MELBOURNE UNIVERSITY LAW REVIEW

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The Hon Justice Michael Kirby AC CMG

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At the end of a century, indeed of a millennium, it is natural that the mind should turn to new dimensions of thought. Just as the end of day is a time when, we are told, the minds of philosophers ruminate upon the insoluble dilemmas of being and intelligence, so it is natural at this time that we should be challenging the boundaries of legal thinking and looking far ahead.

Not that this comes easily to lawyers. Our training is to be respectful of settled authority. Our discipline requires us to

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assume the legitimacy of the hierarchy of laws and rules which we design and help to enforce in society. When we pause to ask basic questions about the ultimate source of the authority of law, we tend to irritate our colleagues who just want to get on with life, accepting its pre-suppositions and obeying its rules.

When I was at law school, the basic *legal* foundation of Australian law was not really questioned. It lay in the exercise of the legitimate legal power of the Sovereign in Parliament. That meant, of course, in the United Kingdom Parliament. The Parliament of the United Kingdom of Great Britain and Ireland (as it then was) which had enacted the *Commonwealth of Australia Constitution Act* 1900[1]. The world had radically changed since those days. Power had shifted. The Imperial fleet had sailed home. Two world wars had been fought. An empire had all but evaporated. And still we clung to the certainty of the basic legal foundation of the political organisation of the Australian people as resting upon a decision made for us, albeit at our request, by the good commons elected by the voters of England and the hereditary Lords across the Hall in the gilded chamber.

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1 63 and 64 Vict Chapter 12.

Now, rather belatedly, Australian lawyers are re-interpreting their history to discover a new *Grundnorm* for their constitutional and political order. It is suggested to be the people of Australia[2]. This notion presents various difficulties[3]. But it seems to be gaining strength[4]. Its foundations lie in the history by which Australians drafted, and twice approved, their Constitution and the means by which they reserved to themselves, by referendum, the power to approve or disprove proposals for its formal amendment[5]. The change in reality has come about slowly and almost imperceptibly. Much legal baggage has accompanied the caravan of reality which has taken this country on a new journey, out of an imperial cluster of settled and captive nations, to an independent future for Australia.

But even this supposed *Grundnorm* presents difficulties. Only men took part in the conventions which drafted the

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2 *Australian Capital Television v The Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 77 per Deane and Toohey JJ.

3 L Zines, "The Sovereignty of the People", Paper delivered to the Conference on the Constitution and Australian Democracy, Canberra, 9-11 November 1995.

4 *McGinty v Western Australia* (1996) 70 ALJR 200 at 239 per McHugh JA.

5 See the Constitution, s 128.

Constitution. The voters who approved it were (in all colonies but South Australia) men only. The constitutional order merely supplemented the derivative law operating out of what was left of the Sovereign's prerogative and the applicable common law and statutes of England[6]. To terminate finally appeals from State Supreme Courts to the Judicial Committee of the Privy Council Australians still felt it necessary to request and consent to the enactment of an Act by the Parliament of the United Kingdom to supplement the statutes enacted by the Parliaments of Australia[7]. This might have been a sensible precaution, for the avoidance of future doubt. It might have been a symbol of historical and legal continuity: a last great legal flash in the sky to brighten the imperial sunset. But some would ask: if the people of Australia are truly now the foundation of the legitimacy of Australia's legal order, what business was it of the United Kingdom, in 1986, to be passing a statute concerning us at all? What business was it of the Parliaments and governments of Australia to ask that that be done by a foreign legislature?

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6 Cf *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104 at 141. See also *Cheatle v The Queen* (1993) 177 CLR 541 at 552; S Donaghue, "The Clamour of Silent Constitutional Principles" (1996) 24 *Fed L Rev* 133 at 167.

7 *Australia Acts* 1986 (UK); (1986 c 2). This was enacted pursuant to a request made and consent given by the Parliament and Government of the Commonwealth in the *Australia (Request and Consent) Act* 1986 (Cth) with the concurrence of all States of Australia (see *Australia Acts Request Act* 1985 of each State).

Questions of this kind illustrate the extent to which, in busy lives, lawyers run away from fundamental dilemmas. So much easier is it to accept those fundamentals and to get on with life. The value of the collection of essays in this special edition of the *Review* is that it challenges the congenial orthodoxy of lawyerly thinking. The essays do so in different ways.

The article by Simon Chesterman explores the extent to which, in international law as in Australia's municipal law, we are the subjects of ideas developed in the European intellectual tradition. Is this the ultimate colonial legacy, that the law of nations has been imposed, and increasingly accepted, by a global community although developed in a very small part of the world representing but a fraction of its peoples.

Mr Chesterman asks of international law, the same kinds of fundamental questions to which I have referred in the Australian constitutional context. Is international law 'law'? What, other than sheer power, is the legal foundation of the *Charter* of the United Nations and the peculiar constitution of its Security Council? By what right (other than power) did the four victorious allies after the Second World War establish their War Crimes Tribunals and retrospectively impose on defeated leaders laws which they declared? Was this the first assertion of the rule of law in the name of global humanity? Or was it a morally flawed

procedure which pretended to protect human rights but by means which were actually brute power dressed up as law?

Just when Mr Chesterman is carrying our thoughts seriously to question the concept of international law and the notion of universal human rights, we consider the topics in the succeeding essays in this Review. Dr Desmond Manderson explores the construction of time and space in contemporary legal theory. He suggests that even when modernist legal theories attempt to be radical, they perpetuate a conservatising aesthetic. Drawing on the chaos theory in science, he argues for reconceptualisation of law to reflect the multiplicity and complexity of society and of the world we live in.

All of this seems a trifle disheartening. A lawyer's training searches for order in the chaos. A modern Australian lawyer's inclination searches for justice and human rights in the chaos. Is international law - indeed is law - nothing more than power, usually imposing rules drawn up by men, far away and typically in Europe to hold in check the complex multiplicity of societies of this world, including our own?

Just as the reader is feeling extremely discouraged, the articles by Ms Emma Henderson and Associate Professor Hilary Astor lift the spirits. This is not because of their content. Ms Henderson traces the process involved in the reform of laws penalising adult consensual homosexual conduct. Professor

Astor examines special problems in intra-lesbian disputes. What is encouraging is not the record of past and still continuing prejudice and discrimination against gay and lesbian citizens in Australia and beyond. It is the very fact that these issues are being examined in this *Review*. The prejudice is being confronted. Unsatisfactory solutions are being exposed. Just remedies, which respect the inherent dignity of individual diversity, are being explored. This is certainly not something one would have seen in a law journal in my university days.

The lessons of the articles by Ms Henderson and Professor Astor are several. First, they each demonstrate the abiding human discomfiture with significant diversity. It exists in matters of gender, race, age, disability, skin colour, sexual orientation and elsewhere. The law, as a reflection of power and an instrument of social values has, in the past, and in Australia, oppressed homosexuals as it has women, indigenous peoples, Asian migrants and many other groups. A reflection on all of the essays in this Part of the Review requires of us, the lawyers for the coming millennium, that we should recognise this tendency of our discipline to stamp an order which is intolerant of harmless diversity. More importantly, we should question whether rules which the law still upholds are unjustly oppressive today so that we should seek to reform them. Where are the other subjects, like laws against homosexuals in my youth, which still require the reformer's fire? If lawyers of those days were blind to the injustices against gay men and lesbians, who

are the silent groups today for whom we should speak up? Do they include drug dependent persons? Do they include refugees? In reading about past wrongs and present problems in Australian law, we should derive lessons about the need for open-mindedness today and in the years to come.

But the essays by Ms Henderson and Professor Astor also have relevance to the themes presented by Mr Chesterman and Dr Manderson. Like it or not, we have to acknowledge that the moves for homosexual law reform in Australia were not home-grown. They only gathered force after the United Kingdom Parliament altered its law against homosexuals in response to the Wolfenden Report[8] described by Ms Henderson. Until then the law was enforced here and largely unquestioned. The important point to note is that the change wrought by Wolfenden could be portrayed as a culture specific alteration, not suitable for export to all other political and cultural systems. Yet it is the very universality of the international law of human rights which is carrying the enlightenment of Wolfenden to societies which still resist the message. This is the reason why the decision of the Human Rights Committee of the United Nations in *Toonen v*

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8 United Kingdom, *Report of the Committee on Homosexual Offences and Prostitution,* Command Paper No 247 (4 September 1957).

Australia[9] has an importance far beyond Tasmania. Humanity's faltering, uncertain steps to build universal human rights, and to share enlightenment with other societies and peoples, ought to be welcomed and supported by Australian lawyers.

These essays show the exciting and challenging time in which the lawyers of today are living. International law is growing in importance, as befits advances of technology and increasing global problems. We are now much more questioning of rules and much more willing to accept criticism of them from pleural perspectives. We can see how, in the past, and at the present, our discipline is sometimes the instrument of injustice. We should strive to repair the injustice. And we should not be content to do so in our own backyard. We should be concerned to provide both the theoretical and practical foundations for a better legal order throughout the world in the coming millennium.

Good lawyers get to know the past where dwells the authority upon which Australian and international law rests. But the best lawyers question received wisdom. They are ever alert to the possibilities of injustice. They look to the future in which they will contribute to making things better.

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9 *Toonen v Australia.* Communication No 488/1992 (31 March 1994).