OPENING OF UNIVERSITY OF NEW SOUTH WALES EUROPEAN LAW CENTRE AND CENTRE FOR EUROPEAN STUDIES

SYMPOSIUM

EUROPEAN CONSTITUTIONALISM: LESSONS FOR AUSTRALIA?

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It is a pleasure to open this Symposium organised by the European Law Centre and the Centre for European Studies at this University. The centrepiece of the Symposium is the inaugural professorial address to be delivered by Judge Mancini. We are immeasurably indebted to the Judge for an address which, for those who have already read it, constitutes a remarkably learned, powerful and eloquent statement of the case for European statehood based on federal democratic institutions and processes.

It would be presumptuous on my part to enter into the debate about a federal Europe. The possibilities discussed call for assessment at the level of political science, government and sociology, as well as law. My experience in England for a year does enable me to give an English perspective on the problems. That

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perspective, as you can imagine, is not altogether favourable to the notion of European federation or statehood. In England - and here I differentiate between England and the United Kingdom because there is much more enthusiasm for Europe in Scotland than in England - I met more opponents than supporters of Judge Mancini's views. In large measures, the Judge's opponents, like the opponents of this country's possible move to a Republic, are concerned about the uncertainties associated with change.

Underlying English opposition to closer integration with the rest of Europe is a deep sense of nationalism and a distrust of decision making by officialdom, all the more so when it is European officialdom. English nationalism takes the form of believing in the superiority of democratic decision making by English institutions in conformity with the parliamentary tradition. To many English eyes, the European Commission is the modern manifestation of a line of bureaucratic decision making by a class of officials stretching through the European monarchies; the Holy Roman Empire, to the Roman Empire itself. Greater democracy - for example, the vesting of wider powers in the European Parliament at Strasbourg - would alleviate the concerns about decision making by officials to some extent at least; but it would not eliminate the apprehension that legislative and executive decision-making affecting English people should be made by persons under the nominal control of representatives chosen by English people.

Although South Africa and India show what is possible where there are deep divisions in culture, religion, traditions and race, the problem is to persuade peoples that European statehood based on federal democratic institutions is the way forward. Embracing statehood, like embracing a new constitution, is generally the outcome of some inspiring experience, whether it be the assumption of independence, autonomy or something of a like nature. The question is whether the problems generated by the coexistence in close proximity of peoples with diverse and divergent characteristics are sufficiently daunting to generate the momentum for a leap forward to greater integration.

English legal thinking is a reflection of the English national spirit; English legal thinking is infused by that sense of superiority of English democratic decision making processes. The doctrine of unlimited parliamentary sovereignty which is now under challenge as a result of the United Kingdom's membership of the European Community and the United Kingdom's subscription to the European Convention on Human Rights, currently to be incorporated in the domestic law of the United Kingdom, is very much a manifestation of that English national spirit. One only has to read Professor AV Dicey's *An Introduction to the Study of the Law of the English Constitution* to see that it proclaims from beginning to end the superiority of English constitutional arrangements over those made elsewhere in Europe.

The Symposium is primarily concerned with the instruction that we in Australia can gain from European constitutionalism. The democratic deficit in decision making in the European Community is a characteristic that is likely to have its counterpart in the decision making of international and intergovernmental bodies which will exercise wider powers as the move towards

globalisation gathers momentum. The democratic deficit means that these bodies are less accessible and more susceptible to the influence of powerful vested interests and lobby groups. So the problem of democratic deficit within the Community mirrors the problem which confronts at the international level and other regional levels.

Apart from that aspect of European constitutionalism, the constitutional arrangements, made and yet to be made, in Europe with respect to the protection of ethnic, religious and cultural minorities are matters of enormous potential interest to Australia as a multicultural and multiracial society. That is a story in itself which lies beyond the papers to be presented today.

For legal observers in Australia, the interaction between the United Kingdom and the European Community is fascinating from both the political and the legal perspectives. What will be the ultimate effect, if greater integration comes about, of Community law on English public law concepts and doctrines? What will be the effect on the common law? Will the role of the courts change? The answer to that last question will be in the affirmative once the European Convention on Human Rights is incorporated. And what influence, if any, will all this have on Australian law and Australian courts in the light of the influence, now by no means as strong as it was, that English legal developments have had for us? In Australia, the English influence has been the strongest; though in more recent times we have been looking more to North America that we have done in the past. That is not without its present relevance because United States and Canadian legal thinking is closer to European legal thought than is English legal thinking.

It is natural to draw a parallel between the European Court of Justice on the one hand, and the Supreme Court of the United States and the High Court of Australia on the other. But, as Judge Mancini himself has acknowledged, the drawing of the parallel is accompanied by great differences. The Treaty of Rome, and associated treaties, offer a role to the European Court of Justice in a world in which the document decisions are made by governments and diplomats, not by democratically elected legislators and politicians. The role of the Court is therefore more extensive and wide ranging than that offered to the High Court of Australia or the Supreme Court of the United States under their national Constitutions. The Treaty envisioned the Court through its decisions, as playing a predominant role in bringing about greater European integration.

The existence of that wider role is associated with the absence, in the case of Europe, of a legislature with extensive powers. The comparative weakness of the European Parliament along with the vesting of strong powers in the Council and the Commission means that the tension that exists under the United States and Australian Constitutions between the democratically elected legislature and executive on the one hand and the judiciary on the other, is not reflected in the same way or in the same degree. Although the European Court is not free from the criticism that it is running wild, that criticism does not emanate from democratically elected politicians who exercise powers equivalent to those exercised by national legislatures. The European Court is therefore not as circumscribed by the need to defer to the judgment of a democratically elected

legislature and executive as is a national constitutional court. Judge Mancini's vision of statehood based on democratic federal institutions would, of course, bring a different perspective to the relationship of the Court with other Community organs.

By Australian standards and current United States standards, the European Court seems to be 'judicially activist', to use an expression which I dislike when it is applied to me but which seems to be not nearly as offensive when it is applied to others. The 'activism' of the Court finds support in the Treaty of Rome in a situation in which the Court is not setting aside the laws and acts of a democratically elected legislature and executive.

Moreover, the moral authority of the Court in discharging this role has been significantly reinforced by its practice of delivering judgments of the Court which have the appearance of unanimity, a point I made when speaking to the Law Society of New South Wales only nine days ago. We know, of course, that the appearance does not reflect the reality. In fact, the cloak of unanimity does more than reinforce the moral authority of a court decision. It actually deprives critics of the prospect of pointing to a division within the Court and of feeding on the dissenting opinion.

Although the Privy Council until the late 1960s, like the European Court, delivered its advices as unanimous advices, we in Australia have always followed the English and American tradition of individual judgments except where the judges jointly agree to a joint judgment. That is because we hold to the view that the litigant is entitled to have and to know the opinion of each member of the court. The competing view, which underlies the practice of the European Court, is that the litigant is entitled only to the collective judgment of the Court. In the light of our history, it would be extremely difficult to secure acceptance of that view.

So there are a number of circumstances which account for the approach and the success of the European Court; circumstances which have no precise counterpart in Australia.

Of all the achievements of the European Court, the one which appeals to Australian human rights lawyers is the Court's implication of fundamental rights protection into the Treaty of Rome. It is said that if the European Court can do it when the Treaty is silent upon the matter, why can't the High Court of Australia do the same? One glib answer is to say that we do not have a German Constitutional Court to subdue. A more compelling answer is to say that we do not have a pattern of fundamental rights protection in the constitutions of the constituent elements in the Australian federation upon which we can securely base an implication of fundamental rights protection. The European Court discovered such a foundation in the common constitutional traditions of its Member States.

So far I have pointed to the elements which differentiate the European Court from the High Court, differences which require that we look at the drawing of parallels between the two Courts with some degree of circumspection. But I do not suggest that there are no lessons for us to learn. On the contrary, there is valuable guidance to be gained from Europe in the fields of constitutional law

and public law. There is simply no reason why we should confine our attention to the United Kingdom, Ireland and North America. Convergence between common law and civil law systems is at work in many jurisdictions.

In the last decade or more we have begun to pick up concepts and doctrines from European law and to make use of them. The concepts of legitimate expectation, legal certainty, proportionality and margin of appreciation have all found their way into our public law, sometimes via England, sometimes directly. As with the English, we have had some difficulty with proportionality and legitimate expectation though I continue to regard both these concepts as providing a valuable addition to our public law jurisprudence. Legitimate expectation has been taken much further in Europe than here, being a source of both substantive and procedural protection and a basis for the recovery of damages in cases of non-contractual liability.

The principle of legal certainty has been accepted unquestioningly in England, largely because English courts consider that they were the first to think of it. That claim is disputable, to say the least of it. However, the English are not alone in thinking that they are the first to adopt a new and useful concept.

We have more difficulty with equality as a free standing principle, though we accept certain aspects of equality and non-discrimination so that European decisions on those matters offer us a real prospect of illumination in the area of public law, even if it be at the non-constitutional level.

Then there is the separation of powers which, though important in European national constitutions, does not loom so large in the jurisprudence of the European Court. It is no secret that, as with the Americans, our separation of powers jurisprudence is not entirely convincing. How can it be when we are unable to define each power to the exclusion of the others? It may be that we can derive some benefit from the jurisprudence of particular jurisdictions such as Germany whose Constitution does provide for a basic separation.

There are a host of other concepts and principles which we would do well to look at with a view to profiting from the way they have been elaborated in Europe: locus standi, the principle of administrative procedure (similar to procedural fairness by taking explicit account of the desirability of efficient administration); the general treatment of invalid acts as voidable within a time frame rather than void; and last but certainly not least, damages for breach of Community law in administrative cases, the last being a topic of inexhaustible interest to English lawyers.

I conclude this opening by congratulating Dr Stephen Hall on organising this stimulating Symposium for the European Law Centre and the Centre for European Studies. It would be inappropriate for me to thank Judge Mancini for an address which I have not yet permitted him to deliver. But I can say that we look forward with eager anticipation to his inaugural address. I know how much effort he has put into what is an extremely important topic and I am delighted to say that, in the few days that he has been here, he has already inspired us with the range of his knowledge and understanding, his energy, his persuasiveness and his interest in this country and the contemporary issues which confront us.