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

By Wendy Lacey
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Wendy Lacey's book is a meticulous examination of the extent to which Australian judges may be guided by unincorporated international human rights conventions when exercising discretionary powers. This is set out in distinction to administrative discretion issues in cases such as *Teoh*, although this case is discussed at length in chapter 3. Lacey sets out in great detail a sound legal basis whereby judges, through application of the common law's interpretive principles, could increase protection of human rights through reference to and application of unincorporated conventions. This is particularly important in Australia because so many core human rights treaties remain unincorporated into domestic law in any fulsome manner, as was made obvious by the UN Human Rights Committee's recent evaluation of Australia's performance under the two international covenants relating to civil and political rights (ICCPR) and economic, social and cultural rights (ICESCR).

Lacey writes in her introduction (p 3):

> The notion that Australia's judges should take into account, when exercising discretionary power, the human rights to which Australia is bound under international law, seems uncontroversial. However, it conceals complex issues regarding the place of international human rights norms in Australian law and the role of judges in giving effect to norms that are unincorporated in domestic law. As a subject, it has historically been overlooked in jurisprudence and academic commentary, often overshadowed by discussion of the influence of international norms on the exercise of administrative discretion. The prevalence of judicial discretion in common law jurisdictions, however, creates an imperative for its analysis.

The text is set out in three parts and, within the very strict parameters Lacey sets out in her introduction, the analysis is rich. Part I begins with a study of the nature and regulation of judicial discretion in Australia and of Australia's engagement with the international human rights system, including the absence of any comprehensive mechanism for domestic implementation of international human rights standards. In Part II, Lacey reviews the common law's interpretive principles, which govern judicial use of unincorporated international instruments, and highlights their irregular, inadequate and sometimes unreasoned application, often by judges sitting alone in different jurisdictions. Lacey focuses on Kirby J, Miles CJ and Perry J in

particular. A comparative analysis is conducted of the application of the interpretive principles in the United Kingdom, Canada and New Zealand, where the principles play a more active role.

Lacy argues and outlines the legal basis for a more principled approach in Australia, including the development of a rebuttable presumption that relevant unincorporated conventions will be considered by judges when exercising discretion. The presumption, articulated on p 217, is worth noting. This seems a very sensible formulation and sits well with the recent argument put forward by Peter Bailey (2009) for the adoption of the rule of law as a constitutional implication.

Part III considers powers under Ch III of the Constitution and the constitutional implications of legal developments achieved via the application of common law's interpretative principles in the context of discretionary powers exercised by the judiciary. Lacey makes a strong constitutional argument for the preservation of judicial discretion. Her arguments will be worth revisiting when constitutional aspects of the South Australian legislation dealing with 'bikie gangs' are considered on appeal to the High Court.

There are two criticisms to be made of this book. First, the author is perhaps overly defensive of her perceived critics and colleagues in the human rights field because, as she notes, substantive protections of rights are unlikely to result from the approach she advocates here. But Lacey is also correct to point out that, as a discipline, human rights lawyers are perhaps too focused on a Bill of Rights or implied constitutional protections, rather than making the most of the modest tools we already have in the common law.

The second and possibly more substantial criticism is that Lacey's argument could benefit from a square recognition of the challenge her thesis holds for judicial and legal education in Australia. As she notes on p 71, Justice Kirby, the most able judge in Australia at incorporating human rights norms, received his judicial education in this area at an overseas colloquium in 1988, resulting in the Bangalore Principles. Byrnes, Charlesworth and McKinnon, in their recent work on *Bills of Rights in Australia* (2009), note the reluctance of public servants, advocates and judges in utilising even codified human rights statues. It is hoped that Lacey's next book will focus on overcoming this foundational challenge.

This is a particularly well-written legal text, and will be a very useful book for judges and advocates, human rights practitioners, and constitutional lawyers. The aspects of the text detailing how judicial discretion in the common law operates are particularly insightful. ●

References

Bailey P (2009) *The Human Rights Enterprise in Australia and Internationally* LexisNexis Butterworths

Byrnes A, Charlesworth H and McKinnon G (2009) *Bills of Rights in Australia: History, Politics and Law* University of New South Wales Press, Sydney

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Dr Susan Harris Rimmer
ARC Research Fellow
Centre for International Governance and Justice
Australian National University
and
President
Australian Lawyers for Human Rights
Email: <Susan.Harris-Rimmer@anu.edu.au>