

Book Reviews

Implementing Human Rights Norms: Judicial Discretion and the Use of Unincorporated Conventions

Wendy Lacey

Adelaide: Presidian Publications, 2008, 301pp, \$137.50

Implementing Human Rights Norms provides a legal analysis of how Australian judges are influenced and guided by unincorporated international human rights conventions in the exercise of their discretionary powers. Despite the push for a bill of rights gaining momentum, until now there has been a lack of literature which considers the important role the interpretative principles of the common law can and do play in the protection of human rights. The book fills this gap, examining the scope and legal basis for judges using interpretative principles to promote the protection of human rights through the use of unincorporated conventions. Lacey's work is exceptional: her research is thorough, her analysis is well thought-out and logically structured, and her writing is clear and concise.

While Australia is a strong supporter of human rights protection at the international level, there has been an unwillingness to formally protect those rights under domestic legislation. In order to facilitate a more informed debate, there is clearly much to gain from an exploration of how common law principles or constitutional implications can promote human rights through the use of unincorporated conventions. The principal way this is achieved is through judicial discretion, which is the primary mechanism for ensuring that the law is flexible. It allows judges to adapt the law to the individual circumstances of each case, alleviating the risk of injustice. It seems uncontroversial that the exercise of this discretion should be informed in part by the body of international human rights law, as it does in administrative decision-making. Strangely, while there has been significant discussion on the impact of international norms in the administrative context, judicial discretion has not been subject to the same scrutiny. Lacey's book seeks to remedy this disparity.

The analysis is developed in three parts. Part one provides a contextual background to the discussion, examining the operation of judicial discretion and human rights in Australia. Lacey considers the prevalence, purpose and limits of judicial discretion in Australia and the principles and rules which regulate its exercise and review. This, coupled with a

discussion of Australia's engagement with and obligations under international human rights law, demonstrates that there is a gap between the domestic implementation of human rights and Australia's legal obligations. Recognising this, part two analyses the circumstances in which the interpretative principles of the common law allow judges to use unincorporated instruments in informing their decisions. Providing an examination of the principles in jurisdictions where there is a bill of rights, the law in Australia is compared with the UK, New Zealand, and Canada. This comparative analysis gives some indication of the impact of the adoption of a bill of rights on these principles, while also allowing for a greater understanding of how they currently operate. Lacey then investigates the relevance of international standards to the exercise of judicial discretion, considering the Australian jurisprudence in cases where international human rights norms have been used to inform such discretion. Noting that this is often done on an irregular basis without sufficient reasoning, she suggests a more principled approach which would allow a more systematic application in future cases.

The third section is devoted to discussing the constitutional implications of any developments in the law arising out of the use of the common law's interpretative principles when judges exercise discretion. According to Lacey, despite the doctrine of parliamentary supremacy, it seems likely that the Constitution limits the ability of parliament to interfere with the interpretative principles and thus the exercise of some judicial discretions. This would make an attempt by Parliament to alter these principles unconstitutional, protecting judicial discretions from parliamentary intrusion. The scope of federal parliament's legislative power under the Constitution to override developments of the common law which occur via the interpretative principles is also examined. In the final chapter Lacey proposes an approach which deals with the limits that arise out of the Constitution which acknowledges and protects the crucial role that some discretionary powers play in the judicial system.

Implementing Human Rights Norms allows for a better understanding of how the common law, especially in the exercise of judicial discretion, can be used to ensure greater protection of human rights. Lacey's work will remain relevant even if a bill of rights is adopted: her comparative studies with other jurisdictions show that the common law is likely to continue to use discretions in much in the same way to guard basic rights. Moreover, the book makes it clear that for a bill of rights to be of real use it must operate as a fundamental part of the legal system, complementing the positive features of the common law tradition. Judicial discretion allows

for flexibility in decisions, allowing them to be sensitive to the position of all parties to a dispute. As Lacey points out, this inevitably brings the potential for abuse. In order to prevent this she suggests that principles and guidelines for the exercise of discretion should be developed, and that international human rights norms form part of the body of law which influences those principles and guidelines. The sensible result Lacey prefers is for the courts to develop a rebuttable presumption that when exercising a judicial discretion, judges take account of any human rights which may be affected, guided in the process by Australia's commitments under international law. If the Australian courts were to adopt such a position it would not only allow for better protection of human rights, but do so in a way which was coherent, reasonable and justifiable. Encouraging judges to engage with international human rights norms would force them to consider and explain why they should maintain or discard the rights involved in a particular case, regardless of the conclusion they eventually reached. Wendy Lacey's book makes a timely and important contribution to the debate about and understanding of the role of human rights in the Australian legal system.

*Simon McKenzie**

Calling out the Troops: The Australian Military and Civil Unrest, the Legal and Constitutional Issues

Michael Head

Sydney: The Federation Press, 2009, 256pp, \$49.95

Calling out the Troops is a concise, yet particularly insightful text, which addresses Australia's legislative response to the threat of terrorism. In particular, it closely examines recent developments contained in the *Defence Legislation Amendment (Aid to Civilian Authorities) Act 2006* (Cth). Dr Head, a recognised expert in military call-out law, examines the legislation which was implemented in 2000 and significantly expanded in 2006 to allow the Australian Defence Force (ADF) troops to be called out against civilians in the event of broad, ill-defined triggering events such as 'aviation incidents,' 'mobile terrorism', 'threatened domestic violence' or in defence of 'Commonwealth interests' (page 105). Once called out, the ADF may (among other things) use lethal force, interrogate people and shoot down civilian aircraft – all without any requirement to notify the public. Head foresees this text as being particularly useful for

* Simon is a fourth year student at the University of Tasmania and was a Board Member of the University of Tasmania Law Review in 2009.