A ROVING JUDICIAL EYE

broader use of foreign judgments by the high court of australia

For most of its history, Australian law has been tied to English common law. Barristers have yearned to become Queen's Counsel, generations of law students learned to judge reasonable conduct by the standards of the 'man on the Clapham omnibus', and up until the mid 1980s an English institution, the Privy Council, was the Court of last appeal for Australian citizens.

In recent years, however, Australian law has begun to diverge, demonstrating a distinct independence from English law. In this article, **Peggy Dwyer** explores the increasing willingness of the High Court to use case law from far beyond the UK.

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Early Justices of the High Court of Australia would perhaps be aghast if they could witness their judicial heirs citing authority from various foreign jurisdictions and using international legal norms in the development of the common law of Australia. In moulding Australia's municipal law, judges are no longer determined to limit themselves to common law concepts developed in line with British thought. Indeed, at the top of the curial hierarchy, they are casting a roving judicial eye and ready to play the international field.

The use of foreign precedent reveals much about the development and future direction of the law of our nation. For at least the first four decades following federation and the establishment of the High Court, Australia was represented by Great Britain on the international stage. Just when Australia became an independent member of the international community is a matter often debated. However, it is certainly safe to say that we are no longer formally or practically tied to the UK, but have gradually progressed to take our own place as a member of the community of nations.

Australian jurists have not abandoned English authority. Rather, as a result of the rapid globilisation of the law, the interdependence of the international legal community and a belief in the legitimacy of international legal norms, High Court judges seem increasingly willing to borrow from overseas experience in addition to British case law.

Increasing usage of overseas case law

Throughout the past decade Justices of the High Court have remarked, both in judgments and in a number of extra-curial writings, on the weight now accorded to international law and decisions of foreign tribunals outside the United Kingdom.

One of the most prominent commentators on the influence of transnational law is the former Chief Justice, Sir Anthony Mason who suggests that 'most of the very important High Court decisions in the last fifteen years were 'strongly influenced' by international or comparative law'. Justice Kirby expressed a similar view in *Young v Registrar (No 3)*, a decision handed down in 1993 when he was President of the NSW Court of Appeal, '[E]ven a superficial knowledge of the recent trend of authority in the High Court will demonstrate to Australian judges and lawyers the growing influence of international law, and specifically, international law relating to human rights, upon Australian court decisions'.

A review of recent case law illustrates this general outlook. In the 1989 decision *Street v Queensland Bar Association*, the High Court considered the anti-disability and anti-discrimination provisions of s 117 of the Constitution. In affirming the right of a barrister resident in one State to practice in another without discrimination, the High

Court relied heavily on decisions of United States Courts, the Supreme Court of Canada, the International Court of Justice, the European Court and Supreme Court of India.

Even earlier, in the 1985 decision of *Gerhardy v Brown*, confirming the validity of a South Australian Act granting land to the Pitjantjatjara people against a challenge that it contravened the *Racial Discrimination Act 1975* (Cth), Justice Brennan referred to the dissenting judgement of Tanaka J in the *South West African Cases* heard by the International Court.

The High Court seems increasingly familiar with and willing to borrow from a number of diverse legal systems. Sir Anthony Mason has described this early flirtation as being indicative of a new spirit among both judges and lawyers.

In 1987 Paul Von Nessen, from the University of Melbourne's Department of Business Law, graphed and analysed the High Court's use of American precedent between 1901–1987, noting an increasing reference to American cases within a broad range of legal areas. In the 1960s, 190 US cases were referred to, compared with 329 in the 1970s and 779 in 1981–1987. As a quick survey of the decisions published by the High Court in 1996 will reveal, there is little doubt that the heavy use of US authority will continue.

It is important to note that in 95 years of law making at the High Court of Australia, legal doctrine and methods of interpretation have been greatly shaped by the decisions of foreign courts.

Until the late 1970s this meant developing Australian law in line with the law as stated by British courts. Apart from the High Court's first 10 year period from 1903–1913, where American cases were relied on to interpret constitutional provisions partly modelled on the US Constitution, the Commonwealth Law Reports reveal an obsession with English precedent.

Initially, the common law was thought to enable many legal problems to be solved by one solution applicable throughout the British Commonwealth. Diversity was, at least for some members of the judiciary, a greater evil than unsound or ill-adapted principle. In 1948 Justice Dixon warned:

> *Diversity in the development of the common law seems to me to be an evil. It's avoidance is more desirable than a preservation here of what we regard as sounder principle (Wright v Wright (1948) 77 CLR 191 at 210)*

Members of the current High Court are less perturbed by the threat of diversity, and are willing to draw from a number of foreign jurisdictions in order to fashion a law particularly suited to conditions in Australia.

The increasing influence of foreign precedent on the High Court cannot be viewed in isolation to an understanding of the 'globilisation' of the law and the legal market place. The term globilisation is used here to imply a global perspective on the development of law. It is a trend or movement that is broadening the jurisprudential base of numerous countries, including New Zealand, Canada and the United Kingdom. Thus, in stark contrast to Dixon's view of a unitary, cohesive body of truly 'common law', the legal systems of common law countries are becoming increasingly diverse.

A break from English Common Law

There is one simple formalistic explanation for the current trend towards reliance on foreign cases outside the United Kingdom. In accordance with the doctrine of *stare decisis* followed throughout the British Commonwealth, every court is bound by any case decided by a court above it in the judicial hierarchy. In Australia, it was accepted well into the 1970s that Privy Council decisions provided binding authority where local authority was unclear.

Although the High Court had, in some areas, departed from English authority, residual symbolic ties remained so long as it was legally possible for the Parliament of the United Kingdom to make laws for Australia. A change in legal thinking appeared to follow the abolition of appeals from the High Court to the Privy Council in 1975 (see *Privy Council (Limitation of Appeals) Act* 1968 (Cth); *Privy Council (Appeals From the High Court)* Act 1975 (Cth)).

Almost a decade later, a succession of acts were passed to eliminate appeals to the Privy Council from any Australian Court (*Australia (Request & Consent) Act* 1985 (Cth), *Australia Acts (Request) Act* 1985 of each Australian State and *The Australia Act* (UK) 1986). The separation was affirmed by the High Court decision in *Cook v. Cook* (1986) which held that no Australian Court is to regard itself bound by decisions of the Privy Council.

Parliament then, had severed the last formal legal bind at a time when Australian judges were anxious to exercise their

greater independence and to seek and accept the relevance of non-English authority.

Playing the field

Another explanation for the increasing use of a range of overseas precedent lies in the broader outlook and experience of individual members of the judiciary. Until the mid 1970s, the High Court bench was stacked with legal minds subject to a much narrower sphere of influence than the Justices of today. Under the dominant philosophy of legal formalism, they regarded themselves as mere interpreters of the law. This view was largely discredited in the early 1980s, when most members of the judiciary rejected the literalism of the Barwick High Court. The High Court may have been encouraged to broaden their interpretative attitudes in order to accommodate novel legal and factual problems that could not be easily answered with reference to the words of an ageing Constitution.

As the judges travel abroad and study foreign jurisdictions, they are likely to become increasingly willing to borrow from other legal systems. Indeed, former Chief Justice Mason may have developed his broader jurisprudential outlook — accepting the law-making role to be played by the judiciary — in view of his extensive contact with judges and academics from various foreign jurisdictions. Increasingly, Justices of the High Court are visiting courts in foreign countries, sharing information and inviting their counterparts to spend time in Australia.

It seems likely that this trend will be continued by the two newest judges appointed to the High Court. The judgments of Gummow J have referred extensively to the decisions of American courts, reflecting, one presumes, the significant period he has spent travelling in the United States and studying US jurisprudence. What can be expected from the truly globe trotting Justice Kirby? Speaking on the occasion of his retirement from the NSW Court of Appeal, Kirby J. listed some important achievements during his 11 years on that bench:

> *I was insistent that the Court should look beyond the traditional sources of judge made law. In an earlier case I tried this out on Mr RP Meagher QC, telling him that I had seen relevant authority in a recent decision of the Supreme Court of Iowa. His immortal response was 'Your honour is such a tease'.*

As Kirby goes on to point out, the reference to overseas case law and international norms was at first considered to be heretical. From his earliest High Court decisions, (eg *North Ganalanja Aboriginal Corp & Anor v State of Qld & Ors*) Kirby J is betraying the influences of his experience of international law and drawing assistance from his knowledge of the legal systems of foreign jurisdictions.

Global access to information

There is no doubt that the increasing availability of legal research tools and access to case law of foreign jurisdictions partly explains the use of foreign materials by judges, practitioners and academics.

The latest decisions of the US Supreme Court, for example, are readily available on CD-Rom, updated by the internet. While High Court librarians are likely to supply the seven judges with any overseas material relevant to the case before them, legal practitioners will implement a similar search of the data base, confident that

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they can seek to rely on decisions of tribunals outside the United Kingdom. The spread of information is also facilitated between legal firms who affiliate with foreign 'sister' firms or establish offices in a number of foreign jurisdictions.

In Australia, Phillips Fox, Allens/Arthur Robson, and Baker & Mackenzie are examples of firms who have expanded to set up branches in numerous countries from both civil and common law jurisdictions. The inevitable transfer of information and experience will contribute to the globilisation of the legal market place and the use of foreign precedent by Australian courts.

Internationalisation of human rights

One significant reason for the increasing reliance on foreign case law is the nature of legal issues now before the High Court, and the acceptance of international instruments as a guide to resolving disputes. As former Chief Justice Mason has often pointed out, we have, in recent decades, witnessed a spectacular advance in the status, breadth and scope of international law.

The High Court has stated and re-stated its acceptance of unincorporated treaties in the development of the common law. In *Mabo*, Brennan J confirmed that 'international law is a legitimate and important influence ... especially when international law declares the existence of universal human rights'. In cases before the High Court, lawyers and Judges accept the legitimacy of rights discourse, reliance on international treaty provisions and the comparative human rights law of other countries. Thus, the European Convention on Human Rights, American and Canadian jurisprudence were heavily relied on in the recent 'implied rights' cases such as *Theophanus* and *Nationwide News*.

In the 1992 case *Dietrich v The Queen*, the High Court referred to the *International Covenant on Civil and Political Rights* (ICCPR) and its interpretation by foreign courts in determining whether the accused had a common law right to legal representation at the public expense. In the 1995 case of *Grollo v Commissioner of Australian Federal Police*, Justices Brennan, Deane, Dawson and Toohey cited a decision of the European Court of Human Rights in support of their view that, in order to safeguard rights of the accused, a judicial warrant must be issued to authorise secret surveillance of suspects.

Developments unfolding during the 1996 September sittings of the High Court reinforce the trend. Three important decisions were handed down. In two of these, *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* and *Breen v Williams*, certain members of the High Court placed heavy reliance on case law from foreign jurisdictions outside the United Kingdom, including Canada, the US and the European Court of Human Rights. In the same sittings, the High Court heard three cases involving potential abuse of human rights; *De L v Director-General NSW Department of Community Services*, *Croome v The State of Tasmania* and *Superclinics v CES*. In all three, counsel placed heavy reliance on the ICCPR, as well as other international conventions and authoritative decisions of foreign tribunals.

There seems little doubt that the protection of human rights will continue to play a major part in the development of Australian common law, while the development and interpretation of human rights by international tribunals will be increasingly relied upon by the High Court of Australia.

Dissolving affinity?

The impact of the UK's membership in the European Economic Community (EEC) and its submission to European law may mean that English precedent becomes less relevant to the development of the law by Australian courts. When the United Kingdom accepted membership of the EEC, it accepted the provisions of the treaty of Rome and the jurisdiction of the European Court of Justice. In addition, as a party to the European Convention on Human Rights, the UK submitted itself to the jurisdiction of the European Court of Human Rights.

Some commentators predict that there will be pressure to develop common law and interpret statutes in accordance with the approach accepted by the European Court, a supra-national body acting as the ultimate arbitrator of disputes. In the view of former Chief Justice, Sir Anthony Mason, the allegiance of the United Kingdom to the EEC 'will affect the traditional affinity between Australian law and English law and serve to emphasise our legal isolation'. As a result, legal thinking in the United Kingdom may be influenced by aspects of civil law and thus less transferable or relevant to law making in Australia.

Conclusion

The High Court's increasing reliance on overseas case law reveals an evolution in the nature of common law and the transfer of information within the legal environment. Forces of globilisation have given the High Court increasing confidence to explore and cite a range of alternative foreign jurisprudence reflecting the importance of and the value we place on international law and our contribution as a member of the international community.

It is also reflective of the increasing independence and maturity of the Australian nation and Australian judiciary who are willing to fashion a separate legal culture particularly suited to our needs. They have the tools, the impetus and the desire to do so. In the words of Sir Anthony Mason:

> *We constantly look to relevant principles of comparative law and to the decisions of international and national tribunals. Naturally we look primarily to decisions in other common law jurisdictions. But our researches do not stop there ... Legal problems, because they often reflect human problems, are not unique to any one system of law ... in large measure, experience is common to all peoples.*

Further reading

- Brazil, P, *The globalisation of legal services: new opportunities* (1989) 15 Commonwealth Law Bulletin p 288
- Mason, Sir Anthony *The relationship between international law and its application in national courts* (1992) Commonwealth Law Bulletin p 750; *The influence of international and transnational law on Australian municipal law* (March 1996) 7(1) Public Law Review p 20; *A Bill of Rights for Australia,* (1989) Australian Bar Journal p 79
- Von Nessen, Paul E *The use of American precedents by the High Court of Australia (1901–1987)* (1992) 14 Adelaide Law Review p 181