Human rights & public interest advocacy

Neither soft law nor esoteric principle, human rights are relevant to social justice and to the public interest in Australia.

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An artificial distinction has developed in Australia between human rights on the one hand and public interest advocacy on the other. This distinction is no doubt the product of a range of factors, including the absence of constitutional guarantees of rights in Australia and, more generally, the Australian reluctance to analyse issues in terms of rights. Whatever its origins, the result of this distinction is the common assumption that the term 'human rights' has relevance only to what happens in other countries, usually those without the blessings of the common law and a Westminster system of government. Public interest advocacy has a primarily domestic focus, working within the Australian legal system and using its vocabulary and institutions 'to promote the public interest through challenging laws, policies and practices which are unjust or deficient'.

In Australia the term 'human rights advocacy' generally conjures up exotic locations and issues, and idealistic 'soft' standards. 'Public interest advocacy' on the other hand connotes tougher, local issues, and invocation of the domestic legal system's harder-edged sanctions to remedy them.

An editorial in the Melbourne *Age* (3.6.93) captures well the general national confidence that the vocabulary of human rights is inappropriate in discussing Australian social and legal issues. It was a response to an Open Family Foundation advertisement which dramatically depicted organised violence against homeless youth, and to some remarks made by Brian Burdekin, the Human Rights Commissioner, criticising Australia's performance of its international human rights commitments. The editorial was titled 'Let's stop crying wolf' and it began:

> Australia is not an abuser of human rights. People here are not tortured by security police or thrown into jail for their political opinions... Homeless children are not run down and shot by vigilante death squads here ...

The editorial concluded that while Australia was not entirely blameless, 'on a world scale, Australia is a decent and compassionate society and it is unfair ... to pretend otherwise'.

This editorial assumes an extraordinarily narrow understanding of the term 'human rights', confining them to a few narrow civil and political rights such as the right to freedom from torture and the right not to be imprisoned for political opinion. In fact, there are other traditional civil and political rights which are violated constantly and systemically in Australia: for example, the well-documented discrimination faced by women at all levels in the paid and unpaid workforce and the pervasive discrimination against our indigenous peoples.

The definition of human rights employed in the editorial is further narrowed by excluding economic, social and cultural rights from its scope: unemployment, it says, is not a human rights issue, despite its recognition in the Universal Declaration of Human Rights and the Covenant on Economic, Social and Cultural Rights, both of which bind Australia.

If we define human rights in a way that applies only to more distant lands, Australia scrubs up pretty well. But if we accept less parochial, internationally negotiated definitions of human rights, it is clear that there are significant human rights questions in Australia. Indeed all the areas in which PIAC has worked over the past ten years have a human rights dimension to them. This is as true of its work in the *Najovska* and *Proudfoot* discrimination cases as it is of its work in the area of consumer rights and toxic chemicals.

My thesis is that the notions of human rights and of public interest advocacy could be fruitfully combined in Australia, and that this is a union worth sponsoring as we move towards the millenium. PIAC has already begun moving in this direction, but should do so in a more thorough way. International human rights law presents a method for expanding, deepening, and internationalising the public interest.

The First Optional Protocol

Australia has recently accepted three separate procedures whereby individuals can make complaints about Australia's human rights performance to international bodies. Using these mechanisms allows international scrutiny of Australian laws and places considerable pressure on the government to institute reform. At the moment there seems to be very little knowledge about, or invocation of, these procedures.

Clearly they will put pressure on the Australian Government only if they are used regularly.

The first of these rights of individual communication is under the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR). Since 25 December 1991, anyone within Australian jurisdiction has had the right to complain to the United Nations Human Rights Committee (HRC) about violations of rights set out in the ICCPR. These rights include the right to life, to freedom from torture and other cruel or inhuman treatment (which is defined to include freedom from subjection to medical or scientific experimentation without consent), to freedom from arbitrary arrest or detention, to procedural safeguards when charged with a criminal offence, to privacy, to non-discrimination, to freedom of speech, association and religion, and the right of minorities to preserve their own culture.

Making a communication

A person who considers that their rights have been violated can make a complaint (technically known as a communication) to the HRC, which meets periodically in Geneva and New York. This involves posting a relatively simple form and supporting documentation to Geneva.

Before the communication is made, its author must have exhausted all domestic remedies. In other words, a person must take advantage of whatever action is open in the Australian legal system to remedy the complaint before it is dealt with at the international level. In some cases this is not a difficult condition to comply with. As Australia offers relatively little protection for the rights set out in the ICCPR, apart from discrimination legislation, there are often no domestic remedies to exhaust in human rights cases.

When the communication is received by the UN Centre for Human Rights it goes through a two-stage procedure. The comments of the state involved are sought at both stages. The HRC must first determine that the communication is admissible – in other words that it complies with the procedural requirements of the Optional Protocol: it must not be anonymous, it must concern a right protected by the ICCPR, and all domestic remedies must have been exhausted. Once this hurdle is negotiated the HRC considers the merits of the case, and concludes by 'adopting views' on whether a violation of the ICCPR is made out. These views are conveyed to both the author of the communication and to the state concerned, and are presented to the General Assembly.

Although there is some debate about whether the HRC's views formally bind parties to the Optional Protocol, if a violation of the ICCPR is found most states are under considerable international and domestic pressure to alter their laws or practices to conform with the views of the HRC. Certainly, an adverse finding by the HRC against Australia would be a very strong force for law reform.

A number of cases have already been brought against Australia under the Optional Protocol. The most advanced and best known of these cases is the communication of Nicholas Toonen, a Tasmanian gay activist. He has argued that Tasmania's continuing criminalisation of homosexuality violates both Article 17 of the ICCPR, (protecting a right to privacy), and also Article 26 (guarantee of non-discrimination). Toonen has successfully negotiated the admissibility phase of the proceedings, helped by the fact that Australia, contrary to the urgings of the Tasmanian Government, did not contest admissibility. The case is now in the merits phase. The HRC is waiting for the response of the Australian Government on the merits. It was due in late May 1993, but Australia requested an extension, reflecting the very intense negotiations between the Commonwealth and Tasmanian Governments on this issue.[1]

A claim against Australia by Cambodian applicants for refugee status detained at Port Hedland is being mooted.[2]

Some reservations

I do not want to suggest that the Optional Protocol procedure is a panacea for human rights violations in Australia. There are a number of reasons why it will not always be appropriate.

It is not a quick procedure. Over a 14-year period, the Committee had 468 communications registered for consideration. Of these, 124 were declared inadmissible and 70 discontinued or withdrawn; views have been adopted by the Committee in 119 cases, 93 of which were found by the Committee to involve a violation of the ICCPR. In July 1991 the Committee had 158 registered cases pending and several hundred other communications on file awaiting further information from their authors. Over three sessions the Committee had time to formulate its views on 9 cases, make 16 determinations that a communication was inadmissible and make procedural decisions in a number of pending cases.

Even when a communication is held admissible, it may be four years or more before the Committee considers the merits of the case. The Committee has recently taken steps to streamline its processes by appointing a Special Rapporteur on New Communications to process communications as they are received between Committee sessions. In some cases the Special Rapporteur has recommended to the Committee that communications be declared inadmissible without being first sent to the state concerned. This, however, is unlikely to ever provide a rapid resolution of a human rights complaint. The problem of delay is slightly mitigated by the Committee requesting states to take interim measures in order to avoid irreparable damage to the victim of the alleged violation.

Although the Committee has responded firmly on some occasions to egregious violations of the ICCPR, it has been very cautious in interpreting the rights set out in the ICCPR. The Committee has readily accepted states' explanations of discriminatory treatment even if they relied on questionable historical assumptions and claims of administrative convenience.[3] Elizabeth Evatt was elected in 1992 to the HRC and I suspect that she will have a very salutary influence on the jurisprudence of the Committee.

The record of the Human Rights Committee since its first meeting in 1976 indicates that it does not regard itself as a 'court of fourth instance', an international appellate tribunal which will review decisions of national courts. It has on many occasions refused to consider whether domestic law has been properly applied, and has generally been reluctant to reassess judicial evaluation of the facts in a case or the exercise of discretion by

domestic authorities. The Committee has seen its role as general supervision of national implementation of the ICCPR, leaving individual states with a wide 'margin of appreciation'; a doctrine first developed in the jurisprudence of the European Court of Human Rights.

Other procedures

Individual complaints can also be made under Article 14 of the Convention on the Elimination of All Forms of Racial Discrimination and under Article 22 of the Convention against Torture. The procedures are quite similar to that under the Optional Protocol: for example, they require the exhaustion of all domestic remedies. These avenues for human rights complaints have not been used very much; indeed there have only ever been two individual complaints made under the Race Discrimination Convention (which has been in force for 25 years) and neither were held to be a violation of the Convention; and nine under the Torture Convention. Australian acceptance of both these procedures may breathe some new life into them.

Although the Australian Government has set up a special unit to respond to individual communications made against it, there is no institution to which potential claimants in Australia can turn for advice, although the Human Rights and Equal Opportunity Commission has assisted some applicants in an ad hoc way. Development of expertise in making international claims would be a valuable direction for an established and respected institution such as PIAC to explore. These claims can generate tremendously powerful pressure for law reform in particular areas.

Using international jurisprudence

A different way in which international human rights law can contribute to public interest advocacy is through offering a significant body of principles and jurisprudence which can be used in domestic court cases and in law reform proposals. Australian courts appear to be increasingly prepared to consider international law in the interpretation of Australian law, especially now that Australia has accepted direct international scrutiny of its implementation of various human rights conventions.

In the *Mabo* case, for example, Justice Brennan said:

> Whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.[4]

Sources of international human rights law include the terms of the human rights treaties themselves, discussion of the terms of the treaties by the treaty monitoring bodies such as the Human Rights Committee, and decisions of international tribunals such as the European Court of Human Rights and the International Court of Justice. Particularly useful are the General Comments adopted by the various treaty monitoring bodies. These three comments offer a great deal to the development of Australian law.

The World Conference on Human Rights

The PIAC Summit coincides with the World Conference on Human Rights in Vienna. I thought it would be worthwhile concluding by considering some of the issues on the agenda of the conference. The official slogan of the Conference 'Human Rights: Know Them, Demand Them, Defend Them' nicely sums up the direction I am urging on public interest advocates.

The Vienna Conference marks the twenty-fifth anniversary of the first World Conference in Teheran in 1968. That Conference was held in turn to mark the twentieth anniversary of the adoption of the Universal Declaration of Human Rights. The preparations for the Vienna Conference have been marked by controversy and bitterness.

Developed, western nations have traditionally regarded civil and political rights as the paradigm of human rights, whereas developing nations have typically insisted that economic, social and cultural rights should take priority over all others. There is also debate over whether the right to development means that richer nations are required to support the less developed, and how far poverty is connected to human rights abuse. Another issue is the definition of the right to self determination: does it apply only to people in colonial situations (of which there are very few left) or should it also extend to members of minority and indigenous groups?

Also contentious is the role of international supervision in the protection of human rights: for example, the declaration adopted at a regional preparatory meeting in Bangkok in March, at which Australia was only allowed observer status, stated that national sovereignty had primacy over international responsibility for upholding human rights.

At an international level, a clear statement of the indivisibility of civil and political and economic, social and cultural rights would make myopic approaches to human rights, such as that in the *Age* editorial I quoted earlier, more difficult to sustain. Also valuable is a proposal for a strong statement of the human right to a safe and sound environment, as is an Amnesty International proposal to create the office of a High Commissioner for Human Rights to coordinate UN human rights activity.[5] Strong statements on women and children's rights could be usefully invoked in the Australian political and legal debate on equality.

PIAC's charter is 'to promote the public interest through challenging laws, policies and practices which are unjust or deficient'. I have argued here that international human rights law gives it a lot of ammunition to do so.

References

1. Australia has since replied, and the case will be considered later this year – Ed.
2. A communication was made in late 1993 – Ed.
3. For example, *Vos v Netherlands Report of the Human Rights Committee*, UN Doc. A/44/40 (1989), p.232.
4. *Mabo v Queensland* (No. 2) (1992) 175 CLR 1, 29.
5. The creation of such a position has since been announced although an appointment is yet to be made.

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