THE NEW WORLD ORDER AND HUMAN RIGHTS*

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SUMMONS TO A NEW WORLD

It is exactly a hundred years since the first journal of the Melbourne University Law School was published. The first issue of *The Summons* appeared on 1 September, 1891, memorialized for that reason as 'a red letter day in our history'.[1] It was the journal of the Law Students' Society of Victoria. To its pages contributed hopeful articled clerks who would go on to lead the legal profession of Victoria and federated Australia. The first issue was of sixteen pages. Its cover depicted an angel with a trumpet over which was emblazoned the motto *Justitia Ante Omnia*. The pages of the first issue reflected the big question which was dominating the Victorian legal community at the time, namely a proposal to amalgamate the two branches of the legal profession: barristers and solicitors. The persistent debates about their relationship extend to the present time, demonstrating that in our legal system few questions ever disappear, and major reforms are rarely rushed. They tend to hang around to haunt us centuries later.

One of the stalwarts of *The Summons*, the Secretary of the Society was Hayden Erskine Starke — later to be a Justice of the High Court of Australia. He was described as 'the most prominent person in the Society'.[2] His sharp personality was to leave its mark on his brethren in the High Court.[3] It was said of him then that, 'if ever there was a fight, he was in it'.[4]

He was succeeded in 1893 by Mr W. H. Weigall. At the turn of the century, when federation came, Starke's successor as Secretary was Mr J. G. Latham, later Chief Justice of the High Court of Australia.[5] *The Summons* continued to be published for many years during which a parade of hopeful law students — later the intellectual leaders of the Australian legal profession — left their mark on its pages: Owen Dixon, R. G. Menzies, Dr Coppel *et alios*. But then the journal petered out and was no more.

When in 1935 the Law Students' Society of Victoria celebrated its fiftieth anniversary 'according to Levitican law', congratulating itself on its achievements in the presence of Chief Justice Latham and Justices Dixon and Evatt of

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1 Bradshaw, F. M., 'The First Fifty Years' (1938) 1 *Res Judicatae* 268.

2 *Ibid.* 271.

3 Lloyd, C., 'Not Peace but a Sword! — the High Court Under J. G. Latham' (1987) 11 *Adelaide Law Review* 175, 181. See also Kirby, M. D., 'Sir Edward McTiernan — A Centenary Reflection' in (1992) 20 *Federal Law Review*, (forthcoming).

4 Bradshaw, *op. cit.* n. 1, 271.

5 *Ibid.* 273-4.

the High Court, the occasion was taken to inaugurate a new journal, *Res Judicatae*. The first edition bore this dedication:

> [T]he Society . . . has undertaken the publishing of *Res Judicatae* partly to give its members an opportunity of expression not otherwise available, partly in the hope that its annual publication will come to be regarded as an important aspect of the work of the Law School at the University at Melbourne. It is the proud aim of the Law Faculty at Melbourne to foster the idea of law not merely as an examination study or as the equipment for ekeing out a doubtful living, but as a social science to be continually moulded and re-made as the needs of Society changed.[6]

The first issue of the new journal contained items which reflected the world before the Second War but again demonstrated the abiding continuity of our legal system. Professor K. H. Bailey wrote on the High Court's jurisdiction in constitutional cases. Mr (later Sir John) Norris wrote on the wife's position as a secured creditor in bankruptcy. Mr (later Justice) C. I. Menhennitt penned an essay on administrative tribunals in Australia. Mr (later Professor) Edward Sykes explained 'the rule of law' in the modern world. And T. D. Phillips wrote of the external affairs power of the Commonwealth. He expressed the then controversial view:

> Now there is discernible a tendency in modern international jurisprudence to elevate the authority of international law so as to subordinate that of municipal law in conflict therewith. A certain juristic quality is postulated of international law which by its nature compels municipal subservience. This doctrine is in truth a legal expression of political conceptions. It might well be described as the juridical parallel of the political conception subjecting the claims of unlimited national sovereignty to the servitudes implied and deduced from the existence of a community of nations.[7]

A review of this contribution and of the cautiously progressive view accepted by Mr Phillips gave a clue to the readers of 1936, of the changes in the world and in Australian law that were to come.

Then the *Melbourne University Law Review* arose phoenix-like from the ashes of *The Summons* and *Res Judicatae*. The first issue of this journal appeared in 1957 without frontispiece, preface or other editorial justification. Perhaps explanation was superfluous. Its pages were first opened in a country still comfortably ensconced as a minor antipodean province of the English law. Yet its links with its notable predecessors may be seen in the names of its contributors. Sir John Latham wrote a review of Professor Geoffrey Sawer's *Cases on the Constitution of the Commonwealth of Australia*. Dr E. G. Coppel wrote an article on that perennial favourite, 'Appeals to the Judicial Committee of the Privy Council'. That fine legal craftsman Sir Wilfred Fullagar wrote on a topic he well knew, 'Legal Terminology'. Professor (later Sir Zelman) Cowen wrote a scholarly text on a century of the Victorian constitution. The subjects of the 1957 edition reflect the legal controversies of that time: the *Boilermakers' Case*, divorce law reform, declaratory judgments and the evergreen section 92 of the Commonwealth Constitution.

And now we leap to the latest issue in the M.U.L.R. series. Inevitably, it reflects the differing issues which concern lawyers of today. Woven through most of the contributions to this part is the theme of lawyers' concerns for human rights. Madame Justice Beverly McLachlin, in her Southey Memorial Lecture,

6 (1935) 1 *Res Judicatae* (sic.).
7 Phillips, T. D., 'External Affairs and the Commonwealth' (1936) 1 *Res Judicatae* 200, 201.

gives her Australian legal audience a perspective of the enormous changes being wrought in the Canadian legal system by the advent of the *Charter*. Hers is but the latest contribution to a profound debate about the compatibility of entrenched rights with the democratic process.[8] The question is whether, over the long haul, judges, who tend to come from the privileged, moneyed, conservative legal profession, are necessarily better guardians of the basic rights of their fellow citizens than the elected representatives of the people in Parliament.

Many articles in this part provide a perspective of the law from the point of view of half of its subjects: women. Linda Dickens laments the failure of sex discrimination legislation in Britian and seeks to analyse why this failure has occurred. There have also been cases of failure in Australia.[9] From time to time, however, there have also been instances of success which bring the messages of education and hope.[10]

Jenny Morgan examines the recent *Mobilio* case[11] in Victoria in her essay on rape during medical treatment. Rosemary Hunter provides a feminist analysis of three labour law texts in current use. There are also comments by four other distinguished women lawyers. Justice Elizabeth Evatt, President of the Law Reform Commission of Australia, who is Chairperson of the Committee on the Elimination of Discrimination Against Women established under the 1979 Convention of the Elimination of All Forms of Discrimination Against Women is a contributor. Professor Margaret Thornton of La Trobe University picks up the themes of Linda Dickens' contribution and compares the experiences of sex discrimination law in Australia and England. Fresh from the publication of her book *The Liberal Promise: Anti-Discrimination Legislation in Australia*,[12] there could be few authors more appropriate to provide this analysis. Professor Liz Sheehy brings us back to the Canadian *Charter*. Dr Hilary Charlesworth records the importance of Australia's accession to the first Optional Protocol to the International Covenant on Civil and Political Rights (I.C.C.P.R.).[13]

The chief contrast with the earlier editions of *The Summons*, *Res Judicatae* and the first volume of the *Melbourne University Law Review* can be seen in the subject matter of these articles and the authors who have written them. This is not to say that essays on tax law, the liability to invitees, forgery and section 92 have a diminished place in the armoury of the lawyer in 1991. But it is to assert that our sights have been raised to view our discipline in a wider perspective. It is geographically wider, for we must increasingly perceive ourselves as lawyers of the world and not just as practitioners of our own little jurisdictions. But it is also conceptually wider: so that today we see perspectives of the law and of its impact on our society which our forebears would have missed entirely. In that sense, this

8 See, *e.g.*, Bakan, J. C., 'Constitutional Arguments: Interpretation and Legitimacy in Canadian Constitutional Thought' (1989) 27 *Osgoode Hall Law Journal* 123; Schabas, W. A., *International Human Rights Law and the Canadian Charter* (1991) 127ff.

9 *Boehringer Ingelheim Pty Ltd v. Reddrop* [1984] 2 N.S.W.L.R. 13.

10 See, *e.g.*, *Australian Iron and Steel Proprietary Limited v. Banovic* (1989) 168 C.L.R. 165; *Waterhouse v. Bell*, Court of Appeal (NSW), unreported, 20 September 1991; (1991) N.S.W.J.B. 91.

11 *R. v. Mobilio* [1991] V.R. 339.

12 (1990).

13 See also (1991) 65 *Victorian Law Institute Journal* 1018.

volume is a health corrective to the myopia, indifference and neglect of earlier times.

THE NEW WORLD ORDER

On the international stage, 1991 has been a year in which many have claimed a new world order has begun. President Bush made such a claim before Congress justifying the international effort in the Gulf to free Kuwait of its Iraqi occupiers. The Minister for Foreign Affairs and Trade, Senator Gareth Evans, himself a distinguished *alumnus* of this Law School, has declared that, like the Holy Roman Empire (which was neither Holy nor Roman nor an Empire), the new world order is 'not very new, not very orderly, and not especially global'.[14] But we can see darkly the disordered beginnings of a new order of sorts. If a date is to be fixed when this new order began, it should either be 1919 when the League of Nations was established or more probably 1945 when the Charter of the United Nations was adopted. That Charter contains in its opening words the expression of the determination of the peoples of the United Nations:

> To reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.

The purposes of the United Nations are declared by Article 1.3 to include:

> To achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, launguage or religion.

By Article 55(c) of the Charter, the United Nations is committed to promote, amongst other things:

> Universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

These are truly revolutionary notions. Until the Second World War, most governments and legal scholars affirmed the general proposition that international law did not impede the natural right of each sovereign to be monstrous to his or her subjects.[15] In the ensuing decades, both through agreements and the development of customary international law, states have committed themselves to a panoply of human rights obligations of self-restraint. From its inception, the United Nations was destined to become the engine of global human rights protection.[16] Reporting to President Truman after the first meeting of the General Assembly, and referring to the establishment by the Economic and Social Council (ECOSOC) of a Commission for the Promotion of Human Rights, the United States Secretary of State commented:

> The unanimous acceptance of this proposal may well prove one of the most important and most significant achievements of the San Francisco conference.[17]

[14] Quoted in the Preface to Bustelo, M. R. and Alston, P., *Whose New World Order: What Role for the United Nations?* (1991) iv.

[15] Farer, T. J., 'The United Nations and Human Rights: More Than a Whimper' in Claude, R. P. and Weston, B. H., (eds) *Human Rights in the World Community — Issues and Action* (1989) 194.

[16] *Ibid.*

[17] See 'Charter of the United Nations — Report to the President' (1945) cited in McGoldrick, D., *The Human Rights Committee — Its Role in the Development of the International Covenant on Civil and Political Rights* (1991) 4.

The Human Rights Commission which was thereby inaugurated set about drafting an International Bill of Rights. The Universal Declaration, which was to be the first part of this Bill of Rights, was adopted by the ECOSOC and, on 10 December 1948, by the General Assembly. There followed the preparation and adoption of the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights. A distinguished Australian, Professor Philip Alston, lately appointed to the Australian National University, is a member of the Committee on Economic, Cultural and Social Rights established in 1966 under the second of these Covenants. His contribution to this part of the Journal on the right to development and on the role of the United Nations Commission on Human Rights is specially timely, although elsewhere he has warned against undue optimism about the new world order.[18]

THE OPTIONAL PROTOCOL

It is Australia's belated accession to the First Optional Protocol of the I.C.C.P.R. which may be seen as the most important institutional development for human rights protection in this country in 1991. As Hilary Charlesworth observes, it is a radical instrument in international law because it offers individuals the standing necessary to bring an international claim. There are various legal and practical constraints on the work of the Committee. One of its most distinguished past members, Mr Christian Tomuschat (Germany) has said of it:

> The Committee was . . . ruled by the Covenant and while it was true that members were not judges they had the task of applying the provisions laid down in the Covenant and therefore had to exercise judgment. It is the duty of the Committee to ensure that states parties fulfil their obligations under the Covenant. . . . The Committee was not an international court but was similar to one in certain respects, particularly in regard to its obligation to be guided by exclusively legal criteria — which rightly distinguished it from a political body.[19]

Other members have said that the Committee is neither legislative nor judicial but *sui generis* — a guardian of the Covenant on Civil and Political Rights.

Having just begun the process of escaping the unquestioning capture by the ideas of the English legal system, Australian lawyers, on the brink of a new century, must now face the prospect of international scrutiny of their system of laws. It is a scrutiny which will be healthy. It will subject our self-assurance — even sometimes arrogance — about our laws to the bracing critical opinion of other human beings trained in the law who look at our system with fresh eyes but judge it by the standards of the developing international jurisprudence of human rights. This process of external evaluation has already occurred in other countries of the common law. Thus Jamaica recently received an opinion that its laws and procedures disclosed a violation of articles of the I.C.C.P.R., despite the decision in the case of the trial court, the Jamaican Court of Appeal and

[18] Alston, P., 'Human Rights in the New World Order: Discouraging Conclusions from the Gulf Crisis' in Bustelo and Alston, *op. cit.* n. 14, 85.

[19] Communication to the author.

the Judicial Committee of the Privy Council confirming a death sentence on the complainant, Carlton Reid.[20]

Acceding to this new international system may also encourage Australian judicial officers to acquaint themselves with, and to use, the treasury of human rights learning which exists outside the casebooks of Australia and England. It is no accident that there is a profound harmony between common law principles on basic rights and the great part of the developing global jurisprudence on the subject. Because of the Anglo-American ascendency which followed the Second World War and lasted through the drafting of the International Bill of Rights, the United Nations Charter and most of the international human rights instruments which have followed it have been profoundly affected by notions of individual rights which are entirely familiar to us, who are the children of the common law.

In Australia, our judicial leaders are beginning to encourage a new sensitivity to this perspective of international law, including that branch which states universal human rights norms. Suddenly international law is becoming relevant to Australian legal practice. Speaking to a conference of the International Law Association in Australia in 1990, Chief Justice Mason said:

> There is a *prima facie* presumption that the legislature does not intend to act in breach of international law. Accordingly, domestic statutes will be construed, where the language permits, so that the statute conforms to the state's obligations under international law. The favourable rule of statutory interpretation goes some distance towards ensuring that the rules of domestic law are consistent with those of international law. In construing statutes to give effect to a Convention, the Court will resolve an ambiguity by reference to the Convention, even where the statute is enacted before ratification of the Convention ... and there are many instances here and elsewhere of national courts taking into account the provisions of the *Universal Declaration on Human Rights* in interpreting national statutes and shaping the rules of municipal law ... [J]udges and lawyers in this country and in other jurisdictions are developing a growing familiarity with comparative law and showing a greater willingness to borrow from other legal systems. Ultimately, the new spirit will facilitate the moulding of rules of international law suited to incorporation into national law and create a climate in which acceptance by national courts is more readily attainable.[21]

Still more recently, in October 1991, Sir Ronald Wilson, a past Justice of the High Court of Australia and now President of the Australian Human Rights and Equal Opportunity Commission, traced the many cases in which international standards have been influential in moulding the common law of Australia.[22] Illustrations of these developments can be seen in a number of judgments of the High Court.[23] And in the judgments of other courts of Australia, including my own.[24]

[20] See, 'Optional Protocol to the International Covenant on Civil and Political Rights: Individual Complaints' (1991) 16 *Commonwealth Law Bulletin* 272; *cf. Reid (Junior) v. The Queen* [1990] 1 A.C. 363.

[21] Mason, A. F., 'The Relationship Between International Law and National Law and its Application in National Courts', unpublished address to the 64th Conference of the International Law Association, Broadbeach, Queensland, 24 August 1990.

[22] Wilson, R. D., 'The Domestic Impact of International Human Rights Law' in *Journal of the Australian Academy of Forensic Science*, 1992 (forthcoming).

[23] See, *e.g.*, *J v. Lieschke* (1987) 162 C.L.R. 447, 463; *cf. Regina v. Secretary of State for the Home Department; ex parte Brind* [1991] 1 A.C. 696.

[24] See, *e.g.*, *S & M Motor Repairs Pty Ltd v. Caltex Oil (Australia) Pty Ltd* (1988) 12 N.S.W.L.R. 358, 361; *Jago v. District Court of New South Wales* (1988) 12 N.S.W.L.R. 558, 569, 580; *Gradidge v. Grace Bros Pty Ltd* (1988) 93 F.L.R. 414; *Smith v. The Queen*, Court of Appeal (NSW) unreported, 12 September 1991.

TOWARDS A CLIMATE OF ACCEPTANCE

So that is the way in which this volume of the *Melbourne University Law Review* should be considered. It comes to mark the centenary of the first publication which emanated from this Faculty. The 1890s moulded Australia's future for the century which was to follow. Federation was at last achieved and with it, eventually, independent nationhood. The Depression of that time stamped on the country the institutions of conciliation and arbitration of industrial disputes which promoted industrial equity behind a high tariff barrier but at a price of some economic inefficiency. The High Court of Australia was provided for. This was eventually to lead the country out of a legal subservience to English law. But the intellectual liberation of Australian lawyers remains to be fully accomplished.

Now, on the brink of a new century, it falls to lawyers today to show imagination and leadership at least equivalent to that of the lawyers of a century ago. If the 20th century saw the beginnings of a new international order under the rule of international law, the 21st century may see its substantial accomplishment. In that accomplishment, there will be a significant role for lawyers in the defence of human rights and the attainment of equal opportunity for all according to universally accepted norms.

I welcome this issue of this most distinguished law review for the contribution it makes to the new spirit amongst Australian lawyers and to the creation of a climate in which the acceptance, in Australia, of the international law of human rights will be more readily attainable.