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GENERATION CONFLICTS IN AUSTRALIAN FAMILIES : THE ETHNIC DIMENSIC

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ADJUSTING THE AUSTRALIAN LEGAL SYSTEM TO MULTICULTURAL REALITIE:

Attached, with the permission of the author, are the pages constituting chapter 5 ('New Laws for New Australians?') from a new book by Mr Justice Kirby, Reform the Law, Oxford University Press, 1983.

New Laws for New Australians?

Impact of an unfamiliar legal system

The legal system has implications for almost every aspect of a citizen's life. The Australian legal system, inherited with all its strengths and imperfections from Britain, is inextricably mixed with the organization and operation of day-to-day Australian society. Inevitably, the great influx of migrants to Australia, especially after the Second World War, and their growing diversity and number has produced pressures for changes of attitude, government policies and even the law. In some ways the law is the 'last fortress'. In many ways it is the social discipline least affected by the influx of immigrants into Australia. Most Australians do not fully understand their legal system. Relatively little is done in schools to teach children of their rights and responsibilities. Living here over many years, the general idea is supposed to be absorbed, as it were, by osmosis.

For the newcomer, arriving from a non-British culture, there is a distinct risk of a legal culture shock. Mr Frank Galbally, who conducted an inquiry into the problems of post-arrival migrants put it well in a speech:

> Few Australians in their lifetime have to solve such a cumulative series of difficulties as migrants must so quickly and under such pressures before even the question of happiness can arise.
>
> From the moment a ship docks, migrants are under a tough assault by salesmen—often ruthless, unscrupulous—to sign papers to buy everything from furniture, cars and houses to courses in English ...

acknowledged that the difficulties are not all on the one side. Cultural stereotypes about various migrant groups undoubtedly exist in the minds of many Australians, including educated Australians. The behaviour of those who work in the legal system can be distorted by such stereotypes.

It cannot be said too often that, even with the inadequate data we have on the incidence of crime in Australia, it appears quite clear that migrants do not breach the criminal law more frequently than non-migrants. Compared to people born in Australia, surveys that have been undertaken point to the fact that people born overseas tend to be much more law-abiding. Proportionately, they are under represented in our prisons. This fact is of particular significance since migrants, as a whole, tend to come from a slightly lower socio-economic status group than the average Australian-born. Crime indices tend to be higher in lower socio-economic groups, other things being equal. Yet news reporting frequently lays emphasis upon the ethnic background of an offender. Specific attention is called to his or her ethnic origin, distorting the reality which more balanced examination of the data will disclose.

Migrants and police

Migrant contacts with the police can pose difficulties for both. In the post-war years, police in Australia had to cope with many and rapid changes in Australian society. They were confronted, often for the first time, with members of the public whose lifestyles and values were at variance with the traditional Anglo-Celtic concepts or who were unfamiliar with the procedures accepted as routine in this country. A breakdown in understanding between police and the migrant population was not unusual. For instance, a particular difficulty in police/migrant relations is the unfamiliarity of many migrants with certain Australian police procedures. By way of example, fingerprinting in Italy is used only for the most serious crimes. In Australia it is a much more routine practice. For an Italian, the experience of fingerprinting can be quite traumatic. Likewise bail is most unusual in European legal systems.[2] Many migrants have mistaken the payment of bail for payment of a fine and have been surprised by subsequent arrest for non-appearance at court.

because of the problems of communications. Yet, in practical terms, a person's liberty can depend upon his ability to communicate in such circumstances.

The operation of the system

Sometimes, without intending it, our legal system can operate unfairly upon persons from a different cultural background. In the criminal trial especially, the impression which the accused may make on a magistrate, judge or members of the jury may be critical. Yet people from different cultural backgrounds and with different accepted modes of behaviour may act in a way that seems quite alien for the simple reason that it *is* alien. Witnesses may appear excited. The fair administration of justice requires that migrants' cultural and linguistic backgrounds should be taken into account in assessing their conduct and their evidence in court. But without regular contact with migrants and familiarity with their ways how is this fairness to be achieved?

Apart from procedural matters, there are also areas of the substantive criminal law which may need to be changed to reflect our new society. One instance relates to the defence of provocation to a charge of murder. Should the standard of provocation be an objective or a subjective one? This issue was dealt with in a working paper by the Victorian Law Reform Commissioner, *Provocation as a Defence to Murder*.[6] The Commissioner said:

> In this State, where there is considerable cultural mix and where it has been asserted, for example, that Melbourne has the largest Greek population of any city outside Athens, it would seem an insoluble problem to pin point the qualities or characteristics of the ordinary man when considering such a man's (or woman's) ability or propensity to lose his (or her) self-control.[7]

What might provoke an Italian or Frenchman or Vietnamese beyond endurance might not be the same as what will provoke an Englishman. The time is fast approaching, if it has not already arrived, when it is quite unsafe in Australia to judge the 'ordinary man' by the characteristics of the 'ordinary Englishman'. Such an objective approach may be valid in a homogeneous English society.

gaol can add a special, exquisite punishment which the non migrant prisoner may not suffer. Furthermore, the migrant removed from his or her family may leave close relatives alone, isolated, resulting in profound punitive effects that fall unequally upon innocent parties: wives, children and the old. This is not, of course, to say that migrants must be exempt from punishment for wrongdoing. It is simply to call to attention the way in which the criminal justice system, particularly, operates unevenly in its punishments in a country with a large migrant population.[9]

Migrants in gaol

The problems faced by migrants in prison in Australia who are not fluent in English include:

- *Language* An inability to write or speak English with fluency can cause problems, such as the misunderstanding of directions or orders or the inability clearly to complain about a legitimate grievance.
- *Religion* A migrant who is the follower of any religion except Christianity may have difficulties in the practice of his religion, especially in such matters as diet.
- *Isolation* In both New South Wales and Victoria the general rule is that migrant prisoners and their visitors must converse in English. This is a rule which frequently makes supportive links with the outside world difficult or impossible to maintain.
- *Prisoners' Mail* Most prisons require correspondence to be written in English for the purpose of censorship. Letters written in other languages may be banned or long delayed whilst they are being translated.
- *Prison Discipline* The Poverty Commission drew attention several years ago to the fact that rule books placed in prison cells are produced only in the English language. This practice can lead to injustice, given that breaches of prison discipline can affect a prisoner's chances of remission, parole and other privileges.

Other migrant groups, perfectly law-abiding, suffer special problems. Many migrants, in coming to Australia, lose the support of

is magnified by assumptions brought from other countries and an inability, by communication, to remove such misapprehensions.

The legal profession

In addition to all these problems, misunderstandings frequently arise between lawyers and migrants. A number of studies have indicated that migrants are more likely than native born Australians to think that lawyers are dishonest, that they are mainly interested in making money and that they tend to take the side of authority rather than their client. In many cases, there is a serious communication breakdown between a migrant and his legal advisor. One confusing aspect of the legal profession in most parts of Australia is the divided profession: solicitors and barristers. This division is simply not known in most countries from which non English speaking migrants are drawn. In the case of migrants, the trust and understanding that may be built up over a long period of time with a solicitor must suddenly, and in their view unaccountably, have to be transferred to a barrister, whom they may see briefly before the case, in circumstances generally of great urgency, stress and confusion.

Many studies have shown that lawyers in Australia continue to be drawn predominantly from families with high education and income backgrounds.[10] A study of the legal profession in Victoria revealed what a small proportion of migrants make their way into the legal profession.[11] The Bench in Australia, whether the magistracy or the judiciary, is still overwhelmingly Anglo-Celtic. The legal profession is overwhelmingly Anglo-Celtic. The law has been called the last Anglo-Celtic bastion of Australia. One is faced with the situation that an important profession in society, integral to the orderly running of society, does not reflect the composition and diversity of society. There is no ready solution to this problem. But the problem must be kept steadily in mind, for it is unhealthy for a profession so important to the just ordering of Australia to be so little affected by the racial cultural, racial and linguistic changes that are felt elsewhere. At the very least, it behoves lawyers and courts to be alert to the changes in the general Australian population and the need to review Australian laws and procedures to take account of those changes.

whose parents wished their children to be kept together, for linguist and cultural reaons, but thereby offended the statutory rules on child care. These tend to be concerned with objective considerations, such as the numbers of children and the availability of physical facilities, rather than with such intangibles as linguistic and cultural congeniality.[18]

In the Commission's review on the law of insurance consideration was given to the duty of a person seeking insurance to inform the insurer of any facts which would affect the risk 'in the judgment of a prudent insurer'. This long established principle is unfair to all Australian insureds. But it may be specially unfair to those who have little acquaintance with insurance and diminished understanding of questions contained in proposal and other forms.[19] It is for this reason that the proposal was made that the law be changed to consider the duty of the insured to the insurer, having regard to 'the circumstances of the insured'.[20]

Within the Australian common law, courts have also begun to substitute a similar test for what was formerly a supposedly objective test judged by the standards of an unidentified—but almost certainly—Anglo-Australian. In *Glaronjic* v. *Foster*[21], Mr Justice Gobbo had to decide whether it was reasonable for the plaintiff injured in a traffic accident to refuse surgical treatment. He held that the plaintiff's behaviour must be assessed in the context of his specific understanding and knowledge and added:

> It is proper in my opinion to take into account whether the plaintiff was made to understand what was the choice before him. It can hardly be said that a plaintiff unreasonably refused medical treatment if, for example, there was not available to him an adequate interpreter where that was necessary for that particular plaintiff ... The final matters that it may be legitimate to take into account were the plaintiff's relatively poor education, his unfamiliarity with institutions different from those in his own country, his very limited command of English ..[22]

Finally, in the Australian Law Reform Commission's enquiry into the law of evidence in Federal and Territory courts, consideration is being given to a number of adjustments to the law of evidence to take into account the language, religious and cultural differences that now exist in the Australian community. Suggestions have been

the Australian legal system is to meet the requirements of our more diverse, more interesting and multi cultural community.

Notes

1 F. Galbally, Speech to Loss Adjusters' Convention, October 1974. Mr Galbally is now chairman of the Australian Institute of Multicultural Affairs, established under the *Australian Institute of Multicultural Affairs Act* 1979 (Cwlth).

2 See Australian Law Reform Commission, *Criminal Investigation* (ALRC 2), Canberra 1975, p. 124.

3 *ibid.*, pp. 123ff.

4 Criminal Investigation Bill 1981 (Cwlth). The main relevant provisions are clauses 19 (notification of rights 'in a language in which the person is reasonably fluent'); 20 (provision of a caution); 28 (presence of an interpreter during questioning); 43 (cautioning after charge) and 45 (provisions of translated statements of co-accused). See also now Australian Institute of Multicultural Affairs, *Evaluation of Post-Arrival Program and Services*, 1982, ch. 12.

5 New South Wales, Bureau of Crime Statistics and Research, 1973, *Pilot Study of Central Court of Petty Sessions, Sydney*. See also A. Jakubowicz and B. Buckley, *Migrants and the Legal System*, Canberra, AGPS, 1982, p. 25.

6 Victorian Law Reform Commissioner (Sir John Minogue), *Provocation as a Defence to Murder*, Working Paper no. 6, 1979. See now *ibid.*, Report no. 12, *Provocation and Diminished Responsibility as Defences to Murder*, 1982.

7 *ibid.*, WP. 6, p. 24. (para. 62). See also, *Reform*, 1980, p. 15.

8 *Moffa* v. *The Queen* (1977) 13 ALR 225; 51 ALJR 403.

9 The problem has been isolated for future study by the Australian Law Reform Commission. See *ibid.*, *Sentencing of Federal Offenders* (ALRC 15), Canberra 1980, p. 315.

10 J. Goldring, Admission To Law Courses in Australia, *Vestes*, 20, 1977, p. 61; M. Hetherton, *Victoria's Lawyers*, Victorian Law Foundation, second report, 1982.