JUDICIAL OFFICERS' BULLETIN

INTERNATIONAL LAW COMES DOWN TO EARTH

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I had a pretty orthodox legal education as befitted a child of the Sydney Law School in the late 1950s. The declaratory theory of the judicial function. The Imperial Parliament as the ultimate font of Australian law. International law: interesting but nothing to do with an Australian lawyer earning a crust in a solicitor's office or busy courtroom.

Now, no one believes the "fairytale" of the declaratory theory[1]. The ultimate foundation of Australian law is said to be the people of Australia who approved the Constitution under which all law is made[2]. And international law is suddenly

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* Justice of the High Court of Australia. President of the International Commission of Jurists.

1 Lord Reid, "The Judge as Lawmaker" (1992) J Soc Public Teachers of Law at 22; cf M H McHugh, "The Law-Making Function of the Judicial Process" (1988) 62 ALJ 15.

2 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 138; cf *McGinty v Western Australia* (1996) 70 ALJR 200 (HC) at 239.

becoming of practical relevance not just to sovereign states and their advisers but also to work-a-day legal practitioners and judicial officers. Is nothing certain in this changing world of law?

If we stop and think about it, it is not so surprising that international law should become increasingly important. There is a growing body of it ranging - from the great international human rights treaties[3] to the highly detailed multi-lateral treaties for the settlement of commercial disputes between businesses in different countries[4]. The ease of modern travel; the increasingly global character of economic activity and the advent of accessible international information technology have all contributed to an acceleration of the growth of international law and of its relevance to judges and lawyers in Australia.

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3 For example *International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; Convention on the Elimination of all Forms of Racial Discrimination; Convention on the Elimination of all Forms of Discrimination Against Women; Convention on the Rights of the Child; Convention Relating to the Status of Refugees;* and *Convention on the Prevention and Punishment of the Crime of Genocide.*

4 Discussed R Pritchard (ed) *Economic Development, Foreign Investment and the Law - Issues of Private Sector Involvement, Foreign Investment and the Rule of Law in a New Era.* Kluwer, 1996 noted (1996) 70 ALJ 852.

The old theory was that there was a virtually complete divorce between international and "municipal" law. This theory was bound to come under review because of the developments mentioned. A common law legal system is intensely practical. It adapts to its milieu. This adaptation is natural and healthy. It is my thesis that it is also a desirable advance at this time in Australia's legal history. At the moment when we threw off the bonds that tied us to the English judiciary (in the form of the Judicial Committee of the Privy Council) there was a real danger that we would retreat into a comfortable, and rather closed, backwater of antipodean common law. We would even boast of being the guardians of the "true doctrine". Actually we would have lost the stimulus of linkage to one of the great legal systems of the world. Now, instead of retreating to provincialism, our judges and lawyers, under the stimulus of the High Court of Australia, are being encouraged to look for new assistance. They are being directed not only to the wider family of common law courts around the English-speaking world[5] but also to a more global jurisprudence, usually based on treaties and expounded by national, regional and international courts and bodies. Australian lawyers should keep our feet on the ground as this development occurs. But they should not feel threatened

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5 *Cook v Cook* (1986) 162 CLR 376, 390.

by it. Rather, they should see it as a development natural to the time we are living in and beneficial to the particular Australian circumstances which I have mentioned.

There are some who see real dangers in the merest mention of international jurisprudence which has not been specifically incorporated into local law by statute. Some commentators even see it as part of an international conspiracy to undermine Australia's sovereignty. Other, more thoughtful, sceptics express concern that, unless restrained, the use of unincorporated international jurisprudence could undermine two important principles of our Constitution. The first is that, although treaties are made by the Executive Government, laws are ordinarily made by parliaments. The second is that, in the Australian federation, it cannot have been the intention of the Constitution that international law should be used as a vehicle for demolishing the respective legal responsibilities of the state and federal polities.

These are fair points. They express reasons why caution must be exercised, at least in Australia, in the use of unincorporated treaty law. But nobody seriously suggests that, simply because of a treaty (including one which Australia has ratified), we should alter our understanding of local statute or common law. Rather what is suggested is that, if uncertainty arises in the state of the law (either because of a gap in the common law or obscurity or ambiguity in the meaning of a

relevant statute), Australian lawmakers may seek guidance to fill the gap or resolve the ambiguity by reference to general principles of international law. At least they may do so where that international law expresses rules applicable to all civilised countries, including our own.

The growing understanding that judicial officers in Australia have choices (in filling gaps or resolving ambiguities in the law) presents a number of dilemmas. One of them concerns the source material to which a judicial officer may have access in performing his or her functions. That material is not limited to lessons learnt in Sunday School. Analogous reasoning and the application of logic to old cases may not always yield the solution to the problem in hand because the circumstances may have changed so much. The ambiguities of the Constitution or of a statute may remain utterly impenetrable. In such circumstances, clearly, the judge may look for guidance in the decision authority of other common law countries. But in a world of growing international jurisprudence, he or she may also now look to the principles of international law. Those principles do not bind the judge. They are not part of the local law until, by statute or judicial decision, they are incorporated. However, the judge may use the material as a step in the judge's own reasoning.

Naturally, a judge will not assume the function of incorporating a whole treaty into local law where the Parliament

has held back. However, the development of local law, in general harmony with international jurisprudence, is a contribution proper to a common law judge at this stage in the relationship between Australia's domestic law and the law of nations. This is what I take Justice Brennan to have said in the oft quoted passage in *Mabo v Queensland [No 2]*[6]:

> "The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights."

Anyone doubting the growing impact of international human rights jurisprudence upon the reasoning and decisions of the High Court of Australia cannot have been reading the *Commonwealth Law Reports* this past decade. In *Dietrich v The Queen*[7], the Court studied closely the requirements of the *International Covenant on Civil and Political Rights,* Article 14(3) concerning access to legal advice. In *Chu Kheng Lim and Ors v The Minister for Immigration, Local Government and Ethnic Affairs*[8], the Court accepted that, in a case of ambiguity,

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6 (1992) 175 CLR 1 at 42. See (1992) 66 ALJ 551 at 552; M D Kirby, "The Australian Use of International Human Rights Norms" (1993) 16 UNSWLJ 363.

7 (1992) 177 CLR 292.

8 (1992) 176 CLR 1.

Australian law would favour the construction of a federal statute "which accords with the obligations of Australia under an international treaty". In *Minister of State for Immigration and Ethnic Affairs v Teoh*[9], the Court held that Australia's ratification of the *Convention on the Rights of the Child* gave rise to a legitimate expectation that the Minister would act in conformity with it and treat the best interests of Mr Teoh's children as a primary consideration in his decision. Whilst warning that this "judicial development of the common law must not be seen as a backdoor means of incorporating an unincorporated Convention into Australian law"[10], the Court refused to regard the Convention as being in a different realm of discourse, as traditional theory might have suggested.

The impact of international law on the daily practice of the courts can be seen in a number of cases in the High Court, even in the short time since my appointment. In *DeL v DeL*[11], the Court had to consider the meaning of the *International Child Abduction Convention* which is incorporated into federal law[12].

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9 (1995) 183 CLR 277.

10 *Ibid,* 288.

11 *DeL v DeL* (1996) 139 ALR 417.

12 Family Law Regulations, Reg 16(3)(c).

In *Applicant "A" and Applicant "B" v Minister for Immigration and Ethnic Affairs,* which stands for judgment, the Court has to elucidate the Refugees Convention, also incorporated into local law[13]. In *Leask v The Commonwealth*[14], there is an interesting discussion of the civil law notion of "proportionality", which has found its way into Australian law by way of decisions of the European Court of Human Rights[15]. These and other cases demonstrate the multitude of sources that are now impinging upon the Australian legal system.

In the place of the one great stimulus of comparative law material (the law of England) we are now opening our courts and our minds to the stimulus of many sources. Doing this is a completely natural and inevitable process. It must be conducted with loyalty to our own democratic and legal traditions. We must exhibit a clear-sighted understanding that, sometimes, foreign legal concepts may be irrelevant or inappropriate to our law. Made overseas does not necessarily make it right for Australia. We must grow out of that post-colonial mentality.

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13 *Migration Act* 1958, s 144.

14 Unreported, High Court, 14 November 1996.

15 Discussed *State of New South Wales v Macquarie Bank Ltd* (1992) 30 NSWLR 307 at 321; *Reg v Home Secretary; Ex parte Brind* [1991] 1 AC 696 at 767.

But international consideration of universal problems may sometimes have lessons for us. On the brink of a new millennium, we should be bold enough, and open-minded enough, to be ready to receive those lessons when they assist in solving Australia's legal problems. Especially in cases relevant to human rights, it is likely that international standards, and the growing body of law that is accumulating around them[16], will sometimes be of help in our labours. It will need the perception of law teachers of the importance of this source of legal principle. And policy and the imagination of legal practitioners to find, and advance, the necessary arguments. And a willingness of judicial officers to listen and learn, released from the assumption that the only good legal ideas that come from overseas are made in England.

In recognition of the growing use of international human rights jurisprudence by municipal courts of every legal tradition in

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16 R Higgins, "Problems and Process - International Law and How We Use It", Clarendon, Oxford, 1994 at 205. For examples of the use of international human rights law in judicial decisions see eg *Gradidge v Grace Bros Pty Ltd* (1988) 93 FLR 414 (NSWCA) at 425-6; *Regina v Greer* (1992) 62 A Crim R 442 (NSWCCA); *Regina v Astill* (1992) 63 A Crim R 148 (NSWCCA); *DPP v Saxon* (1992) 28 NSWLR 263 (CA); *Young v Registrar, Court of Appeal [No 3]* (1993) 32 NSWLR 262 (CA). Cf *Derbyshire County Council v Times Newspapers Ltd* [1992] 3 WLR 28 (CA) at 43, 60.

all parts of the world, the United Nations Centre for Human Rights in Geneva has commissioned the production of a Judicial Officers' Manual. This is being prepared by an international team. It is hoped that it will be of practical use to judicial officers of our legal tradition and that it will be available by the end of 1997. It will contain reference to the basic source material on international law principles, guidance on the applicable elaborations and illustrations of the way in which the task of application can be performed.

So there is a large challenge of adaptation before the Australian legal profession and the judiciary. The question remains: Are we up to it?