Case Commentary

Kruger v *Commonwealth:* Constitutional Rights and the Stolen Generations

SARAH JOSEPH*

Kruger and Bray v *Commonwealth* ['*Kruger*'][1] concerned a challenge by a number of aboriginal plaintiffs to the constitutionality of Northern Territory legislation which authorised their forced separation from their families. The now-defunct nationwide removals policy, creating 'Stolen Generations' of Aborigines, still provokes much political and legal controversy in Australia. In early 1997, the Commonwealth Human Rights and Equal Opportunity Commission concluded a comprehensive investigation into the history of the 'removals policy' and its past and continuing effects ['the HREOC report'].[2] The report severely condemned virtually every aspect of the removals policy.[3] Furthermore, the indigenous community has been disappointed by the Commonwealth Governments response to the HREOC Report, which failed to implement most of its recommendations.[4] Thus, the *Kruger* case, reserved for well over a year, had assumed considerable symbolic significance for the cause of aboriginal social justice. In contrast to the victories enjoyed by indigenous peoples in the landmark native title cases of *Mabo* v *Queensland*[5] and *Wik Peoples* v *Queensland*,[6] this claim failed on all counts.

This note analyses *Kruger's* general relevance to the topic of constitutional protection of individual rights in Australia.

The Challenged Legislation

Seven of the plaintiffs had been removed from their families under the impugned legislation. The other plaintiff was the mother of a child so removed.

The plaintiffs challenged the constitutionality of the relevant provisions of the *Aboriginals Ordinance* 1918 (NT). This Ordinance was enacted under s

* Lecturer in Law, Monash University.

1 (1997) 146 ALR 126.

2 *Bringing them Home*, National Enquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (1997) [hereafter *HREOC Report*].

3 For example, the report condemned the removals policy as genocide and systematic racial discrimination.

4 The government has committed $63 million extra funding to health services, recognising the ill effects the policy had on Aboriginal health. However, it has failed to provide specific compensation to persons affected by the removals policy, and has failed to offer an official apology for the policy. See 'Bringing them Home: Government Response', Statement by Minister for Aboriginal and Torres Strait Islander Affairs, 16 December 1997, and 'Positive Initiatives Welcomed, but regret expressed for lack of understanding of core recommendation — a national apology', HREOC Press Release, 16 December 1997.

5 (1992) 175 CLR 1.

6 (1996) 187 CLR 1.

122 of the Constitution, which gives the Federal Government 'power to make laws for the government of territories'. The Ordinance was repealed in 1953. If the plaintiffs could establish its contemporaneous illegality, the Ordinance would provide no authority for the actions taken under it. Thus, the door would be thrown open for general law actions against persons who had acted under the purported authority of the Ordinance.[7]

Section 7 essentially provided that the 'Chief Protector' was the legal guardian of every 'aboriginal or half-caste' living within the Northern Territory. Section 6(1) provided:

> The Chief Protector shall be entitled at any time to undertake the care, custody, or control of any aboriginal or half-caste, if, in his opinion it is necessary or desirable in the interests of the aboriginal or half-caste for him to do so, and for that purpose may enter any premises where the aboriginal or half-caste is or is supposed to be, and may take him into his custody.

Section 16 provided:

> (1) The Chief Protector may cause any aboriginal or half-caste to be kept within the boundaries of any reserve or aboriginal institution or to be removed to and kept within the boundaries of any reserve or aboriginal institution, or to be removed from one reserve or aboriginal institution to another reserve or aboriginal institution, and to be kept therein.
>
> (2) Any aboriginal or half-caste who refuses to be removed or kept within the boundaries of any reserve or aboriginal institution when ordered by the Chief Protector, or resists removal, or who refuses to remain within or attempts to depart from any reserve or aboriginal institution to which he has been so removed, or within which he is being kept, shall be guilty of an offence against this Ordinance.

The Laws in Context

The impugned Ordinances, and similar statutes enacted by the Australian States, were instruments of a nation-wide policy to assimilate Aborigines into the European population.[8] In pursuit of assimilation, mixed-blood Aborigines were separated from their indigenous families, and 'merged' into white society. The Chief Protector of Western Australia, A O Neville, summarised the policy at a 1937 Commonwealth-State Native Welfare Conference:[9]

> the destiny of the natives of aboriginal origin, but not of the full blood, lies in their ultimate absorption by the people of the Commonwealth, and [the Conference] therefore recommends that all efforts be directed at that end.

As for the pure-blood Aborigines, contemporary wisdom held that they would be extinct within a century.[10]

'Implicit in the assimilation policy was the idea current among non-Indigenous people that there was nothing of value in Indigenous culture'.[11]

[7] (1997) 146 ALR 126, 142 per Brennan CJ.
[8] See generally, *HREOC Report*, 27–37.
[9] Id 32.
[10] Id 30.
[11] Id 32.

The assimilation of indigenous children, and the envisaged consequent collapse of indigenous society, was assumed to be automatically for their benefit and welfare.

The assimilation policy failed. Indigenous people refused to abandon their culture, while non-indigenous people continued to discriminate against Aborigines, refusing them proper access to 'white' society.[12]

Part 3 of the HREOC report details the consequences of this policy for the removed children, the families from whom they had been removed, and the broader indigenous community.[13] Amongst many adverse consequences, the report details clear evidence of greater emotional distress and poor health amongst those of the 'Stolen Generations' and their indigenous families (including greater chance of depression, alcoholism and suicidal impulses), and evidence of brutality and sexual abuse in institutions housing the removed children. The removals policy had a disastrous schismatic effect on indigenous communities, and the continuity of their society.

The removals policy, if undertaken today, would clearly violate current human rights standards, such as freedom from racial discrimination, children and family rights, and minority and indigenous cultural rights.[14] The question before the High Court of Australia was whether the Northern Territory legislation violated any rights in the Commonwealth Constitution.

The *Kruger* Constitutional claims

Five constitutional grounds for invalidation of these provisions were raised. Each was rejected by a High Court majority.

Claim 1: Breach of the doctrine of Separation of Judicial Power

The doctrine of the separation of federal judicial power from the exercises of power by the political branches of government is entrenched in Chapter III of the Commonwealth Constitution.[15] The plaintiffs alleged that the detention powers conferred by the Ordinance were judicial powers invalidly bestowed on the Chief Protector, a non-judicial body.

Some support for the plaintiffs' argument could be gleaned from the joint judgment of Brennan, Deane, and Dawson JJ in *Chu Kheng Lim* v *Minister for Immigration*:[16]

> The involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as

[12] Id 34.
[13] Id 151–246.
[14] See eg *International Convention on the Elimination of all Forms of Racial Discrimination* 1966; *International Covenant on Civil and Political Rights* 1966, Articles 23, 24, and 27; *International Covenant on Economic Social and Cultural Rights* 1966, Articles 10, 15; *Convention on the Rights of The Child* 1989, all reprinted in PR Ghandhi, *Blackstones International Human Rights Documents* (1995).
[15] See eg *R* v *Kirby, ex parte Boilermakers Society of Australia* (1956) 94 CLR 254; *Attorney-General* v *The Queen* (1957) 95 CLR 529.
[16] (1992) 176 CLR 1, 27–9.

> an incident of the exclusively judicial function of adjudging and punishing criminal guilt.

In *Kruger*, Justice Toohey confirmed that the punitive detention of a citizen was part of the judicial power of the Commonwealth. However, his Honour noted that 'there are qualifications to the general proposition that involuntary detention is necessarily an incident of the judicial function of adjudging and punishing criminal guilt'.[17] One such exception is the non-punitive detention of persons for their own welfare and protection. His Honour found that the history and express words of the legislation manifested a welfare purpose.[18]

His Honour conceded that the alleged welfare purpose would not be accepted if judged by current standards. However, he accepted the Commonwealth's argument that the statute 'be judged by the values and standards prevailing at the time' in 1918.[19] Those values and standards were influenced by an uninformed bigotry which presumed that assimilation would undoubtedly benefit infant Aborigines. Therefore, the statute evinced a 'welfare purpose', albeit a misguided one. Gummow J essentially agreed with Toohey J.[20]

Gaudron J found that 'a law authorising detention in custody is not, of itself, offensive to Chapter III'.[21] Therefore, her Honour's judgment offers less constitutional protection against arbitrary detention than those of Toohey and Gummow JJ. She reasoned that it was impossible to clearly distinguish between judicial detention orders and non-judicial detention orders. For example, non-judicial detention might be lawfully authorised for the purposes of containing an infectious disease, confining someone to a mental institution, punishment for contempt of Parliament, breach of military discipline, or for the purposes of expelling an alien.[22]

> The existence of so many acknowledged exceptions to the immunity for which the plaintiffs contend and the fact that those exceptions serve so many different purposes tell against the implication of a constitutional rule that involuntary detention can only result from a court order. . . . [I]t cannot be said that the power to authorise detention in custody is exclusively judicial except for clear exceptions.[23]

Hence, Gaudron J found no breach of Chapter III entailed in the impugned provisions.

The remaining judges, Brennan CJ, Dawson and McHugh JJ, decided that the principle of separation of powers did not operate in regard to federal laws enacted under s 122 of the Constitution.[24] In their opinion, s 122 conferred

[17] (1997) 146 ALR 126, 172.
[18] Ibid.
[19] Ibid.
[20] Id 234.
[21] Id 192.
[22] Ibid. See also *Chu Kheng Lim* v *Minister for Immigration* (1992) 176 CLR 1, where the High Court upheld broad federal executive powers to detain designated aliens for the purposes of expulsion, deportation, and determination of asylum claims.
[23] Ibid.
[24] Id 140–1 per Brennan CJ, 154–5 per Dawson J; 218 per McHugh J.

plenary power over the Territories, unfettered by the prohibition regarding separation of judicial power. In contrast, other federal legislative powers, such as the heads of power in s 51, are fettered by that prohibition. Thus, these judges did not consider whether detention is a *prima facie* judicial power.[25] As will be seen below, several Judges found s 122 to be similarly immune from other potential constitutional freedoms.[26]

No judge upheld the claim relating to separation of judicial power. The Commonwealth government retains great potential power to detain citizens against their will without judicial fiat.

Claim 2: A Right to Equality

The plaintiffs claimed that there exists an implied right of substantive legal equality in the Constitution. The relevant Ordinance provisions infringed this right by discriminating against Aborigines.

The jurisprudential basis for this implied right was clearly the joint judgment of Deane and Toohey JJ in *Leeth* v *Commonwealth*.[27] In that case, their Honours stated:[28]

> The essential or underlying theoretical equality of all persons under the law and before the court is and has been a fundamental and generally beneficial doctrine of the common law . . . Conformably with its ordinary approach to fundamental [common law] principles, the Constitution does not spell out that general doctrine of legal equality in express words.

Their Honours found a right of substantive equality implied from the fact that the Constitution was a 'free agreement' between the people of the federating Colonies. This presupposes 'their inherent equality . . . as parties to the compact'.[29] Toohey J, in a controversial speech delivered in Darwin in October 1992, expanded on this reasoning:[30]

> Where the people of Australia, in adopting a constitution, conferred power [on the] Commonwealth Parliament, it is to be presumed that they did not intend that those grants of power extend to invasion of fundamental common law liberties — a presumption only rebuttable by express authorisation in the constitutional document.

Deane and Toohey JJ in *Leeth* presumed that the people of the Colonies would not have implicitly given up their common law rights of equality in agreeing to form the Commonwealth. Hence, their pre-existing rights of equality remained afoot.

The joint judgment in *Leeth* purported to elevate 'fundamental common law rights' to the status of 'constitutional common law', which could not be altered by ordinary parliamentary enactment. The judgment was radical for a

[25] Dawson J however exhibited scepticism over this claim at 154.
[26] See generally, text at notes 80–3.
[27] (1992) 174 CLR 455.
[28] Id 486.
[29] Their Honours also found a right of procedural equality entailed in the doctrine of separation of powers at 486–7. In this respect, Gaudron J agreed: Id 502–3.
[30] J Toohey, 'A Government of Laws, and Not of Men' (1993) 4 PLR 158, 170. See also *Street* v *Queensland Bar Association* (1989) 168 CLR 461, 554 per Toohey J.

number of reasons. Firstly, the existence of 'fundamental common law rights', especially at the time of federation, is highly controversial. Indeed, a number of cases have shown that the common law is quite deficient in protecting substantive human rights.[31] The incorporation of rights into the common law is a relatively recent phenomenon, influenced by modern (ie post-federation) developments in international law.[32] Secondly, the thesis displaces the orthodox common law presumption of the sovereignty of parliament.[33] Finally, the joint judgment draws from the absence of 'fundamental rights language' in the Constitution an inference that Parliament has been denied power to abrogate rights. Traditionally, the absence of such language has been interpreted as meaning that fundamental rights are not constitutionally protected, and may therefore be freely limited by the Parliament.[34]

In *Kruger*, only Toohey J accepted the existence of this implied right. Quoting the joint judgment from *Leeth*, Toohey J noted limits to this right:[35]

> The doctrine of legal equality is not infringed by a law which discriminates between people on grounds which are reasonably capable of being seen as providing a rational and relevant basis for the discriminatory treatment.

As to whether the Ordinance breached this implied right, Toohey J stated:[36]

> the Ordinance must be assessed by reference to what was reasonably capable of being seen by the legislature at the time as a rational and relevant means of protecting Aboriginal people against the inroads of European settlement. That is a matter of evidence.

Hence, the issue could not be determined by reference to the pleadings then before the Court.[37]

Dawson J delivered the most detailed attack on the notion of an implied right to legal equality. Firstly, he noted that many provisions of the Constitution expressly authorise legal inequality. For example, his Honour argued that ss 51(xix) and 51(xxvi) enable the Commonwealth to pass laws for the benefit or detriment of, respectively, aliens and people of a certain race.[38] Dawson J also noted the numerous instances where the Constitution

[31] See eg *Dugan* v *Mirror Newspapers* (1978) 142 CLR 583, *Malone* v *Metropolitan Police Commissioner* [1979] 2 All ER 620, and *Secretary of State for the Home Department; ex parte Brind* [1991] 1 All ER 720.

[32] See eg *Mabo* v *Queensland* (1992) 175 CLR 61, per Brennan J; *Derbyshire County Council* v *Times Newspapers* [1992] QB 770, and generally, M Kirby, 'The Australian Use of International Human Rights Norms: From Bangalore to Balliol — a View from the Antipodes', (1993) 16 UNSWLJ 363.

[33] See eg J Goldsworthy, 'Implications in Language, Law and the Constitution', in G Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 150, 175.

[34] See J Goldsworthy, 'The High Court, Implied Rights, and Constitutional Change', *Quadrant*, March 1995, 46, 52.

[35] (1997) 146 ALR 126, 179, quoting (1992) 174 CLR 455, 488–9.

[36] Id 182.

[37] The case before the High Court only embraced limited questions of law.

[38] (1997) 146 ALR 126, 156.

expressly forbids discrimination, which contextually denies the existence of a general prohibition against discrimination.[39]

Finally, Dawson J attacked the notion that the common law could provide a foundation for the doctrine of legal equality.[40]

> The plain matter of fact is that the common law has never required as a necessary outcome the equal, or non-discriminatory, operation of laws.... Moreover, the supremacy of Parliament, which is itself a principle of the common law, necessarily leaves the common law subject to alteration without reference to notions of equality.

Finally,[41]

> even if a doctrine of substantive equality were discernible in the common law, it would not appear that it was a doctrine which was adopted in the drafting of the Constitution. Apart from anything else, it is clear that the Commonwealth Parliament was intended to have the capacity, in the exercise of its legislative powers, to alter the common law.

The remainder of the Court essentially agreed with the orthodox judgment of Dawson J.[42] There is no substantive doctrine of equality in the Commonwealth Constitution, so the claim based on legal equality failed.

Claim 3: Freedom of Movement and Association

The plaintiffs claimed that the Ordinance contravened an implied constitutional freedom of movement and association for political and familial purposes. This freedom was said to stem from the implied freedom of political communication guaranteed in the Constitution.[43]

Toohey, Gaudron, and McHugh JJ accepted that the Constitution does guarantee freedom of movement and association. As Gaudron J stated:[44]

> Freedom of political communication depends on human contact and entails at least a significant measure of freedom to associate with others. And freedom of association necessarily entails freedom of movement (footnotes omitted).

As with the implied freedom of political communication, proportionate limitations to the freedoms of association and movement are permissible.[45]

Only Gaudron J found some of the provisions invalid on this basis. She adopted a strict test of proportionality regarding laws, such as ss 6 and 16 of the Ordinance, which directly inhibited freedom of movement and associ-

[39] Ibid. Eg the Commonwealth may not pass tax laws which discriminate between States or parts of States; see s 51(ii).
[40] Id 157–8.
[41] Id 158.
[42] Id 141 per Brennan CJ, 195 per Gaudron J, 218 per McHugh J, 228 per Gummow J. See on constitutional notions of equality before *Kruger*, C Saunders, 'Concepts of Equality in the Australian Constitution', in G Lindell, (supra fn 33) 209–31.
[43] See eg *Australian Capital Television* v *Commonwealth* (1992) 177 CLR 106, *Lange* v *Australian Broadcasting Corporation* (1997) 145 ALR 96.
[44] (1997) 146 ALR 126, 196.
[45] Id 207 per Gaudron J, 178 per Toohey J.

ation. Such laws had to be 'necessary for the attainment of some overriding public purpose',[46] rather than 'appropriate and adapted' to another purpose.[47] Thus, in her view, restrictions on free movement have to be necessary, rather than simply reasonable or desirable. In her view, neither ss 6 or 16 could be described as necessary to protect or preserve Aboriginal welfare.[48]

Toohey J seems to have adopted a slightly more lenient principle of proportionality:[49]

> The relevant provisions of the Ordinance must not be disproportionate to what was reasonably necessary for the protection and preservation of the Aboriginal people of the Northern Territory.

His Honour felt that the issue of 'reasonable necessity' could not be decided at that stage of proceedings. More evidence was needed.[50]

McHugh J agreed that the implied freedom of political communication incorporated freedoms of movement and association.[51] However, his Honour found that this freedom did not operate to fetter laws made under s 122.[52] Dawson J agreed, though he was less forthcoming about the actual existence of any derivative implied freedoms.[53]

Gummow J felt that any implied freedoms of association and movement in the Constitution did not protect familial associations (as distinct from political associations), and thus was not relevant in the case before him.[54] In this respect, Gummow J's judgment exhibits a narrow interpretation of the political sphere; he does not recognise that political communication can take place in many contexts. Indeed, Gummow J doubted the existence of any freedoms derived from the implied freedom of political communication.

Finally, Brennan CJ also doubted the existence of any implied freedoms of movement and association. Such freedoms could only exist as a corollary of the implied freedom of political communication. His Honour found that the impugned provisions were not directed at impeding protected communication. If actions were taken which did in fact impede political communication, 'the invalidity would strike at the action taken, not at the provision which purported to authorise the action'.[55] By focusing on the Ordinance's impact on political communication rather than its impact on the alleged derivative freedoms, Brennan CJ implicitly denied their independent existence.

The claim based on implied freedoms of association and movement failed. However, one may note that three judges, half of the *Kruger* Court, expressly found that such implied freedoms do exist in the Constitution. One may only speculate as to how many other freedoms could be derived from the guarantee

[46] Id 207.
[47] Id 208.
[48] Ibid.
[49] Id 178.
[50] Id 179.
[51] Id 218.
[52] Id 219.
[53] Id 160.
[54] Id 230.
[55] Id 141.

of political speech. Freedom of assembly, for example, would seem essential for political communication. However, could one extend the notion of derivative freedoms so as to restrain government actions which *indirectly* harm or 'chill' free speech? Perhaps this argument could be used to construct freedoms from torture, genocide,[56] or even to resurrect a right to substantive equality. Government-sanctioned brutality would indirectly, and probably directly, impact on free political communication. Government-sanctioned inequality possibly undermines the ability of the disadvantaged to properly engage in political discussion.

The remainder of the Court were sceptical about the existence of the derivative freedoms, though they did not deny their existence outright.

Claim 4: Freedom from Genocide

The plaintiffs claimed that the Acts violated an implied constitutional freedom from genocide. Genocide is defined under Article II of the *Convention on the Prevention and Punishment of the Crime of Genocide* as, *inter alia*:

> any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> ...
>
> (d) Imposing measures intended to prevent births within the group
> (e) Forcibly transferring children of the group to another group.

The HREOC Report concludes that the removals policy constituted genocide contrary to the Genocide Convention[57] and systematic racial discrimination.[58] The policy clearly encompassed the deliberate separation of families on the basis of race, with an intention to destroy, at least partially, the indigenous race. Assimilation was to be achieved by controlling the reproduction of indigenous people by removing mixed-caste children, especially girls, from indigenous communities; the eventual aim was to 'breed out' aboriginality.[59] Furthermore, the misguided welfare motive, effectively saving Aborigines from themselves, does not preclude classification of the separations as genocide: 'the planned extermination of a group need not be solely motivated by animosity or hatred'.[60]

Only Gaudron J expressly found any right to freedom from genocide in the Constitution.[61]

> I would hold that, whatever the position with respect to other heads of legislative power, s 122 does not confer power to pass laws authorising acts of genocide as defined in Art II of the Genocide Convention. The acts encompassed in that definition are so fundamentally abhorrent to the principles of the common law that, . . . it is impossible to construe the general words of s 122 as extending to laws of that kind.

[56] On freedom from genocide, see below.
[57] *HREOC Report*, 270–75.
[58] Id 266–70.
[59] Id 31.
[60] Id 274, quoting M Lippman, 'The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later', (1994) 8 *Temp ICLQ* 1, 22–3.
[61] (1997) 146 ALR 126, 190.

Despite the general plenary wording of s 122, Gaudron J read its words down. She could not agree that the provision was intended to grant limitless sovereign federal power within the Territories. This reasoning contrasts markedly with some of the other judgments regarding the applicability of constitutional freedoms in the Territories.[62]
Indeed, in contrast, Dawson J stated:[63]

> whatever the form of genocide which the plaintiffs assert was authorised by the 1918 Ordinance, it cannot be said that the provisions of the 1918 Ordinance were beyond the sovereign power of the Parliament to enact laws under s 122 for the government of the territories.

Dawson J held that the doctrine of parliamentary sovereignty prevented courts striking down laws on the sole basis of abhorrence.[64] Gummow J agreed.[65]

Gaudron J, along with Brennan CJ, Toohey, and McHugh JJ, found that the Ordinance did not authorise genocide.[66] The latter three judges did not therefore decide whether the Constitution guarantees people a right to freedom from genocide. On its face, the Ordinance did not evince an intent to destroy, in whole or in part, the aboriginal race. The Court refused to look behind the statute's face to consider the possibility of an underlying malevolent purpose of eradicating the 'pure' indigenous race. This decision preserves the orthodox distinction between a statute's ostensible purpose, which may be used to interpret its provisions for constitutional purposes, and the legislative motive behind an Act, which may not.[67]

An important distinction must be made between the Ordinance's provisions and acts performed under those provisions.[68] The Court found that the Ordinance did not authorise genocide; that is not to deny that genocidal acts may have occurred in purported exercises of power under those provisions. Therefore, the High Court's decision does not necessarily dispute the findings of the HREOC report. The High Court's decision means that any genocidal act performed under the Ordinance is in fact ultra vires, and may therefore be the subject of an action for damages.[69] Indeed, many such claims are currently before Australian courts.

The claim based on freedom from genocide failed. Only three Judges expressed any view as to whether such a fundamental freedom is constitutionally guaranteed. Though these judgments were limited to the possibility of such a right applying in the Territories, indications are that two

[62] See supra fns 24–26, and infra fns 80–83.
[63] (1997) 146 ALR 126, 162.
[64] Ibid; see also *Kable* v *Director of Public Prosecutions* (NSW) (1996) 138 ALR 577, 590 per Dawson J.
[65] Id 232.
[66] Id 137–8 per Brennan CJ; 175 per Toohey J; 190 per Gaudron J; 220 per McHugh J.
[67] See eg *Fairfax* v *Commissioner of Taxation* (1965) 114 CLR 1, 6–7.
[68] See especially id 166 and 175 per Toohey J.
[69] See id 190 per Gaudron J. The Court found it unnecessary to decide whether any such actions would be barred for reason of a statute of limitations, an implied constitutional time limit, laches, or other analogous equitable principle; see id 246–7.

Judges (Dawson and Gummow JJ) deny the existence of such a right, while one supports it (Gaudron J).

Claim 5: Freedom of Religion

The plaintiffs' final claim was that the impugned laws prohibited the free exercise of aboriginal religious beliefs, by separating persons from their aboriginal culture, in contravention of s 116 of the Constitution. Section 116 prohibits the Commonwealth government from, *inter alia*, prohibiting the free exercise of any religion.[70]

Gaudron J found that '[section] 116 extends to provisions which authorise acts which prevent the free exercise of religion . . .'[71] Gaudron J therefore rejects the earlier approach of Griffith CJ in *Krygger* v *Williams*, who held that only laws which directly operate to prohibit religious practices breach s 116.[72]

Her Honour was prepared to assume that exercises of power under the Ordinance prevented certain people from freely exercising their aboriginal religious practices in association with other members of their community.[73] She moved on to the issue of whether such restrictions could nevertheless be justified.

Freedom of religion in Australia is not absolute.[74] In particular, a law only infringes s 116 if one of its purposes is to prohibit the free exercise of a religion. However, in ascertaining the true purpose of a law, Gaudron J utilised a test of proportionality:[75]

> A law will not be a law for 'prohibiting the free exercise of any religion', notwithstanding that, in terms, it does just that or that it operates directly with that consequence, if it is necessary to attain some overriding public purpose or to satisfy some pressing social need. Nor will it have that purpose if it is a law for some specific purpose unconnected with the freedom of religion and only incidentally affects that freedom.

Gaudron J decided that the plaintiffs' claim could not be resolved at this stage of proceedings; more questions of fact (eg was aboriginal religion actually impeded) and law (pleadings had to be entered regarding the true purpose of the Ordinance) had to be resolved.[76]

Toohey J believed that s 116 was directed at the making of a law, rather than the administration of the law.[77] Therefore, a noxious anti-religious 'purpose' had to be evinced from the face of the statute. This interpretation renders s 116 a less effective guarantee of freedom of religion. A law must evince an

[70] On s 116, see R McLeish, 'Making Sense of Religion and the Constitution: A Fresh Start for s 116' (1992) 18 *Mon L R* 207.
[71] Id 210.
[72] (1912) 15 CLR 366, 369.
[73] (1997) 146 ALR 126, 210.
[74] See eg *Adelaide Company of Jehovah's Witnesses* v *Commonwealth* (1943) 67 CLR 116.
[75] (1997) 146 ALR 126, 211.
[76] Id 212.
[77] Id 173, quoting *Attorney-General (Vic), ex rel Black* v *Commonwealth* (1981) 146 CLR 559, 580–2 per Barwick CJ.

ostensible purpose of inhibiting religious practice, rather than have the effect of inhibiting religious freedom, before it can be found to have breached s 116. His Honour duly decided that the language of the Ordinance evinced no purpose of restricting aboriginal religious freedom. Brennan CJ, Dawson and Gummow JJ agreed.[78]

Finally, Dawson and McHugh JJ found that s 116 did not restrict legislative power under s 122, due to the plenary nature of that power.[79] The claim under s 116 failed, with the majority confirming its apparent limited utility.

Section 122

Space precludes a detailed analysis of the *Kruger* reasoning regarding the application of each relevant right in the Territories. It will suffice to say that generally, three Judges construed s 122 as being fettered by constitutional rights (Toohey, Gaudron and Gummow JJ) while three Judges construed the plenary language of s 122 as excluding the application of such rights (Brennan CJ, Dawson and McHugh JJ).

The subsequent case of *Newcrest Mining (WA)* v *Commonwealth*[80] concerned the applicability of property rights under s 51(xxxi) to s 122 laws. Gaudron, Gummow and Kirby JJ were prepared to overrule a previous case[81] to find that s 51(xxxi) applied to such laws. Brennan CJ and Dawson J dissented on this point. McHugh and Toohey JJ did not decide the issue. Kirby J delivered a convincing rationale for his decision:[82]

> Where there is an ambiguity in the meaning of the Constitution, as there is here, it should be resolved in favour of upholding such fundamental and universal rights. The Australian Constitution should not be interpreted so as to condone an unnecessary withdrawal of the protection of such rights. At least it should be so interpreted unless the text is intractable and the deprivation of such rights is completely clear.

The requirements of federalism should not unnecessarily dictate that residents in the Territories be denied rights enjoyed by other Australians under the federal Constitution.[83]

Conclusion

The *Kruger* decision is disappointing for those seeking to utilise a notion of constitutional rights as a way of remedying government wrongs in Australia. It heralds a return by the High Court to the orthodox view that the

[78] Id 138 per Brennan CJ; 153 per Dawson J; 232–3 per Gummow J.
[79] Id 153 per Dawson J; 218 per McHugh J.
[80] (1997) 147 ALR 42.
[81] *Teori Tau* v *Commonwealth* (1969) 119 CLR 564.
[82] Id 150.
[83] In some cases, such denial is unavoidable. In *Snowden* v *Dondas* (1996) 139 ALR 475, the Court confirmed that s 24 confers no minimum representation in the House of Representatives for Territory residents; the relevant text is explicitly limited to 'the number of members chosen in the several States'.

Commonwealth Constitution contains very few individual rights. Apart from the few express rights, constitutional rights seem to be confined to the implied freedom of political communication and possibly some derivative or subsidiary rights, and some due process rights gleaned from the doctrine of the separation of powers.[84] Furthermore, the applicability of both express and implied constitutional rights is controversial in the Territories.

However, it would be wrong to construe the *Kruger* decision as shutting the door to legal compensation for the victims of the Stolen Generations. There remains the possibility of success for claims of breach of statutory duty, as well as claims based in equity and the common law. Nor does the *Kruger* decision justify a government's failure to take appropriate non-legal measures to offset the injustices of a particularly oppressive and cruel policy.[85]

[84] In this respect, see *Kable* v *Director of Public Prosecutions (NSW)* (1996) 138 ALR 577. See also F Wheeler, 'The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia', (1997) 23 *Mon L R* 248.

[85] This author regrets the federal government's continued failure, as of September 1998, to offer an official apology to the Stolen Generation, contrary to Recommendation 5A of the *HREOC Report*, at 284–7.