Can International Law Protect our Civil Rights? The Australian and British Experience Compared

John Kidd Senior Lecturer in Law, University of Queensland.*

Introduction

In 1994 an international body, the United Nations Human Rights Committee, gave its decision (or more accurately its 'views') in *Toonen* v *Australia*[1] (*Toonen*). It was a decision in which the Committee found that certain provisions of the Tasmanian law, for which Australia is responsible internationally, breached Australia's obligations as a State Party to an international treaty, the United Nations *International Covenant on Civil and Political Rights* 1966 (the Covenant). More precisely, it was the Committee's opinion that ss 122 and 123 of the Tasmanian *Criminal Code* which criminalise certain male homosexual conduct violated the right to privacy guaranteed by Article 17 of that Covenant.

The decision in *Toonen* generated constitutional controversy and a further round in the continuing battle of State rights versus the Commonwealth a battle won, at least for the present, by the latter in the form of the *Human Rights (Sexual Conduct) Act* 1994 (Cth) which overrides the 'offending' Tasmanian law. It also served to focus attention, legal and lay, on the increasing impact of international human rights law on Australian law. In particular, it brought home the implications of Australia's accession in 1991 to the procedural provisions of the First Optional Protocol (the Protocol) to the Covenant the purpose of which is, however imperfectly, to provide individuals with some practical protection of their theoretically guaranteed Covenant rights. By acceding to these provisions Australia accepted the right of an individual claiming to be a victim of a violation of his or her Covenant rights in Australia to bring his or her claim to the Human Rights Committee established under the Covenant.[2] The *Toonen* claim was the first launched by an Australian under the Protocol procedure. It was indeed initiated on Christmas Day 1991 the date from which the Protocol applied in Australia.

Accession to such a treaty as the Protocol is in Australia an executive act. It does not require legislative endorsement nor even Parliamentary debate. This was the case with Australia's accession to the Protocol. Although foreshadowed by ministerial announcements in Parliament,[3] the accession itself was announced by a press release on 25 September 1991 following lodgment of the necessary documents with the United Nations in New York by the Minister for Foreign Affairs and Trade. It therefore passed unnoticed at that time by most of the community. The media publicity and political debate which three years later greeted the *Toonen* decision and which rarely accompanies matters of international law has, however, brought the matter firmly into the public arena. Indeed the subject matter of the claim involving a veritable cocktail of sex, 'gay rights' and state rights could hardly have been more guaranteed in modern Australia to attract that publicity. Thus, in the immediate aftermath of the decision, the views of many critics of the Protocol

* This article is based on a paper presented t a staff seminar at the University of Queensland in May 1994.

1 CCPR/C/50/D/488/1992 4 April 1994.

2 See Article 28 of the Covenant. The Comı ittee consists of 18 members.

3 See eg, Statement by the Minister of Fore gn Affairs (Mr Hayden) on 5 June 1986 (in the House of Representatives) and by the Attorney-General (Mr I owen) on 17 December 1987 (House of Representatives). Both statements referred to the problems of obtainin the agreement of State and Territory governments to the step.

procedure were persuasively summarised by Liberal Party Senator, R Kemp.[4] He made the following points: that the UN Committee's scrutiny of Tasmania's law created a 'dangerous precedent' in that it could justify the Commonwealth Government's use of the external affairs power to override such state laws (precisely, as noted, what followed the decision) and thus engender constitutional crises; that the Committee itself was hardly an ideal scrutineer of Australian domestic laws with its no more than quasi-judicial status, with its *in camera* proceedings, with no cross examination of witnesses and with, in his view, at least a question mark over the independence of its membership; and that there is an irony in the Government's apparent eagerness to accept overseas scrutiny of our laws only a few years after appeals to the Judicial Committee of the Privy Council were finally abolished on nationalistic grounds.

The *Toonen* case and its significance internationally and in domestic law are further analysed later in this paper. Before doing so, however, it is necessary to set the scene by a brief examination of the broader issue of the role or reception of international law in Australian law. Then, in the last part of the paper we will compare and contrast the Australian experience with that of the United Kingdom as a State party to the most significant regional human rights treaty, the *European Convention on Human Rights* 1950 which, compared with the UN Covenant and Protocol, has a much more advanced and mature enforcement machinery.

The role of international law in Australia

The traditional approach which still prevails is that rules of international law are not in any direct sense part of Australian law. They might bind Australia in its external relations with other States or international organisations but, in the absence of incorporation or translation into domestic law, they have no binding force in Australian courts. Thus, Australia is bound internationally by the provisions of a treaty to which it is a party (such as the *ICCPR*) but, until and unless the treaty is incorporated domestically by Act of Parliament, they form no part of domestic law. This is because, as classically expounded by Lord Atkin in *Attorney-General for Canada* v *Attorney-General for Ontario*,[5] entry into a treaty is an executive act in Australian constitutional law, whereas it is for the legislature or courts to enact make or modify domestic law. The decision of the High Court in *Simsek* v *Macphee*[6] provides an apt illustration. There, in an application for an interlocutory injunction to restrain execution of a deportation order, the plaintiff unsuccessfully argued that he was entitled to refugee status and associated rights under the 1951 *Convention Relating to the Status of Refugees* to which Australia is a party. The rights allegedly conferred by the treaty could not be relied upon, even in the High Court, because, in the words of Stephen J: '[I]in our constitutional system treaties are matters for the Executive, involving the exercise of prerogative power, whereas it is for Parliament, and not for the Executive to make or alter municipal law ... Were it otherwise "the Crown would have the power of legislation" '.[7]

However, in an indirect sense international law can and does play a role in our domestic law in two principal ways: (i) to resolve ambiguities or fill gaps in the common law, and (ii) under the extended administrative law principle of legitimate expectations applied in the 1995 decision of the High Court in *Minister for Immigration and Ethnic Affairs* v *Teoh*[8] (the *Teoh* decision).

4 See *The Australian*, 8 April, 1994.
5 [1937] AC 326.
6 (1982) 148 CLR 636.
7 *Id* 642.
8 (1995) 69 ALJR 423.

(i) Ambiguities or gaps in the common law

It has for long been the case that international law may be drawn upon as a possible source of domestic law (and thereby incorporated into that law) by a court faced with an ambiguity or gap in the pre-existing common law. And, in the context of civil rights, this process is now assuming a higher profile than hitherto because of Australia's accession to modern human rights treaties. Some courts now stress the desirability of the common law being developed wherever possible in harmony with those treaty obligations. Of the several examples of this two recent and famous High Court decisions, as well as the Teoh decision discussed below, deserve particular mention: that in *Mabo* v *Queensland*[9] on indigenous people's land rights, and that in *Dietrich* v *The Queen*[10] on whether a fair criminal trial necessitates a right of an indigent defendant to publicly funded counsel.

Giving the leading majority judgment in *Mabo*, Brennan J noted[11] Australia's international obligations under the UN Covenant and the more intense spotlight to which her human rights record is now exposed following acceptance of the Protocol procedure. Although they were not directly part of domestic law, those obligations were 'a legitimate and important influence on the development of the common law'. This was particularly so in *Mabo* where the High Court was faced with a pre-existing common law which applied the doctrine of *terra nullius* to the European settlement of Australia and which, according to Brennan J,[12] was 'founded on unjust discrimination in the enjoyment of civil and political rights [which] demands reconsideration' but which was not firmly entrenched as a 'skeletal principle of our legal system'. In his Honour's opinion, therefore, the treaty obligations had an important role to play in the formulation of a concept of traditional communal native title as a new part of the common law.

In *Dietrich* most of the judgments of the seven member Court are replete with references to Australia's obligations under the human rights Covenant. Article 14(3) of the Covenant guarantees the right to a fair trial, an ingredient of which is the right of an accused to legal assistance 'when the interests of justice so require, and without payment by him ... if he does not have not have sufficient means to pay for it'. The question was whether this right had been or could be incorporated into domestic law so that it could be relied upon by the appellant at his trial for serious drug offences. It was noted that neither at the time of accession to the Covenant in 1980 and the Protocol in 1991, nor at any other time, had any specific legislation been enacted implementing the Covenant. Although it is contained in Schedule 2 to the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth) which gives its Commission the role of investigating and conciliating alleged human rights violations, this, as stated by Toohey J 'does not create justiciable rights for individuals'.[13] Neither was the common law uncertain on the matter. There was no such right to counsel as alleged although a court has, in some circumstances, power to stay a trial in the interests of a fair trial where an indigent accused is not represented. In the absence of domestic incorporation, therefore, the treaty provision could fulfil no direct role in the Court's decision: there was no gap or uncertainty which it was capable of resolving. However, six[14] of the High Court judges discussed the treaty at some length. Three thought it, in the words of Mason CJ and McHugh J,[15] somewhat 'curious that the Executive Government has seen fit to expose Australia to the potential censure of the Human Rights Committee without endeavouring to ensure that the rights enshrined in the ICCPR are

9 (1992) 175 CLR 1.
10 (1992) 177 CLR 292.
11 (1992) 175 CLR 1, 42.
12 *Id* 42–43.
13 (1992) 177 CLR 292, 360. See now *Minister for Immigration and Ethnic Affairs* v *Teoh* (1995) 69 ALJR 423.
14 Mason CJ and McHugh J (in a joint judgment), Brennan, Dawson, Toohey and Gaudron JJ).
15 (1992) 177 CLR 292, 305.

incorporated into domestic law . . .'. Some mentioned the somewhat analogous case of the status of the European Convention on Human Rights in English law. There, as confirmed by the House of Lords in *R* v *Home Secretary, Ex parte Brind*,[16] courts will resolve ambiguities in legislation by reference to a presumption that Parliament intended to legislate in harmony with the United Kingdom's international obligations and may draw upon those obligations to resolve ambiguities in the common law. In *Dietrich*, where it was not necessary to do so, the High Court refrained from deciding whether Australian courts had an obligation to adopt a similar 'common sense approach'.[17]

Dietrich therefore confirms that Australian law at least permits a court to resort to Australia's international law obligations to resolve ambiguity in either statute or common law. One is also left with a distinct impression that, as well as Brennan J who reiterated his *Mabo* views, the other members of the High Court see this as being desirable at least where individual civil rights are involved.[18] Other judges (for example Kirby J, President of the New South Wales Court of Appeal)[19] have spoken in similar vein. It may well be that the time has come when an Australian lawyer practising in the criminal and civil rights areas will be expected to have knowledge of international human rights treaties and jurisprudence as an essential, or at least useful, tool of his or her trade. Anything less might risk exposure to claims of professional negligence.

(ii) The Teoh decision

This last comment has now been fortified by the decision this year (1995) in *Minister for Immigration and Ethnic Affairs* v *Teoh*.[20] There, a majority of the High Court (Mason CJ, Deane, Toohey and Gaudron JJ; McHugh J dissenting) extended the administrative law principle of legitimate expectations to embrace some of Australia's treaty obligations. In certain circumstances, it was held, Australia's ratification of a treaty might, without any legislative implementation, generate a legitimate expectation that a domestic decision-maker will act in conformity with relevant provisions of that treaty. Thus, in *Teoh*, an immigration officer when deciding whether to refuse resident status and deport an alien when such decisions might separate him from his Australian wife and children had a duty to consider Australia's obligation under Article 3(1) of the UN *Convention on the Rights of the Child* 1989 that 'in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'. The Convention had been ratified by Australia in 1990 but had not been incorporated into domestic law. It was, however, in 1992 (after the *Teoh* immigration decision) annexed, as a relevant international instrument, to the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth) (HREOC).[21]

The reasons for the extension of the legitimate expectations principle in *Teoh* were given by Mason CJ and Deane J in their joint judgment.[22] Australia's ratification of a treaty, particularly a human rights treaty, was not to be regarded, domestically, as 'a merely platitudinous or ineffectual act'. Rather, it operated as 'a positive statement by the executive government of this country to the world and to the Australian people that the executive

16 [1991] 1 AC 696.
17 (1992) 177 CLR 292, 306 (Mason CJ and McHugh J).
18 And see now, in confirmation of this view, the *Teoh* decision discussed below.
19 See eg, *Jago* v *District Court of New South Wales* (1988) 12 NSWLR 558, 569 (on the alleged right to a speedy criminal trial); *Gradidge* v *Grace Bros* (1988) 93 FLR 414, 422 (on the right of a deaf mute litigant to an interpreter as part of entitlement to due process); and see *Re Jane* (1988) 94 FLR 1, 11–17 (Family Court, Nicholson CJ).
20 (1995) 69 ALJR 423.
21 Under s 47(1) of the *HREOC* Act upon a declaration that a Convention is an 'international instrument relating to human rights and freedoms' which makes it a 'relevant international instrument' for the purposes of s 3(1).
22 (1995) 69 ALJR 423, 432.

government and its agencies will act in accordance with the Convention'. It was this which generated 'a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention . . .'. However, the effect of this was not to admit the Convention into domestic law 'by the back door'. The principle of reasonable expectations, not being a binding rule of law, does not require a decision-maker to act in a particular way. Instead, it falls within the ambit of the rules of procedural fairness in the sense that a decision contrary to a legitimate expectation should not be made without first giving those affected adequate opportunity of putting their case.

On the facts of *Teoh* the immigration department had denied such procedural fairness as there was no evidence that, in making their decisions, the relevant provisions of the Convention had been either considered or applied. The interests of the applicant's children had not been treated as a primary consideration as required by the Convention without giving the applicant adequate opportunity to argue against that course.

How far might the *Teoh* decision extend? It should be noted that the High Court confirmed[23] the 'well established' rule that 'the provisions of an international treaty . . . do not form part of Australian law unless . . . validly incorporated into our municipal law by statute'. And, as already indicated, the court was mindful of the dangers of allowing unincorporated treaty law in by the back door. Thus, an individual is still unable to rely on a treaty provision as in itself constituting an enforceable rule of law whatever legitimate expectations might have been aroused by its ratification by Australia. For such reasons it is submitted that *Teoh* has not substantially changed the previous position. Its restated principle of legitimate expectations will probably extend no further than the exercise of administrative discretion on matters found in ratified human rights treaties; that a governmental decision-maker (State as well as Commonwealth?) must act, procedurally, in accordance with relevant legitimate expectations generated by the Commonwealth's accession to a Convention protecting civil rights unless that course is barred by contrary domestic law. Indeed, Gaudron J seems to have suggested a narrower, more subjective, approach in the following passage: 'Given that the Convention gives expression to an important right valued by the Australian community, it is reasonable to speak of an expectation that the Convention would be given effect. However, that may not be so in the case of a treaty or convention that is not in harmony with community values and expectations'.[24] It is respectfully submitted, however, that the questions begged by any such approach would make it somewhat less than satisfactory. Who would be the arbiter of harmonious compliance with community values? Presumably the judges. And how difficult might be the task of a decision-maker having to second guess the likely judicial view on the matter? Perhaps it would be preferable, and more convenient for the decision-maker, to confine the principle to acting in conformity with those treaties executively declared to be relevant international human rights instruments under s 47(1) of the *Human Rights and Equal Opportunity Commission Act* noted above. This would, however, be contrary to the *Teoh* decision itself where such declaration in the case of the Rights of the Child Convention did not occur until after the relevant departmental decisions had been made.

Even the last suggested limit failed to impress McHugh J who, in a powerfully argued dissenting judgment in *Teoh*, highlighted the problems accompanying any extension to treaties of the legitimate expectations principle as follows:[25]

23 *Id* 430 (Mason CJ and Deane J).
24 *Id* 440.
25 *Id* 447.

> If the result of ratifying an international convention was to give rise to a legitimate expectation that the convention would be applied in Australia, the Executive government of the Commonwealth would have effectively amended the law of this country. It would follow that the convention would apply to every decision made by a federal official unless the official stated that he or she would not comply with the convention. If the expectation were held to apply to decisions made by State officials, it would mean that the Executive government's action in ratifying a convention had also altered the duties of State government officials. The consequences for administrative decision-making in this country would be enormous. Junior counsel for the Minister informed the Court that Australia is a party to about 900 treaties. Only a small percentage of them has been enacted into law. Administrative decision-makers would have to ensure that their decision-making complied with every relevant convention or inform a person affected that they would not be complying with those conventions.

And later,[26] his Honour made clear that his apprehension applied just as much to a treaty recognised under the HREOC Act if not otherwise incorporated into Australian law.

Whatever the overall impact of the *Teoh* decision might prove to be one consequence might be readily foreseen. That is that, unless the decision be legislatively neutered, the Commonwealth government would be wise to adopt a more cautious, more consultative, approach than hitherto when deciding whether to ratify treaties. Even its own and other potentially affected and harassed decision-makers might view that as a beneficial effect of the decision.

Should the Australian Parliament wish to legislate to implement its treaty obligations the objective is easily obtained. Under the external affairs power of the Constitution (s 51(xxxix)) as interpreted by the High Court in *Koowarta* v *Bjelke Petersen*[27] and the *Tasmanian Dam* case[28] the Commonwealth can enact legislation, which may override State law, for that purpose. As noted above, this was indeed the procedure adopted by the Commonwealth to give effect to the *Toonen* decision in the form of the *Human Rights (Sexual Conduct) Act* 1994 (Cth) which has the effect of overriding the relevant provisions of the Tasmanian *Criminal Code*. We now turn to a further consideration of the *Toonen* case and its aftermath.

The Toonen case

The claim

The applicant was, in the language of the Protocol,[29] the 'author' of a 'communication' addressed to the Human Rights Committee in which he claimed to be a 'victim' of Covenant violations. In particular, he claimed that the threat of the application to him, as a homosexual activitist in Tasmania, of ss 122(a) and (c) (unnatural carnal knowledge) and 123 (Indecent practices between male persons) of the Tasmanian *Criminal Code* (the sodomy laws) amounted to an arbitrary interference with his right to privacy guaranteed by Article 17 of the Covenant and to unlawful discrimination against him on the ground of sex contrary to Article 26. It should be noted that he had never been prosecuted under the sodomy laws. Indeed, in recent years the Tasmanian authorities have not charged any consenting adult males with such offences. However, the offences remained on the statute book and on at least one occasion prosecuting authorities had indicated that, if the evidence existed, charges would be brought.[30]

26 *Ibid*
27 (1982) 153 CLR 168.
28 (1983) 158 CLR 1.
29 See Article 1 of the Optional Protocol. See generally on the Optional Protocol process H Charlesworth, 'Australia's Accession to the First Optional Protocol to the International Covenant on Civil and Political Rights' (1991) 18 *Melbourne University Law Review* 428, and C Caleo, 'Implications of Australia's Accession to the First Optional Protocol in the International Covenant on Civil and Political Rights' (1993) 4 *Public Law Review* 175.
30 See the views of the Human Rights Committee at p 3.

The case, therefore, raised as a preliminary issue at the admissibility stage the question whether in these circumstances the threat of prosecution was sufficient to give the applicant the victim status required by Article 1 of the Protocol. The same issue had earlier arisen in an analogous case in the European Court of Human Rights, *Dudgeon* v *United Kingdom*,[31] in which a Northern Ireland homosexual was successful in his claim that sodomy laws still applying in that province (but not on the British mainland) violated his right to privacy guaranteed by Article 8 of the European Convention on Human Rights (considered below). And, just as in *Dudgeon*, it was found in *Toonen* that a real threat of prosecution under the challenged law could and did suffice to make the claimant a victim.

We might also note that Australia as the respondent State party to the Covenant made for itself no real attempt to defend the claim. Rather it appears to have done much to advance the claimant's case. True, it added to its own submissions 'observations' of the Tasmanian Government in which public health and moral grounds were argued to justify its laws. However, while doing this, it also did its best to undermine those observations to such an extent as to make its own support for the claim clear. Thus, the Commonwealth conceded[32] that the claimant was the victim of arbitrary interference with his privacy and that the Tasmanian law could not be justified on public health or moral grounds. Specifically, it denied the Tasmanian Government's argument that the law promoted the public health interest by helping to protect Tasmanians from the spread of HIV/AIDS. To the contrary, it argued, the law in fact obstructed the national government's HIV/AIDS strategy an essential part of which was the promotion of 'safer sex'. It is quite apparent that the Commonwealth, on behalf of Australia, was not prepared to defend what it patently regarded as the indefensible even though an adverse 'decision' of the Committee would target Australia as the State party responsible internationally for the Tasmanian law. Perhaps it was happy to assist the claimant in attracting international attention to that law and thereby facilitate its own efforts to neutralise it.

The decision

In the light of the above it was hardly surprising that the Committee unanimously upheld the claim. In reasoning similar to that of the European Court of Human Rights in *Dudgeon*, and other analogous decisions,[33] the Committee found that the continued existence on the Tasmanian statute book of the sodomy laws was an arbitrary and unjustified interference with the claimant's right to privacy which therefore breached Article 17 of the Convention. There could be no doubt, in the Committee's view, that adult consensual sexual activity in private was covered by the concept of privacy. Further, those laws could be justified neither on public health nor moral grounds as the Tasmanian Government's argument failed to show that they were necessary and reasonable for the achievement of either objective. In other words, the requirement of proportionality for such justification had not been demonstrated. As for the health ground, as well as its acceptance of the Commonwealth Government's argument (noted above), the Committee noted the apparent failure of the Tasmanian Government to show any link between its sodomy laws and effective control of the spread of sexually transmitted disease. And, on the morality issue, the Committee rejected the Tasmanian Governemnt's claim that morals were exclusively a matter of domestic concern and, again in a faithful echo of the Commonwealth's case, took into account as a telling fact that throughout the rest of Australia homosexual conduct had been decriminalised. Even in Tasmania its continued criminality was highly controversial and the current failure to enforce the laws hardly suggested that they were deemed essential for the protection of local morals.

31 (1981) 4 EHRR 149.
32 For Australia's 'observations' see the Committee's views at pp 5–8.
33 See *Norris* v *Ireland* (1988) 13 EHRR 186 and *Modinos* v *Cyprus* (1993) 16 EHRR 485.

Because of its findings on the Article 17 privacy issue, the Committee did not consider it necessary to reach a decision under Article 26 and, thus, on whether the claimant had been the victim of discrimination 'on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. It did, however, in what, if it were a court, would be categorised as *obiter dicta*, express its opinion that the reference to 'sex' in that provision and in the similarly worded Article 2(1) should be interpreted as embracing sexual *orientation* as well as its perhaps more obvious meaning of discrimination on grounds of gender.[34] On this point the Committee went beyond *Dudgeon* where the European Court of Human Rights carefully restrained from expressing an opinion on any possible discriminatory effect of the Northern Ireland homosexual law.

The aftermath

A State party to the Covenant has a duty to ensure an 'effective remedy' to the victim of a human rights violation.[35] In *Toonen* the Committee recommended the repeal of the offending Tasmanian laws as the appropriate effective remedy. Australia was duly called upon to report within 90 days of the measure to be taken to give effect to the Committee's views — the practice in such a case. There was of course only one way of so acting, that is, to overrule or otherwise change the State law. This was not a course amenable to the Tasmanian Government. Hence, as we have seen, the stage was set for the controversial step of the Commonwealth's use of its external affairs power to enact the *Human Rights (Sexual Conduct) Act* which took effect on 19 December 1994. The Act confirms the findings of the Committee and gives effect to its interpretation of Article 17 of the Covenant throughout Australia. How far the Act might go beyond protecting the privacy of male homosexuals from the intrusion of any Tasmanian type sodomy laws and apply to other forms of sexual conduct remains to be seen.

The *Toonen* claim was merely the first individual claim from Australia to be considered by the Committee. There are others in the pipeline and no doubt many more to come. Increasingly, therefore, and as has been the case in Europe for several decades, there will be challenges to Australian laws and practices (Commonwealth and State) mounted at the international level. And this will not simply be to the Committee under the Covenant on Civil and Political Rights. There are other such treaties[36] to which Australia has acceded with similar committee-based procedures. Thus, Australia is party to International Labour Organisation (ILO) conventions which allow complaints to be taken to and ruled upon by that organisation. A potentially controversial challenge to provisions of the *Industrial Relations Act 1994* (Cth) is presently being considered by the Organisation (as in early 1995).[37] It was brought in May 1994 by the Australian Chamber of Commerce and Industry and, in essence, challenges the Act's system of compulsory arbitration as breaching ILO Conventions[38] on freedom of association and on the rights to organise and collectively bargain. As with the Human Rights Committee, any adverse decision of the ILO will have

34 Committee's views at p 12.

35 Article 2(3)(a) ICCPR.

36 Thus, 28 January 1993 was something of a field day for those who support such international procedures as, on that day (and during a federal general election campaign), Australia accepted the following: (i) the procedure under Article 14 of the UN *Convention on the Elimination of All Forms of Racial Discrimination* 1966 which allows individuals or groups of individuals to complain to the Committee on the Elimination of Racial Discrimination; and (ii) the procedure under Article 22 of the UN *Convention against Torture* 1984 which allows individual claims to its Committee against Torture; and (iii) the procedures under Article 41 of the ICCPR and Article 21 of the Torture Convention which allow claims against Australia to be brought to their Committees by other State Parties on a basis of reciprocity. No such inter-State claims have so far been brought.

37 See A Wood, 'Why Labor's Industrial Relations Act Won't Survive', *The Australian*, 7 March, 1995.

38 ILO Conventions Number 87 (on freedom of association) and Number 98 (on right to organise and to bargain collectively).

no legal force in Australia. The present federal government would no doubt be loath to implement any ruling the effect of which would radically deregulate Australia's traditional industrial relations system and thereby harm its close relationship with the trade union movement. Yet how would it explain any such failure to follow the precedent of its prompt action to implement the views of the Committee in *Toonen*?

As earlier indicated, the international procedure exemplified and highlighted by *Toonen* has not been universally acclaimed. The procedure undoubtedly has its faults. The Committee is not a court of law but a committee of eighteen experts. Even at the international level, its 'views', lacking any legal force, are no more than persuasive interpretations of the Covenant rights. Its deliberations in *Toonen* could no more bind Australian courts than they could Australia itself internationally. This was why implementation of the Committee's views by means of the *Sexual Privacy Act* was needed for them to have any domestic legal relevance. For these reasons some of the criticism of *Toonen* was misconceived. Charges that the United Nations, through its Committee, was acting to overrule State laws or that unelected international officials were forcing the Commonwealth to overrule an elected State Parliament's laws simply went too far. The fact that the Commonwealth adopted such a course was not because it was legally obliged to do so but because it chose to do so and the successful outcome of that course, in the form of the implementing legislation, was of course dependent upon its obtaining the necessary support from elected parliamentarians. What is highlighted (not for the first time) by the post *Toonen* proceedings is how much the balance between federal and state governments in Australia has been tilted in favour of a federal government equipped with its *Tasmanian Dam* case capacity to overrule state laws under the Constitution's external affairs power, and to do so pursuant to an Executive decision to accede to a treaty. Criticism of *Toonen* is perhaps better and more cogently directed in this constitutional direction than at the optional international procedure — at the legally responsible body, the Australian Government, rather than the no more than morally persuasive UN Committee. Should not that body be encouraged or made to obtain domestic legislative or popular endorsement of accession to a treaty which might have a potential to dramatically impact upon the lifestyle and conduct of Australians?

Comparison with the United Kingdom experience

There are interesting parallels, but also significant differences, between Australia's accession to the Optional Protocol and the United Kingdom's acceptance of Article 25 of the European *Convention on Human Rights* 1950 (the European Convention). This allows individual victims of alleged breaches of the European Convention to bring claims under that Convention's enforcement machinery. In both countries broadly similar procedural requirements must be fulfilled by an individual applicant. Thus, any available domestic remedies must first be fully tested[39] before an international claim may proceed (the general international law principle of 'exhaustion of local remedies'). The claimant has to be a 'victim' of an alleged human rights violation (see above). And the complaint must not be anonymous nor an abuse of the right of petition nor be 'manifestly ill founded'.[40] A difference is that, under the European Convention, applications may also be made (under Article 25) by a 'non-governmental organisation or group of individuals' whereas, under

39 See Article 26 of the ECHR and Articles 2 and 5(2) of the First Optional Protocol to the ICCPR. On the general principle of exhaustion of local remedies, see eg, the *Ambatielos Arbitration* (Greece v UK) 1956, 23 ILR 306. The rationale of the principle is broadly that a state should be given an opportunity, through the full testing of any available local remedies, of correcting its own wrongful acts before being exposed to the serious step of an international claim. Note that the lack of local remedies may in some circumstances be in breach of the ICCPR under Article 2(3).

40 See Article 27 of the ECHR and Article 3 of the Protocol.

the Protocol, only an individual may claim. Both countries are common law jurisdictions which, by dint of acceptance of the treaty procedures, have exposed, at least partially, their human rights records to international scrutiny. A scrutiny, moreover, by international interpreters of treaty 'bills of rights' which define their constituent freedoms in sweeping principled terms comparatively alien to the incremental piecemeal traditions of the common law.

The United Kingdom, however, has had a longer experience of this process than Australia. She has accepted the European individual complaints procedure since 1966. During that time she has been the respondent State in an ever increasing number of claims which have culminated in decisions of the European Court of Human Rights (the Strasbourg Court as we may call it after the city of its location), the judicial interpreter of the European Convention. Indeed, until recently, the United Kingdom had, for various reasons,[41] the seemingly unenviable record of having had the highest number of adverse decisions given against her by that Court of all the Convention's State parties (now over 30 parties). The British experience might, therefore, be of some interest to human rights lawyers in Australia. There might even be lessons to be learned from it.

Mention of the Strasbourg Court immediately indicates one crucial difference between the UN and the regional treaties. Unlike the UN Covenant's procedure with its Committee, the European Convention's enforcement machinery has at its apex a fully fledged court which sits normally in public, hears oral as well as written submissions, and the decisions of which bind the parties.[42] It is true that in the United Kingdom its decisions have no direct effect in domestic law. We have earlier noted that, as in Australia, and as confirmed by the House of Lords in the *Brind* decision,[43] an externally binding treaty lacks that internal force unless domestically implemented. That notwithstanding, the fact that the European Convention is the subject of legal interpretation by a court gives it an authority and acceptance in excess of the UN Covenant and its closed committee system. It has also led to a jurisprudence of interpretative case law[44] of great value to those seeking to pay more than merely lip service to the protection of human rights.

Other differences between the two treaties exist. Most significant is that, as well as having a court, the European Convention has overall more effective enforcement means than its UN equivalent. Thus, all State parties have now accepted the right of individual petition under Article 25 and the compulsory jurisdiction of the Court under Article 46. Indeed, these provisions, so vital to international enforcement of any human rights treaty, could hardly be said nowadays to be optional as their acceptance is almost invariably made a condition of accession to the Convention and to its parent body, the Council of Europe. As a result, over 500 million people living in the present thirty-two State parties have access to the Convention's machinery. There are readily understandable reasons for the relatively advanced machinery of the European Convention. In the aftermath of their experience of large scale and terrible violations of civil rights before and during the Second World War, the original Council of Europe States had, in 1950, both the motive and desire to adopt a workable treaty to give binding force to the rights which they had so recently supported in the UN Charter 1945[45] and the Universal Declaration on Human Rights 1948 (the latter being, in itself, a non binding resolution of the UN General Assembly). Also,

41 See, by the present author, ' "Twas easier said than done": Britain and the European Convention on Human Rights' (1983) 14 *Melbourne University Law Review* 104.

42 See Article 53 ECHR.

43 *Supra* note 15.

44 Now well over 300 decisions of the Court at an ever increasing rate. The European Commission of Human Rights has dealt with over 22,000 individual applications. See (1995) European Commission of Human Rights, *Information Note*, No 123. The Commission is, incidentally, as a claim receiving and quasi-judicial body, the European equivalent of the UN Human Rights Committee.

45 See UN Charter, Article 1(3), 55 and 56.

the willingness to submit domestic matters to international judicial scrutiny prompted by that desire has, as could have been anticipated, proved easier of achievement at the European level than at the world wide UN level. This is because the nations of the Council of Europe have increasingly common interests of a political, social and economic nature,[46] much more so than the inaptly named United Nations with its large and disparate membership. Common standards and goals at a regional level provide a relatively firm, and perhaps essential, foundation upon which to build an effective international human rights structure.

It is interesting to note that in the vast majority of cases where the Strasbourg Court has found British law to be in breach of the Convention the offending law has been duly repealed or amended. Though not legally obliged to, a compelling reason for the British Parliament so acting, apart from wanting to be seen in a good European light, is the avoidance of future claims for redress brought under that law. Thus, this process was followed in *Golder* v *United Kingdom*,[47] the first decision of the Court against the United Kingdom and one of the best known of the prisoners' rights Convention claims.[48] It was in *Golder* that the Court made clear that not all individual rights 'stop at the prison gates'. In particular, it was held that the right to a fair trial guaranteed by Article 6 included a right of access to a court and to associated legal advice. On the facts, it was held that this right could be exercised by a sentenced prisoner in order to pursue a defamation action against a prison officer who had reported him as having been a prison riot ringleader. As a consequence of the decision the Prison Rules[49] under which such access had been denied were appropriately amended. Similarly, in *The Sunday Times* v *United Kingdom*,[50] the Court's decision that the suppression, at the behest of the Government, of publication of newspaper articles on grounds of contempt of court violated the right to freedom of expression under Article 10 was followed by new contempt legislation[51] giving broad effect to the Court's views. And, one may speculate that the then recently elected Conservative government of Prime Minister Margaret Thatcher was hardly reluctant to repeal legislation of its Labour predecessor which gave legal endorsement of trade union-employer closed shop agreements.[52] This was following the Court's decision in *Young, James and Webster* v *United Kingdom*[53] that the closed shop agreements in issue (between British Rail, as the employer, and trade unions which the three applicants refused on principle to join for which refusal they were dismissed) violated Article 11's right to freedom of association: that the positive right to associate and to join a trade union includes by inference a right not to be forced to join a union at least in the case of workers already employed at the time of such an agreement.

The above are only a few of the best known of many examples of legislative endorsement of the Court's decisions. An exception to this norm (in the case of the United Kingdom) was the reaction to the decision in *Brogan* v *United Kingdom*[54] which involved the highly sensitive area of security in Northern Ireland. There, the Court held that

46 Those common interests are recognised in the Preamble for the European Convention which refers to its signatory states as being 'like-minded and [having] a common heritage of political traditions, ideals, freedom and the rule of law'.

47 (1975) 1 EHRR 524.

48 Others include eg, *Silver* v *UK* (1983) 5 EHRR 347; *Campbell and Fell* v *UK* (1985) 7 EHRR 165; *Boyle and Rice* v *UK* (1988) 10 EHRR 425; *McCallum* v *UK* (1990) 13 EHRR 597.

49 The *Prison Rules* 1964 made under the *Prisons Act* 1952.

50 (1979) 2 EHRR 245.

51 The *Contempt of Court Act* 1981.

52 The *Trade Union and Labour Relations Act* 1974 which, with a few exceptions, provided that dismissal for refusal to join a union required by a closed shop agreement was not 'unfair dismissal' for purposes of the Act: repealed by the *Employment Act* 1982.

53 (1981) 4 EHRR 38.

54 (1988) 11 EHRR 117; see also *Norris* v *Ireland* (1988) 13 EHRR 186.

emergency legislation which gave the police in the province the power to arrest and hold suspected terrorists for up to seven days before any judicial review of the detention contravened Article 5(3) of the Convention which requires an arrested person to be brought 'promptly' before a judicial officer. The British Government refused to modify the legislation which, across party lines, was regarded as being an essential weapon in the fight against terrorism in that province. Instead, it made a derogation from Article 5(3) under the terms of Article 15 which permits a State to opt out of several of the Convention rights 'to the extent strictly required by the exigencies of the situation' during a time of 'war or other public emergency threatening the life of the nation'.

This small sample hopefully gives some indication of the impact that the Convention has so far had in the United Kingdom. The response of the Government to the *Brogan* decision was by way of being the exception that marginally tests the rule. Indeed, so influential has the Convention been that there have been siren voices[55] calling for its incorporation into British law as a ready-made Bill of Rights (as is the case with several Convention States): that it would be but a short step from the present international system to a domestic system for the protection of civil rights, a step which would reduce the need to use the more costly and lengthy Strasbourg proceedings and would allow home-based judges to determine matters which might otherwise embarrass the United Kingdom internationally. As in Australia, the Bill of Rights question is complex and controversial. Could such a Bill be in any way entrenched in a unitary constitution such as the United Kingdom where Parliament lacks the power to bind its successors? Might there be a risk of judges being drawn too much into the political arena by constant exposure to litigation challenging the laws and practices of elected government and in which they might have to tread a sensitive tightrope between individual and community rights? Yet is this not already happening without apparent damage to judicial impartiality in the field of administrative law with its challenges to government decisions and determination of issues involving principles such as proportionality?

It should by now be clear that the European system of human rights protection has long since passed any experimental stage. Though there is at present no Bill of Rights in the United Kingdom the Convention is today entrenched as a European Bill of Rights. It is part of a bigger picture, the Pan-European movement. The Council of Europe, its progenitor, is larger than its economic cousin, the European Union. However, all fifteen member states of the European Union are also Council of Europe members and parties to the Convention. They are bound internationally by the Convention but are also bound, domestically as well as internationally, by important individual rights provisions of the European Union treaties[56] (Rome and Maastricht) and by their interpretations by the European Court of Justice, a court which has emphasised the desirability of achieving consistency with the Convention law.[57] There are even serious proposals for the European Union to become a party in its own right to the Convention. More Council of Europe States are queuing up to join the European Union in circumstances where no doubt perceived economic advantages provide the primary motive but where a good human rights record may be a crucial factor in winning a prized badge of admission.

For these reasons, a European human rights lawyer might seem justified in having both a pride of achievement and optimism for the future. Any such optimism might be sorely tested, however, by present or looming large scale disaster. The threat posed to the Balkan and other Eastern European States by the tragic conflict in Bosnia and Croatia and the

55 Including former Lord Chancellors Gardiner and Hailsham, and Lord Scarman.

56 See eg, Articles 48, 52, and 59 (dealing with freedom of movement for 'workers', the right of establishment, and the freedom to provide services respectively), and Article 119 (dealing with equal pay for equal work for men and women) of the EU treaty.

57 For example, in *Johnson* v *Chief Constable of the RUC* [1986] 3 CMLR 240.

rapidly growing refugee influxes into some Western European states are two such dangers. Otherwise, the European Convention has, on the whole, so far been a success. It has spawned a regional human rights law which attempts to be broadly reflective of prevailing European democratic values and one which, because of its interpretative and enforcement machinery, is well in advance of any elsewhere at the United Nations or regional level. This seems set to continue so long as its Court travels a cautious interpretative path not too far ahead of its region's values and thereby retains the crucial confidence of the Convention States.

Conclusion

The European model is clearly not of direct relevance to Australia. As seen, a regional court-based structure differs markedly from the United Nations non-binding committee-based structure to which Australia has subscribed. The chances of any advance in the latter from committee to court of human rights are remote indeed. There is an understandable reluctance, one which is likely to remain for some time, on the part of United Nations members to derogate from their sovereignty (as it might appear) by submitting their domestic laws and affairs to foreign judicial scrutiny at the behest of individuals. The present world court, the International Court of Justice, cannot perform as a judicial protector of individual rights. By virtue of Article 34 of its statute only states can appear as parties to its contentious jurisdiction, and, even in the field of reciprocally based inter-State disputes, its less than busy case load is eloquent testimony to that reluctance at a more general level. Further, there is, locally, no real regional equivalent to the Council of Europe — no 'Council of Pacific and South-East Asian Nations' as it were — committed to effective judicial protection of the rights of the individual. To the contrary, given the fundamental differences of attitudes to such rights proclaimed and evidenced in the region, the very idea seems ludicrous.

One concludes with a reflective question. Do Australians really need international protection of their civil rights? With the checks and balances of a federal constitution, with an active High Court not averse to finding implied rights, and with a long tradition of parliamentary democracy and a firmly entrenched respect for the Rule of Law, Australia is a relatively blessed nation. To allow individuals to complain internationally might be useful as a 'feel good' gesture calculated to show her in a favourable international light. As such it might usefully serve to make it appear less hypocritical for Australia to admonish other nations about their human rights records. On the other hand, and as *Toonen* aptly shows, it risks disturbance of the delicate balance between State and Commonwealth rights. Constitutional crises caused or prompted domestically by decisions of a High Court or centralist Commonwealth Government are perhaps inevitable given the nature of the constitutional beast, but do we really wish to unnecessarily add to them those caused by or following the views of international organs? If an Australian Bill of Rights be deemed necessary, should it not be better done via the front door of parliamentary and popular debate and support than by the back door of Executive accession to international treaty?