HR Panel, Draft I: 28.ii.95

Discussion Paper

Rights: Proliferation & Adjudication -

Tribunalisation in an Age of Internationalisation

I Introduction

1.1 To place the following discussion, appropriately, in some theological context, it is as well to begin with a brief restatement of significant comments of the Church in relation to human rights in recent times. For example, the *Pontifical Commission "Justitia et Pax"* in 1974, said:

> As we are well aware, the Church's attitude towards human rights during the last two centuries too frequently has been characterised by hesitations, objections, reservations and, on occasion, even vehement reaction on the Catholic side to any declaration of human rights made from the standpoint of liberalism and laicism[1].

Less well known is a statement in the same year by Pope Paul VI: "The promotion of human rights is an evangelical demand and it should have a central place in the Church's ministry."[2]

1.2 The Church's promotion of human rights since the making of these statements has developed markedly.[3] Activity in more profane circles in relation to human rights has been equally vehement, developed but rather inconsistent. A number of recent examples of actions by the Commonwealth Government are illustrative of the complexity of human rights issues, be it in relation to international instruments and or on the question of a Bill of Rights:

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[1] Working Paper No.1, *The Church and Human Rights*, (Vatican City: Pontifical Commission "Justitia et Pax", 1975) para.18.

[2] Cited by Claude Geffré, "Toward a Christian Interpretation of Human Rights," in his *The Risk of Interpretation: On Being Faithful to the Christian Tradition in a Non-Christian Age*, (trans.D. Smith) (New York: Paulist Press, 1987) 216-30 at 216. No further reference is given by Geffré, Professor at the Institut Catholique de Paris, as to the original source of Paul VI's remark.

[3] For comments by John Paul II on human rights, see *Redemptor Hominis*, n.17, and on human rights and evangelisation, *Sollicitudo rei Socialis*, n.41. For a useful history, see the papers of Joseph Joblin and Walter Kasper in *Human Rights and the Church: Historical and Theological Reflections*, (Vatican City: Pontifical Council for Justice and Peace, 1990) and W. Huber, "Human Rights - A Concept and Its History," *Concilium* 124 (1979) 1-10. Huber notes generally that in the modern age, human rights are used either as an instrument of criticism or as an instrument of legitimation: *cf.* the pithy comment, quoted by Kasper, attributed to one of the members of the drafting commission for the UN Universal Declaration on Human Rights: "We are unanimous about these rights on condition that no one asks why." *Ibid.* 48. The most recent, and complete, critique of human rights, albeit in the context of an exhaustive critique of feminist theology, is by Francis Martin, "Human Rights and Ecclesial Communion" in his *The Feminist Question: Feminist Theology in the Light of Christian Tradition*, (Grand Rapids, MI: William B. Eerdmans Publishing Company, 1994) 293-330.

(i) the somewhat innocuous proclamation in 1993 of the so-called *Religion Declaration* as an international instrument for the purposes of the Human Rights and Equal Opportunity Commission occasioned much debate in the Federal Parliament and elsewhere as to its need and import.[4] Apart from the litany of statements which the Declaration contains, some of which are clear and some of which are quite obscure, to date its effects are not immediately evident.

(ii) following a finding by the (UN) Human Rights Committee that Australia was in breach of its international obligations, the Federal Government used a specific provision of the *International Covenant on Civil and Political Rights* (1966) to enact legislation to protect any persons (not representing any specific group protected by international treaty) who choose to engage in "sexual conduct in private" and who "fear persecution" from the provisions (unused for the last 10 years) of state criminal laws in relation to homosexuality.[5]

(iii) the same Government currently is seeking to enact retrospective legislation to deny identified persons (refugees), who have been physically persecuted and who fear on-going physical and other persecution (notably on the basis of the Peoples Republic of China's "one-child" policy), from being protected by international treaty to which Australia is a signatory.[6]

(iv) appeals to international instruments to which Australia is a signatory, such as the *Convention on the Rights of the Child* and the *Convention on the Elimination of Discrimination Against Women*, have not stopped clinical trials of abortifacient drugs, nor have they figured prominently in government-sponsored discussion about the sterilisation of intellectually disabled children.[7]

1.3 Against this background of on-going discussion in Australia, and in the international community, of the determination of rights - determination in the sense of definition or declaration, and in the sense of adjudication between rights - the current paper is crafted.

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[4] On this *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, 1981*, see the *Discussion Paper* of the Bishops' Conference of September, 1993 (attached).

[5] (i) A copy of a letter from the Bishops' Conference to the Attorney-General, dated 27th October, 1994, outlining concerns with the *Human Rights (Sexual Conduct) Bill*, now *Act*, is attached. Despite protestations in the *Act's Explanatory Memorandum* to the effect that it does not affect regulation of the sex industry, it has been reported (*Sydney Morning Herald* 23rd February, 1995, p.3) that a Queensland prostitute is challenging that State's laws in relation to prostitution relying on the *Human Rights (Sexual Conduct) Act 1994*.

(ii) For a useful discussion of the "Toonen Case", especially the procedures of the Human Rights Committee and brief comments on its findings, see Hilary Charlesworth, "Protecting Human Rights," *Law Institute Journal* (June, 1994) 462-63. The most detailed treatment of this Committee, including its operations, is the definitive work of D. McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* , (Oxford: Clarendon Press, 1994).

[6] The most systematic treatment of Australia's obligations under international treaties to which it is a party in relation to refugees is by Savitri Taylor, "Australia's Interpretation of Some Elements of Article 1A(2) of the Refugee Convention (Marginalising the International Law Claims of On-Shore Asylum Seekers in Pursuit of Immigration Control and Foreign Policy Objectives)," *Sydney Law Review* 16 (1994) 32-71 and "Australia's Implementation of its Non-Refoulement Obligations Under the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights," *UNSWLJ* 17 (1994) 432-74. For comment on the one-child policy in China from the Vatican, see the report, attributed to *Asia News*, distributed by the Papal Institute for Foreign Missions, "Torture used in birth campaign," *Sydney Morning Herald* 16th February, 1995, p.8.

[7] Copies of the Bishop's Conference *Information Paper* in relation to clinical drug trials of RU 486 (12th August, 1994) and the submission to the Family Law Council on the sterilisation of intellectually handicapped children (March, 1994) are available on request.

Increasingly, the proliferation of rights - or claims thereto - has been paralleled by a growth in tribunals which adjudicate on them, hence the term "tribunalisation."[8] Increasingly, too, rights are claimed and adjudicated by reference to policy of one sort or another rather than to strict legal precedent or principle. Further, rights which previously were the subject of adjudication only by national or local tribunals now come under the gaze of international eyes.[9]

1.4 Part of the milieu immediately relevant to this Paper is the reference to the Senate Legal and Constitutional Legislation and References Committee to review and to report on the processes by which Australia accedes to and complies with its obligations under international treaties.[10] Equally relevant is the debate over a Bill of Rights for Australia which has been given new focus, and perhaps impetus, by the ACT Legislative Assembly's release in December, 1994 of an exposure draft of a *Bill of Rights Bill 1994*.[11] The debate over a Bill of Rights has been, and continues to be, rehearsed elsewhere and need not be repeated here.[12]

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[8] Mr Justice Teague uses this term in his "Tribunals and the Judicial Arm of Government," in *Administrative Tribunals: Taking Stock*, (ed. R. Creyke) (Canberra: Centre for International Law, 1992) 21-31.

[9] In this regard there is a growing body of critical literature. See, for example, C. Schreuer, "The Waning of the Sovereign State: Towards a New Paradigm for International Law?" *European Journal of International Law - Journal européen de droit international* 4 (1993) 447-71; U. Fastenrath "Relative Normativity in International Law," *EJIL* 4 (1993) 305-40; S.V. Scott, "International Law as Ideology: Theorizing the Relationship between International Law and International Politics," *EJIL* 5 (1994) 313-25; R. McCorquodale, "Self-Determination: A Human Rights Approach," *International and Comparative Law Quarterly* 43 (1994) 857-85. Scott's article is illuminating for its treatment of the politics of international law, the general impotency of international law, and the perception that international law is either a "myth" or a "panacea"; McCorquodale notes that "human rights are interpreted in the context of current standards" without observing that those standards are extremely variable. Finally, see also J.V. Schall, "Human Rights as an Ideological Project," *American Journal of Jurisprudence* (1987) 47-61; Kirby, P., "The New World Order and Human Rights," *MULR* 18 (1991) 209-15 and T.H. Jones, "Legal Protection for Fundamental Rights and Freedoms: European Lessons for Australia?" *Fed Law Rev* 22 (1994) 57-91.

[10] The Senate Committee received its reference on 8th December, 1994; its Terms of Reference are attached. Submissions close on 30th March, 1995; its reporting date to Parliament is 30th August, 1995. The most recent academic writing on the topic is summarised neatly by Professor Cheryl Saunders, "The External Affairs Power in the Australian Constitution," *International Law News* 24 (October,1994) 36-40. In the light of decisions of the High Court beginning with *Koowarta v Bjelke-Petersen* (1982) 153 CLR 153 and the *Franklin Dam Case (Tasmania v Commonwealth* (1983) 158 CLR 1), it would be otiose in this paper to consider whether the Commonwealth Government has constitutional power to enter into international treaties. Saunders summarises the position well:

> ...we know that, subject to express and implied constitutional limitations, the Commonwealth can rely on the external affairs power to give effect to any international obligation imposed by a bona fide international agreement. The validity of the treaty itself, at international law, is probably irrelevant. Equally, we know that the power authorises the enactment of legislation on matters physically external to Australia. In all probability, the power is not confined to the implementation of treaty obligations, at least where the legislation deals with a matter of international concern; the notion of an obligation is very broad. It is likely that it extends also to the implementation of other measures with an international base: a rule of customary law...or perhaps to the recommendations of international bodies. In some circumstances, the power may authorise legislation on matters otherwise of international concern, in the absence of a treaty, or some form of externality. And, finally, a law which draws its authority from implementation of a treaty must be `capable of being reasonably considered to be appropriate and adapted to the object of the agreement' and need not necessarily implement all of the provisions of the treaty in question.

ibid. 37 (Saunders' extensive footnotes in support of each proposition are omitted.)

[11] The closing date for submissions on this Bill is 30th May, 1995.

[12] (i) Among recent literature, see Mr Justice Kirby, "The Bill of Rights Debate," *Australian Lawyer* (December, 1994) 16-21; L. Zines, "A Judicially Created Bill of Rights?" *Sydney Law Review* 16 (1994) 166-84; Sir Anthony Mason,

1.5 Against the political and legal background outlined above, this paper provides an overview of the diverse kinds of extra- or quasi-judicial bodies which determine rights in Australia at a Federal level with special reference to international instruments; note must be taken also of avenues of redress to international tribunals such as the United Nations Human Rights Committee and the International Court of Justice to which Australian citizens may now apply.[13] The paper provides also a case study and a synopsis of rights recognised by the High Court.

IV - International Instruments: *A Case Study*

4.1 Again to contextualise the discussion from a theological perspective, it is instructive to note the recent remarks of Pope John Paul II. In an address to a symposium convened last November by the Congregation for the Doctrine of the Faith entitled "Catholics and the Pluralistic Society: The Case of Imperfect Laws," the Pope said:

> If at times the public authorities must tolerate what they cannot forbid without causing an even greater evil, they can never legitimise as a right for some what radically threatens the fundamental right of others. A law that does this is not a true law. [Quoting Pope John XXIII from *Pacem in terris*, ch.2, he continued] "In modern times, the achievement of the common good finds its basic direction in the rights and duties of the individual. Therefore the chief tasks of the public authorities consist, above all, in recognising, respecting, ordering, safeguarding and promoting those rights, and in contributing, as a result, to making the fulfilment of the respective duties easier."[14]

"Express Guarantees of Rights in the Australian Constitution," an address to the University of the Northern Territory, Darwin, 21st July, 1994; Sir Maurice Byers, "The Lawmaking Role of the High Court," *Australian Bar Review* 11 (1994) 187-96; K. Rubenstein, "Towards 2001: An Assessment of the Possible Impact of a Bill of Rights on Administrative Law in Australia - Part II," *Australian Journal of Administrative Law* 1 (1994) 59-79. Further bibliographical material is provided in the Discussion Paper issued by this Department on 6th April, 1994 entitled *A Bill of Rights for Australia?* (Copy attached).

(ii) Particular attention should be paid to the following recently published works: M. Wilcox, *An Australian Charter of Rights?* (Sydney: The Law Book Company, 1993); M. Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia*, (Melbourne: Oxford University Press, 1990); C.S. Nino, *The Ethics of Human Rights*, (Oxford: Clarendon Press, 1993); P. Thornberry, *International Law and the Rights of Minorities*, (Oxford; Clarendon Press, 1992); J. Crawford (ed.), *The Rights of Peoples*, (Oxford: Clarendon Press, 1992); K.E. Mahoney & P. Mahoney (eds.), *Human Rights in the 21st Century: A Global Challenge*, (The Hague: Martinus Nijhoff, 1993); N. O'Neill & R. Handley, *Retreat from Injustice: Human Rights in Australian Law*, (Sydney: The Federation Press, 1994); P. Alston (ed.), *Towards an Australian Bill of Rights*, (Canberra & Sydney: Centre for International and Public Law at the Australian National University & the Human Rights and Equal Opportunity Commission, 1994) and the newly released *Australian Journal of Human Rights* published by the Human Rights Centre at the University of New South Wales.

[13] The character of these bodies lend themselves to being described as tribunals; formally they have no powers of enforcement of their findings other than by the international equivalent of `peer pressure.' See further the works cited in footnote 5 *supra*. In this paper, there will be no treatment, *per se*, of tribunals established by the States of Australia, nor by certain industries, such as the Australian Banking Industry Ombudsman, the Life Insurance Complaints Board, and the Superannuation Complaints Tribunal.

[14] "Ethics in a Pluralistic Society," *L'Osservatore Romano*, 14th December, 1994, p.9.

4.2 The following outline of a current case provides a good example of how ineffectual international treaties can be in protecting, at a national level, rights recognised by the international community; it gives force to Austin's comment that "the defining test of law is that of enforcement."[15]

4.3 (i) As noted above, the Commonwealth Government is seeking to enact legislation, with retrospective effect, to deny a particular category of refugees protection under international instruments, such as the *Convention Relating to the Status of Refugees* (1951) and the *Protocol Relating to the Status of Refugees* (1967) to which Australia is a signatory[16]. The two Bills in question respond, *inter alia*, according to the relevant Second Reading Speech (Senate *Hansard*, 31st January, 1995: pp.34 *ff.*), to what the Government believes to be a distorted meaning of the definition of "refugee" under the treaties as it has been interpreted by Sackville J of the Federal Court in *Minister for Immigration and Ethnic Affairs v Ru Guang Quan & Ors* (13th December, 1994). Further, the Explanatory Memorandum to the *Migration Legislation Amendment Bill (No.3)* claims that its introduction is necessary also on the ground that "the Government believes that the Court's decision will permit claimants to be found refugees on grounds *that were not envisaged when Australia ratified the Refugees Convention and incorporated into domestic law*" (emphasis added). Sir Ronald Wilson's submission to the Senate Legal and Constitutional Legislation Committee is instructive by way of rebuttal of the Government's position on this point:

> The fact that the government did not appreciate the reach of the convention in this respect when legislative effect was given to it cannot change the meaning of the convention nor the obligations assumed under it. Those countries which have ratified the Convention have undertaken to extend protection to all of those who fall within its ambit. If the proposed law is enacted, a consequence will be that protection and access to the processes by which refugee status is determined will no longer be available to all persons who claim refugee status under the Convention. Such protection and access would no longer be available to those who base their claims on fertility control policies and persecutory enforcement policies.

(ii) As some witnesses before the Senate Committee noted, the effect of the legislation proposed would be to enter a formal, but domestic, reservation to an international treaty. It would not be

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[15] Quoted by Shirley Scott, "International Law as Ideology: Theorizing the Relationship between International Law and International Politics," *op. cit.* 317 footnote 24.

[16] Relevant texts and commentaries are found in *Les réfugiés et le droit international: Refugees and International Law*, (ed. B.M. Mbuyi) (Ontario: Carswell, 1993) and J.C. Hathaway, *The Law of Refugee Status*, (Toronto: Butterworths, 1991).

done before the formal gaze of the international community which, effectively, is the principal means of enforcement for any treaty.[17]

4.4 For the sake of completeness, one should note that unless they become part of Australian domestic law by formal enactment, international instruments are, for courts, at least (or at best), "a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights."[18]

V Bills of Rights: A Summary

5.1 If enforcement is the criteria by which law is in fact law, the High Court has provided a rather good example of rights which have been recognised and enforced by Courts, rather than the legislature, in a way which gives credence to Tennyson's quip that "freedom broadens slowly down from precedent to precedent." Professor Zines notes the following rights recognised by the High Court in recent times:

(i) the right to due process or procedural fairness: *R v Quinn* - the rights that will be regarded as particularly under judicial protection are those "basic rights which traditionally and therefore historically are judged by that independent judiciary which is the bulwark of freedom;"[19]

(ii) in *Polyukhovich v Commonwealth*,[20] six judges agreed that the Australian Constitution prevented the Commonwealth Parliament from enacting a Bill of Attainder which purported to impose punishment on a specific person or members of a specified group without judicial trial (in this instance in relation to persons charged with so-called "war-crimes");

(iii) following *Polyukhovich*, the High Court has found as unconstitutional laws which purport to change substantive rights retrospectively;[21]

(iv) a right to be free from incarceration by legislative decree; incarceration must be imposed only by courts after due process;[22]

(v) a right to freedom of communication on political matters;[23]

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[17] See, for example, the evidence of Margaret Piper from the Refugee Council of Australia, Senate *Hansard*, Legal and Constitutional Committee, 6th February, 1995, p.162. For cogent critiques of both Migration Bills, see the submissions of the Law Council of Australia and the New South Wales Bar Association to the Senate Committee.

[18] *Mabo v The State of Queensland (No.2)* (1992) 175 CLR 1 at 42 per Brennan J.

[19] *R v Quinn* (1977) 138 CLR 1 at 11. See too *Dietrich v R* (1992) 174 CLR 455 on the right to a fair trial.

[20] (1991) 172 CLR 501.

[21] *Lim v Minister for Immigration* (1992) 176 CLR 1, where the majority of the High Court held invalid a provision of the *Migration Act* (1958) which purported to prevent any court from ordering the release from custody of certain non-citizen "boat people" who had arrived in Australia between 1989 and 1992.

[22] *Australian Communist Party v Commonwealth* (1951) 83 CLR 413 and *Lim's Case*, *ibid.*

[23] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Commonwealth* (1992) 177 CLR 1.

5.2 On the basis of this overview, it is not surprising that Professor Zines presents an increasingly prevalent view thus:

> The issue today is...to what extent has Australia received, and to what extent it is likely to receive, a Bill, Charter or Chapter of Constitutional Rights, not by amendment in accordance with section 128 of the Constitution, but by a process of Hight Court judges finding rights implied in the Constitution.[24]

5.3 In contrast with the High Court's approach of what might be described as a needs-based approach, activists for Bills of Rights plead that such instruments are necessary to protect the rights of minorities. However, given the diversity of rights which are claimed to require protection, yet the selective exclusion of some minorities, such as the unborn and refugees, it must be questionable whether the cure would be worse than the disease.[25]

VI To Intervene or Not?

6.1 The principal question is whether the Bishop's Conference should provide a submission to the Senate Committee? Should the Bishop's Conference also provide a submission to the ACT Government in relation to its *Bill of Rights Bill* (subject, of course, to whether the Bill will proceed should there be change of government)? If yes to either or both questions, what should the nature and principal points of a submission be? Relevant questions to assist the discussion might be: what is the nature of the legal, social and political milieu which requires rights found in treaties and bills or charters of rights to become part of domestic law? To put it another way, how are people denied protection by law of basic human rights which might now be conferred and protected by a Bill of Rights? Or, why and how are people not free to exercise some right which is sought to be enshrined in a Bill of Rights?

27th February, 1995

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[24] "A Judicially Created Bill of Rights?" *Ibid* 167.

[25] See further, J. Waldron, "A Right-Based Critique of Constitutional Rights," *Oxford Journal of Legal Studies* 13 (1993) 18-51. Note too that the *Explanatory Notes* to the ACT *Bill of Rights Bill* say that the provisions of the Bill in relation to "life, liberty and security" are not meant to deal with the difficult issues of abortion and euthanasia. Thus, the unborn and the terminally ill would be excluded from protection under such a Bill.

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