Chapter Eight

Importing Wooden Horses

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I am not the first speaker at our meetings to take as a theme the use, or misuse, of a mode of legal argument to reach conclusions congenial to the reformist ideals of the few at the cost of interpretive integrity, and confidence in the law, for the many.

I want to explore this tendency within the context of agitation by some for the entrenchment of species of human rights in this country. I will illustrate how ratified international human rights conventions have become a vehicle for the advancement of this tendency. And it seems to me, as an observer, that it is associated with rights enthusiasms in some sections of the judiciary in federal jurisdictions. I believe this is a more serious threat to our institutions than any failure to implement home-grown Bills of Rights or international human rights instruments.

In my opinion, some of these international rights conventions are flawed and dangerous. In some cases they would, if implemented, cause confusion and undermine existing rights which are fundamental to at least one of our institutions. I will later give some examples from the United Nations *Convention on the Rights of the Child.*

In thus reflecting on the effects of ratifying international conventions and importing their obligations, I was reminded of the Trojan Horse, a story or myth which, for over 3000 years of Western history, has stood as a warning against gullibility, subversion and folly. I would like you to bear in mind a few key features of the story.

You will remember that the abduction of Helen is said to have launched a Greek fleet in the direction of Troy, where the Greeks landed and laid siege to the city. But the Trojans, jealous of their independence, robustly and stubbornly foiled them for many years.

So, in desperation, the Greeks resorted to a stratagem. During the night, they pretended to abandon their siege. They put out their camp fires, struck camp, boarded their ships, put to sea, and waited out of sight.

Upon their departure, they left behind on the shore a massive structure in the form of a wooden horse, which piously bore a dedication to the goddess Athene. Our modern equivalent today would no doubt be a charter of human rights and an inscription calling for the elimination of all forms of discrimination.

The following morning the citizens of Troy gazed upon a deserted plain, occupied only by the solitary figure of the giant horse. As they came out to inspect it, the Trojans argued among themselves about its purpose and, in particular, whether it was a ruse by the Greeks. Some warned about Greeks bearing gifts, and the more sceptical drove a spear into its sides to see whether it might contain hostile invaders. But the Greek warriors inside, including the wily Ulysses, kept still and silent, remaining undetected.

Beguiled, fascinated, even flattered by what some took to be a gift in homage from the foreigners, the guardians of Troy accepted the horse and resolved to take it into the citadel. But it was so portentously large that part of the walls of the city had to be torn down to let it in. Having done that, the guardians took to their beds, leaving the horse within the city.

And you all know the rest of the story as, in the dead of night while all were sleeping, the flanks of the horse opened to release its burden of invaders who, joined by their compatriots now pouring through the opened gates, then set about destroying the city.

The rights movement and the courts

There are few more beguiling phrases than "fundamental human rights". It resonates with us, and mostly for good reasons. But, to the undiscriminating, it would seem that rights are always gifts to be embraced and incorporated. Especially so, in the view of many of our Platonic Guardians, when they are imported from the United Nations.

For example, in a recent lecture in the *Australian Senate Occasional Lecture Series*, Professor Hilary Charlesworth[1] of the Faculty of Law at the Australian National University, castigates those who are sceptical about U.N. committees bearing gifts of rights, and asks rhetorically: "Why should international principles be held at arms length"?

In a previous lecture in the same series, the Honourable Ms Elizabeth Evatt,[2] in recommending the *International Covenant on Economic, Social and Cultural Rights* as a model we should implement, declares:

> "Rights have to be turned into realities. For this we need to make provision for our courts, and in particular the High Court, to determine whether our laws, policies and practices comply with our obligations under the Covenant".

Professor Charlesworth and the Hon Ms Elizabeth Evatt are but two representatives of a rights movement in this country for which Professor Greg Craven,[3] in last year's Alfred Deakin Lecture, coined the term "the constitutional circle", to identify the more active participants of the movement in this country. By that term he meant "a broad combination of persons, pressure groups and institutions", which included many academics, lawyers, some politicians, and members of the media, whose instincts are deeply centralist and who are determined, in the face of the failure of referenda intended to entrench human rights, to achieve their ends by other means. Among those means are international human rights conventions and the High Court.

Let me illustrate judicial reflection on the employment of these means with examples, involving the U.N. *Convention on the Rights of the Child,* and other human rights conventions, which are drawn from the Family Court and the High Court.

Just over a year ago, the Family Court handed down a decision in a custody case[4] in which each of the contending parties sought to support their arguments by reference to the U.N. *Convention on the Rights of the Child.* Unusually, the federal Attorney-General appeared before the Court at the invitation of its Chief Justice.

As it turned out, the case was decided on grounds that did not involve the Convention. But the issues raised by reference to it were discussed by the Court. So here is the Family Court, quoting the High Court in *Mabo v. Queensland*:

> "The opening up of international remedies to individuals pursuant to Australia's accession to the *First Optional Protocol of the International Covenant on the Protection of Civil and Political Rights* brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. 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".[5]

Later on, in presenting a series of arguments against the Attorney-General's view that the *Convention on the Rights of the Child* could not be used to interpret the *Family Law Act* and, in particular, s.43 (c) which refers to the rights of children, the Court commented as follows:

> "Thirdly, even if the Convention had no such recognition other than ratification and s.43 (c) did not exist, it is our view that the Court could have regard to the Convention in accordance with principles outlined in *Magno's Case, Murray's Case,* and *Teoh's Case.* We do not accept the Attorney-General's submission that the *Family Law Act* constitutes, in effect, a code, or that s.60B is couched in such terms that it is unnecessary to look outside

it. Both the object and principles set out therein are expressed in broad and not exclusive terms such that extrinsic assistance may be necessary or useful to interpret them".[6]

And then, later on:

"Fourthly, we consider that UNCROC [the United Nations *Convention on the Rights of the Child*] must be given special significance because it is an almost universally accepted human rights instrument and thus has much greater significance for the purposes of domestic law than does an ordinary bilateral or multilateral treaty not directed at such ends".[7]

Let us now look briefly at just a few of the Articles from this Convention which the Family Court believes must be given special significance.

The United Nations *Convention on the Rights of the Child*

At a superficial glance, the UN *Convention on the Rights of the Child* seems to be a document which any country would be glad to welcome. For example, the Convention's Preamble acknowledges:

"….that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community".

Article 5 says, *inter alia*, that "States parties shall respect the responsibilities, rights and duties of parents". The Convention thus seems very conventional, and simply to articulate a traditional view of the family's customary responsibilities and prerogatives.

But — to pursue my allegory — when the flanks of this particular horse are opened, some alien baggage topples out which is anything but conventional. And I'm sure you won't be surprised when I tell you that it comprises "rights talk" of a very modern kind.

Article 12 requires, *inter alia*, that government:

"…..shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child".

Our five-year old grand-daughter has, very capably, formed the view that chocolates are very good for her, and she has no hesitation in eloquently expressing that view publicly; and we all give her view due weight in accordance with her age and maturity. The problem is that we disagree with her view that chocolate, always and in every circumstance, is good for her. Whose view should prevail; and who should be the judge?

More seriously, would high school students be permitted, without restraint, to express their views freely in all matters affecting them within the school? And have recourse in law if they consider that the Article has been breached? It would seem to follow that they should.

And so, the same Article 12 goes on to say that, for the purposes of the Article:

"…..the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law".

It is clear that the Article envisages separate representation of the child in such proceedings, and the making of judgments by persons other than the child's parents or teachers or others acting *in loco parentis.*

But since the Article also abandons the objective age criterion of competency, how is a judgment to be made by a court or tribunal or Children's Commissioner, about whether a given child is "capable of forming his or her own views", and how is "due weight" to be measured "in accordance with the age and maturity of the child"? It would seem that the Article opens up considerable scope for conflict and challenge between children, parents, and others. It significantly qualifies the right of fit parents to guide and direct their children by making it subject to external scrutiny and possible veto.

Article 13 of the Convention guarantees to the child rights of freedom of expression, including "freedom to seek, receive and impart information and ideas of all kinds regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice".

This would seem, absolutely, to constrain parental supervision of what a child may say, hear, read or see, irrespective of a parental judgment that to do so may cause harm, distress or emotional disturbance to the child. Nor does it seem to take any account of the harm one child might do to another in exercising such rights.

It puts parents in the position of acting irresponsibly if they do not act to prevent such things happening, or of being accused of acting oppressively if they do. Similar difficulties could arise elsewhere, such as in schools or other situations where parental delegates are in charge of children.

Article 14 requires that national governments "shall respect the right of the child to freedom of thought, conscience and religion". Here, however, it goes on to say that:

> "States parties shall respect the rights and duties of parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her rights in a manner consistent with the evolving capacities of the child".

Leaving aside the subjective judgments that a court may be required to make about "evolving capacities", the inclusion of a reference to parental rights here reinforces the significance of its deliberate omission from the previous two Articles.

Otlowski and Tsamenyi,[8] writing in the *Australian Journal of Family Law* in an article which recommends implementation of the Convention, nevertheless acknowledge:

> "Inevitably however, the formal recognition of the rights of children does entail some tension with the rights of parents, as well as bringing into question the role of the state in intervening in family relationships".

That's putting it mildly. It is also worth noting that, with one exception in the Articles I've quoted from, there is no mention of parental rights or prerogatives that might qualify the absoluteness of the children's rights which are proposed.

Article 15 requires participating governments to "recognize the rights of the child to freedom of association and to freedom of peaceful assembly". Again, there is no mention of parental rights of guidance and control to restrain a child from associating with whomever he or she wishes, no matter how unsuitable or dangerous the parents may believe that association to be.

Article 16 provides that:

> "No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour or reputation....".

What would constitute arbitrary interference with privacy by a parent? The nature of parenthood is such that the role could scarcely be carried out without constant intrusion into a child's "private" affairs. One can imagine many, many situations where responsible parents have a duty of protection and guidance in a variety of personal, medical and sexual matters that might be considered "private". Could their attempts to do so be construed as "arbitrary interference", and be subject to veto by external authority if petitioned to do so by a child acting through an advocate appointed by the state?

The overall gist of the Convention in a great many respects, therefore, is that children's interests are under threat, and that the primary source of the threat is from their own parents. Hafen and Hafen, in the *Harvard Journal of International Law,*[9] quote an official United Nations document which describes the U.N. *Convention on the Rights of the Child* as promoting a "new concept of separate rights for children, with the Government accepting [the] responsibility of protecting children from the power of parents".

Implementing the Convention

One might think that responsible authorities would express caution about implementing the Convention and the absolutist character of many of its recommendations; but there is no shortage of influential voices urging that the Convention should be legislatively implemented by the federal Parliament right away.

For example, in a recent joint report, the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission have spoken enthusiastically of the Convention's recognition "that children, as members of the human family, have certain inalienable, fundamental human rights",[10] and they have demanded that:

> "... the Commonwealth should use its external affairs power to ensure that UNCROC's [United Nations *Convention on the Rights of the Child*] obligations are complied with".[11]

In other words, these guardians of rights have no compunction about steam-rolling the States into submission.

They are supported by many associations, senior academics, and prominent lawyers, such as former Victorian Human Rights and Equal Opportunity Commissioner, Ms Moira Rayner. In a chapter of a book on children's rights published by the Australian Institute of Family Studies, she conjures a vision of the Convention recruiting Big Brother to look over the shoulder of the family. She says:

> "We must look outward to the community, which must take responsibility for ensuring that the family fulfils its proper role.....
>
> "The only way in which this may be achieved well is on the basis of universal human rights for all human beings".[12]

In other words, since children are human beings they should enjoy the same rights as the adults responsible for their care, and the state's role is to oversee family affairs to ensure this. There is no suggestion here that full adult rights for children may, in some degree, be incompatible with meeting parental duties of care, protection and guidance for children. But this, of course, is typical of the absolutist cast of much rights talk of this kind.

The present federal government has so far shown no inclination to legislate on the Convention, but we cannot be sure that future governments will refrain, so long as the Convention remains unrepudiated and unreservedly accepted as an international instrument.

Legal and familial implications

Ratification of an international Convention by the federal Executive does not mean that its articles become the law of the land. They must be implemented by specific legislation in order to achieve that. Nevertheless, ratification alone has some important legal implications.

There is, for example, the common law principle or presumption that the Parliament intends, in all its legislation, that its international obligations shall be observed. Accordingly, where existing domestic law is ambiguous or indeterminate, and where a term or Article of a ratified Convention speaks relevantly to the case at issue and is not inconsistent with existing law, the term or Article of the Convention may be used to clarify or interpret the law.

In addition, ratification of a Convention may carry implications for administrative decisions. For example, Article 3.1 of the U.N. *Convention on the Rights of the Child* places an obligation on States Parties to accept the best interests of the child as a primary consideration in administrative and other decisions. Accordingly, in the *Teoh Case,*[13] the High Court found that ratification of the U.N. *Convention on the Rights of the Child* raises:

> "…..a legitimate expectation, absent statutory or executive indication to the contrary, that administrative decision-makers will act in conformity with the Convention and treat the best interests of the children as a 'primary consideration' ".

Consequently, if an administrative decision-maker proposes to make a decision inconsistent with that legitimate expectation, procedural fairness requires that the persons affected should be told and given an opportunity to argue against the taking of such action. In the *Teoh Case* this "legitimate expectation" had not been met, so the administrative decision to deport Teoh was overturned.

It should be noted that the Teoh case purports to do no more than establish a procedural right. It does not mean that the Articles of the Convention can be enforced. I say "purports", because my layman's reading of a recent case in the Federal Court[14] suggests that we are moving in the direction of converting a procedural rule into substantive law. That is a matter I won't pursue here.

However, the High Court's findings in the Teoh case, and its administrative implications, caused a great flurry in Canberra. The Labor Government — which, of course, had ratified the Convention in the first place — hastily drafted the *Administrative Decisions (Effect of International Instruments) Bill* 1995, which I understand has not yet been passed.

The purpose of that Bill is to provide that ratification of an international treaty or convention imposes no obligation on the government of the day to observe its provisions for domestic purposes. The contradiction and incoherence in the attempt to do this is obvious. The purpose of ratification is to undertake international obligations along with whatever domestic consequences they might entail, yet the purpose of the Bill is to avoid those domestic consequences.

One might disagree on occasions with the distinguished jurist, the Hon Ms Elizabeth Evatt, but she is surely right when she says of this:

> "This comprehensive rejection by the Government of any obligation to respect the principles of a treaty it has entered into puts it in a Janus-like position, promising the international community that it will comply, while telling the Australian people that they cannot count on its doing so". [15]

In other words, one set of guardians is telling us that we've acquired a truly fine Wooden Horse, but another set is saying: "for God's sake let's get the damned thing out of the citadel".

That may be difficult. The wall was breached to get it in but, as we shall see, some of our courts seem determined to keep it tethered in place.

Much more could be said about the doubtful contents of the Convention; not least the raft of welfare and redistributive rights or entitlements it proposes.

But, from the perspective of the internal integrity of family life, the Convention is likely to have the effect of setting children's rights in potential conflict with the customary prerogatives of fit parents. Where the Convention does speak of parental rights and duties, it implicitly defines them as obligations to ensure that their children's rights will be made effective.

The children's rights that matter are their claims upon parents and other adults for the care, education and guidance that promotes the competent maturity necessary for enjoying adult rights. But if we undermine the parental authority necessary for that development, we work against the interests of children. Rather than joining the Family Court in celebrating this Convention, it is a gift horse we should look carefully in the mouth.

Rights talk and reformist jurisprudence

Let me now return to the theme of the connections between rights talk and a mode of judicial thinking and interpretation which seems to me to be a threat to democratic process and confidence in the law.

I found one passage from the Family Court's discussion of the issues raised by the case referred to earlier, especially revealing. In support of the view it was taking, the Court quoted a statement by Sir Anthony Mason, as follows:

> "True it is that a convention does not embody rules of international law. But the *Convention on the Rights of the Child* has attracted widespread international acceptance. 178 nations have acceded to it. And why should the principle that the provisions of a ratified but unincorporated convention do not form part of the law of the land forbid judicial formulation of the common law by reference to the convention if it enjoys widespread acceptance, including acceptance by Australia? The point of the principle is that it denies the status of domestic law to a provision in an unincorporated convention. But the provision will achieve that status if it is incorporated into domestic law by statute. And the provision may contribute to the development of a principle of domestic law if the judges draw upon it for that purpose".[16]

There could hardly be a better illuminated signpost than that, pointing the way forward to implementing rights, without the messy inconvenience of public and parliamentary scrutiny. Our curial Ulysses is showing a common law path through the democratic wall, and the Family Court takes note. All that remains is for the court to drag the Horse into the citadel.

And, unblushingly, all of this is supposedly in the service of human rights. And justified, it seems, because the Convention concerned has been greeted with widespread acceptance; including acceptance by some of the most repressive and cynical regimes on this earth. Sir Anthony's observation ignores, for example, the refusal of the United States Senate to ratify the Convention, and the reservations which have been declared by several western European countries and the Vatican.

We are driven to ask ourselves what view of the law, of rights, and of justice, underlies the cast of mind revealed here.

Six years ago, Professor Mark Cooray in front of this Society quoted Sir Anthony Mason writing in 1987.[17] Sir Anthony's words then were that the courts have a responsibility "to develop the law in a way that will lead to decisions that are humane, practical and just". Professor Cooray commented on this as follows:

> "Such a formulation provides a slippery slope for judges. Judges will have vastly different conceptions of what is humane, practical and just".

And, indeed, Sir Anthony's remark neatly instances the slippery slope which has come to bedevil courts in the English-speaking world in this century.

It is typified in the way Sir Anthony coalesces and conflates, in a single formulation, two elements in our conception of justice which need to be distinguished; two elements which our history and traditions brought to realisation in the functions of two separate, two deliberately separated, institutions — the courts, and the Parliament.

Justice may be said to comprise two things. On the one hand, in its substance, as just or ethically acceptable laws; and, on the other, in the procedures and traditions intended to ensure faithful and intellectually defensible interpretation of those laws, and prompt and certain delivery of justice according to established law.

The substance of the law is determined by the common law, the people in Parliament assembled, or by referendum. The function and duty of the courts is to oversee the processes of interpretation and enforcement of the law so established.

It is, of course, in the nature of things that people will disagree about the ethical character and desirability of particular laws; and therefore whether they consider them just. What are we, or judges, to do if we consider established law to be unethical, inhumane, unpractical, and unjust?

Must ordinary citizens, despite their objections, obey such a law; whereas a judge may so use his position to develop the law in a way that will, in his view, lead to decisions that are "humane, practical and just"? Even if that means abandoning the delivery of justice according to law?

In other words, should the law be respected as much by the judge in his role as interpreter and upholder of the law as by the citizen in his ordinary behaviour? And do both conspire, in their different ways, to destroy the law when they refuse to acknowledge its authority?

It seems to me that the delivery of justice according to law insists, and democratic legitimacy insists, that we must answer "yes" to both questions.

These, then, are the tendencies I observe that come with reformist jurisprudence and zeal to smuggle in rights unauthorised by the people and their democratic instruments. And the danger is this.

If courts, especially courts from which there is no appeal, aspire to conjure decisions to serve private ideals and a higher purpose than delivery of justice according to law, they make us subjects of an exercise of power that is no less arbitrary because it issues from the courts, no less repugnant because the motive might be benevolent, and no less suspect if it is done in the name of human rights; because the foundation of liberty and human rights is the constraint of the arbitrary.

Endnotes:

1. Charlesworth, Hilary, *Globalisation, the Law and Australian Sovereignty: Dangerous Liaisons,* in *Australian Senate Occasional Lecture Series*, Parliament House, 12 June, 1998, p.7.

2. Evatt, Hon Elizabeth, AC, *Meeting Universal Human Rights Standards: The Australian Experience,* in *Australian Senate Occasional Lecture Series*, Parliament House, 22 May, 1998, p.4.

3. Craven, Gregory, *The High Court of Australia: A Study in the Abuse of Power*, The Thirty-First Deakin Lecture, The Alfred Deakin Lecture Trust, Melbourne, 9 October, 1998.

4. Family Court of Australia, *In the Matter of B and B*, unreported, *Family Law Reform Act* 1995, 9 July, 1997.

5. *Ibid*., at 10.5.

6. *Ibid*., at 10.16.

7. *Ibid*., at 10.19.

8. Otlowski, Margaret and B. Martin Tsamenyi (1992), *Parental Authority and the United Nations Convention on the Rights of the Child: Are the Fears Justified?* in *The Australian Journal of Family Law*, Vol. 6, p. 146.

9. Hafen, Bruce C. and Jonathan O. Hafen, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child,* in *Harvard International Law Journal*, Spring, 1996, Vol. 37, No. 2, p. 450.

10. Australian Law Reform Commission and Human Rights and Equal Opportunity Commission (1997), *Seen and heard: Priority for children in the legal process*, Report No. 84, AGPS, Canberra, p. 75.

11. *Ibid*., p. 78.

12. Rayner, Moira, *Self, Self-esteem and Sense of Place,* in *Citizen Child: Australian Law and Children's Rights*, Australian Institute of Family Studies, Melbourne, 1996, p.53.

13. *Minister for Immigration and Ethnic Affairs v. Teoh* (1995), 69 ALJR 423.

14. Federal Court of Australia (1998), *Tevita Musie Vaitaiki v. Minister for Immigration and Ethnic Affairs*, NG542 of 1997, 15 January.

15. Evatt, *op. cit*., p.4.

16. Family Court of Australia, *op. cit*., 10.19.

17. Cooray, Mark, *The Centralist Tendency: The Role of the High Court,* in *Upholding The Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 1 (1992), p.115.