LAUNCH OF THE SYDNEY LAW REVIEW (VOL.17 NO.2)

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Reporting Papers of the Symposium:

The Internationalisation of Australian Law

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Chief Justice of Australia

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Madam Deputy Chancellor, Mr Dean, Professor Phegan, your Honours, ladies and gentlemen:

It is a great pleasure to be here this evening at the Sydney University Law School. Though not a graduate of this school, I pay my respects to this institution, not least because it has given us Justice Mary Gaudron, who is here today. Not only her Honour but other members of our Court; indeed, many members of our Court. In fact, one might say, most members of our Court! So, it is an institution which has a close connection with the High Court of Australia.

When you say, Professor Phegan, that I have a short time in the office of Chief Justice, as I do - in fact, only three years - I am encouraged by the presence here of the Prime Minister Emeritus, Mr Gough Whitlam. He, too, had about the same period in office. But I know in advance when I am going to go! It is a pleasure to see him here as one who has been in the forefront of bringing Australia into the international community and making this nation not only a respected international citizen but one which stands independently on its own feet, charting its own directions, having its own influences, limited though they may be, yet hopefully disseminating concepts and values which will ultimately result in the improvement of international relations. We have seen some of that already in areas such as Cambodia and it is to be hoped that Australia, in the international sphere, will continue its work in bringing to the international community something of the ambitions of peace which has marked the United Nations' papers, if not always the United Nations' achievements.

But this evening we are speaking about something different. We are speaking about the internationalisation of domestic law. This special edition of the Sydney University Law Review has been written largely from that viewpoint. It is a topical work of great value to those who are engaged in any matter in which international conventions or international law may have an impact upon domestic law. I would suggest it is first and foremost a resource book. Those who have written the papers are knowledgeable in their fields and have done their homework before they put pen to paper. It is not only rich in footnotes, it is rich in insights. That rare combination of scholarship and reflection shows, I think, in practically every page of this journal. It is an outstanding production and, for my part, I would like to convey my respectful congratulations to the editors and the contributors.

The stage is long past when public international law could be safely disregarded by municipal lawyers. The global village is no longer divided by natural barriers and that phenomenon has been accompanied by some bridging of the strict divide between international and municipal law. The influence of international law on statutory interpretation, development of the common law and administrative decision-making has been examined by the courts of this country and that examination is explored in the papers collected in this journal. The viewpoint of the authors, as I have said, is that of the municipal lawyer but a municipal lawyer familiar with the

federal distribution of legislative power and the Westminster division of legislative and executive power.

The basic issue, I suppose, with which one starts is the existence of international law's significance for sovereignty in its internal aspect as Henry Burmester defines it [1]. That is to say, the extent to which international law affects the State's exclusive right or competence to determine the character of its own institutions, to provide for their operation, to enact laws of its choice and to ensure respect for those laws. Of course, to the extent that international law is admitted to affect municipal law, it becomes enforceable by the municipal courts. A different but significant question - politically as well as legally - is the reaction of Australia to the decisions of international tribunals under international law.

Burmester makes an interesting comment with respect to the question of Australia's conformity to the decisions of the International Court of Justice [2]. This passage warrants some consideration. He says:

> "as a middle ranking power with a high regard for international law, Australia considers its interests are best served by accepting the risks of action being brought against it in return for being able by its commitment to the process to enhance its status as a good international citizen and being able to invoke, or threaten to invoke, the mechanisms itself when it considers that appropriate. As the actions brought by Nauru and Portugal demonstrate, however, Australia's open ended unilateral acceptance of the International Court's jurisdiction does make it vulnerable to what might be described by some as opportunistic claims being made against it."

His view, it must be said, has been borne out by the recent decision of the International Court of Justice in the case brought by Portugal. I would not, of course, presume to comment on the correctness of that Court's decision, especially in deference to the dissent of Judge Weeramantry, but the judicial approach by that Court to the question of its jurisdiction can only enhance the Court's authority and bear out the wisdom of the approach that Australia has taken as indicated by Burmester.

The next stage of the examination of the theme is conducted by Professor Saunders. Her paper [3] is firmly rooted in the books and in principle but she raises some tantalising questions which await much examination. Of particular interest to the political administrators of our federal system is her reference to the German federal experience and the mechanisms adopted in the Federal Republic of Germany for intergovernmental co-operation in treaty matters. I confess to some surprise at her revelation that, in this country, less than one quarter of international agreements are subjected to Cabinet approval before official signature and ratification [4].

For a domestic lawyer, Professor Saunders canvasses the questions whether and to what extent the common law already incorporates customary international law. This is a subject which Professor Higgins, in an article [5] referred to in one of the footnotes, takes up. I found it extremely interesting because Professor Higgins - or Judge Higgins of the International Court as she now is - asserts in fairly categorical terms that international law is part of the law of the land, and that raises the question of the extent to which international law is part of the common law of our country.

Professor Higgins takes to task the Supreme Courts of Denmark, Norway and Sweden where the European Convention on Human Rights has not been incorporated but where those courts have treated it as a source of domestic law. Then - and I suppose this was particularly interesting to me - she takes to task my observations in *Mabo v Queensland (No 2)* with reference to the effect of the optional covenant and the effect that that might have in exposing our common law to the influences of the International Covenant on Civil and Political Rights. She observes that [6]

> "Australia is, in relation to the ICCPR, in the same position as the United Kingdom in relation to the European Convention - that is to say, a

ratifying party to an unincorporated treaty, but in respect of which a right of individual application is permitted to the international tribunal."

This is a fascinating situation. International norms might be litigated in an international forum where the decision might be advisory only or, at least, where the forum's opinion is not binding in domestic law. The same international norms might be litigated in a domestic forum where the decision will be binding in domestic law. Different relief might be given in the two jurisdictions though the same question has been submitted for determination. In Europe, where the European Court of Human Rights will render its decision after the domestic courts have done their work, an obligation may be imposed on one of the signatory countries to bring their domestic law into conformity with the ruling of the European Court. We do not quite have that situation in relation to the Committee that might deal with cases under the optional covenant.

But, nonetheless, the possible embarrassment of having an advisory opinion by an international tribunal and a binding decision by a domestic tribunal is one which must be faced. It was faced, if you remember, in this country in the Queen of Queensland Case 7 where the Queensland Parliament had legislated to confer advisory jurisdiction on the Privy Council with respect, inter alia, to inter se matters arising under the federal Constitution. By section 74 of the Constitution, the High Court of Australia was given the final jurisdiction of determining inter se matters under our Constitution for the purposes of our domestic law. The Queen ofQueensland Case resulted in the invalidation of the Queensland Act 8 a s some inconsistency was found to exist between section 74 and that Act.

Perhaps that simply illustrates that we are here at the cutting edge of problems of national sovereignty. The jurisdiction of international tribunals determines to some extent the limits of the internal sovereignty of which Burmester speaks in his paper.

Professor Saunders also raises questions as to the suitability of our present constitutional arrangements to meet the requirements of dealing with international agreements of increasing significance to Australian lives and interests. No doubt that is a significant problem, and it will be a matter of continual political debate as to the allocation of power in respect of the making, ratification and enforcement of international obligations as between the Parliament and the Executive of the Commonwealth on the one hand and the States on the other. However, what is clear at the moment is that, pursuant to section 51(xxix) of the Constitution, Commonwealth legislative power has been enhanced by the exercise of executive power and that enhancement has sometimes occurred without full Cabinet approval of the particular international agreement.

Whether the States should play any and what part in the making or ratification of a treaty and whether there is any inconsistency between a proposed international obligation and the domestic law enacted or enforced in the States are important questions. No doubt, these questions are addressed in the course of the international negotiation of instruments. At all events, it is to be hoped that there are no situations where, without at least conscious adversion, Australia binds itself to an international obligation which might occasion embarrassment so far as a State is concerned. Hopefully, any possibility of embarrassment is consciously addressed before the international obligation is undertaken.

One of the areas, of course, where the internationalisation of law is of extreme importance is that of human rights. Significantly, the protection of human rights is regarded by some nations as very much a matter of concern only for their domestic law - something which ought not to be intruded upon by the international community. We, and the international community generally, have taken the opposite view overwhelmingly in the light of recent history.

It is therefore to be expected that the international norms of human rights will have a greater influence, whether by way of statutory interpretation or by way of incorporation into parts of our common law,

than they have had in previous times. However, I suggest that Professor Higgins puts it in a rather tendentious fashion. She suggests that 9 " many human rights obligations are indeed part of general international law" and, on that account, part of the common law. "These obligations", she says, "properly understood, are already obligations of English law. Just like other such obligations, they will be overridden by a clear contrary directive in a statute; and otherwise will be a consideration of great weight in identifying exactly what the common law is. In short, there is not 'international law' and the common law. International law is part of that which comprises the common law on any given subject." That seems to me to be a large statement and it seems to deny the prospect of the mediating influence either of a national legislature or of a national judiciary.

Now, I think I have spent more than sufficient time on what might be regarded as some of the basic issues which face the problems of international law and its incorporation or effect upon domestic law. They are problems which are well and adequately addressed in these papers. The papers themselves are really divided into two areas. Some of them deal with questions of sovereignty, with jurisdiction and with power. Other papers deal with the specific application of these principles to particular and important areas of domestic law. There is, for example, the excellent paper by Donald Rothwell and Ben Boer on Australian Environmental Law and Policy 10, raising questions dealing with the effect in Australian law of international conventions on the environment. Some of those effects are all too familiar to us, but the authors raise an interesting question, namely, whether the Australian public is aware of the significance and the importance of the monitoring function of international bodies on the Australian performance of our international obligations under the laws relating to the environment. Mark Findlay, in his paper on Criminal Investigations 11 notes some of the extraordinary difficulties that are faced when the domestic law endeavours to cope with the problems of crime that knows no boundaries. Professor Jeff Waincymer, in a paper of great intellectual clarity, deals with Australia's trade laws 12 . It is a paper that I would not try to summarize but which I would commend to those who address the classification and analysis of Australia's international trade laws. And David Harland has furnished an instructive paper on "The Influence of European Law on Product Liability in Australia" 13 tracing, in particular, the effect of European Law on Part VA of the Trade Practices Act . These and the paper by Penelope Mathew on Human Rights 14 are extraordinarily useful contributions to their respective fields.

There is one other paper by Margaret Allars dealing with Teoh's Case 15 . I make it a point not to comment on judgments of the High Court of Australia and this is no exception. I do not think it is appropriate for judges of a court to comment upon the judgments that come from that court. The reasons for judgment of a court are expressed by the judges. They are the account to the public of the way in which judicial powers are exercised. There is no other method of accounting to the public and it is not open to judges, in my respectful view, to defend or to criticize the judgments that come from their court or from any other, except in the course of appeals and then within the strictly defined limits appropriate to appellate review.

So, therefore, I shall have to pass by Margaret Allars' One Small Step for Legal Doctrine, One Giant Leap Towards Integrity in Government. But I will say this: her paper canvasses the legal implications of inconsistency in executive action between that branch of the Executive that enters into international obligations and that branch of the Executive which exercises domestic discretionary power. That is a big question. Teoh's Case 16 is but the first step along what might be a very long road.

This part of the Sydney Law Review is a tribute to the authors; it is a tribute to the Committee of Review and it is a tribute to the Editorial Board. I offer my congratulations to all of you upon it. If it is appropriate to launch it, it is hereby launched.

1"National Sovereignty, Independence and the Impact of Treaties and International Standards", 17 Sydney Law Review 127 at 131.

2ibid. at 142.

3"Articles of Faith or Lucky Breaks", 17 Sydney Law Review 150.

4"Articles of Faith or Lucky Breaks" at 168.

5"The Relationship Between International and Regional Human Rights Norms and Domestic Law" (1992) 18 Commonwealth Law Bulletin 1268.

6"The Relationship between International and Regional Human Rights Norms and Domestic Law" at 1273.

7 The Commonwealth v. Queensland (1975) 134 CLR 298.

8The Appeals and Special Reference Act 1973 (Q.).

9ibid.

10"From the Franklin to Berlin: The Internationalisation of Australian Environmental Law and Policy", 17 Sydney Law Review 242 .

11"International Rights and Australian Adaptations: Recent Developments in Criminal Investigation", 17 Sydney Law Review 278.

12"The Internationalisation of Australia's Trade Laws", 17 Sydney Law Review 298.

13ibid. at 336.

14"International Law and the Protection of Human Rights in Australia: Recent Trends", 17 Sydney Law Review 177.

15"One Small Step for Legal Doctrine, One Giant Leap Towards Integrity in Government: Teoh's Case and the Internationalisation of Administrative Law", 17 Sydney Law Review , 204.

16 Minister for Immigration and Ethnic Affairs v. Teoh (1995) 69 ALJR 423; 128 ALR 353.