CROSSCULTURAL ISSUES

INTERNATIONAL LAW AND THE AUSTRALIAN LEGAL SYSTEM

One contemporary aspect of crosscultural issues in the Australian legal system is the extent to which international jurisprudence, especially in the field of human rights, is extending an influence over Australian domestic law. This influence may arise in the courts where judges interpret statutes and develop the common law and in Parliament where laws are drafted with an awareness of international human rights standards. Justice Michael Kirby delivered a paper on this topic at the 14th Annual National Conference of the Australian Society of Labor Lawyers. The paper has been drawn on in this discussion and page references in brackets are to his paper.[1]

British position

Since Britain became bound by the European Convention on Human Rights, English law is being 'criticised and altered following complaints which led to the measurement of that law against regional and international standards. In important respects, English law is being found to fall short of acceptable minimum standards . . .' (at p.3).

One result of the criticisms of English law by the European Court of Human Rights may be seen in a growing acceptance by English judges of the appropriateness of using the principles of Covenants and Conventions in order to 'resolve an ambiguity' in English legislation or to develop the common law.

In *Derbyshire County Council v Times Newspapers Limited* [1992] IWLR (CA) (forthcoming) it was stated that in the face of ambiguity 'the English court is not only entitled but, in my judgment, obliged to consider the implications of [the Convention]' (quoted at p.37).

The Australian position

Australian courts have always relied heavily on British legal judgments to provide authority for their decisions. Indeed, until the passage of legislation, including the *Australia Act* in 1986, Australian court decisions could be overturned by an appeal to the Privy Council in England. After reviewing the British legal scene, Justice Michael Kirby predicts that Australian law will 'come under the discipline of international human rights jurisprudence'.

Justice Kirby points to decisions where he has relied on the International Covenant on Civil and Political Rights (ICCPR). One such case was *Gradidge v Grace Bros Pty Limited* (1988) 93 FLR 414 (CA) where a deaf mute claimed the right to have an interpreter for the whole of the legal proceedings, which were taking place in open court. The trial judge tried to prevent the interpretation of argument put by counsel. On appeal it was argued that the trial judge had properly exercised a discretion which was part of the judge's right to control the operation of the court. However, this argument was not accepted by the court, which held that the interpreter was entitled to interpret everything that was said during the course of the trial. Justice Kirby in his judgment referred to the principles behind the ICCPR. So did Justice Samuels.

Justice Kirby acknowledges that some judges are not drawing on international Covenants and Conventions. However he sees indications that these documents will have a growing impact on Australian law. One indicator is contained in a statement by Sir Roland Wilson, (formerly a High Court judge), who said in an address to the Australian Academy of Forensic Sciences:

> In cases involving statutory interpretation, where words to be interpreted are ambiguous or lacking in completeness, it will be right for the court to consider whether the case is one where the search for legislative purpose will be furthered by the assumption that Parliament would have intended its enactment to have been interpreted consistently with international law. [quoted Kirby at p.38]

Another important development in the Australian context is the signing by Australia of the First Optional Protocol to the ICCPR. Under the First Optional Protocol, Australian citizens, and others residing in Australia, may complain to the United Nations Human Rights Committee about a breach of fundamental human rights standards. Before a case can be taken to the Human Rights Committee a person must have exhausted all domestic remedies.

The availability of this avenue for Australians will ultimately lead to Australian courts and Australian Parliaments being influenced by international human rights jurisprudence.

A third and most important development has occurred since Justice Kirby delivered his paper. In *Mabo v The State of Queensland*, unreported, High Court, 3 June 1992, Justice Brennan of the High Court of Australia, appears to have accepted the thesis which Justice Kirby has been expounding for some time. Justice Brennan said:

> Whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights (68) 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. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands

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reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organisation of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.

Two pieces of legislation that raise queries about their adherence to international human rights are the *Migration Amendment Act* 1992 (Cth) and the *Crimes (Serious and Repeat) Offenders Sentencing Act* 1992 (WA).

Migration Amendment Act 1992

The Federal Government's concern over the arrival of 'boat people' in Australia, in particular the Cambodian 'boat people' who are now being held at Port Hedland, has led to passage of the *Migration Amendment Act* 1992.

The Act requires that all people who arrive in Australia by boat, without a visa and who have not been granted an entry permit, shall be described as 'designated persons' and shall be kept in custody. Further, the Act provides that a court is not to order the release from custody of any designated person. The Act is declared to override all other Australian law, whether written or unwritten, except the Constitution. As the Constitution is silent about rights to liberty of the person, the Act appears, on the face of it, to be unchallengeable.

However, there is an argument that the legislation is in breach of Article 9 of the ICCPR. Article 9 provides for court proceedings to be taken by any person deprived of liberty by arrest or detention. The Covenant is not restricted in its application to citizens but refers to 'anyone'. As Australia has signed the First Optional Protocol to the ICCPR, 'boat people' could apply to the Human Rights Committee for a consideration of whether their detention was in breach of international human rights standards. The domestic courts must be approached first; however if they interpret the *Migration Amendment Act* as a valid exercise of Commonwealth power, and the detentions made under the Act as lawful, the only avenue for redress available is the Human Rights Committee.

It will be interesting to see what Australian judges think of s.54S of the Act which prevents a court from ordering the release from custody of a designated person. This section may be viewed as an unwarranted fetter on judicial power.

Crimes (Serious and Repeat Offenders) Sentencing Act

The Western Australian Government's *Crimes (Serious and Repeat Offenders) Sentencing Act* 1992 (discussed in (1992)17(2) *Alt.LJ* 58) is likely to impact more heavily on Aboriginal youth than on non-Aboriginal youth and the Western Australian Government's own specialist Advisory Committee on Young Offenders has pointed out that the legislation was in 'clear breach . . . of the ICCPR'. Further the legislation might be in breach of Article 41 of the United Nations Convention on the Rights of the Child which provides that penalties must be 'consistent with the age of the child'. Criticism of the legislation has led the Premier of Western Australia, Carmen Lawrence, to indicate that the legislation would be reviewed by a Committee of the Legislative Council of Western Australia (Kirby at p.29).

Justice Kirby welcomes the influence of international Covenants and Conventions on the debate over the Western Australian legislation. It is a further sign, he asserts, that 'Australia is finally joining the international human rights movement' (Kirby at p.29).

Greta Bird

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Reference

1. The Hon Justice Michael Kirby, *Human Rights — Emerging International Minimum Standards*, 14th Annual National Conference, The Australian Society of Labor Lawyers, Melbourne, 23 May 1992.

[Editor's note: Of relevance to this discussion see also in this edition the two articles on the *Mabo* decision; the article 'State vs parents: Whither the child?'; and the article by Kate Eastman on how to apply to the UN Human Rights Committee.]

A VOICE FOR ABORIGINAL PEOPLE IN COURT

A court interpreters course begins this month (August) for Aboriginal people. The course which is the first Aboriginal language course (Pitjantjara) to be accredited by the National Accreditation Authority for Translators and Interpreters (NAATI), is part of the Attorney-General's Department response to the findings of the Royal Commission into Aboriginal Deaths in Custody report and the recommendations on law and justice from the ensuing working party.

The course has been developed by the Department after extensive consultation with Aboriginal communities in South Australia. The first stage was due to begin in South Australia on 10 August. Conducted by the Adelaide College of TAFE, the course is to be held in Ceduna, Port Augusta, and Whyalla.

In October, participants will undergo training in real cases in a moot court environment, with a South Australian magistrate presiding. Graduation as qualified interpreters will take place in November. There were 20 volunteers for the course at the time of writing.

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