

# THE IRRESISTABLE INTERNATIONALISATION OF AUSTRALIAN LAW

The University of Melbourne

Melbourne, Victoria

23 May 2009

Upon conferral of honorary degree of Doctor of Laws

**THE UNIVERSITY OF MELBOURNE**  
**MELBOURNE, VICTORIA, 23 MAY 2009.**

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**The Hon. Michael Kirby AC CMG, Hon. LLD (Melb Uni)**

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**A LONG LOVE AFFAIR**

I express my thanks for the honour that makes me, like the other graduates today, a full member of the University of Melbourne. I confess to a long love affair with the University of Melbourne and its law school, teachers and students. At last, we have made our relationship legal. No longer de factos. Not just a civil union. A full-blown marriage. As such, it is a new experience for me. I plan to savour it, coming as marriage does so late in life.

I first came to this campus in 1963, nearly 50 years ago. I was in my prime as president of the Sydney University Students' Representative Council. The local president was a bearded youth, Gary Evans. Later, as Gareth, he was to be my colleague in the inaugural Australian Law Reform Commission (ALRC). He went on to serve as a senator, a federal minister, Attorney-General and chief executive of the International Crisis Group, one of the most effective monitors of peace and justice in our world. A measure of his success may be seen in the fact that, on his recent retirement, his successor is the Hon. Louise Arbour: a past Justice of the Supreme Court of Canada and fourth United Nations High Commissioner for Human Rights.

Professor Zelman Cowen was still the Dean of Law in those days. His spectacular service to universities, to the ALRC and the nation as Governor-

General, lay ahead. He and Lady Cowen do me the honour of attending this occasion, linking us all back to earlier memorable days in this university and in our country.

Whenever I return to this campus, something of the feeling of that first visit returns to my spirit. I quickly discovered that the University of Melbourne was a special place, questing and questioning where so many others in those times were silent. Challenging received values. Contesting, at that time, Aboriginal neglect, White Australia, suspicions of radicals, gay oppression, national conformism and international obsequiousness. Over the years, Melbourne, and its graduates, have often helped to shake me out of complacency, as an Australian, as a lawyer and a judge.

In my ALRC years, I came to know the members of the law faculty here and began the process of learning from them, although never formally their pupil. Great teachers and questioners, including Colin Howard, Howard Luntz, Harold Ford and so many others. I honour them all and their successors under the four Deans I have known during my judicial years who also included: Sandy Clark, Mark Weinburg, Michael Crommelin, Ian Ramsay and James Hathaway, our latest maestro.

In happy times, in the New South Wales Court of Appeal, and in challenging times in the High Court of Australia, I returned on many occasions to draw on the deep well of affectionate feelings that I always found amongst the teachers and students of Melbourne Law School. Outside the law I have had the pleasure to serve on the Centre for Applied Philosophy and Ethics, and the Institute of Post Colonial Studies. I have given not one but three lectures to honour that great Chief Justice, Sir Anthony Mason. I have returned regularly for interchange with the student body. Book launches, cocktail parties, staff farewells and the annual celebrations of Australia's premier university journals: the *Melbourne University Law Review* and the *Melbourne Journal of International Law*. I even came last year to give the annual tax lecture,

although my qualifications for that honour were at best dubious. Nothing could keep me from the Melbourne Law School, even if it meant I had to bone up on unknown law. On one occasion the students engaged a duo to sing happy birthday to me. In Italian. Now the gruesome seventieth birthday has come around. After so long, power and position have fallen from my shoulders.

I was questioning whether, in my reduced state, I would still be welcome at the Melbourne Law School when two splendid privileges were accorded to me: reassurances for a youngish man whom the Constitution deems irredeemably old. The conferral of the honorary doctorate at this ceremony. And the naming of a chair of international law after me. These amazing honours will mean that I will always be present in one form or another in the law faculty and this university. I look forward to participating in the teaching and research. I am glad indeed that Anne Orford has accepted appointment as inaugural holder of the Chair named for me. She will find in me an ever-willing support for her teaching and scholarship, in her most fascinating discipline of international law.

Dean James Hathaway, himself one of the leading world scholars of international law, heads a faculty of great renown. These are not chauvinistic remarks or new-minted self-congratulation. That is not my style at all. These are facts, acknowledged throughout Australia and beyond. Despite uncertainties in the present economic times and our current condition, my fellow graduates and I can look at the world and our unknown futures with assurance and confidence because of the degrees we have received today. And because the same questing, questioning spirit that I found when I first entered Tin Pan Alley in 1963 remains alive and ardent, so many decades later. Melbourne University promises us all a rocky ride as we challenge accepted dogmas and press our minds into thinking about the future shape of the world. Of us, this University expects nothing less.

## **WHY INTERNATIONAL LAW?**

Over the intervening 40 years, I have gradually come to understand the increasing role that international law will play in the law. This realisation has sometimes put me at odds with judicial and other legal colleagues. But I have lived long enough, read deeply enough, and travelled far enough, to see the discipline of law redefine itself as something more than the rules of the sub-national jurisdictions of Australia. When I first arrived at the Sydney Law School in the 1950s and also when I first came to Melbourne, law in Australia was fundamentally State-bound. Lawyers were then accredited only to their own State jurisdictions. Apart from the High Court, federal jurisdiction was virtually unknown. International jurisdiction was the concern of princes and potentates or their modern equivalents.

In my professional lifetime, the irresistible force of international law has become a common reality:

- The Charter of 1945 created the United Nations Organisation, flawed but still our best hope for peace, security, economic equity and basic rights in the world;
- Eleanor Roosevelt's *Universal Declaration of Human Rights* of 1948 has given birth to the vast body of human rights and humanitarian law in which individual entitlements play an increasing role;
- International and regional trade law respond to the global economy. There will be more of this in the future, precisely to prevent financial crises like the present one arising in the future;

- International criminal, civil and universal jurisdiction expands including to render tyrants accountable to the people whom they oppress. At first hand I saw an aspect of such accountability in my work for human rights in Cambodia;
- Global technology; biotechnology; flight; telecommunications; extra-terrestrial exploration; climate change demand and need international law; and
- So does the realisation of our human duty to protect the biosphere and the diverse living creatures within it.

Slowly at first, often reluctantly, and with rear-guard resistance from some quarters, the minds of lawyers have been stretched in my lifetime to see our discipline in this wider focus. This has brought to young law graduates, like today's, opportunities of work in foreign jurisdictions, in global corporations and in international agencies, to participate in international investment disputes and in human rights volunteering. All of this expands the horizons of today's graduates in exciting new ways that were not even dreamt of when I started my journey in the law.

Is it any wonder, then, that amongst the challenges that today's law graduates must face, is the need to adjust the national legal system to the reality of the international legal system? This is a simple truth. But it is one that I always insisted on in the courts. Sometimes, as in *Al-Kateb v. Godwin*, I was in dissent. Sometimes, as in *Roach v. Electoral Commissioner*, I was part of the majority. But do not doubt that every nook and cranny of the law of Australia will adapt to international jurisdiction, and rapidly. Nothing will be left out, including Australian public law and constitutional law. These may be heresies for some lawyers whose minds have not travelled beyond the confines of the local

jurisdictionalism in which they were first taught. But today's graduating class will see my ideas vindicated. Be in no doubt about that.

### **HOW DID IT HAPPEN?**

How did I come upon these truths? There were many causes:

- My training at Sydney University under Julius Stone made me look to the realities of law and to its constant adjustment to the changing values of the times;
- My opportunities, in student affairs in the 1960s, to travel outside Australia, helped me to appreciate how the comfortable world of White Australia, of Aboriginal denial and of female inequality were often seen elsewhere as unworthy and shocking;
- My work in law reform, assisted me to understand the need to modernise Australia's laws and gave me a chance to propose law reform in dialogue with Australian lawyers and with experts around the world;
- My penchant as a young lawyer to join and participate in civil society organisations and in *pro bono* cases, left me questioning formalism, complacency and self-satisfaction in the law;
- My later work in international agencies gave me a vantage point, from which to see Australian law as others saw it.

Nobody with my upbringing and life's journey – certainly nobody of my sexual orientation in those days – could ever really be a legal formalist, satisfied with the injustices in the law and complacent about wrongs that should, and could, be righted. It is not, of course, for judges and lawyers to correct every perceived wrong in the law. However, judges and lawyers can do a lot to secure just outcomes. And when they cannot, they should certainly derive no satisfaction from that outcome. They should call it to notice so that there will ultimately be right.

### **NOBLE AND EXCITING DREAMS**

I am proud to be at this ceremony with my partner, Johan van Vloten, a guest of the University. That itself would not have happened in earlier times. He has accompanied me through every day of my public life. So things happen. The earth moves. Wrongs are righted. The world can be made a better place. International and national law can play a part.

Johan joins me in honouring you all – students, faculty and families. So in your presence I honour him as a fellow citizen and life companion for his contributions to my life. Today is probably the closest to a public affirmation like marriage that we two will ever get. So it is just as well for us to say these things in your presence. Out loud. And in a University that has always led and challenged the spirit of the times.

Towards the end of his life, Richard Strauss, the composer of the Vienna waltzes of the 1890s, survived the Second World War in Germany. He went to live in America. He was fêted and acclaimed for his achievements. Repeatedly, he was honoured as a great man of an earlier century. But then, his son said to him: “Papa. Don't be content with all these prizes and laurels. Stop revelling in retrospective. Do something new; something really noble and grand. So that your admirers can celebrate your present and not just your past”.



Strauss did as his son urged. In 1948 he wrote *Die vier letzte Lieder* – the Four Last Songs. They are, it is true, a kind of aftershock of the golden era of lushly orchestrated *Lieder* of the 1890s. But they are also fresh, inventive and brilliant. Although he never heard them publicly performed, Strauss showed he had it in him. The flame was not dimmed.

That is how I feel at this moment of my life with my new degree from Melbourne University. It is how we should all feel today. We all have the flame within us. For all of us, the best years lie ahead. And in law, as in life, that means a rich Australian engagement on the part of our inclusive, multicultural and inventive society with our region and the world. And lawyers must not be left out.

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