Janet Saleh - MAIL FROM JUSTICE MICHAEL KIRBY'S SYDNEY CHAMBERS

2071

From: Janet Saleh
To: brian.flanagan@law.oxford.ac.uk
Date: 21/12/2005 12:19 PM
Subject: MAIL FROM JUSTICE MICHAEL KIRBY'S SYDNEY CHAMBERS
CC: ewan.mckendrick@law.ox.ac.uk

Dear Mr Flanagan

I respond to your survey as follows:

Q1: Regularly.

Q2: For all of the above. They are not binding rules but useful stimuli to the legal mind from the writings of other jurists. See *Al-Kateb v Godwin* (2004) 219 CLR 562 at 618 [156] ff. I suggest that you have a look at this decision, especially the reasons of McHugh J and myself. They set out the debate as it stands in Australia.

Q3: Yes.

Q3A: All of the above. I have a great number of contacts with judges of other final courts. Every year I attend the Yale Constitutionalism Seminar which also has participants from about 20 final courts and the European Courts of Justice and of Human Rights.

Q3B: I have a greater sense of professional esteem and association with judges of final courts, especially in common law countries. We share many of the same problems, faced at approximately the same time. Having served in lower and intermediate courts, and on a final court, one discovers a special empathy with judges who work at the end of the track.

Q4: Obviously the domestic constitution is the starting point. However, international human rights law, moral thinking and the writings of scholars, philosophers and others can all be useful. What is wrong is to think that all relevant wisdom lies in the reasoning of judges eg of England in an earlier time when international issues and legal relationships were quite different. Lawyers, like scientists, must be more innovative in their thinking. However, it is difficult to convince many lawyers of this. Their brains may be differently wired.

Q5: Regularly. At least 15 times a year.

Q5A: All of the above.

Q6: Regularly. Of course, reference to international material must be circumscribed in Australia by the absence of a constitutional or even statutory national bill of rights, the enactment of federal, State and Territory laws that can sometimes derogate from human rights and the general cultural scepticism concerning rights theory and especially overseas jurisprudence. If the law is clear and valid, it is the duty of the municipal judge to give effect

to it, whatever may be said in international law save possibly for certain exceptional cases such as crimes of universal jurisdiction. See *B v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 219 CLR 365 at 420 [156] ff.

Q7: Yes.

Q8: Yes.

Q8A: As comparative law material.

Q9(a): At most, this is a subconscious motivation, flowing from the desire that each State should feel in a world of high vulnerability to be al law abiding member of the international community.

(b): Depending on the source, this can be so.

(c): This is o.

(d): It tends to confirm conclusions independently arrived at.

(e): This too. We live in a world of interaction and instant communication.

(f): This is not a specific objective, given the differences of laws on some topics. However, it is remarkable how the same problems arise in many jurisdictions at about the same time. Gay marriage is a case in point. Earlier, the "irretrievable breakdown of marriage" as the basis for divorce spread from Scandinavia, through the United Kingdom, to the United States and many Commonwealth countries - in the place of the old grounds for divorce. This is the way ideas spread in the current age.

(g): This can be useful forensics.

(h): Showing that the world does not fall in when judges use common jurisprudence is helpful for the waverers and timorous souls.

Q10(a): It is natural, because of the sources of material and limited time, to look particularly at the final and higher courts of the United Kingdom, Canada, New Zealand, the United States, South Africa, India and neighbouring countries. The link of the English language and a common legal tradition and system facilitates borrowing. Citation of cases from such countries needs no special justification. In tort, contract and business law, we are now increasingly also citing German, French and other lines of authority, especially on international treaties. Linguistic difficulties sometimes make it problematic to borrow from other lands. For example, in a recent (still reserved) case on so-called "wrongful life", the Court received a citation from the Constitutional Court of the Netherlands. However, a translation was not available. These are the practicalities. The Israel Supreme Court translates key decisions into English and thus has a large utility because of special exposure to problems such as terrorism.

Q10A: The guidance must be below normative rules. Therefore, there is a freer hand to use comparative law material.

Q11: No. Because it is the act of the judge of the municipal jurisdiction, within his or her legitimate constitutional and legal powers, that brings the comparative material into use legally. It is an infantile view of democracy to believe that every norm must be backed by a

vote at an election. In fact, popular elections occur infrequently and are then put forward by this over-simplistic view of democracy as the foundation for everything that a government, its ministers and officials do for the next 3-5 years. This is an absurd view of democracy. Modern democracies involved respect for the will of the majority within a paradigm that protects the rights of the vulnerable and minorities. It is in the latter respect especially that judges have legitimate, constitutional and democratically endorsed functions.

Q1: All of the above, although I believe, working in a secular society, that God exists (if at all) in the private zone and in personal conscience, not as a specific criterion for endorsement or disapproval of judicial functions.

Q10A: Perhaps subconsciously. However, seeking approval and plaudits from these sources is not a specific objective.

Q1: Not particularly. Once it is accepted that the materials are used only for information and as comparative law stimuli, exactness is not the object of the search. Self-evidently, to the extent that the legal foundation is different, judicial *dicta* will have greater or less persuasiveness.

Q1: Yes.

Q1: I strongly disagree with this insular attitude which is wholly out of keeping with the age of the internet, the jumbo-jet, nuclear fission, global problems such as HIV, SARS, Avian Flu etc. We have to live together in this small planet and build international as well as national communications. Judges who do not believe this have simply got locked into an old way of thinking and have not noticed the changing world around them.

Q1: I would probably attend a speech by a member of my own Court out of courtesy. I would then next attend a speech by a Supreme Court judge out of courtesy and comity. But it would depend upon the subject of the talk. The next in order of attention for me would probably be a distinguished academic from abroad. They tend to be more original and stimulating in their thinking; but it all depends on the individual and the subject matter.

Q1: I suppose I would rank the order of priority (c), (e), (d), (a), (b).

Q1: Yes. See my remarks in *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 and many other cases.

Q1: The use of domestic precedents is part of the law of my country so that all of the reasons are, within this requirement, necessarily taken into account.

Some additional comments on the foregoing are contained in my 2005 Grotius Lecture delivered for the American Society of International Law in Washington. I attach copy of that lecture (which has now been published) to this email.

I acknowledge that, in part, my appreciation of international human rights norms was enlivened by participation in the Bangalore series of conferences organised by the Commonwealth Secretariat in London. I also acknowledge that my activities in various United Nations agencies - WHO, UNDP, ILO, UNAIDS and as Special Representative of the Secretary-General for Human Rights in Cambodia, opened my eyes to international and comparative law and made me more receptive than I previously was.

I accept that there is a concern about the "democratic deficit" in international law and the norms of international agencies. However, we cannot have all persons of the world voting on international law. It must therefore be built on a more indirect manner, mainly through organs of the United Nations which contains the Nation States of the world. But the foundation of the *Charter* is the people of the United Nations. Improving accountability, efficiency, review and auditing is a challenge for international institutions and the law they make. But this does not excuse ignorance and hostility to that law. Those attitudes are often the product of unimaginative thinking, indifference to the changing world and society and hostility to the realities of the present and the future. Such hostility tends to come with the baggage of law. There is a need for judicial leaders (such as Breyer J in the Supreme Court of the United States and Baran J in the Supreme Court of Israel) to demonstrate the legitimacy and utility of the use of international and comparative law. In Australia, I make my efforts.

Good luck with your research. I will be interested to read the outcome.

Sincerely, Michael Kirby

This is an email from the Sydney Chambers of Justice Michael Kirby
High Court of Australia
Level 19, Law Courts Building
184 Phillip Street, Sydney NSW 2000
Janet Saleh is the judge's Personal Assistant.
Telephone: +61 2 9230 8203
Fax: +61 2 9230 8626
email: JSaleh@hcourt.gov.au