"INTERNATIONAL LAW COMES DOWN TO EARTH"

JUDICIAL OFFICERS' BULLETIN

JUNE 1997

The Hon Justice Michael Kirby AC CMG

Photograph by David Coward

INTERNATIONAL LAW COMES DOWN TO EARTH

The Honourable Justice Michael Kirby AC CMG[1]

The following article traces the growing influence of treaty-based and customary international law on Australian law and considers some of the issues that this entails. In particular, it explores the issue of why international law should have any role to play in Australian legal affairs, contends that such a role is not only necessary but beneficial, and proceeds to detail when and how international legal doctrine may be applied to Australia's jurisprudence.

I had a pretty orthodox legal education, as befitted a child of the Sydney Law School in the late 1950s. The declaratory theory of the judicial function. The Imperial Parliament as the ultimate font of Australian law. International law — interesting, but nothing to do with an Australian lawyer earning an income in a solicitor's office or busy courtroom.

Now, no one believes the "fairy-tale" of the declaratory theory.[1] The ultimate foundation of Australian law is said to be the people of Australia who approved the Constitution under which our laws are made.[2] Moreover, international law is suddenly becoming of practical relevance, not just to sovereign states and their advisers, but also to workaday legal practitioners and judges. Is nothing certain in this changing world of law?

If we stop and think about it, it is not so surprising that international law should become increasingly important. There is a growing body of it, ranging from the great international human rights treaties[3] to the highly detailed multilateral treaties for the settlement of commercial disputes between businesses in different countries.[4] The ease of modern travel, the increasingly global character of business activity, and the advent of accessible, far-reaching information technology have all contributed to an acceleration in the pace of the growth of international law and to its relevance to judges and lawyers in Australia.

The old theory of a virtually complete divorce between international and municipal law was bound to come under review because of these developments. A common law legal system is intensely practical. It adapts to its milieu. This adaptation is natural and healthy. It is my thesis that it is also a desirable advance at this particular time in Australia's legal history. At the moment that we threw off the bonds that tied us to the English judiciary, in the form of the Judicial Committee of the Privy Council, there was a real danger that we would retreat into a comfortable and rather closed backwater of the antipodean common law. We would boast of being the guardians of the "true doctrine." Actually, we would have lost the regular stimulus of linkage to one of the great legal systems of the world. Now, instead of retreating to provincialism, under the stimulus of the High Court of Australia, our judges and lawyers are encouraged to look for assistance not only to the wider family of common law courts around the English-speaking world[5] but also to international jurisprudence, which is usually based on treaties and given voice in national, regional and global courts and like bodies. Australian lawyers should keep their feet on the ground as this development occurs — but they should not feel threatened by it. Rather, they should see it as a development natural to the time we are living in and beneficial in the context of the particular Australian circumstances which I have mentioned.

Let there be no doubt that there are some who see great dangers in the merest reference to any international jurisprudence which has not been incorporated by statute into local law. Some see it as part of an international conspiracy to undermine Australia's sovereignty. Other, more thoughtful, commentators express concern that, unless restrained, the use of unincorporated international jurisprudence could undermine two important principles of our Constitution. The first is that, although treaties are made by the executive government, laws are ordinarily made by parliaments. The second is that, in the Australian federation, it cannot have been the intention of the Constitution that international law could be used as a vehicle for demolishing the respective legal responsibilities of the State and federal polities.

These are fair points. They express reasons why caution must be exercised, at least in Australia, particularly in the use of unincorporated international law. But nobody seriously suggests that, simply because of a treaty (including one which Australia has ratified), we should alter our understanding of local statute or common law. What is suggested is that if uncertainty arises concerning the state of the law (either because of a gap in the common law or obscurity or ambiguity in the meaning of a relevant statute), Australian law-makers may seek guidance to

fill the gap or resolve the ambiguity by reference to general principles of international law, at least where that law states rules universally applicable to civilised countries, including our own.

The growing understanding and resulting acknowledgment that judicial officers sometimes have choices, when it comes to filling gaps or resolving ambiguities in the law, presents a number of dilemmas. One of them concerns the source material to which the judge may have access in performing his or her function. It is not limited to what the judge learnt in Sunday School. Analogous reasoning and the application of logic to old cases may not yield the solution because the circumstances may have changed so much. The ambiguities of a Constitution or statute may remain utterly intractable. In such circumstances, the judge may certainly look for guidance to the decisional authority of other common law countries. But in a world of growing international jurisprudence, he or she may also look to the principles of international law. Those principles do not bind the judge. They are not part of the local law until they are incorporated by statute or by judicial decision as a step in the judge's own reasoning. The judge will not assume the function of incorporating a whole treaty into local law where the parliament has held back. But involvement in the development of local law in general harmony with international jurisprudence is a contribution proper by a common law judge at this stage in the relationship between Australia's domestic law and the law of nations.

This is what I take Justice Brennan (as he then was) to have meant in the often quoted passage in *Mabo v Queensland (No 2)* —

> "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."[6]

Anyone doubting the growing impact of international human rights jurisprudence upon the reasoning and decisions of the High Court of Australia cannot have been reading the *Commonwealth Law Reports* this past decade. In *Dietrich v The Queen*,[7] the court studied closely the requirements of the International Covenant on Civil and Political Rights, art 14(3), concerning access to legal advice. In *Chu Kheng Lim v The Minister for Immigration, Local Government and Ethnic Affairs*,[8] the court accepted that, in a case of ambiguity, Australian law would favour the construction of a federal statute "which accords with the obligations of Australia under an international treaty." In *Minister of State for Immigration and Ethnic Affairs v Teoh*,[9] the court held that Australia's ratification of the Convention on the Rights of the Child gave rise to a legitimate expectation that the minister would act in conformity with it and treat the best interests of Mr Teoh's children as a primary consideration. Whilst warning that this "judicial development of the common law must not be seen as a back door means of importing an unincorporated convention into Australian law,"[10] the court refused to regard the convention as being in a different realm of discourse, as traditional theory might have suggested.

The impact of international law on the daily practice of the courts can be seen in many cases in the High Court in the short time since my appointment. In *De L v Director General, New South Wales Department of Community Services*,[11] the court had to consider the meaning of the Convention on the Civil Aspects of International Child Abduction which is incorporated into federal law.[12] In *Applicant A v Minister for Immigration and Ethnic Affairs*,[13] the court had to elucidate the Refugee Convention, also incorporated into local law. In *Leask v The Commonwealth*,[14] there is a discussion of the civil law notion of "proportionality," which has found its way into Australian law by way of decisions of the European Court of Human Rights.[15] These and other cases demonstrate the multitude of sources that are now influencing the Australian legal system.

In the place of the one great stimulus of comparative law material (the law of England) we are now opening our courts and our minds to the stimuli of many sources. This is a completely natural and inevitable process. It must be conducted with loyalty to our own democratic and legal traditions, and a clear understanding that sometimes foreign concepts may be irrelevant or inappropriate. Made overseas does not necessarily make it right for Australia. We must grow out of that post-colonial mentality.

But international considerations of universal problems may sometimes have lessons for us. On the brink of a new millennium, we should be bold enough and open-minded enough to be ready to receive those lessons when they assist in solving Australian legal problems. Especially in the field of human rights, it is likely that international standards, and the growing body of law that is accumulating around them,[16] will occasionally be of help in our labours. It will need the recognition by law teachers of the importance of this source of legal principle; the readiness and the imagination of legal practitioners to find and advance the arguments; and the willingness of judicial officers to listen, released from the assumption that the only good legal ideas that come from overseas are "made in England."

In recognition of the growing use of international human rights jurisprudence by municipal courts of every legal tradition in all parts of the world, the United Nations Centre for Human Rights, in Geneva, has commissioned the production of a Judicial Officers' Manual. This is being prepared by an international team. It is hoped that it will be of

continued page 39

COURT OF APPEAL

• Courts and judges

Requirement to give reasons — damages — loss of earning capacity — physical impairment — miscarriage of justice

The appellant suffered back and neck injuries in a motor vehicle accident. She was awarded damages following a trial at which liability was not in issue. However, her claim of long term physical impairment and work incapacity was rejected. A central issue in the case was the judge's assessment of the appellant's credibility because of an absence of any objective symptoms. The appellant's case and her credibility as a witness were corroborated by three witnesses whose evidence would have justified a higher award of damages. Two of the witnesses called by the appellant gave credible evidence supporting the appellant's claim that she suffered prolonged headaches and neck pain. The trial judge did not make any reference to the evidence of the two witnesses or give reasons as to why their corroborating evidence should not be taken into consideration. The third witness was a doctor who prepared what was described by the judge as a correct history of the appellant. However, the judge in his conclusions used the evidence of the doctor against the appellant's case.

The court (Mason P, with whom Sheller JA agreed; Meagher JA agreeing with an additional judgment) held that the failure of the trial judge to make reference to evidence corroborative of the appellant's case led to a miscarriage of justice. Justice must not only be done but be seen to be done. The evidence of the three witnesses stood as direct evidence of the injury suffered by the appellant and of the consequential impairment of earning capacity, which was not reflected in the award of damages. The appellant was entitled to a finding or some indicative reason, be it demeanour or otherwise, as to why the judge did not take account of this evidence. The conclusions of the judge in relation to the unchallenged evidence of the third witness, particularly that it was destructive of the appellant's case, also did not accord with the evidence.

The appeal was allowed and the matter remitted to the District Court for rehearing as to damages.

Beale v Government Insurance Office of New South Wales (unreported) 2 April 1997

INTERNATIONAL LAW COMES DOWN TO EARTH
continued from page 36

practical use to judicial officers of our legal tradition and that it will be available by the end of 1997. It will contain references to the basic source material on international law principles, guidance on the applicable elaborations, and illustrations of the way in which the task of application can be performed.

So there is a large challenge of adaptation before the Australian legal profession and the judiciary. The question remains — are we up to it?

[†] Justice of the High Court of Australia; President of the International Commission of Jurists.

Endnotes

[1] Lord Reid, "The Judge as Law-maker" (1972) *J Soc Public Teachers of Law* 22; cf M H McHugh, "The Law-making Function of the Judicial Process" (1988) 62 *ALJ* 15.

[2] *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 138; cf *McGinty v Western Australia* (1996) 70 ALJR 200 at 239.

[3] For example: the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Elimination of all Forms of Racial Discrimination; the Convention on the Elimination of all Forms of Discrimination Against Women; the Convention on the Rights of the Child; the Convention Relating to the Status of Refugees; and the Convention on the Prevention and Punishment of the Crime of Genocide.

[4] Discussed in R Pritchard (ed), *Economic Development, Foreign Investment and the Law — Issues of Private Sector Involvement, Foreign Investment and the Rule of Law in a New Era*, 1996, Kluwer Law and the International Bar Association, London; which is noted in (1996) 70 *ALJ* 852.

[5] *Cook v Cook* (1986) 162 CLR 376 at 390.

[6] (1992) 175 CLR 1 at 42. See the Honourable Mr Justice Young, "Australian Native Title" (1992) 66 *ALJ* 551 at 552; MD Kirby, "The Australian Use of International Human Rights Norms" (1993) 16 *UNSWLJ* 363.

[7] (1992) 177 CLR 292.

[8] (1992) 176 CLR 1.

[9] (1995) 183 CLR 277.

[10] Ibid at 288.

[11] (1996) 70 ALJR 932.

[12] *Family Law (Child Abduction Convention) Regulations* (Cth), reg 16(3)(c).

[13] (1997) 71 ALJR 381 applying the *Migration Act* 1958 (Cth), s 144.

[14] (1996) 70 ALJR 995.

[15] Discussed in *State of New South Wales v Macquarie Bank Ltd* (1992) 30 NSWLR 307 at 321; *R v Home Secretary, ex parte Brind* [1991] 1 AC 696 at 767.

[16] R Higgins, *Problems and Process — International Law and How We Use It*, 1994, Clarendon, Oxford, p 205. For examples of the use of international human rights law in judicial decisions, see *Gradidge v Grace Bros Pty Ltd* (1988) 93 FLR 414 at 425 – 426; *R v Grecr* (1992) 62 A Crim R 442; *R v Astill* (1992) 63 A Crim R 148; *Director of Public Prosecutions (Cth) v Saxon* (1992) 28 NSWLR 263; *Young v Registrar, Court of Appeal (No 3)* (1993) 32 NSWLR 262; cf *Derbyshire County Council v Times Newspapers Ltd* [1992] 3 WLR 28 at 43, 60.