Dinner Address
The Erosion of National Sovereignty

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Jonathan Swift told the story of an island on which there was a spring whose water, when tasted, drove men mad. The water was so attractive that everyone drank it, except for one philosopher who was too wise to do so. In the end, however, the philosopher could not bear to be the only sane person left on the island and he too drank the water. Swift's point was that even the wisest person cannot free himself from the delusions of his time.

The truth illustrated by that fable seems to me to provide as good an explanation as any for the fact that so many nations have bound themselves to conduct their internal affairs according to rules expressed in terms of broad generality, particularly when the meaning and effect of these rules are to be determined by committees constituted by people of no particular qualifications, none of whom will necessarily be representative of the nation affected by the determination, and some of whom may be chosen from nations whose practices and culture are regarded as inferior or abhorrent.

The Covenants and Conventions which have this effect confer rights and impose duties which are entirely domestic in character. So far as Australia is concerned, they impose restrictions on the power of Australian governments to fulfil their functions within Australia.

Before the 1960s it was exceptional for a treaty to dictate to a State how it should govern the inhabitants of its territory, except in those cases where the requirements of the treaty were incidental to a matter which was essentially international in character. The justification suggested for making treaties which are concerned entirely with internal affairs is that the treaties concern human rights, and that the protection of human rights is a matter of international concern.

General De Gaulle once said that treaties are like girls and roses; they last while they last. That may have been true for the pragmatic French but Australia cannot shrug off its treaty obligations so easily. Even if a Convention is not incorporated into Australian law by statute, the Courts may give effect to it in two ways. They may conclude that the Convention is a statement of international law and that the common law should be developed consistently with it, or they may hold that individuals would have a legitimate expectation that administrative decision makers would act consistently with the Convention. It has not yet been explained how a person who has no knowledge of the existence of a treaty can have an expectation of that kind. More important, for present purposes, is the fact that there are agencies of the United Nations which monitor the performance of these treaty obligations and seek to enforce compliance with them.

Although most treaties of this kind were made after the second world war, there had earlier been a cloud on the otherwise clear horizon. A harbinger of change was the International Labor Organisation established in 1919 as a consequence of the Treaty of Versailles. That treaty stated that conditions of labour existed, "involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled". One may doubt whether world peace at that time was imperilled by the conditions of labour but however dubious the reason for its establishment, the ILO proved to be a sturdy creation. It survived the fall of the League of Nations and has produced hundreds of Conventions and recommendations which deal not only with conditions of labour but also with discrimination, the rights of indigenous people and the environment.

Revulsion at the barbarities committed during the second world war and the hope (that proved vain) of preventing similar atrocities in future led to the adoption of the Charter of United Nations, which had as one of its aims the promotion of the observance of human rights and

fundamental freedoms. In 1948 the General Assembly of the United Nations adopted the *Universal Declaration of Human Rights*. That was a statement of principle, rather than a binding treaty and would not have been regarded as infringing national sovereignty, at least in those days when it was not supposed that the Courts might give effect to documents of that kind as part of the national law.

The flood of treaties began to flow strongly in the 1960s. That was the time when the transformation of culture – some would say its disintegration – which the wars had set in train began to accelerate. One aspect of the change in society that then occurred was the tendency to insist on individual rights and to indulge individual wishes, without at the same time recognizing the co-relative obligations of individuals to society. The treaties that were made were in tune with this sentiment and some of them reflected the ideas that became regarded as politically correct. They covered a field including Civil and Political Rights, Economic, Social and Cultural Rights, Refugees, Torture, the Rights of the Child and The Elimination of All Forms of Discrimination against Women as well as the protection of the Environment. There is hardly an area of governmental activity which these treaties do not touch.

One feature of these Conventions was that they set up Committees to which the nations which are parties to the treaties are bound to report, and which themselves report to the United Nations and to the State concerned on the progress made in implementing the Convention. The members of these Committees are elected by the nations which are parties to the treaties; their qualification is that they must be of high moral standing and competence in the field covered by the treaty – in practice this allows a nation to nominate anyone who has not got a criminal record. The nations which win the right to make nominations to Committees need not themselves be notable exemplars of human rights. The Committee which decided against Tasmania in a case to which I shall refer a little later, included representatives from Senegal and Yugoslvia but none from Australia.

Under the first *Optional Protocol to the International Covenant on Civil and Political Rights*, which Australia ratified in 1991, any individuals who claim that their rights have been violated and who have exhausted all domestic remedies may submit their cases to the Committee. Similar rights are given to Australians under the *Convention on the Elimination of all forms of Racial Discrimination* and the *Convention Against Torture*. Australia has so far refused to ratify the *Optional Protocol to the Convention on the Elimination of all Forms of Discrimination Against Women,* which would give similar rights of access to a Committee under that Convention. This refusal has given rise to a clamour of criticism, but when one considers the nature of some of the decisions given by that Committee, which I shall mention later, the restraint of the Australian Government is indeed a wise one.

In addition to the remedies given to individual citizens by these Protocols, the Human Rights Commission of the United Nations, the ILO and UNESCO all have procedures under which they entertain complaints against governments. Not only the individual affected may apply; non-government organisations (NGOs) are recognised as having standing and status before these Committees and bodies. There are many dozens of NGOs. Some have worthy charitable objects, others simply aim to further their preferred ideologies. It is doubtful if anyone of these NGOs is responsible to the public in formulating the policies which it presses before these United Nations bodies. It is equally doubtful whether in principle these NGOs should be allowed to intermeddle in these matters, almost certainly against the interests of the States against which complaints have been laid.

Many of the provisions of the *International Covenant of Civil and Political Rights* seem on their face to be desirable and even to be statements of the obvious. However, the effect given to them by the zealous officers of the United Nations or by the NGOs is far from beneficial. Article 14 of that Convention says that a person charged with a crime is entitled to a fair and public hearing by a competent, independent and impartial tribunal. No one could disagree with that

proposition. However, surely that does not mean, as a United Nations investigator has held it to mean, that mandatory sentencing laws are in breach of this provision. I do not support mandatory sentencing, but a trial is no less fair and the tribunal no less impartial because the law provides a mandatory sentence.

Article 17 of the same Covenant provides that no one shall be subjected to arbitrary or unlawful interference with his privacy. A United Nations Committee held that sections of the Tasmanian Criminal Code which made criminal certain forms of sexual conduct between men, including those committed in private, were in breach of this provision and required that the law should be repealed. The Commonwealth Parliament complied, and legislated to over-rule the Tasmanian sections. If this decision is correct (and there was no way of appealing from it) it would mean that the United Nations Committee can form its own opinion as to the validity of any law which criminalised acts done in private; if it is an arbitrary breach of privacy to forbid sexual conduct between men, why could not the same be said of laws forbidding sexual conduct with girls under the age of 16 or laws forbidding the growing of marijuana plants or laws making it a crime to live on the proceeds of prostitution?

A Committee has criticised Australia for legislating, after the decision in *Wik*, in a way that affected in some circumstances the right of Aboriginals to negotiate before interests could be acquired over lands to which they claimed rights. Surely it cannot be said to be discriminatory to take away a privilege given by statute to one class of persons, when no similar right is available to the community generally.

A similar expansive view has been suggested regarding the *Convention against Torture*. It has been argued by a NGO that the reference to cruel, inhuman and degrading treatment in that Convention extends to cases of domestic violence. Other, even more bizarre views have been expressed by the Committee set up under the *Convention for the Elimination of all Forms of Discrimination Against Women*. That Committee has directed the Irish Government to eradicate the influence of Catholicism from its culture and its people; it has told Slovenia that it is inappropriate that children under three should be cared for by their families rather than in day-care establishments; it has criticised the Government of Belarus for reinstating a national Mothers' Day, and has said that the Koran should be interpreted in ways which the Committee considers permissible. We may mock at some of these rulings, which seem to be based on the rule of interpretation stated by Humpty Dumpty: "Words mean what I say they mean". But the rulings have the force of international law.

Not all of the Conventions even have an innocuous appearance. The *International Covenant on Economic, Social and Cultural Rights* is expressed in wide terms that practically invite a reference to arbitration. The *Convention on the Rights of the Child* appears designed to free children from all parental guidance and supervision. Mr Barry Maley gave us some examples at our Conference in 1998. Tomorrow's speakers may provide further instances.

One phrase that has been repeated in these treaties is particularly mischievous. The Charter of the United Nations stated that one of the purposes of that body was to develop friendly relations between nations based on respect for the principle of equal rights and self-determination of peoples. That reference to self-determination has been described as loaded with dynamite. It apparently was made in the light of the situation in Europe after the war. Whether that was so or not, the reference has been repeated in the *Conventions on Civil and Political Rights* and on *Economic, Social and Cultural Rights*, which cannot be restricted to European conditions.

In the very forefront of each of those Covenants there appears the following provision:

> "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".

One European delegate to the United Nations has said that these clauses are applicable only to conditions in Australia and the Americas, where invading powers have occupied the land of the

indigenous peoples. One wonders how any government in Australia or the Americas could have been so unwise as to accede to a treaty in these terms.

It has been argued on behalf of Australia that the provision does not normally entail the right of secession. The use of the word "normally" seems to have been cautiously incautious. It was further argued that the provision does not authorise action to impair the territorial integrity or the political unity of sovereign and independent States. Aboriginal activists have put forward a contrary argument, which is not without support in the words of the treaties. Their argument is for sovereignty, and the call that Australia should enter into a treaty with the Aboriginal people is a step in this direction. Some would limit the demand to one for internal self-government, but others more extreme would go further. There is under consideration at present a draft *Declaration on the Rights of Indigenous Peoples* which would of course re-assert the right to self-determination.

We may hope that there is only a remote possibility that effect will be given to the right of self-determination in a way that will detract from our sovereignty. The question remains whether the sovereignty of the nation is already being eroded by the Conventions that have already been ratified, and particularly by those that give our citizens, and other inhabitants, including illegal immigrants, a right of access to agencies of the United Nations. The Australian Attorney-General who held office at the time when the *Optional Protocol to the International Convention on Civil and Political Rights* was ratified claimed that no infringement of our sovereignty was involved. His argument was that the ability of the Committees of the United Nations to hear complaints from Australia derives from the power granted by Australia, and that these Committees have no power to enforce their decisions, which can be given effect only by Australian law. All this is technically true. However, it is equally true that individuals living in Australia have a right to apply to these international tribunals to seek redress against Australian laws and governmental actions. The decisions of these tribunals have so strong a moral force that governments face obloquy at home and abroad if they fail to give effect to them. Realistically these Conventions have diminished Australian sovereignty.

Some commentators say that the increasing interdependence of the nations of the world, and the need for Australia to relate to other nations, have made it necessary for us to transfer some of our sovereignty to the United Nations. It is true that we cannot live in isolation. It does not follow that we should allow remote Committees to decide what rights the inhabitants of Australia should have. The decisions they have so far made do not convince us that they have more wisdom than our own processes can provide.

Another argument is that although Australia has a better record than most in observing human rights, we set a good example to others by entering into these treaties. Like poor Admiral Byng in the 18th Century, we must suffer to encourage the others. The weakness in this argument is that people are not always willing to follow good examples. For instance, the developing countries do not appear to be inspired by the restraints imposed on developed countries by the *Kyoto Protocol* to reduce their production of greenhouse gases.

It has been frankly said, by supporters of the system, that the promotion and protection of human rights is a modern tool of revolution. That revolution has already been successful in Australia. We already have laws that have created new rights at the expense of rights that we took for granted. We should not allow a revolution that affects us to be under the control of others. There is no good reason to allow rules that govern the rights of individuals and shape the nature of society to be interpreted by foreign bodies which have plainly shown an intention to give effect to their own modish notions.

There are more Conventions which await either the completion of drafting or ratification. I have mentioned the draft *Declaration on the Rights of Indigenous Peoples*. A Convention setting up a court to try war criminals is being considered for ratification at present. One can understand the desire to bring to justice persons who commit atrocities, but the establishment of the proposed

international court will further surrender some of our sovereignty. It cannot be assumed that the alleged war criminals will always be the inhabitants of some foreign country.

It has been suggested that Baroness Thatcher should be indicted for the sinking of the *Belgrano*; who knows what military efforts of Australia might provoke a similar suggestion, and who can tell what action such a suggestion might provoke.

A nation is not sovereign unless it is independent from control from outside its own borders. In practice we have lost some of that independence. This erosion of our sovereignty was our own doing.

At the risk of hyperbole, we might apply Shakespeare's words to the present situation:

"This England never did, nor ever shall
Lie at the proud foot of a conqueror
But when it first did help to wound itself".

Whether future Parliaments will prevent the further erosion of our national sovereignty must be regarded as doubtful, having regard to the difficulty which even the wisest of men and women find in trying to free themselves from the prejudices of the times.