Human rights and the 'Breakfast Theory of Jurisprudence': treaty monitoring bodies and public administration

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This paper will explore some of the measures that may be pursued to promote compliance by Australia with international human rights standards. Hilary Charlesworth has written that '[w]hile we participate at a high level in the process of United Nations law-making, at home we demonstrate a deep ambivalence about the law we have created'.[1] She describes compliance measures in Australia as follows:

> The spectrum of implementation techniques (moving from the most comprehensive to the minimal) goes from: the enactment of Commonwealth legislation incorporating most treaty obligations; to Commonwealth legislation incorporating selected treaty obligations, and, on occasion, a single provision of a treaty; to Commonwealth legislation creating institutions to monitor in a limited way the performance of treaty obligations; to Commonwealth claims that treaty obligations are already adequately implemented under existing Commonwealth, State and Territorial laws.[2]

She concludes that there are two main reasons why the implementation of international human rights in Australia is desultory: 'an unfamiliarity with the concept and language of human rights' and a 'deference to a conservative form of federalism'.[3]

I will concentrate on the first reason in terms of the extent of compliance by the decision-maker — usually a public servant — faced with an international human rights law issue. The former Commonwealth Attorney-General Michael Lavarch has discussed how the 'anti-*Teoh* legislation'[4] came about. He describes the 'variety of

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1 Charlesworth H 'Australia's Split Personality: Implementation of Human Rights Treaty Obligations in Australia' in Alston P and Chaim M (eds) *Treaty-Making and Australia: Globalisation versus Sovereignty* (Federation, 1995) p 130.

2 See above, p 132 (footnotes omitted).

3 See above, p 138.

4 The legislation was the Administrative Decisions (Effect of International Instruments) Bill 1995. This legislation was designed to overcome the decision of the High Court in *Minister for Immigration and*

woes' which concerned public servants had told his government 'would swamp and ruin public administration' if the *Teoh* decision was given full effect. According to Michael Lavarch, 'the strongest advocates for confronting "legitimate expectation" came from Immigration and Ethnic Affairs in respect of the hundreds of thousands of decisions made each year on visa applications and other decisions which involved the exercise of discretions'.[5] So how is compliance by those decision-makers with international human rights law to be brought about?

Compliance by decision-makers

In *Teoh*, the High Court concluded that treaties could be used as an aid to interpretation of legislation where there was ambiguity. Mason CJ and Deane J said:

> In this context there are strong reasons for rejecting a narrow conception of ambiguity. If the language of the legislation is susceptible of a construction that is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail.[6]

Further more, international law is now, without question, a 'legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights'.[7] Similarly, Michael Kirby, prior to his elevation to the High Court, stated that:

> if there is a gap in the common law, or if a statute is ambiguous, it is both inevitable and right that Australian courts, in today's world, should fill the gap, by reference to any applicable international rule. Better that the judge should do this than rely upon personal, idiosyncratic values or upon distant analogies.[8]

Ethnic Affairs v Teoh (1995) 183 CLR 273. This Bill lapsed with the 1996 election. The new government introduced the Administrative Decisions (Effect of International Instruments) Bill 1997 (which was in substantially the same terms as the previous Bill) but, similarly, this lapsed with the 1998 election.

5 Lavarch M '*Teoh* – Was it Much Ado About Nothing?', unpublished paper presented to the Australian Society of Labor Lawyers, Canberra, October 1996.

6 *Minister for Immigration and Ethnic Affairs* v *Teoh* (1995) 183 CLR 273 at 287.

7 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 42 per Brennan J.

8 Quoted in Shearer I 'The Growing Impact of International Law on Australian Domestic Law — the Implications for the Procedures of Ratification and Parliamentary Scrutiny' (1995) 69 ALJ 404 at 405; and in Mason A 'The Influence of International and Transnational Law on Australian Municipal Law' (1996) 7 *Public Law Review* 20 (though Mason is critical of Kirby's view).

Thus there is no shortage of judicial prompting to decision-makers about international human rights law. But it takes more than a High Court judgment to change administrative policy.[9] Most decision-makers, and particularly those outside the central areas of Commonwealth administration, are unaware of Australia's international human rights obligations. The challenge is to persuade public administrators that international human rights standards are important, finite and helpful. Rather than shrink from them, they can be harnessed to achieve the goals of certainty, smooth administration and effective management. This is particularly necessary where decision-making includes significant discretionary powers and the use of 'personal, idiosyncratic values'.

In jurisprudential terms, a related issue is the inarticulate major premise, sometimes known colloquially as the 'Breakfast Theory of Jurisprudence'. This is the concept that there has to be more to guide the decision-maker than what he or she had for breakfast, whether they had a good night's sleep, or whatever.[10] Unfortunately, there has been little consideration of this question in the context of judicial decision-making in Australia, although it is clearly an issue of great moment for the review of administrative action. Judges may only occasionally acknowledge the need to supply an inarticulate major premise. Public servants should also acknowledge this premise, especially as they are operating without the same detailed understanding of the law that is expected of judges, and as they often are in polycentric environments commonly involving the balancing of a large number of competing demands.

Human rights have a role to play in filling this vacuum. That is not to argue that human rights should magically become the single moral code for all Australians. Rather, in making decisions or taking actions which impact on others, human rights have to be a relevant consideration, and that serious departures from these standards are a cause for concern.

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9 See also Churches S 'Treaties and their Impact on the Practitioner' unpublished paper presented at the Conference on the Impact of International Law on Australian Law, 28 November 1997, University of Sydney Law School: 'the scientific community has a process for acceptance of new ideas which the common law resists with all the vigour of its birth in the 13th century. Once the paradigm shift has been made, the whole scientific community accepts the new understanding. Not so with common lawyers, who particularly in the backwaters of public law, will resist ferociously any change from social irrelevance, obscurantism and a mania for hairsplitting minutiae. The ferocity becomes charged with a primal, tribal contempt if the changes proposed are in favour of a rational systematisation, embracing common sense interests of the public, or, heaven forbid, international standards' (pp 4-5).

10 See *Tangentyere Council Inc v Commissioner of Taxes* (1990) 21 ATR 239 per Angel J.

Education and co-operative reporting

Human rights observance depends on education.[11] It is hoped that the *Discovering Democracy: School Materials Project*, funded by the Commonwealth Department of Employment, Education, Training and Youth Affairs (DEETYA), will help to raise human rights awareness in Australia. The overview booklet distributed for this project contains a unit on human rights in the middle secondary units. According to the booklet it will consider a number of current human rights issues including the United Nations (UN) Conventions, rights of minorities, the role of the churches and non-governmental organisations (NGOs), the balance of rights and responsibilities, and the role of institutions such as the Human Rights and Equal Opportunities Commission (HREOC) and the Ombudsman.[12] Hopefully, the public servants of 20 years hence will be better informed because of this breakfast of human rights.

The nature of reporting on human rights matters is often seen as a challenge to an existing order rather than as a co-operative raising of standards. Reporting to the treaty bodies can be undertaken with varying degrees of commitment, and with varying outcomes, as Australia's experiences have shown.[13] If a passive approach is taken,[14] and particularly if there is insufficient encouragement of the States and Territories to participate constructively in reporting, the process comes within Hilary Charlesworth's criticism of deference to a conservative form of federalism. If NGOs are not brought into the process in a consultative fashion, there is an increased risk of NGOs informing international human rights bodies independently and provoking international criticism of Australian governments.

Consultation with the States, Territories and NGOs is a time-consuming and difficult exercise, involving as it does the fine balancing of a large range of competing interests and agendas. It can never be done without adequate resourcing and effective consultative partners. While there may be those within government who complain about NGOs from time to time, the simple fact is that this type of public reporting process should not be undertaken without them. As for the States, given that they have carriage of almost all the practical aspects of compliance, it would be incoherent not to involve them fully. Failing to report is no solution as it creates a

11 A view emphasised by UNESCO: see its web site <http://www.unesco.org>.

12 Curriculum Corporation, *Introducing Discovering Democracy School Materials Project* (Curriculum Corporation, 1997) p 56.

13 Lombard G 'Keeping Up appearances', *The Canberra Times*, 29 September 1997.

14 See Morgan W 'Passive/Aggressive: the Government's Responses to Optional Protocol communications', in this collection.

very poor international reputation.[15] What is required is encouragement and leadership to make the process a co-operative one by which Australia's human rights protections are improved.

New Zealand

One initiative that attempted to combine encouragement, leadership and the creation of popular support, was New Zealand's Consistency 2000 program. If it had been successful it would have made the process of reporting to the treaty monitoring bodies a spectacularly easy and painless exercise.

This program arose from the passing of the *Human Rights Act 1993* (NZ). The *Human Rights Act* was contemporaneous with New Zealand's aim to gain a seat on the UN Security Council in that year. It consolidated previous legislation, extended the grounds of prohibited discrimination and generally enhanced the powers of the New Zealand Human Rights Commission to investigate human rights infringements. However it did provide for wide exemptions for government. These exemptions were bought at the price of a sunset clause: s 152 of the *Human Rights Commission Act*, which (read with s 151 of that Act) has been interpreted as providing that from the year 2000, the human rights guarantees in the *Human Rights Commission Act* would take primacy over all other legislation.[16] In its consideration of New Zealand's third periodic report under the International Covenant on Civil and Political Rights in 1995, the Human Rights Committee (the Committee) identified the exemptions as a principal subject of concern.[17] In response to questioning about the exemptions, the New Zealand Government stated to the Committee that the exemptions were 'intended to afford the Government sufficient time to review its policies and practices and to implement all changes which may be required to ensure compliance with the [*Human Rights*] *Act*'.[18]

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15 For example, in the 1997 *Refugee Survey Quarterly*, Zaire's reporting performance in terms of reporting under the six principal human rights conventions was analysed to show that Zaire was an international pariah. It is interesting that the editors chose to use compliance with the reporting requirements under these international instruments as a measure of that pariah status.

16 Interview between Sir Geoffrey Palmer and Kim Hill, 'Nine to Noon', New Zealand Public Radio Broadcast, 8 July 1997.

17 Ministry of Foreign Affairs and Trade, *Human Rights in New Zealand: Report to the United Nations Human Rights Committee under the International Covenant on Civil and Political Rights* Information Bulletin No 54, Wellington, June 1995. See also Roche 'Human Rights for the Year 2000' (1996) 2 *Human Rights Law and Practice* 169 at 170.

18 *Ibid.*

In order to evaluate what provisions should outlive the sunset clause, the New Zealand Human Rights Commission embarked on what it called 'Consistency 2000', a project to examine all New Zealand legislation and any policy or administrative practice of the New Zealand government, and to determine whether the legislation, policy and practices infringe the spirit or intention of the *Human Rights Act* (which includes major international human rights treaties) or conflict with the unlawful discrimination provisions of the *Human Rights Act*. While this is a simple exercise conceptually, administratively it proved a major exercise. To chart all human rights observance issues in government it is necessary to establish a matrix of administration and rights.

Each of the 42 agencies in the New Zealand government undertook an initial 'listing' of its administrative responsibilities, to identify every relevant policy, legislation and practice. Subsequently, a 'batching' exercise took place to divide the lists into manageable or coherent segments of responsibility, normally on either a conceptual or administrative basis, depending on the agency. Probably the creation of such lists and batches was as useful for agencies as a management information system tool as it was for the Consistency 2000 project itself. After batching, agency staff were trained to administer a self-audit database. This database was intended to allow conflicts to be identified with the anti-discrimination codes in the *Human Rights Act* as well as infringements of the 'spirit or intention' of the *Human Rights Act*, which in turn comprehensively captured New Zealand's international human rights obligations. When each batch had been processed, the resulting reports were to be forwarded to the Human Rights Commission, which was then to undertake an external audit and prepare its determination reports in consultation with the agency.

Consistency 2000 attracted significant international attention when it was first mooted, and has been favourably received by at least one UN treaty review body, the Committee on the Rights of the Child. This Committee suggested that a 'separate and complementary' review of Convention on the Rights of the Child obligations take place in New Zealand.[19]

On 27 June 1997, the acting New Zealand Minister for Justice announced a review of Consistency 2000. In announcing the review, he made it clear that 'there would be a permanent exemption for the Government in respect of legislation and the development and implementation of Government policy'.[20] The review provoked outrage. Rodney Harrison pointed out that, while private sector activities would still

19 CRC/C/15/Add 71, 24 January 1997.

20 Office of the Minister of Justice, 27 June 1997.

be subject to the full range of anti-discrimination and human rights provisions, almost no public sector activities would be if the Government created a blanket exemption for itself. He also commented that:

> [N]ot only will New Zealand breach its obligations under these covenants if it enacts the wholesale exclusion of Government policies and activities presently under contemplation; but this will also send a very clear international message that this country cares little about basic human rights at the most fundamental level, namely the activities of the State itself.[21]

Harrison also noted that the only practical effect of the Government's move would be to shield the Government from the Human Rights Commission and the adjudicative body established under the *Human Rights Act*, the Complaints Review Tribunal, so 'challenges to Government action and policies would have to be fought out in the Courts'.[22] This is because the New Zealand Bill of Rights continues to bind the Crown and, the New Zealand Court of Appeal has held that New Zealand courts have jurisdiction to grant effective and appropriate remedies against the Crown for a breach of the Bill of Rights.[23]

On 22 October 1997, the New Zealand Minister of Justice announced the outcome of the review. Rather than halt the Consistency 2000 exercise altogether, the Government decided to neutralise it, by relieving the Human Rights Commission of its responsibility for the exercise and instead vesting that role in heads of agencies. It was said that 'Chief executives will now be responsible for managing their department's legal risks in meeting the requirements of the law regarding human rights'.[24] By empowering agencies, given that the grounds of discrimination and the international human rights treaties are finite in their extent and able to be understood and applied by administrators after adequate training, it was hoped that the agencies would learn to apply the relevant principles constructively. Further, the *Human Rights Act* will not override inconsistent prior or subsequent legislation, not even regulations.[25] Therefore New Zealand is still going to be in a position to identify exemptions to the *Human Rights Act* by the year 2000 but a risk management approach controlled by agencies will probably result in a wider range of proposed exemptions.

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21 Harrison R QC, unpublished opinion of 6 August 1997.

22 *Ibid* at p 4. See also Rishworth P 'Applying Human Rights Legislation to Government: "Consistency 2000" and the *Human Rights Act 1993* (NZ)' (1998) 9 *Public Law Review* 6 at 9.

23 *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667.

24 Minister of Justice, press release, 22 October 1997.

25 Human Rights Commission, 'Consistency 2000 Update', November 1997.

Risk management as a style of public administration is appropriate when it is the agency which runs the risk in a domestic context with respect to, say, electricity, gas or water. It is more difficult to implement when there is international scrutiny and an important part of the national image is at stake.

Conclusion

In this decade for human rights education, one priority target group must be public administrators. Whatever view may be taken of Consistency 2000, it certainly provided valuable training for administrators which would not otherwise have been possible.

Public administrators and decision-makers must be trained in international human rights law. This must be done even if their increased sophistication in human rights makes them more adept at restrictive interpretations of rights, because if it is only the lawyers who know about human rights there will be no progress. If there is not this broader education, the breakfast theory will win every time. ●