).

154 *Al-Kateb* (2004) 219 CLR 562, 629 (Kirby J). See also Michael Kirby, 'International Law: The Impact on National Constitutions' (2006) 21 *American University International Law Review* 327; Michael Kirby, 'Transnational Judicial Dialogue, Internationalisation of Law and Australian Judges' (2008) 9 *Melbourne Journal of International Law* 171.

The influence of the European Court of Human Rights is not defined exclusively by the number of references made to it in Australian case law. It has also had a more intangible, and possibly more enduring, effect, in the way in which it has guided and influenced our thinking about human rights. As Sir Anthony Mason pointed out in relation to international law and legal institutions:

> The influence of international legal developments travels far beyond the incorporation of rules of international law and convention provisions into Australian domestic law. The emphasis given by international law and legal scholars to the protection of fundamental rights, the elimination of racial discrimination, the protection of the environment and the rights of the child, have changed the way in which judges, lawyers and legal scholars think about these subjects.[155]

This influence will be maintained, and indeed will grow, in the future. This is because Australia, like other modern nations and economies, has become increasingly international in its outlook and culture, including its legal culture. As well, the Australian people are becoming more aware of the importance of human rights issues and jurisprudence. The effective protection of human rights has become a subject of interest and debate in Australia.[156]

In this environment, the role of the European Court of Human Rights will become even more significant. Reasoned, serious, balanced judicial opinions are a powerful weapon against injustice and arbitrary or ill-conceived deprivation of fundamental rights. The Strasbourg court will therefore continue to influence and guide the development of human rights law in Australia, as it has done in many non-signatory countries. The European Court of Human Rights is a court for the modern age. It takes a leading part in, and stimulates, the trans-national conversation about human rights. It gives intellectual leadership in a controversial field of the law's operation where wisdom and proportionality matter most.[157] It is time that Australia's judges and lawyers acknowledged their indebtedness to it. That has been the purpose of this Seventh *Fiat Justicia* Lecture.

155 Sir Anthony Mason, 'An Australian Common Law?' (Paper presented at the Australian Law Teachers Association 50th Anniversary Conference, Melbourne, 1 October 1995) 5. The paper was later published in Christopher Arup and Lee Ann Marks (eds), *Cross Currents – Internationalism, National Identity and Law* (1996).

156 George Williams, *The Case for an Australian Bill of Rights* (2004).

157 Michael Kirby, 'Terrorism and the Democratic Response: A Tribute to the European Court of Human Rights' (Speech delivered at the Robert Schuman Lecture, Sydney, 11 November 2004). The speech was later published in (2005) 28 *University of New South Wales Law Journal* 221.