Mandatory sentencing assessed against regional systems for the protection of human rights

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Introduction

This paper tackles the debate on Northern Territory mandatory sentencing legislation by making a survey of the regional institutional structures that have emerged, in other parts of the world, to bind governments to international human rights laws. This will help isolate some useful comparators against which to measure Northern Territory mandatory sentencing principles and assist in determining whether their legality would be queried if introduced in other parts of the world.

But the first question to ask is why is this important? Why does it matter that, in other jurisdictions, the compliance of mandatory sentencing rules with human rights law could be questioned? Why should we be concerned with developments in democratic standards and human rights unfolding outside of our own shores?

Firstly, the genesis of the Northern Territory legislation lay, at least in part, in the conviction of the then Northern Territory Chief Minister Dennis Burke, and Federal Liberal Party President Shane Stone, that New York was a useful model for the development of Northern Territory criminal law, and more particularly, the introduction in the Northern Territory of a policy of zero tolerance for crime. If resort to comparators is good enough for the pro-mandatory sentencing camp, then it is good enough for anyone concerned to make a contribution to the debate. Except that there are, I would argue, some much more useful and relevant comparators available in developing Northern Territory criminal law, than the somewhat surreal choice of New York City law enforcement rules (Gibson 2000: 103, 105). The comparators I will be examining relate to developments in international human rights law, and the regional systems and instruments that could be called in aid to reign in draconian sentencing legislation. The regional systems are one of the most effective means of calling countries to account for

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violation of fundamental human rights and principles of democracy. As these systems develop, they increasingly supply real, effective remedies, and are securing more rigorous enforcement of human rights law, thereby thwarting its violation.

The second reason, however, is much more important. We need to keep pace here in Australia with developments in international human rights law in order to remain a respected, and as far as possible influential, member of the international community. If Australia develops its own conceptions of human rights and democracy, independently of trends unfolding in other parts of the world, it will inevitably suffer a loss of influence in international fora of all kinds, including trade fora. The need for our constitution to keep pace with developments in international human rights law, and to protect Australians whose human rights have been infringed, has been supported at various times by individual members of the High Court. For example, Justice Kirby has held that the Australian constitution is the fundamental law of government in this country, and accommodates itself to international law, including fundamental rights protected by international law. The Constitution, he has observed, speaks not only to the Australian people, but also speaks to the international community as the basic law of the Australian nation, which is itself part of the community of nations (see *Newcrest Mining (WA) Ltd v The Commonwealth*; see also Simpson and Williams 2000).

So what has been happening in other parts of the world from which Australia might draw lessons?

Inter-American system of human rights

All 35 sovereign States of the Americas, including Canada and the US, are members of the Organisation of American States (OAS), which has a highly developed institutional structure. Within this structure there are special organs to secure the enforcement of fundamental rights elaborated in the *American Declaration on the Rights and Duties of Man*, and the *American Convention on Human Rights* (see Harris and Livingstone 1998).

Two of the principal activities of the American Commission of Human Rights pertain to individual complaints and investigative reports. The Commission hears petitions by individual victims alleging breach of the American Convention and Declaration, in much the same way as the United Nations Human Rights Committee, which oversees the implementation of *International Covenant on Civil and Political Rights* (see Ghandhi 1998). The American Commission also conducts comprehensive studies and on-site investigations, leading to the promulgation of country reports on particular issues. A very large number of studies and reports have been conducted by the Commission, including, to take only two examples, a study of the conditions

of Cuban prisoners detained in US jails (see Harris 1998) and broader reports on the state of more general human rights concerns, such as the independence of the judiciary (see for example, IACHR 1992-3).

The American Court of Human Rights hears complaints referred to it by the Commission with respect to OAS members that have accepted the Court's jurisdiction. In essence, it adjudicates over disputes that have been impossible to resolve before the Commission by friendly settlement. The Court has the power to issue interim orders with respect to cases pending before it, and it also has the authority to award compensation to victims. In addition to this, the Court can supply advisory opinions to OAS organs and member States on the interpretation of the American Convention and any other treaties concerning the protection of human rights that are operative in the Americas.

Of particular interest, for present purposes, is that the inter-American system has been seized by questions concerning the rights of indigenous people (Hannum 1998: 323). Both in the context of reports on the human rights situation in particular countries, and individual disputes brought before it, the Commission has been called on to assess whether the rights of native Americans to life, liberty, security, health, fair remuneration for work, and cultural integrity, have been violated by American governments. This has resulted in the introduction of measures by the offending government to secure the future protection of these rights (see Hannum 1998).

Inter-African system of human rights

The inter-African system was established by the 53 member States of the Organization of African Unity (OAU), and like the OAS, the OAU has special institutions to secure the enforcement of its principal human rights instrument, the *African Charter on Human and Peoples' Rights* (see Murray 2000). The African Commission on Human and People's Rights hears individual petitions, in a similar fashion to the American Commission on Human Rights. The Commission has also appointed Special Rapporteurs to investigate problems arising in discrete subject areas. These include a Special Rapporteur on Extra-Judicial, Summary, or Arbitrary Executions, a Special Rapporteur on Women's Rights, and a Special Rapporteur on Prison Conditions and Detention. Traditionally the OAU regime has differed from the OAS regime, in that the former has lacked a judicial body to support enforcement of the African Charter. However, the African Court of Human Rights was established by Protocol in 1998, and, like the American court, it will, once established, have the power to hear cases referred to it by the African Commission, and award interim relief and damages.

A subsisting distinguishing characteristic of the inter-African system lies in the fact that the African Charter is the only human rights instrument which also confers group rights, such as the right to self determination supplied by art 20 and the right to freely dispose of wealth and natural resources guaranteed under art 21. In this respect the African Charter proves that it is possible for a regional human rights instrument to be adapted to reflect and respect local cultural conditions.

Organization for Security and Cooperation in Europe (OSCE)

The OSCE is made of 54 members, ranging from the US and Canada in the west, and encompassing a geographical continuum to the most eastern of the former states of the Soviet Union. As the name suggests, the OSCE is mostly concerned with maintaining security, yet as time has passed the organisation has become increasingly occupied with humanitarian concerns, inextricably linked as they are to the protection and promotion of security.

While the institutions of the OSCE provide only 'soft law' enforcement of international human rights law, there being neither a Commission or a Court to hear complaints, its humanitarian institutions are increasing both in number, and in the range of activities that they pursue. For example, there is an Office for Democratic Institutions and Human Rights, a Representative on Freedom of the Media, and a High Commissioner of National Minorities, all of which report on, survey, and actively promote matters falling within their respective ambits of authority. In addition, the OSCE has run numerous field activities and missions to monitor and promote democracy and human rights in central and east European countries.

Most interesting perhaps, for present purposes, is the so called Vienna process, which allows any OSCE member State to ask questions, and require answers from, another member State, with respect to alleged human rights abuses (Wright 1996: 190, 198-9; Lennox 2000). These issues are then discussed at regular meetings. For example, the former Soviet Union questioned the compliance of United Kingdom immigration law with international humanitarian law in the early days of the process, and in the same period it was invoked by the former Czechoslovakia with respect to the treatment of anti-apartheid demonstrators by the Netherlands (McGoldrick 1990: 923, 926).

European Convention of Human Rights

The most well-established and rigorously enforced regional human rights instrument is the *European Convention for the Protection of Human Rights* (ECHR). Struck by the 41 members of the Council of Europe, and implemented principally via individual petition to the European Court of Human Rights in Strasbourg, and

surveillance by the Committee of Ministers of the Council, the broad range of civil and political rights protected in the ECHR has passed into the corpus of fundamental principles of law recognised in all its member States. This process has been aided by incorporation of convention rights into their domestic law (Palmer 1998: 125). Further, the rich body of case law elaborated by the Court in Strasbourg is an entrenched and widely respected source for delimiting the content of civil and political rights both within Europe and beyond. The Convention is supplemented by other Council of Europe human rights instruments, such as the *European Social Charter*, the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, and the *Framework Convention for the Protection of National Minorities*, which are enforced through separate soft law mechanisms.

European Union

The European Union has its own distinct mechanisms for protecting human rights, and one from which Australia might draw important lessons. Despite the entire absence of a catalogue of fundamental rights in the EC Treaty, or any other express mandate for the European Court of Justice in Luxembourg to promulgate rulings in this field, the Court has nonetheless *implied* an expansive bundle of rights into the EC legal system. These can be invoked by individual litigants against all 15 EU national governments, and against EU institutions themselves (see Ward 2000; Tridimas 1999). In some respects, therefore, the Court of Justice in Luxembourg has been confronted with the same difficulty which is increasingly engaging the High Court of Australia; namely, requests from private citizens for the enforcement of fundamental rights, despite the near entire absence of reference to such rights in a primary constitutional document (Simpson & Williams 2000).

The sources of inspiration of fundamental rights, as the Luxembourg court terms them, are the ECHR (even though the EC is not a signatory to that convention in its own right),[1] other international instruments in which EU member States have collaborated, and constitutional traditions common to the member States. In this way the Court has elaborated a 'case based' system to protect, for example, the right to property, the right to family life, the right to free speech, freedom of religion, and the prohibition on discrimination on grounds of gender. Of perhaps more significance is the fact that *political actors* have, subsequent to the development of the Court's case law, supported its initiatives, by amending foundation constitutional documents expressly recognising, in art 6 of the *Treaty on European Union*, that the 'Union shall respect fundamental rights'. More recently, and perhaps more significantly, the EU's *Charter of Fundamental Rights*, a

1 The EC lacks constitutional competence to sign up to the ECHR: European Court of Justice Opinion 2/94 *Accession by the Community to the ECHR* [1996] ECR I - 1759.

solemn declaration of the EU institutions, may assist in codifying and expanding Court of Justice case law on fundamental rights. Further adherence to human rights norms as reflected in the ECHR, are now a pre-requisite for membership of the EU, and art 7 of the EU Treaty provides for suspension of EU members in the event of serious breach of human rights and democracy standards. Finally, the European Union has 'exported' its insistence on adherence to these rules, by obliging non-EU States with whom it enters into certain types of agreement, to sign up to a clause in which both the EU and the non-EU State concerned recognise the protection of human rights and democracy as 'fundamental' to the agreement, breach of which by either side allows it to be suspended. This has had ramifications in all aspects of the EU's external relations policy, including trade policy. Australia has refused to sign the clause, oblivious to fears of straining the relationship, even though the EU is its major trading partner (Ward 1998; Ward 2001).

Criticisms of Northern Territory legislation in the light of international human rights law

Academic commentaries have alleged three principal breaches of international humanitarian law when critiquing Northern Territory mandatory sentencing legislation. They concern:

- the independence of the judiciary;
- the imposition of arbitrary, cruel, and disproportionate punishment; and
- race discrimination.

In addition to these, tangential concerns have been raised, such as the impact of the legislation in the light of the traditional dearth of translation facilities for Aboriginal languages in criminal courts. Indigenous Australians continue today to have difficulties in obtaining adequate translation in the course of both criminal investigation and court proceedings (Blundell 2000). A further concern relates to the relationship between indigenous Australians and the police, and the concern that policing practices may result in discrimination against them on grounds of their race. This has revolved around fears that non-indigenous Australians may be cautioned in circumstances in which indigenous offenders would be charged.

How then might these arguments be received if they were put to some of the regional human rights bodies described above?

Independence of the judiciary

The imposition of statutory minimum sentences and independence of the

judiciary has been expressly considered by the European Court of Human Rights in Strasbourg. In *T v United Kingdom* the Court concluded that the fixing of a sentence by the British Home Secretary, in the entire absence of a review facility in the hands of a court, breached the art 6 ECHR right to a fair trial, and art 5, which requires that the lawfulness of a person's sentence be reviewable by a court. In the Northern Territory the *Sentencing Act 1997* (NT), as amended, similarly divests the judiciary of any role in reviewing sentences, and places plenary authority in the hands of the legislature. Such a measure, if introduced in a member State of the Council of Europe, might therefore be challenged for breach of arts 5 and 6.

Article 8 of the *American Convention of Human Rights* guarantees independence of the judiciary. The American Commission, particularly in the context of country reports, has emphasised the importance of the doctrine of the separation of powers. It has described separation of powers as the 'logical consequence of the very concept of human rights'. In order to protect the rights of individuals against arbitrary actions of the state, the Commission has expressed the view that it is 'essential' that one of the branches have the independence that permits it to judge both the actions of the executive branch and the constitutionality of laws passed (IACHR 1983; IACHR 1994). Given that the Northern Territory legislation removes this authority from Northern Territory courts, at least in the context of sentencing, then the American Commission might, if such a law were introduced within its jurisdiction, question its compliance with art 8. In addition, the Commission has produced a report entitled *Measures Necessary for Rendering the Autonomy, Independence and Integrity of Members of the Judicial Branch More Effective* (IACHR 1992-3). Therein it states that one such essential measure is a guarantee of freedom of interference with the judiciary by the executive and legislative branches. Meanwhile the African Charter of Human and People's Rights protects judicial independence in its arts 7(1) and 26.

Imposition of arbitrary, cruel and disproportionate punishments

Given that the *Sentencing Act*, as amended, imposes a two week sentence for a 'first strike' offence, a three month sentence for a 'second strike', and 12 months for a 'third strike', and that a 'strike' can be, and indeed has been, registered by commission of even the most petty of offences, the legislation has imposed jail terms that are wildly disproportionate to the seriousness of the offence committed (Ah Kit 2000). Further, it has been argued that such sentences are entirely arbitrary (Hardy 2000).

Article 7 of the *American Convention on Human Rights* precludes arbitrary detention. In the *Gangaram Panday* case the Inter-American Court held that a lawful deprivation of liberty would be arbitrary if the reasons for it or procedures followed are

'unreasonable, unforeseeable, or lacking in proportionality'. Further, art 7(2) of the *African Charter on Human and People's Rights* prevents arbitrary sentences by providing that punishment is to be 'personal and can be imposed only on the offender'.

The European Court of Justice in Luxembourg has repeatedly ruled that the principle of proportionality is one of the general principles of law recognised by the European Community legal order (see Tridimas 1999), and more specifically that any penalty imposed by an EU institution must be proportionate to the alleged wrongdoing (*Garage Molenheide v Belgium*). The EU *Charter of Fundamental Rights* provides in art 49(3) that the 'severity of penalties must not be disproportionate to the criminal offence'.

Race discrimination

Highly persuasive statistics have been compiled, in a number of academic commentaries, which indicate that the Northern Territory legislation is having a disproportionate impact on indigenous Australians, increasing their incarceration rates (Howse 1999; Hardy 2000). Further, in early 2000, the United Nations Committee on the Elimination of Racial Discrimination (CERD) concluded that Northern Territory mandatory sentencing schemes 'appear to target offences that are committed disproportionately by indigenous Australians' (CERD 2000). This allegation is further supported by the bizarre drafting of the *Sentencing Amendment Act 1996* (NT) which introduced the 'three strikes' rules for certain property offences. The Act provides that the regime shall apply to 'property offences' then attaches a schedule listing certain property offences that shall attract mandatory sentencing. Offences not listed include shoplifting, all forms of white collar crime, and credit card fraud. All these offences are better known in Australia as a socio-legal problem among the non-indigenous community, as opposed to the indigenous community.

The *European Convention of Human Rights*, the *American Convention on Human Rights*, and the *African Charter on Human and Peoples' Rights* all contain a prohibition on race discrimination with regard to enjoyment of the rights contained in the (respective) conventions.[2] Any breach of this rule would be taken very seriously by the institutions that have been established to enforce these conventions. Race discrimination in the form of unequal treatment before the law might be viewed particularly severely by the European Court of Human Rights, and could precipitate, in addition to infringement of equality before the law, breach of the art 3 ECHR prohibition on cruel, unusual and degrading treatment. This is so

2 Article 14 ECHR; art 1 of the American Convention; art 2 of the African Charter.

because it has been argued that 'publicly to single out a group of persons for differential treatment on the basis of race might, in certain circumstances, constitute a special form of affront to human dignity' (see *Abdulaziz Cabales and Balkandali v United Kingdom*). Further, I would argue that, if the Northern Territory legislation were in fact racially discriminatory, this would mean that the parameters of the debate have been too conservative. Rather than discussing whether mandatory sentencing had any merit, we should have been addressing the problems generated by a racially discriminatory criminal justice system.

Tangential concerns

As mentioned above, the advent of mandatory sentencing has served to highlight subsisting difficulties in the broader treatment of Aboriginal people in the criminal justice system. First, the legislation has brought into sharp relief the absence of translation facilities for indigenous Australians, which contrasts markedly with the provision of translation for 150 European and Asian languages in Australian courts (see Blundell 2000). While the Federal Government has recently taken initiatives to correct this state of affairs, the failure to secure the most basic tenets of the right to a fair trial is a startling breach of a universally recognised, and indeed fundamental, legal principle. In itself it might warrant investigation via a Royal Commission, either addressing this subject alone, or in the context of a broader Royal Commission of Inquiry into the treatment of indigenous Australians in the criminal justice system.

In addition to this, mandatory sentencing has also underscored differential treatment of indigenous Australians with respect to policing practices. Indeed, on 3 April 2000, during the ABC Four Corners program 'Go to Jail', one police officer said that '[p]art of the reason mandatory sentencing hits these small remote communities so hard is that, while the clear up rate for burglary in Darwin is around 15 per cent, everyone here gets caught'. The reasons why 'everyone' gets caught in Aboriginal communities are doubtless many. However, evidence that Aboriginal people are over-represented at the point of charging (that is, they are likely to be charged in circumstances in which a non-indigenous Australian might be cautioned), and indicators that there are substantially more police per head of population in remote communities than in the city of Darwin (see Australian Bureau of Statistics 1999), might contribute to this phenomenon.

Further, if race discrimination permeates policing practices, this would make for a stark contrast with developments in Europe. There a large number of initiatives have been taken, and continue to be taken, to ensure that policing in multi-ethnic societies

complies with human rights law.[3] To the same end the International Committee of the Red Cross has been particularly active in Africa, and indeed elsewhere, in providing police forces with training in international human rights law (de Rover 1998). Given these developments, it might be timely for a review of police training programs in the Northern Territory (and perhaps other parts of Australia), to determine whether they equip police with adequate knowledge of international human rights rules, and how their observance might be secured in daily police work.

Conclusion

It can be seen, therefore, that regional systems for the enforcement of human rights are becoming increasingly prevalent and influential. From Africa in the west to the Americas in the east, regional bodies are taking greater responsibility for securing adherence by States to human rights and fundamental freedoms. It seems, in addition, fairly likely that if it were introduced in their respective jurisdictions, mandatory sentencing of the type in force in the Northern Territory would be closely scrutinised by all of the regional human rights bodies here described, and doubts would almost certainly be raised about its legality.

Australia is, of course, not party to any regional system for the protection of human rights. A reason most commonly cited for this is distrust by our neighbours to the north in the essentially 'eurocentric' nature of the contemporary human rights discourse. Yet, as has been pointed out by one prominent South East Asia leader, Asian critics of regional human rights bodies give too much credit to the Europeans, and overlook the fact that for thousands of years concepts of human rights and justice have been articulated in the teachings of major eastern philosophies and religions (Ramos Horta 1996). Nor have concerns over 'eurocentricity' stopped the emergence of regional instruments and mechanisms in Africa and the Americas. Given Australia's long tradition in promoting the development of international human rights law, and the credit this has brought to Australia in the past on the global stage (Pritchard 2000), might not the time have come for Australia to adopt, and vigorously pursue, the cause of establishing a regional human rights body? Would not such an initiative be particularly warranted in the light of the fact that

3 See, for example, Macpherson Sir W *The Stephen Lawrence Inquiry* The Stationery Office, London 1999 (An inquiry into the death of Stephen Lawrence, a young black British man); *The Rotterdam Charter: Policing for a Multi-ethnic Society* (drawn up at the Rotterdam Conference, 30 May – 1 June 1996); Ten Basic Human Rights Standards for Law Enforcement Officials; Council of Europe Police Programme. For documents on police training, human rights, and multi-ethnic policing in the United Kingdom see the homepage of the Home Office of the United Kingdom.

Australia is now the only Western nation that does not have a bill of rights in its constitution and is not a member of a regional human rights instrument? [4]

The current Federal Government is presently pursuing an inverse agenda. On 29 August 2000 the Minister of Foreign Affairs Alexander Downer, Attorney General Daryl Williams, and the Minister for Immigration and Multicultural Affairs, Philip Ruddock, issued a press release in which they unveiled their plans for *paring back* the human rights powers of United Nations Committees; the only international institution for human rights protection in which Australia participates. Of particular concern is their assertion that 'Australia will only agree to visits to Australia by treaty committees and requests from the Committee on Human Rights "mechanisms" for visits and the provision of information where there is a compelling reason to do so'. Such an initiative is entirely at odds with the practice of 35 member States of the Organisation of American States, the 53 members of the Organisation for African Unity, and the 54 members of the Organisation for Security and Cooperation in Europe (which encapsulates members of the Council of Europe). It might be questioned, therefore, whether any of these 142 States would support an Australian sponsored curtailment of the UN's inspection powers. If the Australian Government's proposals either fail, or are supported only by states with a poor record for protecting and enforcing human rights, what might the costs be, in terms of loss of good will, in international fora of all kinds in which Australians participates? Given that there is no sign that the Government's current agenda will be abandoned, or even refined, the answers to these questions will only be reckonable in time. ●

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Organisation of African Unity: www.oau-oua.org/
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Web-based documents

Draft Charter of Fundamental Rights of the European Union: fundamental.rights@consilium.eu.int

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