

THE LORDS, TOM BINGHAM AND AUSTRALIA^{*}

The Hon Justice Michael Kirby AC CMG^{**}

A CONTINUING CONVERSATION

Recently the High Court of Australia, far away in Canberra, was about to deliver its decision in the South Australian appeal in *Ayles v The Queen*¹.

The appeal concerned the conduct of a District Court judge who, of her own motion, amended the criminal charges faced by the appellant without application from the Crown Prosecutor. The need for amendment had arisen when the effect of supervening legislation was belatedly discovered during the trial. The High Court of Australia was divided over the consequences of the judge's taking her own initiative in this way.

^{*} A portion of the first section of this paper is adapted from an earlier essay on the debt of Australia and New Zealand to the House of Lords. This will be published in 2008 in L Blom Cooper, G Drewry and B Dickson (eds), *The Judicial House of Lords*.

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¹ [2008] HCA 6.

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A majority of the judges affirmed the decision in the intermediate court, concluding that, although the prosecutor ought to have made a formal application for amendment in open court, the statutory provisions relied upon had been made clear enough during the trial, so that there was no miscarriage of justice. In dissenting reasons, Justice Gummow and I insisted on the importance of adherence to strict procedures in the formulation of criminal accusations. We demanded a clear delineation between the responsibilities of prosecutors to formulate charges and of judges to try them.

In the way of these things, as we were about to publish our reasons, the House of Lords, on the opposite side of the world, delivered its opinion in *R v Clarke*², an appeal from the Criminal Division of the English Court of Appeal. That case too concerned the technicalities of pleadings in criminal cases. There the defect was that the bills of indictment found against the accused had not been signed by the proper authorised officer. Unanimously, the House of Lords insisted that such signature was an integral and essential element in the correct presentment of the document that initiated the criminal trial of the accused. It was the foundation for the entire procedure. The defect was fatal to its validity.

² [2008] UKHL 8.

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As so often happens, the participating Law Lords agreed in the analysis and conclusions of the senior Law Lord, Lord Bingham of Cornhill³. Moreover, in a succinct statement of principle, Lord Bingham encapsulated the issue of legal policy that was at stake and the reason why a seemingly technical rule should be observed in an age and legal culture that otherwise gives so much prominence to substance over form. He said⁴:

"Technicality is always distasteful when [such a rule] appears to contradict the merits of a case. But the duty of a court is to apply the law, which is sometimes technical, and it may be thought that if the state exercises its coercive power to put a citizen on trial for a serious crime a certain degree of formality is not out of place".

Naturally, Justice Gummow and I pounced upon this affirmation of the approach that we thought proper to the Australian case in respect of which it bore certain similarities⁵. The reminder by Lord Bingham of the fundamental policy of the law and the exposition of decisional authority dating back to the early nineteenth century⁶ represented a *tour de force*

³ [2008] UKHL 8 at [24], [25], [37], [43].

⁴ [2008] UKHL 8 at [17].

⁵ *Ayles* [2008] HCA 6 at [11], [28]-[30]; cf at [85] per Kiefel J. Thus in *Clarke*, the indictment was signed by the proper officer during the trial at what Lord Bingham described as "the eleventh hour" after the evidence had ended. This was held not to "throw a blanket of legality over the invalid proceedings already conducted".

⁶ *Jane Denton's Case* (1823) 1 Lewin 53; 168 ER 956; *Guiseppe Sidoli's Case* (1833) 1 Lewin 55; 168 ER 957.

of judicial reasoning. It was typical of this great judge. Dissenting judges far away were glad to call on his reasons to explain and strengthen their own efforts of persuasion. They were not cited because of Imperial sway. Now they were embraced for reasons of logic and analogy.

Tom Bingham is honoured in Australia as a man, a judge and a much respected legal scholar. He has been saluted as a visitor and he has welcomed us to London as judicial friends. In this essay, I will use the occasion to recount the debt for the judicial work of the House of Lords that Australian law owes to Lord Bingham and his distinguished colleagues and predecessors. I will also mention his enormous contribution to the ongoing conversation that takes place, especially between the highest courts of countries in the Commonwealth of Nations and specifically with the judicial members of the House of Lords.

Until quite recently, the transnational judicial conversation was substantially a one-way street. The House of Lords, the Privy Council and the English Court of Appeal spoke and we listened. They rarely cited from Commonwealth, specifically Australian,⁷ judicial authority. A significant contribution of Lord Bingham to Commonwealth-wide jurisprudence in the past twenty years has been his interest in, and use

⁷ The statistics of citations of decision in the *Commonwealth Law Reports* in the Appeal Cases is 1910 – 0; 1920 – 0; 1930 – 0; 1940 – 1; 1950 – 1; 1960 – 4; 1970 – 15; 1980 – 8; 1990 – 5; 2000 – 12; 2007 – 14.

of, judicial reasoning from other English-speaking countries of the common law tradition. I will illustrate this point with a number of references to his judicial opinions citing reasons of my own court. I will point out that his compliment has been repaid many times.

As Lord Bingham's retirement from judicial office heralds the end of the House of Lords era and the beginning of the new Supreme Court of the United Kingdom, it is timely for an Australian lawyer and judge to pause and reflect upon the impact of the House of Lords' judicial authority on the law of Australia and the debt that we owe to their Lordships and specifically to Tom Bingham.

AN UNUSUAL ARRANGEMENT

The House of Lords was never part of the Australian judicial hierarchy. No appeal ever lay from an Australian court to the judicial members of the House of Lords. Instead, from colonial times, appeals lay to the Judicial Committee of the Privy Council, whose personnel were largely (but not entirely) the same as the Law Lords. Appeals continued to be taken to the Privy Council from Australia until 1986, by which time successive Australian legislation⁸ finally had the effect of terminating such appeals for the future.

⁸ Appeals to the Privy Council were abolished in stages: first in federal matters (*Privy Council (Limitation of Appeals) Act 1968* (Cth)), secondly, appeals from the High Court (*Privy Council (Appeals from the High Court) Act 1975* (Cth)) and finally, appeals from State Supreme Courts (*Australia Act 1986* (Cth) and (UK)). In

As chance would have it, in the New South Wales Court of Appeal, I presided in the last Australian appeal that went to the Privy Council⁹. Happily, our orders were affirmed. The story of the impact of the Privy Council upon the law in Australia is another but different and interesting story¹⁰.

Given the lack of formal links between Australian courts and the House of Lords, it is at first blush surprising that the decisions of their Lordships were followed so closely by Australian courts, well into the twentieth century, virtually as a matter of course. In Australia, it was said that the Lords "had sometimes been mistaken for a part of the Australian doctrine of precedent"¹¹. Lionel Murphy, one-time Australian Attorney-General and Justice of the High Court, put this tendency of obedience down to an attitude "eminently suitable for a nation overwhelmingly populated by sheep"¹².

Viro v The Queen (1978) 141 CLR 88 the High Court held that it was no longer bound to follow decisions of the Privy Council, with minor possible exceptions.

⁹ *Austin v Keele* (1987) 10 NSWLR 283 (PC).

¹⁰ A M Gleeson, "The Influence of the Privy Council on Australia" (2007) 29 *Australian Bar Review* 123.

¹¹ A R Blackshield, "The High Court: Change and Decay" (1980) 5 *Legal Service Bulletin* 107, p 107.

¹² L K Murphy, "The Responsibility of Judges", Opening Address for the First National Conference of Labor Lawyers, 29 June 1979 in G Evans (ed) *Law, Politics and the Labor Movement* (Melbourne: *Legal Service Bulletin*, 1980) p 5.

There were, however, at least three other reasons why Australian judges paid so much attention to the judicial opinions of the House of Lords. First, there was the realistic appreciation that the same personalities substantially constituted both their Lordships' House and the Privy Council, so that a very high coincidence of judicial approach and conclusion was to be expected from each tribunal. Secondly, the habits of Empire inculcated in Australian lawyers a high measure of respect for just about everything that came from the Imperial capital. Not least in the pronouncements of law which was the glue that helped to bind the Empire together. Thirdly, traditions long observed and utility derived from linkage to one of the great legal systems of the world as well as the high standards of reasoning typical of the House of Lords, helped maintain the impact of its influence long after the Imperial tide had receded.

When Australia and other lands became British colonies, the colonists inherited so much of English statute and decisional law as was applicable to "their own situation and the condition of the infant colony"¹³. The inheritance of English law was regarded as a precious birthright of the settlers. It was generally embraced as part of the shared Imperial tradition, not only by lawyers but by the general population

¹³ There was statutory recognition of this principle in s 24 of the *Australian Courts Act 1828* (Imp) (9 Geo IV c 83). In New Zealand, the principle was reflected in the *English Laws Act 1858* (Imp), which likewise adopted the laws of England.

when they thought about such matters. Well into the twentieth century, there was a reluctance to diminish the unity of the world-wide common law. As Justice Gibbs, later Chief Justice of Australia, explained¹⁴:

"The presumption, at least, is that the entire fabric of common law, not shreds and patches of it, was carried with them by the colonists to the newly occupied territory"

Whilst the common law, so adopted, was not forever frozen in the form in which it was originally received¹⁵, there was a common reluctance amongst Australian judges to vary and adapt even the most unsuitable of rules on the ground that they were inappropriate to the conditions of the new land¹⁶. This judicial and professional attitude therefore made it quite natural for Australian judges, virtually from the beginning, to look to the decisions and reasons of the House of Lords as expressing the last word on the state of the common law throughout the Empire and the meaning of British statutes, many of which applied, or were copied, in far away countries such as Australia¹⁷.

¹⁴ *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617 at 626 per Gibbs J.

¹⁵ *Trigwell* (1979) 142 CLR 617 at 625.

¹⁶ *Trigwell* (1979) 142 CLR 617 at 626.

¹⁷ J Chen, "Use of Comparative Law by Australian Courts" in A E-S Tay and C Leung (eds), *Australian Law and Legal Thinking in the 1990s: A collection of 32 Australian reports to the XIVth International Congress of Comparative Law presented in Athens on 31 July-6 August 1994* (Sydney: Faculty of Law, University of Sydney, 1994) p 61.

To these conditions of *Realpolitik*, pride and practical utility, the Privy Council in *Robbins v National Trust Company*¹⁸ added its own authoritative instruction on how dominion and colonial judges should take into account decisions of the House of Lords:

"...[W]hen an appellate Court in a colony which is regulated by English law differs from an appellate Court in England, it is not right to assume that the Colonial Court is wrong. It is otherwise if the authority in England is that of the House of Lords. That is the supreme tribunal to settle English law, and that being settled, the Colonial Court, which is bound by English law, is bound to follow it. Equally, of course, the point of difference may be settled so far as the Colonial Court is concerned by a judgment of this Board".

However discordant this instruction was for the formal hierarchy of courts, and the line of appeal to London, colonial and dominion judges read and understood what they were supposed to do. So did the local legal profession who closely followed not only the decisions of the Privy Council but also those of the House of Lords. Right up to recent times it has been usual for the libraries of judges and advocates throughout Australia to contain the English casebooks. They were presented in pride of place with the *Commonwealth Law Reports* and the local *State Reports* as the regular source books of basic legal principle and authority. The general view prevailed that, so long as a right of appeal

¹⁸ [1927] AC 515 at 519 (PC) per Viscount Dunedin.

to the Privy Council remained in Australia, the policy of following House of Lords decisions was a "practical necessity"¹⁹.

It is ironic that one of the strongest opponents to the separate development of the common law, as late as 1948, was Justice Owen Dixon, later Chief Justice of Australia²⁰. Writing in *Wright v Wright*²¹, Dixon declared that: "[d]iversity in the development of the common law ... seems to me to be an evil". This would have been a common, certainly a majority, attitude in Australia well into the 1970s. It helps to explain the largely unquestioning reference to House of Lords authority until (and even beyond) that time.

When the Australian Constitution was drafted and negotiated with the Imperial authorities, a sticking point (only resolved at the last minute) was the access given to appellants from Australian courts to the Privy Council. Qualified access was eventually granted in the Constitution²². Yet, in the earliest days of the High Court of Australia, the utility of

¹⁹ P Brett, "High Court – Conflict with Decisions of Court of Appeal" (1955) 29 *Australian Law Journal* 121, p 122; see also B J Cameron, "Law Reform in New Zealand" (1956) 32 *New Zealand Law Journal* 72, p 74; *A-G for Hong Kong v Reid* [1992] 2 NZLR 385 at 392; A Mason, "Future Directions in Australian Law" (1987) 13 *Monash University Law Review* 149, p 150.

²⁰ J Spigelman, Foreword, in P Ayers, *Owen Dixon* (Melbourne: The Miegunyah Press, 2nd ed, 2007) vii.

²¹ (1948) 77 CLR 191 at 210.

²² Australian Constitution, s 74.

having available the body of principle and learning emanating from the House of Lords was recognised by the new High Court itself. In 1909, in *Brown v Holloway*²³, Justice O'Connor observed:

"In matters not relating to the Constitution this Court is, no doubt, bound in judicial courtesy by the decision of the House of Lords, the tribunal of the highest authority in the British Empire".

The same point was acknowledged as late as 1943 in *Piro v W Foster and Co Ltd*²⁴. Whilst acknowledging that House of Lords decisions were not "technically" binding on Australian courts, Chief Justice Latham declared²⁵:

"[I]t should now be formally decided that it will be a wise general rule of practice that in cases of clear conflict between a decision of the House of Lords and of the High Court, this Court and other courts in Australia, should follow a decision of the House of Lords upon matters of general legal principle".

Given that this *dictum* was written in the midst of wartime dangers, when the very survival of an independent Australian nation was under threat, it seems astonishing, in retrospect, that such an extra-hierarchical

²³ (1909) 10 CLR 82 at 102.

²⁴ (1943) 68 CLR 313.

²⁵ 1943) 68 CLR 313 at 320. See also 325-6 per Rich J; 326-7 per Starke J; 336 per McTiernan J; and 341 per Williams J.

view should be taken towards a court, unmentioned in the Australian Constitution and having no formal links to the Australian judicature.

It did not take long for criticisms of this viewpoint to arise. Chief Justice Barwick in 1970 declared that Latham's attitude amounted to an abdication by the High Court "of its own responsibility as a Court of Appeal within each State system"²⁶. Yet, the Latham declaration and longstanding practice proved quite difficult to eradicate from traditional legal thinking, including amongst Australian judges who should have known better because of the text of the Constitution and the pain involved in settling its final provisions in respect of appeals beyond Australian shores.

I said that it was ironical that Justice Dixon should have emerged as such a strong proponent of the unity of the common law because it was his decision in *Parker v The Queen*²⁷ in 1963 that amounted to a declaration of judicial independence towards the status of English precedent in Australian courts. There, the High Court of Australia declined to follow the decision of the House of Lords in *DPP v Smith*²⁸. In time, the Privy Council would substantially follow the approach of the

²⁶ G Barwick, "Precedent in the Southern Hemisphere" (1970) 5 *Israel Law Review* 1, p 28-9; Z Cowen, "The Binding Effect of English Decisions Upon Australian Courts" (1944) 60 LQR 378, 381.

²⁷ (1963) 111 CLR 610.

²⁸ [1961] AC 290.

High Court of Australia, returning to the more orthodox doctrine of English law concerning the subjective test for intent for murder²⁹. And in 1967, the British Parliament effectively disapproved of *Smith* by enacting s 8 of the *Criminal Justice Act 1967* (UK). In private correspondence with Justice Felix Frankfurter of the Supreme Court of the United States, Dixon conceded that his leanings "towards purity in the common law have been counterpoised by too much British sentiment"³⁰.

After the decision in *Parker* several cases in the High Court of Australia gave the Justices the opportunity to adhere to their own approach to particular common law rules in preference to House of Lords reasoning³¹. Often, it has to be said, these rebellions reflected a view that Australian law was perhaps more orthodox and more purely English than the House of Lords was becoming over time. Perhaps this was the highest tribute that could be paid to the great English judges of the nineteenth and early twentieth centuries. To this day, there remain Australian judges who adhere to similar sentiments.³²

²⁹ *Frankland v The Queen* [1987] AC 576 at 594.

³⁰ Sir Owen Dixon to Felix Frankfurter, 20 December 1960, in *Correspondence 1960 – 1973*, Owen Dixon, Personal Papers. See P Ayers, *Owen Dixon*, above, 276-277.

³¹ A good example was *Skelton v Collins* (1966) 115 CLR 94 where the Court declined to follow *H West and Sons Ltd v Shephard* [1964] AC 326.

³² cf *Coventry v Charter Pacific Corporation Ltd* (2006) 227 CLR 234 at 249-253 [35]-[51] per Gleeson CJ, Gummow, Hayne and Callinan JJ; cf at 267 [110]-[113] of my own reasons.

A little belatedly, the Privy Council acknowledged the entitlement of the High Court of Australia to express its own opinions where they conflicted with a House of Lords precedent³³. Yet despite this, to this day, cases arise where distinguished Australian judges still reach unquestioningly and almost automatically for House of Lords authority and apply it as if it were still binding as a statement of the law applicable in the Australian Commonwealth³⁴. It is not and, as a matter of law as distinct from practical reality, it never was so.

With the emergence of the High Court as the final appellate court for Australia, the need for a clear new rule was ultimately recognised. Eventually, it was stated by the High Court of Australia in *Cooke v Cooke*³⁵:

"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. Subject, perhaps, to the special position of decisions of the House of Lords given in the period in which appeals lay from this country to the Privy Council, the precedents of other legal systems are not

³³ *Australian Consolidated Press Ltd v Uren* (1969) 1 AC 590; *Geelong Harbour Trust Commissioners v Gibbs, Bright and Co* (1974) 129 CLR 576.

³⁴ See eg *International Air Transport Association v Ansett Australia Holdings Limited* (2008) 82 ALJR 419; [2008] HCA 3 at [154].

³⁵ (1986) 162 CLR 376 at 390.

binding and are useful only to the degree of the persuasiveness of their reasoning".

In my view even the postulate of a pre-1986 exception can no longer be admitted as a matter of constitutional principle. In a country that is wholly independent in law and politics and in all of its branches of government from the authorities of any other country, self-respecting legal principle obliges a single, simple, rule.

Thus, Australian courts may use House of Lords authority, like any other judicial reasoning, as and when it helps them in their reasoning and analogical deliberations. However, such decisions have no binding force whatsoever unless an Australian judge, with the constitutional power and legitimacy, decides to adopt the decision or the reasoning in it and to declare that it represents a correct statement of the law of Australia. Thus we refer to House of Lords opinions for the power and force of their reasoning and persuasiveness of their logic. Nothing more. The relationship is thus now one of rational respect, not Imperial or other power. The greatest tribute to the House of Lords can be found in the fact that, despite this change in the precedential authority of its decisions, they continue to be cited in so many fields of contested principle involving the common law, the rules of equity and the approach to statute law.³⁶

³⁶ A good recent illustration is found in *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 241 ALR 86. In that case a majority of the High Court (Gleeson CJ, Gummow, Heydon and Crennan JJ) applied the reasoning of Lord Diplock, as Diplock LJ, in *Hong Kong Fir Shipping Co v Kawasaki Kisen Kaisha Ltd* [1962] 2

In a landscape that discloses countless instances where the reasoning of the House of Lords has been considered and adopted as still expressing the law of Australia, the exceptions, where that authority has been departed from, are the more notable. Some of the areas where Australian law, as expressed in the High Court, has taken a different direction include in cases on the law of nervous shock³⁷; the law on the liability of local authorities³⁸; the law of judicial disqualification for financial interest³⁹; the law of resulting trusts⁴⁰; the liability of advocates for negligence⁴¹; and the law on exemplary damages in tort⁴².

QB 26 recognising the “intermediate term” category for termination of contracts. My own preference (*ibid*, 118 [107]-[108]) was to adopt an alternative Australian taxonomy. The case is an instance of the ongoing influence of English judicial pronouncements upon Australian legal doctrine.

- ³⁷ *Alcock v Chief Constable of South Yorkshire Police* [1992] 2 AC 310; cf *Annetts v Australian Stations Pty Ltd* (2003) 211 CLR 317.
- ³⁸ *Anns v Merton Londonborough Council* [1978] AC 728; cf *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, later followed in *Murphy v Brentwood DCC* [1991] 1 AC 398.
- ³⁹ *Dimes v Proprietors, Grand Junction Canal* (1852) 3 HCL 759 (HL); 10 ER 301; cf *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337. The writer followed and applied the stricter House of Lords principle.
- ⁴⁰ *Tinsley v Milligan* [1994] 1 AC 340; cf *Nelson v Nelson* (1995) 184 CLR 538.
- ⁴¹ *Arthur J S Hall v Simons* [2002] 1 AC 615; cf *D’Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1. The writer preferred the House of Lords opinion.
- ⁴² *Rookes v Barnard* [1964] AC 1129; *Broome v Cassell and Co Ltd* [1972] AC 1027; cf *Uren v John Fairfax and Sons Ltd* (1966) 117 CLR 118.

It is an indication of my own particular regard for the principles stated by the House of Lords that in two of the foregoing instances (judicial disqualification and advocates immunity) I preferred the approach favoured by the Law Lords to that embraced by my colleagues. Yet I gave effect to them not because of their source but because I considered that they should be accepted and declared to state the applicable law of Australia.

A NEW DIALOGUE

During the time of Imperial power, suggestions were occasionally made for institutional arrangements that would ensure a more equal participation of judges from the Dominions, such as Australia, in the Imperial courts whose authority beyond England was so remarkable and enduring.

The most obvious way that this could have been done would have been the reconstitution of the Judicial Committee of the Privy Council to include more than an occasional visiting judge from the British dominions. Alternatively, it might have been possible in the 1950s and 1960s to constitute a Privy Council for Pacific countries of the Commonwealth (including Australia, New Zealand, Papua New Guinea, Fiji, Solomon Islands, Tonga, Nauru, Samoa etc) substantially comprising judges of high authority from that part of the world. The fact is that there was never much interest in Britain in any of these ideas.

This proves that it is not only Australian lawyers who suffer from an occasional inflexibility of mind.

The historical moment for institutional creativity passed. The possibility of building a true Commonwealth-wide court of final appeal (if that ever was feasible) was lost. For the most part, the countries of the Commonwealth of Nations went their own way. Thus Australia finally did in 1986 and New Zealand in 2003⁴³. Viewed from the other side of the world, one is left with an impression that, in the earlier decades of the twentieth century, the British interest in judicial thought and reasoning in the British dominions and colonies was never a fraction of that moving in the opposite direction. Considering this reality, we can lament lost institutional opportunities. However, they make all the more important the recent contributions that Lord Bingham has made to rebuilding a new judicial relationship across borders on a foundation of mutual respect and inter-active utility.

In fact, one of the most significant contributions that Lord Bingham has made to English law and British judicial practice in recent decades has been his unfailing attention to the decisions of Commonwealth and American courts (and also European courts) on questions of basic general principle. In this respect, he has led the way in the transnational

⁴³ *Supreme Court Act 2003 (NZ)*.

judicial dialogue which is such a feature of the current age⁴⁴. He has done so, in part, by example and, in part, by insisting that counsel appearing to argue cases involving questions of basic legal principle before the House of Lords (and the Privy Council) must be armed with any analogous decisions made by judges in other lands that may throw light on the resolution of the problem before the highest courts in Britain.

Lord Bingham's leadership in this respect has consequences far from London. By showing what can be done, particularly within the English-speaking judiciary, to utilise the reasoning of other courts, he has enhanced the realisation that all wisdom is not home-grown; that there is no necessity to reinvent judicial wheels; and that common questions of principle can be better decided with the aid of comparative legal materials. The age of Imperial deference has passed. A new age of transnational dialogue has opened. Lord Bingham has been a leader in the new age.

⁴⁴ See eg A-M Slaughter, "Transnational Conversation"; A-M Slaughter, "A Typology of Transjudicial Communication" 20 *University of Richmond Law Review* 99 (1994); Vicki C Jackson, "Constitutional Comparisons: Convergence, Resistance, Engagement" 119 *Harvard Law Review* 109 (2005) (describing Philippines litigation); Vicki C Jackson, "Transnational Challenges to Constitutional Law" (2007) 35 *Federal Law Review (Aust)* 161 (describing Australian constitutional developments); Sujit Chowdhry, "Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation" 74 *Indiana Law Journal* 819 (1999); Kim L Schaeppeler, "Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models" (2003) 1 *International Journal of Constitutional Law* 296; Karen Knop, "Here and There: International Law and Domestic Courts" 32 *New York University Journal of International Law and Politics* 501 (2000).

Take, first a number of cases where, in the House of Lords (and earlier in the English Court of Appeal), Lord Bingham has utilised Australian and other foreign judicial authority. The case of *R v Clarke*⁴⁵, mentioned at the outset of this essay, is a classic case in point. Not only did Lord Bingham's opinion in that appeal refer to a mass of English authority on the legal question in issue. It also drew on Australian authority, including that of the Court of Criminal Appeal of New South Wales in *R v Janceski*⁴⁶. There too the Australian court had adopted a strict approach to the requirement of a valid indictment at the outset of the trial. Tellingly, that case was repeatedly cited to their Lordships by counsel. The Internet citations of the cited foreign decisions are given. There is no doubt that the coincidence of the Internet with its search engines has made more accessible foreign authority that would earlier have been undiscoverable but now may readily be discovered and bear on a point in contention.

There have been many other instances. Some, doubtless, are the product of the researches of counsel. Some are probably the product of the researches of Lord Bingham and his colleagues themselves. Sometimes acquaintance with recent Commonwealth decisions comes from the invaluable references to world-wide authority contained in law

⁴⁵ (2008) UKHL 8.

⁴⁶ (2005) 64 NSWLR 10; [2005] NSWCCA 281 at *Clarke* [2008] UKHL at [12].

reviews of which the *Law Quarterly Review* is a most precious example. Sometimes there is nothing more than personal conversation and friendly personal contact⁴⁷.

One area where final courts are constantly looking to colleagues in other countries concerns treaty law such as the law on the *Refugees Convention* and *Protocol*. In many leading cases touching this subject, Lord Bingham has referred to, and applied, overseas authority on the meaning of that Convention⁴⁸.

The law of torts, and the troublesome issue of tortious liability in negligence for pure financial loss has been a rich field for trans-national borrowing⁴⁹.

⁴⁷ This was the source of the writer's citation of Indian Supreme Court authority in *Osmond v Public Service Board of NSW* [1984] 3 NSWLR 447 at 461 (CA). The Indian decisions in *Siemens Engineering Mfg Co of India v Union of India* Air 1976 SC 1785 and *Maneka Gandhi v Union of India* Air 1978 SC 597 were cited following a visit of Bhagwati J to Australia. The reaction of the High Court of Australia at the time was unfavourable and somewhat dismissive. See *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 at 668 per Gibbs CJ. It would be different today.

⁴⁸ See eg *R v Secretary for Home Department; Fornah v Secretary of State for the Home Department* [2007] 1 AC 412 at 430 [13], 431 [14] citing *Applicant A v Minister* (1997) 190 CLR 225, 263, 234. See also *Sepet v Secretary of State for the Home Department* [2003] 1 WLR 856 at 872 [22] applying *Minister for Immigration v Ibrahim* (2000) 204 CLR 1 at 33 [102].

⁴⁹ *Customs and Excise Commissioners v Barclays Bank Plc* [2007] 1 AC 181 at 189-190 [4] where reference was made to my own reasons in *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 275 [259] and of Brennan J in *Heyman v Sutherland Shire Council* (1985) 157 CLR 424 at 481.

Another field where, as *Clarke* shows, similarities between English and Australian law make examination of common issues specially fruitful, is criminal law. Thus, in *R v Coutts*⁵⁰, Lord Bingham followed the "strong statements" of Justices McHugh and Hayne in *Gilbert v The Queen*⁵¹. He pointed to the fact that their approach reflected, even if unconsciously, the principle generally applied in the United States in *Stephenson v United States*⁵² and later cases⁵³.

Sometimes, a dissenting opinion in the Australian court is preferred to that of the majority. So it was in the closely divided decision of the High Court of Australia in *Chappel v Hart*⁵⁴ on the issue of causation in cases of medical negligence. When like questions arose for decision in *Chester v Afshar*⁵⁵, Lord Bingham adopted the dissenting approach of Justice McHugh. In another case of medical negligence, *Reece v Darlington Memorial Hospital NHS Trust*⁵⁶, Lord Bingham again

⁵⁰ [2006] 1 WLR 2154 (HL).

⁵¹ (2000) 201 CLR 414.

⁵² 162 US 313 at 323 (1896).

⁵³ *Berra v United States* 351 US 131 at 134 (1956); *Keeble v United States* 412 US 205 at 212-3 (1973) per Brennan J cited *ibid* 2166-2167 [21].

⁵⁴ (1998) 195 CLR 232.

⁵⁵ [2005] 1 AC 134 at 141-142 [9].

⁵⁶ [2004] 1 AC 309.

drew on the closely divided opinions in the Australian courts declaring that he had found them "of particular value since, although most of the arguments deployed are not novel ... the division of opinion amongst the members of the Court gives the competing arguments a notable sharpness and clarity"⁵⁷. In a world of many common legal problems, a number of them presented by shared technology, often arising at the same time, there is value and assistance to be gained in looking at the reasons of those who have gone before.

Occasionally it may be thought that those who have gone before, whilst deserving of respect, have taken too bold a course⁵⁸. But often the treatment of basic issues in the common law will be helpful. Occasionally an Australian exposition of the common law may succinctly express the conclusions reached elsewhere. In considering issues of causation in *Fairchild v Glen Haven Funeral Services Ltd*⁵⁹, it was natural that Lord Bingham would find utility in Chief Justice Mason's Australian decision in *March v E & M H Stramare Pty Ltd*⁶⁰, as so many Australian courts have also done. Especially when considering an advance on previously stated common law principles, being armed with

⁵⁷ [2004] 1 AC 309 at 314 [2]. See also at 314 [3], 315 [5], 316 [6], 317 [9].

⁵⁸ *Transco Plc v Stockport MBC* [2004] 2 AC 1 at 8 [4]-[6] concerning the Australian absorption of *Rylands v Fletcher* in general negligence law in *Burnie Ports Authority v General Jones Pty Ltd* (1994) 179 CLR 520.

⁵⁹ [2003] 1 AC 32 at 44 [10].

⁶⁰ (1991) 171 CLR 506 at 508.

the decisions of judges in other countries can help to steer the way ahead.

When great issues arise, or where it is suggested that old common law rules are ripe for reconsideration, it is natural and helpful in every country to look to other lands, specifically with similar legal systems, both as a stimulus to change and as a precaution against excessive ardour. This, Lord Bingham has done on many occasions, as in his restatement of the law on advocate's immunity⁶¹ and on privileged discussions on matters of political opinion and argument⁶². In the lastmentioned case, Lord Bingham reached not only for developments that had occurred in Australian courts but also to decisions from Canada⁶³, India⁶⁴ and South Africa⁶⁵. By the end of the twentieth century there was no disparagement for taking this course. It was natural and perfectly accepted.

This utilisation of foreign, but analogous, judicial authority is one of the great legacies of the British Empire. Now it is sometimes working in

⁶¹ *Arthur J S Hall and Co v Simons* [2002] 1 AC 615 at 635 [29], where *Giannarelli v Wraith* (1988) 165 CLR 543 was cited.

⁶² *Reynolds v Times Newspaper Ltd* [2001] 2 AC 127 at 175-176 noting *Lange v ABC* (1997) 189 CLR 520.

⁶³ *Stopforth v Goyer* (1979) 97 DLR (3d) 369; *Loos v Robbins* (1987) 37 DLR (4th) 418.

⁶⁴ *Rajogopal (R) v State of Tamil Nadu* (1994) 6 SCC 632.

⁶⁵ *National Media Ltd v Bogoshi* (1998) 4 SA 1196.

a reverse direction. Even before his appointment to the House of Lords, Lord Bingham adopted this course. Thus, in the English Court of Appeal, in striking the correct balance in the often contentious issue of judicial disqualification for apparent bias⁶⁶, he drew repeatedly on judicial remarks in several Australian cases⁶⁷. Similarly, he embraced the reasoning of Chief Justice Mason and Justice Deane in *Teoh's Case*⁶⁸ in accepting that, sometimes, a court can discern from a statute a legitimate expectation of proper and timely governmental conduct⁶⁹.

Where, as quite often occurs, the search for foreign authority detects reasoning that runs counter to his own judgment, Lord Bingham has been forthright in identifying the authority, noting that a different rule prevails, sharpening his own opinion and explaining why he prefers a different rule⁷⁰. In such cases, access to the foreign reasoning, in legal systems sharing so much in common in matters of basic doctrine, can be helpful even when the reasoning is not followed.

ONGOING BORROWINGS

⁶⁶ *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 at 479-480 [22]-[25], 496-496 [86]-[87].

⁶⁷ Especially *In re JRL; Ex parte CJL* (1986) 161 CLR 342, 352; *Vakauta v Kelly* (1989) 167 CLR 568 at 570-571.

⁶⁸ *Minister for Immigration v Teoh* (1995) 183 CLR 273 at 291.

⁶⁹ *R v DPP; Ex parte Kebilene* [2000] 2 AC 326 at 337-339.

⁷⁰ See eg *Banque Bruxelles SA v Eagle Star Co Ltd* [1995] QB 375 at 417, 422 (CA).

The cases which I have cited are just a handful of those in which Lord Bingham's reasons have drawn upon Australian authority and that of other common law cases. Even more frequent has been the citation of his opinions in Australian courts.

In the recent defamation decision in *Channel Seven Adelaide Pty Ltd v Manock*⁷¹, several members of the High Court of Australia drew on what Lord Bingham had said in the English Court of Appeal in *Brent Walker Group Plc v Time Out Ltd*⁷². If he has cited our decisions in a number of refugee cases, he has often been for us a source of elucidation on the meaning of the *Refugees Convention*⁷³.

Whereas in matters of treaty law it is natural for every country, facing similar problems, to look to approaches of other countries, it is when the law is concerned with the rules of private obligations that the use of overseas authority is the more striking. Yet, there are countless instances where Lord Bingham's reasoning has been invoked in such

⁷¹ [2007] HCA 60; 82 ALJR 303; 241 ALR 468 at [5], [12], [35].

⁷² [1991] 2 QB 33. See also *Pervan v North Queensland Newspaper Co Ltd* (1993) 178 CLR 309 at 321-322.

⁷³ See eg *SZAT v Minister* (2007) 81 ALJR 1659 at 1663-4 [19]-[22] per Gleeson CJ; [25] per Gummow, Hayne and Crennan JJ, 1669 [53]-[59]-[71] of my own reasons all referring to *Januzi v Secretary of State for the Home Department* [2006] 2 AC 426 (HL). See also *NAIS v Minister* (2005) 228 CLR 470 at 478 [20], 495 [81]-[82] citing *Dwyer v Watson* [2004] 1 AC 379.

instances. Thus it has happened in consideration of the substantive law of defamation⁷⁴ where I found great assistance from his opinion in *Grobbelaar v News Groups Newspapers Ltd*⁷⁵; in the law of limitations of actions⁷⁶; in the law of recklessness in criminal cases⁷⁷; in the law of privity of contracts⁷⁸; in the law of contribution between tortfeasors⁷⁹ and on the general approach to striking out pleadings involving novel causes of action⁸⁰.

Sometimes, Australian judges, searching for an apt phrase⁸¹ or explanation of a basic legal principle⁸² will track down an extra-judicial

⁷⁴ *John Fairfax Publishers Pty Ltd v Gagic* (2007) 81 ALJR 1218; see also *John Fairfax Pty Ltd v Rivkin* (2003) 77 ALJR 1657 citing *Grobbelaar*.

⁷⁵ (2003) 1 WLR 3024.

⁷⁶ *Singel v Clarke* (2006) 226 CLR 442 at 452-453 [11] citing *Stubbings v Webb* [1992] QB 197 (CA).

⁷⁷ *Banditt v The Queen* (2005) 224 CLR 262 at 267 [7] citing *R v G* (2004) 1 AC 1034.

⁷⁸ *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 citing *Homburg Hautimport BV v Agrosin Ltd* [2004] 1 AC 715. See also *Royal Botanic Gardens and Domain Trust v South Sydney Council* (2002) 76 ALJR 436 at 445 [39] citing *Bank of Credit and Commerce International SA v Ali* [2001] 2 WLR 735.

⁷⁹ *Alexander v Perpetual Trustees WA Ltd* (2004) 216 CLR 109 applying *Royal Brompton Hospital NHS Trust v Hamond* [2002] 1 WLR 1397.

⁸⁰ *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 268 [161] citing *Johnson v Gore Wood and Co* [2002] 2 AC 1. See also *ibid* 224 [95], 319-320 [308].

⁸¹ *Dow Jones and Co Inc v Gutnick* (2002) 210 CLR 575 at 612 [66].

contribution that Lord Bingham has made to supplement the case books. Yet in the case books, there are plenty of comments over his long years of judicial service that show the sharpest intellect applied to common questions coming before appellate courts everywhere. These include the changing context of judging witness credibility on courtroom appearances⁸³; the capacity of equity, like the common law, in appropriate circumstances, to fill perceived "gaps" in the coherent system of law⁸⁴; and the developing law on the dissemination of confidential information⁸⁵.

The foregoing is just a sample of the very many cases in which Australian judges, toiling away far from the Strand and Westminster, have reached for Lord Bingham's words where they did not have to and where they were not bound by them. They have done so for the wisdom, experience and sharpness of thought that has helped them to arrive at their own conclusions about where justice according to law should take the busy Australian judge.

⁸² *Ebner v Official Trustee in Bankruptcy* (2006) 205 CLR 337 at 357 [56].

⁸³ *State Rail Authority of NSW v Earthline Constructions Pty Ltd (In Liq)* (1999) 73 ALJR 306 at 327 [87] citing *R v Ministry of Defence; ex parte Smith* [1996] QB 517 at 554 per Sir Thomas Bingham, M R.

⁸⁴ *Hill v Van Erp* (1997) 188 CLR 159 at 231, 234 where Gummow J cited *Al-Kandari v J R Brown and Co* [1988] QB 665 (CA).

⁸⁵ *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 429 per Brennan J citing Bingham LJ in *Attorney-General v Guardian Newspapers [No 2]* [1990] 1 AC 109 at 214.

A VERY MODERN LEGACY

Like all judges of the common law, Tom Bingham walks in a journey begun by famous forebears. When those forebears include the great judges of his the House of Lords, it is inevitable that his works will be compared with the great judges of the past - Hailsham - the Halsburys - Atkin - Reid - Diplock - Scarman - Wilberforce and yes, the occasional Tom Denning. In such company it is difficult to shine. But shine Tom Bingham has.

None of us can say how words we have written may be used in the future. They are reified and have taken on their own lives independent of the minds that conceived them. In the global economy of ideas and values represented by the common law, it is the intellectual market that makes the decision according to perceived usefulness. By that criterion, Tom Bingham's stocks, as he leaves the judgment seat, are extremely high.

It is natural that he should be praised in his own country to which he has given much sterling service. But that he is so admired and valued in independent countries throughout the world, linked now only by the power of persuasion, is a most significant accolade. Tom Bingham inherited the mantle of respect won by the House of Lords in colonial and post colonial times when judges elsewhere followed their reasoning by the actuality and habit of Imperial obedience. When the

duty of obedience fell away, only the power of reason could explain the continued citations and perceived usefulness.

By showing himself a child of the modern age, by insisting on outreach at home and by utilising the technology of the Internet, Tom Bingham has extended the contribution of the English law in an environment where extension was by no means assured. This is a unique, special and precious achievement because it points to the future. It sets a challenge for his successors. It gives an example to judges far away to reject parochialism. To search for principle. To be concerned with legal doctrine for it matters⁸⁶. To embrace conceptual thinking. To consider legal principle and legal policy. And to do all this, where appropriate, with the aid of colleagues of the same and other judicial traditions.

At a watershed moment for judicial institutions of the United Kingdom, it is proper for us to honour Tom Bingham's service and leadership.

⁸⁶ *Koompahtoo* (2007) 241 ALR 86 at 118 [78].

THE LORDS, TOM BINGHAM AND AUSTRALIA

The Hon Justice Michael Kirby AC CMG