2588

INTERNATIONAL PROTECTION ON THE GROUND OF SEX, SEXUAL ORIENTATION AND BELONGING TO A SEXUAL MINORITY

By Marco Balboni
10 April 2012

The Hon. Michael Kirby AC CMG

INTERNATIONAL PROTECTION ON THE GROUND OF SEX, SEXUAL ORIENTATION AND BELONGING TO A SEXUAL MINORITY

FOREWORD

The Honourable Michael Kirby AC CMG[*]

By Marco Balboni and Carmelo Danisi

A foreword by a retired judge of the High Court of Australia might seem an unnecessary intrusion into a book concerned with international protection on the grounds of sex and sexual orientation, written mainly for a European audience.

The languages of legal practice and public administration in Australia and most European countries are different. A gulf also divides the procedures and techniques of countries of the common law system followed in Australia and those of the majority of European and other nations that, like Italy, which follow the civil law tradition. Australia is not a party to any regional human right convention or court system. None is yet in place in Asia or Oceania. The countries of Europe, on the other hand, are mostly parties to the *European Convention on Human Rights* and subject to the jurisdiction of the European Court of Human Rights and the European Court of Justice. Australia's legal ethos is greatly influenced by the strong secular laws and attitudes inherited from Britain. It is a land with many religions and with many people of no religion. Italy and many European countries remain predominantly Catholic nations and, although constitutionally secular, are profoundly influenced by the moral perspectives and traditions of that Church. So why this foreword?

[*] Justice of the High Court of Australia (1996-2009); President of the International Commission of Jurists (1995-8); Laureate of the UNESCO Prize for Human Rights Education (1998); Gruber Justice Prize (2010).

The answer is that many elements, relevant to the subjects examined in this book, are common to Australia and Europe today. These elements are symbolic of the growing interaction of legal systems in all parts of the world:

* International law, and specifically the law of universal human rights is permeating the municipal legal order, bringing in its train influential notions and shared wisdom;
* International treaties, including the *International Covenant on Civil and Political Rights (ICCPR)* and the *Refugees Convention and Protocol* stamp on domestic law their shared concepts and principles, reflecting the interdependent nature of the world in which we now live;
* Modern means of transport, the internet and social networks link people across the world in ways that have never happened previously in human history. With these linkages come shared ideas of justice, equality and rationality that expect and demand that lawyers give attention to common legal claims arising at roughly the same time; and
* Judges, advocates and scholars are increasingly studying the reasoning of colleagues across the nation and across the world, as they seek to unravel shared controversies and common dilemmas.

This sharing of jurisprudence was happening anyway across the English speaking world of the common law because of the normally discursive techniques of judicial and other discourse. Why would a judge tackle a problem unaided if he or she could readily draw upon the illuminating reasoning of a trained lawyer who had come upon the problem earlier? And where there is a shared obligation of international law (as in the duties imposed by the *ICCPR* or the *Refugees Convention*) reasons of consistency, convenience, efficiency and mutual respect naturally take administrative and judicial decision makers to domestic decisions in other lands. Frequently, these are being referred to, cited and explained in national texts such as this. There is now no excuse for rejecting the persuasive force of decisions made elsewhere, at least without reading and considering them if they came from a legal source of high authority.

Australia, since its modern establishment in 1788, originally as a British penal colony, has always been a land of immigrants. Yet, paradoxically, like many island nations, it has long exhibited attitudes of fear and hostility towards newcomers: especially those who looked and sounded different from the majority already in place. The obligations of the post Second World War international law of human rights, and especially of the *Refugees Convention,* have now intruded their dynamic into this equation. Although Australia duly signed up to the international legal obligations, many in its population raised in a legal ethos of White Australia, resisted any large influx of persons seeking asylum. Especially so if they came from minority groups with differing races, religions, politics, languages and sexual practices from those familiar to the majority. Elected politicians failed to reflect these popular anxieties at their peril. It was therefore largely left to lawyers, administrators and courts to uphold the high principles of international protection. On the whole, in Australia, the courts have been strong and consistent in performing their duties:

- In 2001, a decision was affirmed requiring protection of the particular social group of women in Pakistan who feared persecution by family members and domestic violence which was not responded to adequately, or at all, by state authorities because of their gender;[1]
- In 2003, reversing decisions below, it was decided that two male citizens from Bangladesh were entitled to claim protection as refugees on the grounds of fear of persecution of their homosexuality and that it was an error to deny the existence of that fear on the basis that, at home, they would live in a way that disguised and hid this aspect of their lives[2]; and
- In 2011 a politically popular scheme to send refugee applicants to be processed in Malaysia (not a party to the *Refugees Convention*) was struck down as incompatible with Australian law and invalid.[3]

It is understandable that many of the problems that have arisen in Australia will be similar to those arising at the same time in Europe. Most good people pay lip service to the duty of asylum. Yet most of society is still gravely fearful of floods of different

---

[1] *Minister for Immigration v Khawar* (2002) 210 *Commonwealth Law Reports;* [2002] HCA 14.
[2] *Appellant s395/2002 v Minister for Immigration* [2004] 216 *Commonwealth Law Reports* 473; 2002 HCA 71.
[3] *Plaintiff M70/2011 v Minister for Immigration* [2011] 83 *Australian Law Journal Reports* 891; [2011] HCA 32.

looking people arriving in huge numbers on their doorstep and bringing with them alien ways, customs, dress and ideas. The reconciliation of the forces of principle and pragmatism is a common challenge in which decisions makers in Europe and Australia can certainly learn from each other. The authors of this book deserve praise and encouragement for making this beneficial intellectual exchange easier to accomplish and more practical to achieve.

Two further developments should also be noted. First, with the never ending stream of cases demanding lawful and just conclusions in this area come many in which claimants, and those representing them, make demands, and express arguments, that would not have been ventured in earlier times. In Australia, the three important court decisions that I have cited above are illustrations in point. Once, not so long ago, the patriarchal elements in society would have deferred to the municipal laws of a country of nationality, in respect of the domestic treatment of women. They would have denied refugee protection to a potentially very large group of women from traditional societies denied protection because of their gender. Also, not so long before the gay applicants were granted a right of claim refugee status by the courts, they would have been regarded as criminals and evildoers who only had themselves to blame for being forced to hide their sexuality at home as they would also have to do in Australia as well. And offshore processing of refugees in a foreign land might have been seen as legitimate 'administrative arrangement', which had a beneficial side effect of discouraging "boat people" from "jumping the queue" for immigration for economic rather than asylum purposes.

In explaining changes in attitudes to these cases, some credit should be given to the lawyers and civil society organisations that took up the cause of women, homosexuals and other social groups and challenged traditional ways of looking at their cases and the persecutory elements in their earlier lives. Once these advocates for changed perceptions came to be heard, formalistic responses became increasingly unacceptable to decision makers and courts around the world. The same shift in attitudes may be seen in another context in relation to the legal claims by homosexual citizens to equal access to the civil right to marriage. Once such

claims would have been rejected as lacking any legal substance[4]. This appears still to be the approach taken by the Constitutional Court of Italy[5]. However, undoubtedly, the new international discourse on this topic has opened the doors of many minds, even legal ones, to new perceptions of justice and to reasoning that now influences decisions across the world, many of them in countries with very different laws and legal traditions.

Finally, there is a puzzle. When I was a young lawyer in Australia, few lawyers or indeed other citizens perceived (and fewer still expressed) the discrimination and injustice then present in the legal system in relation to the rights of Aboriginals; of Asians and other "non white" persons; of women; of gays; of older people and the young; and other groups. As we look back today on those earlier times, we are bound to ask a key question. It is a question presented by this book. If, today, our perceptions of law and justice are still defective, but so much better than they were even in recent times, what are the areas of blindness that still afflict our own generations? What are the groups of applicants for international protection whose disadvantages and exposure to persecution will be seen more clearly in the future than they are now?

It is because this book contributes to the never ending process of legal and communal enlightenment, that I welcome it. It will be important for Italian and other European lawyers. But I venture to suggest, that because of the global character of the issues, with their treaty foundation, that it tackles, the book will be important and useful to lawyers, administrators and judges in far-away Australia and in other lands of refuge. This is an area of law and legal practice where truly we are all substantially in the same boat. So we can all learn from each other. And the

---

[4] See for example *Quilter v Attorney General (New Zealand)* [1998] 3 *Law Reports of the Commonwealth* 119 (NZCA)

[5] *Sentenza 38/2010* (14 April 2010) noted *International Commission of Jurists, Sexual Orientation, Gender Identity and Justice: a Comparative Law Casebook* (ICJ Geneva) 2011, 370. In this decision, the Constitutional Court of Italy reversed the decision of Trento Court of Appeal, which had concluded that the challenges to the interpretation of the *Civil Code of Italy* were not manifestly ill founded. In reaching this decisions, the Italian Court's approach can readily been seen to be out of line with the new perceptions of law, justice and equality recognised by courts in Canada, South Africa, Israel, United States of America, Portugal, Argentina and Mexico.

process of sharing involves more than legal principles. It extends to wisdom and the direction for our ongoing journeying.

Michael Kirby

Sydney, Australia
10 April 2012

****