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THE REPATRIATION OF SENTENCED PERSONS: A NEW ZEALAND PERSPECTIVE

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1. INTRODUCTION

In recent years there has been increasing recognition of the need for international co-operation in the field of criminal law. Attention has traditionally focussed on the investigation of crime, the apprehension of offenders and their return to the jurisdiction in which they offended. However, in the aftermath of that process - after conviction and imprisonment - there remain some important issues which have largely been neglected. In this paper I will firstly set out the problem of nationals imprisoned overseas. I will then describe the philosophy behind the European Convention on the Transfer of Sentenced Persons and highlight some of its key provisions. Finally, I will discuss whether New Zealand should accede to the Treaty and move to repatriate its convicted nationals.

2. CRIME AND NEW ZEALAND NATIONALS OVERSEAS

As we all know, crime has little respect for national boundaries. We hear more and more of Australian and New Zealand nationals being apprehended and sentenced abroad for offences committed there. It is likely to be an irreversible trend and unfortunately one that will manifest itself in every type of crime: from sophisticated commercial fraud,1 to drug smuggling, through to offences against the person. The fact that we live in an increasingly mobile society creates a further dimension to the problem: incarceration of young adults in foreign prisons. As you will be aware, each year young people leave their homes for that indispensable finale to their

1 The point was expressed pithily by Sir Peter Millett: "International fraud is a growth business." In: "Tracing the Proceeds of Fraud" in (1991) 107 L.Q.R. 71

education - Overseas Experience. It is a particular tragedy when things go badly wrong and they find themselves incarcerated abroad, in an unfamiliar setting, without the support of friends and family.

Regardless of the different theories of punishment and sentencing policy, it is commonly recognised that responsibility for the offender cannot be abandoned as the cell door closes. It can be anticipated that at some point convicted persons will rejoin the greater community. It would therefore appear desirable to undertake rehabilitation at two levels: to enhance the welfare of the individual offender and to achieve a universal social goal.

When I refer to responsibility for rehabilitation, I am thinking not only of the role of government in relation to domestic offences, but also its extended responsibility toward citizens who are detained abroad. Such persons will often feel culturally alienated. They will be separated from family and community ties. Their environment compounds their punishment. It is a setting which severely undermines the task of rehabilitation and social adjustment. This was clearly acknowledged in the multi-lateral treaty of the Council of Europe which in 1983 adopted a wide ranging scheme for transfer of prisoners between States. [2]

3. THE EUROPEAN TRANSFER TREATY

The Preamble to the Treaty is set out as follows:

[To develop] international co-operation in the field of criminal law;

[and] [c]onsidering that such co-operation should further the ends of justice and the social rehabilitation of sentenced persons;

these objectives require that foreigners who are deprived of their liberty as a result of their commission of a criminal offence should be given the opportunity to serve their sentences within their own society; and

that this aim can best be achieved by having them transferred to their own countries... [3]

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2 Convention on the Transfer of Sentenced Persons, Strasbourg, 21 March 1983.

3 Ibid. ,p.2.

The signatories to this Convention include not only the member States, but also certain non-members, notably the United States of America and Canada. Parties to the Convention undertake to afford each other the widest measure of co-operation in respect of the transfer of prisoners. [4] Moreover, when a prisoner is transferred from the Sentencing State (where the sentence is imposed) to the Administering State (where the prisoner is transferred to serve his or her sentence), the latter may in certain circumstances impose a sanction in accordance with its domestic laws, in substitution for the original sentence. [5] The severity of the original sentence cannot be increased under this procedure. [6] There is also the additional safeguard that a transfer may only take place if the sentenced person consents. [7]

Clearly the multi-lateral treaty contemplates a high degree of cooperation between States and a sensitivity to the perceptions of the offence by the Administering State. Such a regime must surely be conducive to the overall welfare of convicted persons.

It is now more than a decade since the European treaty was declared and I have been asked to speak on whether the time has come for New Zealand to accede to this Convention.

4. NEW ZEALAND'S POSITION

I should mention at the outset that I am speaking as a practising criminal lawyer and that I am not appearing as a representative of the New Zealand government.

In my view, New Zealand recognises the need for international cooperation in the administration of justice. In terms of extradition, for example, New Zealand has trans-jurisdictional arrangements with both Commonwealth [8] and non-Commonwealth [9] countries for the exchange of persons accused or convicted of an offence. In 1992 the New Zealand Parliament passed the Mutual Assistance in Criminal Matters Act to facilitate CO-operation in criminal matters between New Zealand and other Countries. This Act is generally limited to providing assistance in the process of criminal investigation and the conduct of criminal proceedings. [10] It does not

4 Article 2.1.

5 Articles 9-13.

6 Article 11.1 (d).

7 Article 3.1 (d).

8 Fugitive Offenders Act 1881 (U.K.).

9 Extradition Act I 965.

10 Mutual Assistance in Criminal Matters Act 1992, s.4.

extend to transferring prisoners for the purpose of serving a sentence in their country of origin. I will not recount further details, as I suspect many of you are familiar with the scheme of this legislation, which is modelled on the Australian Act of the same name. [11]

Although in many areas of the administration of justice, New Zealand enjoys close ties with other countries, it has not to date made a commitment to the exchange of prisoners in the manner contemplated by the European Convention. [12] Let me suggest some reasons why there may be a degree of reluctance.

(a) Economic and Physical Constraints

First, New Zealand prisons are overcrowded. The prison muster as at 28th September 1994 was 4407. [13] Annual projections to June 1998 indicate an increase to over 5,600.

Secondly, there is the expense of maintaining prisoners in custody. At present the direct annual operating cost [14] is on average $29,000 per prisoner. To ameliorate this situation, Parliament enacted the Criminal Justice Amendment Act 1993 which provides that prisoners may now be eligible for release after serving a reduced period of their sentence. [15]

In discussing the economic and physical constraints of the prison system it has been assumed that New Zealand's accession to a prisoner transfer treaty such as the European Convention would have the effect of increasing its present prison population. This seems to be a common belief in government circles. Officials talk

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11 Mutual Assistance in Criminal Matters Act 1987 (Aust.).

12 It is interesting to note that in regard to one jurisdiction at least, New Zealand was perhaps ahead of its time. I refer to the Cook Islands Act, which was passed in 1915. Section 275 of that Act provides for the transfer of convicted persons to New Zealand to serve a prison sentence. Political and legislative developments in recent decades have overtaken this piece of legislation, which is now quite possibly defunct: it has seldom been invoked, except, that is, for one recorded request received by the New Zealand government many years ago. On that occasion the Island jail had burned down. The sole inmate was desirous of being transferred to New Zealand. In due course the administrative wheels began to turn. But before the paperwork was completed, the request became redundant, for the prisoner's sentence had expired.

13 Source: Corrections Operations, Justice Department, Wellington.

14 Rations, clothing, supervisory personnel, etc., excluding capital costs.

15 Criminal Justice Amendment Act 1993, s.43. Where the sentence is less than 12 months, one-half of the sentence must be served. In most other cases, two-thirds of the sentence must be served.

cautiously of the need for a careful cost-benefit analysis, on the assumption that there may be a deficit in the balance of trade, with incoming prisoners exceeding the number leaving.

If this principle is taken to its extreme, then New Zealand's position would be governed by the number of New Zealanders living in treaty countries. I ask, rhetorically, whether this forms the basis of a valid objection to, say, Australia and New Zealand jointly acceding to the European multi-lateral treaty. I tender this example without the assistance of demographic data, and merely surmise that it is not beyond the bounds of possibility that the Australian prison service may be providing accommodation for a number of expatriate New Zealanders.

I suggest that such considerations have no place in assessing what is essentially an issue of social accountability. The signatories to the multi-lateral treaty include larger nations such as the United States of America, the United Kingdom and Germany, and smaller States such as Luxembourg and Denmark. Whatever logistical or economic problems that may have arisen were obviously overcome. The same, I believe, could be said in regard to New Zealand.

Further, the decision-making process is in some senses easier for New Zealand than many other countries. For example, I understand that prisoner repatriation has been the subject of political lobbying in Australia and that the issue is under active consideration. Any difficulties in reaching consensus between State and Federal levels of government would not be a concern in New Zealand where the relevant political authority rests solely with central government.

(b) New Zealand's Recent Philosophical Change in Criminal Justice

There has been a major shift in the approach towards sentencing of young persons. New Zealand has moved towards a restorative model of justice. The Children, Young Persons and Their Families Act 1989 departs from traditional theories of punishment, emphasising instead the need to "put things right" between offender and victim, with input from family members and social agencies. [16] On this model, most offenders are diverted from court and of course, the possibility of a custodial sentence. Given its success, consideration is being given to a similar scheme for adult offenders.

16 For a review of the operation of the Act, see Judge F.W.M. McElrea, "A New Model of Justice' in Legal Research Foundation publication No.34: The Youth Court in New Zealand 1993.

Thus it would be philosophically difficult to incarcerate repatriated New Zealanders when its domestic court may have opted for an alternative punishment. [17]

(c) The Rainbow Warrior and the General Debate

I should also mention the Rainbow Warrior incident. The facts are too well known to require detailed discussion and I will just recap the main points very briefly.

On 10 July 1985 French undercover agents placed explosive devices on the Greenpeace vessel, Rainbow Warrior, berthed in Auckland Harbour. The vessel was sunk and one man died. Two of the French agents were apprehended in New Zealand. They subsequently pleaded guilty to charges of manslaughter and wilful damage, and were sentenced to 10 years imprisonment. The French government confirmed that the defendants had been acting under orders, as members of the military security service. France sought the return of their agents but discussions between France and New Zealand broke down. To compound the problem, France imposed economic sanctions, by restricting New Zealand imports. Diplomatic attempts to settle the dispute were unsuccessful and ultimately the parties agreed to submit the matter to the Secretary-General of the United Nations for binding arbitration.

The Secretary-General ruled that France should formally apologise to New Zealand for its violation of international law and that it should pay compensation. A further term of the Secretary-General's ruling was that the French agents should be transferred from New Zealand to French military authorities on Hao atoll where they would spend a further 3 years of their sentence.

The notoriety of the Rainbow Warrior saga was again ignited when France unilaterally repatriated these parties before expiry of the stipulated term. Both were sent to France for compassionate reasons but neither was subsequently returned to Hao. An international tribunal later held that these actions constituted a breach of France's obligations under the terms imposed by the Secretary-General.

I have sketched these basic facts to demonstrate that the prisoner transfer issue cannot be viewed in isolation. In its broader context, the Rainbow Warrior incident was a dispute between two nations.

17 Much would depend on the viability of New Zealand Courts to review the sentence under the Convention.

The case turned on a unique set of facts which cannot be extended to a generalised objection to the concept of prisoner repatriation. It is essentially a red herring. However, the case does highlight the need for a recognised forum for resolving disputes and effecting sanctions to combat breaches of agreement by an Administering State.

5. CONCLUSION

May I conclude by saying that, in theory, the European Convention is a sound idea that is in keeping with progressive thinking in human rights and criminal justice reforms. Whilst some may argue that any real benefits for New Zealanders may be outweighed by cost and administrative factors, nonetheless, it is my belief that in the final analysis New Zealand should accede to the European Prisoner Transfer Treaty. I offer my colleagues in Australia fraternal greetings along the same path.

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