Melville Miranda

Email: [redacted]

Date Submitted: 26 Sept 2015

Due Date: 30 Sept 2015

Sub: Invitation for Public Submissions on Victims of Crime in Criminal Trial Process in Australia

The Rule of Law is the basis for evaluation of all decisions. The supreme quality of the Rule of Law is fairness and legal certainty. The principle of legality occupies a central plan in the Rule of Law. Every prerogative has to be subject to the Rule of Law. That rule cannot be comprised on the grounds of political expediency. To go by such considerations would be subversive of the fundamental principles of the Rule of Law and it would amount to setting a dangerous precedent. The Rule of Law principle comprises a requirement of "Government according to law". The ethos of "Government according to law".requires the prerogative to be exercised in a manner which is consistent with the basic principle of fairness and certainty. Therefore, the *right to a fair trial* is set out in Pt II Art 9 .14 of International Covenant of Civil and Political Rights (ICCPR).

The *criteria* for what amounts to a fair trial for the Victims of Crime are set out in Australia's domestic law in the decisions of the High Court.(Sanga , Roach and Moles, *Forensic Investigation and Miscarriages of Justice* , 2010, Irwin Law, Toronto and Federation Press , Australia , ch 5). They make it clear that a trial may be unfair in three important aspects.

1. Non –disclosure: Where there has been a significant no-disclosure at the trial , which could possibly has have affected the jury's verdict , the conviction must be set aside

   In order for there to be a fair trial the prosecution is obliged to disclose to the defence all material that is available to it which is relevant or possibly relevant to any issue in the case (*Grey v R* (2001) 184 ALR 593, : Gleeson CJ, *Gummow and Callinan* JJ) An essential question is whether , if the jury had known about additional material , it would have cast doubt on the essential features of the prosecution case. or, to put that another way , was the body of evidence which was not presented to the jury potentially significant (*Mullard v R* (2005) 224 CLR 125; Gummow, Hayne, Callinan and Heydon JJ)

2. Misleading evidence: Where significant evidence has been led at the trial which has subsequently proved to be non-productive, then it could possibly have affected the jury's verdict , the conviction must be set aside.

   If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the Court of Criminal Trial/Appeal to conclude that, even making full allowances for the advantages enjoyed by the jury, there is a significant possibility that an innocent

person has been convicted , then the court is bound to act and to set aside a verdict based upon evidence. (*M v R* (1994) 181 CLR 487, 126 ALR 325, 69 ALR 83)

3. Procedural irregularities: Where the basic conditions of a fair trial are absent, the conviction must be set aside.

   For [the court] will set aside a conviction whenever it appears unjusr or unsafe to allow the verdict to stand because some failure has occurred in observing the conditions which in the court's view, are essential to a satisfactory trial ---- (*Davies v R* (1937) 57 CLR 170 at 180; was referred to by Gleeson CJ in *Nudd v R* (2000) 225 ALR 161).

   In *R v Stafford*, the appeal court accepted that it was a procedural error for prosecution to have put a scenario to the jury which was not fairly open on the evidence, as that evidence was subsequently accepted by the Court of Appeal (*R v Stafford* [2009] QCA 407). This was one of the few cases in Australia to have resulted from a second reference under the petition procedure. In the South Australian case of *R v Keogh* the prosecution put a scenario to the jury which was not fairly open on the evidence as it now stands.

   The exercise of power depends upon the facts and circumstances of each case and the necessity or justification for exercise of that power has to be judged from case to case It is important to bear in mind that every aspect of the exercise of power under *right to a fair trial* in Pt II Art 9.14 of the ICCPR falls with the judicial domain.

   Suppose there is a conviction of an unfair trail according to the principles laid down by the High Court of Australia (HCA) The person who was subject to that unfair trial is also a recipient of the guarantee contained in the ICCPR of the right to a fire trial ----------a guarantee which according to the Covenant imposes obligations to comply with its provisions on all Australian citizens (Sanga/Moles at 98). It follows that a breach of the obligation to provide a fair trial must impose obligations upon legal officials to act to remedy the effects of any unfair trial which has occurred. But the Judges of the Criminal Court of Appeal and HCA state they are powerless (Moles at 89)

   In *Forensic Investigations* Sangha , Roach and Moles said:
   The inability to re-open an appeal in combination with the principle that the High Court considers that it is unable to heart fresh evidence , means that there are significant obstacles in the way of achieving justice . As Kirby J has pointed out
   " The rule [prohibiting the High Court from receiving fresh evidence] means where new evidence turns up after a trial and hearing before the Court of Appeal are concluded whenever the reason and however justifiable the delay, the High Court , even in a regular appeal to it still underway , can do nothing . Justice in such cases , is truly blind. The only relief available is from the Executive Government or the nedia – not from the Australian judiciary (*Foreign Investigations*, ch 5 , p.141 citing

Kirby J, "Black and White Lesson for the Australian Judiciary" (2002) 23 Adelaide Law Review , 195-213 at 206)

It is that position, correctly explained of course by Kirby J , which amounts to a breach of the Convention obligation to ensure a fair trial and where necessary to provide an effective remedy for an unfair trial. In the circumstances Kirby J refers to , the person/victim/accused is told that in Australia there is no legal right to any review of the case , despite the compelling evidence that there has been miscarriage of justice. The only avenue open to such a person/ victim/accused is to petition under the statutory procedure for the case to be referred back to the Supreme Court (Sanga/Moles at 99-100)

Australian law says that statutory petition procedure does not provide any *legal* right to to an applicant either to a referral to the court or even to a fair reading of the petition . The whole thing is subject to arbitrary and non –reviewable discretion of the Attorney –General (A-G) who is not entirely an independent arbiter in such matters (Sanga /Moles at 99). The A-G, it is said has no legal duty to act fairly ; and indeed , has no legal duty at all (Sanga/Moles at 99-100) . The best the A-G can do of a situation as this is that the he has some administrative responsibility in the matter.

If that position is correct, I believe that it is the failure of duty in Australia under the ICCPR to provide an effective , it is also unconstitutional under Australian domestivc law.

In the case *South Australia v Totani (Totani)* , the High Court spoke about the need for courts and judges to be able to decide cases independently of the executive government . As French CJ said " [t] that is part of Australia's common law heritage which is antecedent to the Constitution and supplies principles for its interpretation and operation" (*South Australia v Totani* (2010) 242 CLR 1). An important element of the judgement was the fact that " [j] judicial independence is an assumption which underlies Ch III of the Constitution -----" (*Totani* at [1])

He said, " [1]it is a requirement of the Constitution that judicial independence be maintained in reality and appearance for the courts created by the Commonwealth and for the courts of the Sates and Terrrtories (*Totani* at [1] citing *North Australian Aboriginal Legal Aid Service v Bradley* (2004) 218 CLR 146 at 163 [29] per McHugh, Gummow, Kirby Hayne, Callinan and Heydon JJ) . Importantly for the purpose of this submission he added , " [o]bservance of that requirement is never important than when decisions affecting personal liberty and liability to criminal penalties are to be made. (*Totani* [1])

He referred to the Full Court judgement of Bleby J in *Totani* where said that the " unacceptable grafting of non-judicial powers onto the judicial process in such a way that the outcome is controlled , to significant and unacceptable extent, by an arm of the Executive Government ---destroys the court's integrity as repository of federal jurisdiction (*Totani* at [6])

The Chief Justice then said that the understanding of what constitutes "courts of law" may be expressed in terms of assumption underlying various provisions of the constitution in relation to the courts of the states. There must be the universal application throughout the Commonwealth of the rule of law, an assumption " upon which the Constitution depends for its efficacy" (Totani at [61] citing *Thomas v Mowbray* (2007) 233 CLR 307 at 342 [61] per Gummow and Crennan JJ) . The Chief Justice went on further to say in *Totani* that another important assumption is that the courts of the states must continue to present the defining characteristics of courts especially " the characteristics of independence , impartiality , fairness and adherence to the open-court principle" (*Totani* at [62]) All of which are undermined when decision of the court has been procured by way of evidence which was incomplete or misleading . It is further undermined when an attorney –general acting in an administrative capacity as a government official (rather than as a law officer guided by legal principles) refuses to allow the courts to correct the matter.

The Chief Justice also said "[a]t the heart of judicial independence , although not exhaustive of the concepts , is decisional independence from the influences external to proceedings in the court, including , but not limited to, the influences of the executive government and its authorities" (*Totani* at [62]. Yet, it said, the courts are powerless to deal with a manifest miscarriage of justice unless the state attorney –general gives them permission to do so. It is further said that upon refusal to give such permission there is no requirement to give reasons, for the refusal. This is a point which Noble acknowledged might be in conflict with the ICCPR

The Chief Justice is *Totani* stated "[decisional independence is a necessary condition of impartiality.. Procedural fairness effected by impartliality and natural justice hearing rule lies at the heart of the judicial process" (*International Finance Trust Co Ltd* (2009) 240 CLR at 379-384 [139] – [150] per Heydon J)

The linking of "procedural fairness" with " natural justice" in this way is precisely what has been denied to the people/victim/accused mentioned above. These people/victim/accused have never been given a chance to confront the case against them. In effect, guilt is maintained by public officials who act administratively and ignore the legal guidance laid down by the HCA at the expense of a conviction for the victim of crime.

Melville Miranda
Australian Citizen