MACEDONIAN AGENDA

16 essays on the development of Macedonian culture in Australia. Includes cultural values, language, religion, arts, identity, women's issues, the elderly, immigration, politics, the "child refugees", human rights and more

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Front cover: February 2, 1960, Bitola Railway Station, Macedonia: Mr Aleksandar Kolupacev is farewelled by his village, Gjavato, as he sets out for a new life in Port Kembla, Australia.

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Australian Law, International Treaties And The Government's "Slav" Prefix

Risto Balalovski

This paper was written in July, 1994 as part of a Bachelor of Laws degree and received some exposure at a display at Newcastle University

"He still believed in the constitutional liberty of an Englishman".[1] Like the character in Lawrence's novel, many Australians believe that they have inalienable rights and freedoms. This paper examines some of those rights; detailing their origins and sources, and how they are enforced. In particular, it focuses on the rights of Australian individuals belonging to an ethnic minority group, or of a group in its entirety, to self-identity.

In March 1994, the Federal Government of Australia in a Ministerial Statement announced that it would issue a directive to all Commonwealth Departments that in their official dealings with Australians who originate from, or identify with, the Republic of Macedonia, a 'slav' prefix to the identity of 'Macedonian' was to be used temporarily in regard to country of birth and nationality data. In response, the Macedonian Australian Council of Sydney (the Council) has said that "the term ... is a vilification and denial of ... cultural, ethnic and national identity". It further said that "the directive transgresses basic human rights to self-determination and self-identification ... (and) ... contravenes international human rights agreements to which Australia is a signatory".[2]

Historical Context

In examining the claims of the Council, it is necessary to discuss the historical development of human rights standards.

In ancient Greece, deliberations on the role of the individual led to an examination of the 'Rights of Man'. This notion was linked to those of 'Natural Law', 'right reason', and 'the eternal law of God'[3] developed later by the Stoics and Christian thinkers.

Struggles against the abuse of the power of the English Crown further developed and protected individual liberties and rights; epitomized by the Magna Carta 1215-1297, the Petition of Right 1628, the Bill of Rights 1688 and the Habeas Corpus Acts.

Concepts of the 'law of nations', a 'social contract', and the 'separation of powers', developed during the 12th, 17th to 19th and 18th centuries respectively, all contributed to the incorporation of human rights into the American Declaration of Independence of 1776, and in the French 1789 Declaration of the Rights of Man and the Citizen, which attempted to control the exercise of power, vested in a state, over the individual.

Concerns in the 18th and 19th centuries for the treatment of Christian minorities, the exploitation of labour, the protection of people entangled in war, public health, welfare, education, and the banning of the slave trade and slavery, were all factors relevant in the development and extension of the idea of human rights.

The Modern Era of International Human Rights

After World War I, the League of Nations sought, unsuccessfully, to protect the rights of minorities. The founding of the United Nations (UN) in 1945, however, established human rights as a matter of universal concern and commitment.

Perhaps the most important document produced by the UN was the Universal Declaration of Human Rights in 1948. Along with the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR), it forms the basis of international human rights law.

In the context of time, the range of human rights has changed. For example, increasing global attention to pollution and the exploitation of the Earth's resources has led to the development of a right to protection of the environment.

Specific Provisions of the Treaties

The Universal Declaration, the ICCPR and the Convention on the Elimination of All Forms of Racial Discrimination 1975 (CERD), contain similar provisions which seek to promote and protect the rights to a nationality, self-determination and a culture.

In the absence of any precedents directly in point, in my opinion, it is possible that all of the above provisions, in instruments to which Australia is a signatory, have been violated by the prefix directive, by the denial of a right to self-identity, which I consider essential to concepts of nationality, self-determination and culture. My contention is supported by Patrick Thornberry, who feels that "the concept of a right to identity for minorities is implicit in Article 27 of the ICCPR".[4]

Self-determination

According to both the First Optional Protocol of the ICCPR (in force in Australia) and the ICESCR, "all peoples have the right to self-determination...".[5] The existence of this right is advantageous to the argument of the Council, but is it available?

It seems that the concept particularly relates to groups, who have "a will to assert their separateness, and institutions to reflect that will".[6] Thus, the notion appears limited to groups who seek autonomy. Nevertheless, Thornberry has said that minorities use the term whether they have secessionist aspirations or not.[7]

Political, Cultural and Philosophical Context

In discussing the interpretation of the international human rights standards, Bailey says that "almost certainly, each (ratifying State) would lay different emphasis on the rights they set out".[8] Indeed, the Universal Declaration is sometimes criticized as reflecting Western ethical, philosophical and political principles. For instance, the Universal Declaration's obligations to ensure rights to private property were excluded from the ICCPR and the ICESCR because of the objections of the USSR and Eastern Europe.

The contention is not limited to the interpretation of the provisions of the Covenants, but extends also to the philosophy upon which the rights have been based; revolving particularly around their compatibility with the world's major religions.

Christianity, Islam and Judaism appear to be able to reconcile their basic tenets with the rights proclaimed in the international standards. Buddhism is regarded as compatible also, due to its non-belligerent approach, centred on the individual. Hinduism, however, is fundamentally incongruous with the notion of equality between individuals, due to it being based upon the caste system of differentiation.

Opposition on the nature of human rights continues to exist between the Western and Socialist/Communist political views. Marxist doctrine categorizes individual rights as bourgeois fabrications, existing at State expense. In fact, the People's Republic of China has asserted that the protection of human rights, in developing nations, entails a priority being given to economic development.

As a result, some states say that each state should be permitted to observe human rights from within its own political and cultural context.

The Australian Context

Unlike many other nations, Australia does not have a Bill of Rights. This means that our human rights laws must be substantially sourced elsewhere. Those sources are:

a) the Constitution;
b) the powers of legislation vested in the States and Territories;
c) the 'reception' of English laws into the Australian colonies, resulting in the applicability of certain doctrines and laws;
d) ever increasingly, from the interpretations of the judiciary;
e) international human rights expectations.

There have been attempts to change the paucity of human rights provisions in the Constitution on several occasions during the past century. However, all attempts to amend the Constitution or introduce a Bill of Rights have failed, due to arguments that: the common law democratic system inherently protects human rights; from the experiences of other countries, a Bill doesn't necessarily protect human rights; posited rights will be interpreted in a limited way; the power of the Commonwealth would increase to the detriment of the States; and that a Bill is undemocratic!

Although there is no specific constitutional authority for the Commonwealth Parliament to legislate with respect to human rights, the 'external affairs' power in the Constitution has been interpreted to enable Australia to adopt, sign, ratify and accede to international treaties, and legislate with respect to them. For example, in *Koowarta v. Bjelke-Peterson* (1982) 39 ALR 417, the High Court held that compliance with the CERD was indeed an aspect of Australian 'external affairs'.

The terms of international conventions become a part of Australian law by being 'incorporated' into legislative provisions. With respect to human rights legislation, there currently exists in Australia, at the federal level:

* the Racial Discrimination Act 1975, which relates to the CERD;
* the Human Rights and Equal Opportunity Commission Act 1986 and the Human Rights Commission Act 1981, which both incorporate the ICCPR;
* the Sex Discrimination Act 1984;
* the Privacy Act 1988; and
* the Crimes (Torture) Act 1988.

For the purposes of this paper, only the first two enactments are relevant. Both of those acts make it an offence to discriminate on the basis of race, colour, descent or national or ethnic origin, to the detriment of

any human right or fundamental freedom; the Human Rights and Equal Opportunity Commission Act particularly relates to employment situations, and seeks to protect the human rights described in the ICCPR.

All of the Australian states and territories, except Tasmania, have passed anti-discrimination laws. They are limited though, in that they typically only operate when an individual is seeking access to education, work, accommodation, goods and services, clubs, and professional associations.

Discrimination on the basis of race, thus, is specifically made illegal in all Australian jurisdictions. From *King-Ansell v. Police* (1979) 2 NZLR 531, at page 542, a race may exist where "individuals or the group regard themselves, and are regarded by others in the community, as having a particular historical identity in terms of their ... origins". In that case, the judge further said (at page 543) that, a race may be identifiable by having "shared customs, beliefs, traditions and characteristics derived from a ... common past". It is my view that the Macedonian community satisfies this test; evidenced by the establishment in Australia, since the late 19th century, of common religious, cultural, sporting and academic associations, which have *always* been recognized by the wider Australian community as Macedonian.

Any Precedents?

When the Constitution was amended in 1967 to enable Parliament to legislate with respect to and include 'Aboriginals' within any national population statistics, an official policy of self-determination has applied to indigenous Australians. One aspect of this notion is "the retention by Aboriginal people of their distinctive cultural identity, lifestyle and values".[9]

For a long time these people had been collectively referred to as 'Aboriginals', and it appears that from 1967 it was realized that the term was an imposed generalization upon the various peoples of the indigenous 'nations'. Since then, traditional nomenclature, such as Koori and Murri, has come into common use. This appears to be a fairly clear example of how particular Australian ethnic groups have been allowed the right to identify themselves with titles that they prefer.

Are We Bound?

In an environment where there is an increasing degree of international scrutiny of the domestic laws of the signatories to various international

covenants, conventions and treaties, several writers seem to agree that Australian law will come under the increasing influence of international human rights jurisprudence. Others, however, feel that the ICCPR, for example, is not a part of Australian law, upon which a cause of action can be founded in Australian courts; as Australia has not enforced the right to petition by a national Charter or Bill of Rights.[10]

From an article quoting directly from Chief Justice Mason, however, "there is a prima facie presumption that the legislature does not intend to act in breach of international law".[11] In *Mabo*, Justice Brennan said that "international law is a legitimate and important influence on the development of the common law, especially when the international law declares the existence of universal human rights".[12]

Thus, there is contention with regard to the extent to which Australian courts will recognize, and consider themselves bound by, international law. The Positivists say that a court cannot apply the international laws until they have been 'transformed' into local law, usually by legislation, which, in my opinion, has occurred in Australia. Others, who adhere to the natural law approach, say that international law is axiomatically 'incorporated' into domestic law, and can be applied.

The Remedies

The Human Rights and Equal Opportunity Commission administers the Commonwealth anti-discrimination laws, and seeks to ensure Australia's compliance with its international obligations by inquiring into the activities of Commonwealth Government departments. Individuals or groups may make a complaint to the Commission. The Commission may make non-binding determinations, which will only be given force in the Federal Court.

The various state and territory dispute resolution mechanisms are similar to the federal, except that the decisions of the state and territory bodies are enforceable.

By operation of the First Optional Protocol, individuals, and groups of Australian citizens and residents, may complain to the UN Human Rights Committee (HRC) about breaches of human rights standards. Only an individual may bring a complaint to the HRC, however, for alleged violations of the ICCPR. Thus, corporations and groups are excluded from such actions, presenting an impediment to the Council if it in particular wishes to bring the case to the HRC.

An important condition for the laying of a petition to the HRC is that all domestic remedies have been sought and exhausted. If it does hear a

case, the HRC will only express its opinion, and is "reluctant to interfere with (a) domestic legal system".[13]

Redress may also be sought from specialist UN bodies such as:
* the Committee on the Elimination of Racial Discrimination; and
* the Committee on Economic, Social and Cultural Rights.

Conclusion

In 1986, the Federal Australian Government required all relevant departments and authorities to "develop personnel practices which sensitize staff to cultural factors"[14] and, in its 1989 National Agenda for a Multicultural Australia, sought to protect every Australian's right to express and share their individual cultural heritage, and to equality of treatment and opportunity.

Australia has an enviable and reputable international status with respect to the protection and promotion of human rights, and is renowned for having an all government policy recognizing its multi-cultural society, giving support to individuals and groups in the preservation of their cultures, languages, traditions and customs.

Despite the adoption of the above policies, it appears that the Federal Government has acted in breach of both international and domestic human rights laws. The issuing of the directive does not appear to comply with the principle of 'good government', in that it was undemocratic, and does not respect the rule of law and rights to a culture and identity. The directive threatens the right of Australians to freely identify with their ethnic background, and to develop and promulgate their heritage within the wider Australian community, without fear of prejudice or discrimination. I feel that it should be withdrawn, in order that Australia continues to model a respectable social, legal and political system which complies with international customary law.

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