

HUMAN RIGHTS IN AUSTRALIAN LAW

I HUMAN RIGHTS

A What are Human Rights

- Thornberry: Freedoms or privileges that international community has agreed should attach to all individuals irrespective of the context in which they live
- Kaye and Pietrowicz: Significant rights or freedoms possessed by all men and women...by virtue of membership of the human species
- Cranston: Human rights are the fundamental rights of all people at all times in all places
- Flynn: Universal legal guarantees protecting individuals and groups against actions by governments which interfere with fundamental rights and human dignity
- Dworkin: Rights as trumps held by individuals/minority groups against governments, trumping the goal of the social majority

1 Dignity

a as the Source of Human Rights

Dignity → relates to state of being human

- UN Charter: faith in the dignity and worth of the human person
- UDHR: inherent dignity and equal and inalienable rights
- Art 1: all human beings are born free and equal in dignity and rights etc

Human rights standards describe what it is to be human and represent core minimum standard required to attain human dignity

Bailey: Human rights standards are basically moral rights that necessarily involve the law in order to be achieved

The quintessential concern of the human rights enterprise is to raise to a status of dignity and equality each powerless person – persons who for reasons such as law, poverty, race, religion, gender are unable to achieve dignity, fairness, basic equality and justice

b as an Underpinning Value

Bailey: Dignity and equality are the meta-principles (values) on which all statements of human rights are based

Dignity in human rights draw from moral philosophy → all persons have equal dignity

- Human rights preserve dignity
- Call for equal respect of human dignity for all
- CF:
 - o Onto-theological notion that humans have dignity because created an image of god, so derived from being God's creatures
 - o Notion of aristocratic dignity flowing from social status

Immanuel Kant: Dignity derives from rational agency (ability to reason)

- Human dignity is an inherent worth of all persons
- Flows from the free and autonomous nature of all human beings
- Categorical imperative: flowing from dignity:
 - o a human being is an end for himself as well as for others and is not enough that he is not authorised to use either himself or others merely as means (since he could be indifferent to them)
 - o it is in itself his duty to make man as such his end

Jurgen Habermas: Dignity expressed in human rights norms

- Protection of dignity flows logically from fundamental freedom and autonomy

2 Legal Concept of Rights: Rights, Freedoms and Liberties

a Rights

A claim that is recognised and enforceable at law (involves a claim held by someone, duty borne by someone, enforceable at law)

Traditionally conceived as 'positive' in nature (duty bearer required to do something)

b Freedoms

A claim recognised though not necessarily enforceable at law

The 'freedom from' interference when doing an act that is not legally prohibited (eg freedom of assembly)

Traditionally conceived as 'negative' in nature (duty bearer required not to interfere)

c Liberties

A right in the narrowest sense

General state of being free to act and choose

d Language Conflated

Eg right to liberty of person, right to freedom of expression

3 Human Rights – Inherent, Inalienable and Universal

Inherent → being the birthright of all human beings because of their humanity

Inalienable → cannot be removed or given up

Universal → apply to everyone, everywhere

American Anthropological Association 1947: any attempt to formulate postulates that grow out of beliefs or moral codes of one culture must to that extent detract from the applicability of any Declaration of Human Rights to mankind as a whole

American Anthropological Association 1999: respect for difference in humans (encompassing its full range of cultural, linguistic and other senses) should not be basis for denying human rights and should embrace commitment to human rights

Philip Alston: The language used in human rights instruments is inherently indeterminate and its capacity to accommodate differences is 'a type of elastic glue which enables the whole human rights enterprise to be held together and remain coherent'.

4 Human Rights – 'Indivisible Interdependent and Interrelated'

Vienna Declaration and Programme of Action (1993): All human rights are universal, indivisible and interdependent and interrelated

- The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.
- While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms

Indivisible → rights are functional parts of a greater system

Interdependent → enjoyment of one right depends on others

Interrelated → exist in relation to one another

B How did the Rights Develop

UDHR: 10 December 1948, birth of human rights

But deep roots in history:

- Greek and Roman philosophers: Plato, Aristotle, Cicero
- Judeo-Christian thinking (a universal god above human laws): Torah, Bible
- Hindu, Buddhist, Islamic (Qur'an) and early Confucian texts

Dominant strands of legal philosophy:

1. C17th Natural rights (evolved from natural law) → rights inherent in nature and have divine origins, law not made but to be found
2. C19th Legal positivism → natural rights are moral claims while binding law must emanate from sovereign power

1 Natural Law

Origins in ancient Greek and Roman thought

Law derived from nature

Applied universally to all due to intrinsic humanity

Concerned with responsibility of rational beings to contribute to common good

Aquinas (C13th): natural law attributed to either people or rule of people

Came to represent the authority of the rule

Magna Carta of 1215: enshrined principles which we would now call rights

- Principle of equality before law
- Right to property
- Religious freedom
- Habeas corpus – writ requiring release of person improperly detained

2 Natural Rights

Grotius (1625) → state power restricted by natural law which emanates from human reason

Hobbes (1651) → distinguished natural rights (allowing liberty to do as you chose) from natural law, which limits what you can do

Locke (1689) → the relation between individuals and the state

- Rights derived from the laws of nature, supported by belief in god and founded upon human reason
- Rights equally available to all

Government gets its authority from the free and democratic choice of the individual ('the social contract')

In the interests of society as a whole, each individual surrendered certain rights to a government of their creation on the basis that those rights could be better exercised collectively for the benefit of society

Supports essential freedoms:

- Freedom from arbitrary power
- Freedom from religious intolerance
- Freedom of expression
- Freedom of movement
- Freedom of property ownership

a Influenced Documents

English Bill of Rights (1689): an Act declaring the rights and liberties of the subject

- Use of terms rights and liberties drew on natural law
- Recognised freedom of speech and debate, parliamentary privilege

American Declaration of Independence (1776): we take these truths to be self-evident, that all men are created equal, and that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness

- upholds individual autonomy and inalienable nature of fundamental human rights
- refers to freedom of religion, right to fair trial, and right to freedom of person and property and is the foundation of the US constitution
- right to bear arms for the purpose of civil defence 'necessary to the security of a free state'

French Declaration of the Rights of Man and of the Citizen (1789): man are born and remain free and equal in rights

- foundation of the French Constitution but also influenced the constitution of other European countries
- right to liberty, a fair trial and right to free communication of ideas and opinions

b Problems

Uncertainty

Vagueness

- diverse natural law theories and diverse assertions of what the law is based on the theorists' particular conceptions of nature

Merely moral claims

Non-scientific

Imaginary

Bentham: nonsense on stilts

- Gave way to legal positivism
- Only law issued by sovereigns and enforceable by the threat of sanctions are real laws

3 Positivism

Sovereign enacts laws and individuals can look to content of law for protection

John Stuart Mill: authority only derives from a sovereign power if it is stated by the sovereign power

Valid legal rule must bear the warrant of the sovereign

Remains the dominant view in modern legal philosophy (eg HLA Hart, Joseph Raz, Jules A Coleman)

a Problems

Undemocratic to base rights on something other than a statement of law

Citizens should have their voices heard

nexus between law and morality broken

Taken to its extreme, leading to tyranny and oppression rationalised by the will of majority

4 Human Rights

Treaty of Versailles (1919): League of Nations, International Labour Organisation

Franklin Roosevelt annual message to Congress (State of Union Address) (6 January 1941): case for US involvement in WWII

- Freedom of speech, freedom of worship, freedom from want and freedom from fear

- 'Freedom means the supremacy of human rights everywhere'

Allies' Joint Declaration of 1942: the complete victory ...is essential to defend life, liberty, independence and religious freedom and to preserve human rights and justice

5 The United Nations

Charter of the United Nations, Constitution of UN

Links tolerance, peace and security as essential to the achievement of human rights

a Preamble

We the peoples of the United Nations determined

- to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind,
- to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small,
- to establish conditions under which justice and respect for the obligations arising from ...international law can be maintained,
- To promote social progress and better standards of life in larger freedom

b UN Purposes

Art 1 Charter:

The Purposes of the United Nations are to

1. maintain international peace and security...
2. develop friendly relations among nations...
3. achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all w/o distinction as to race, sex, language, or religion...
4. be a centre for harmonizing nations' actions...in the attainment of these common ends.

c Pledge

Art 56: member states pledge to 'take joint and separate action' in cooperation with the UN to achieve 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion'

e Charter Based Organs

i Security Council arts 23-54

15 member states

5 permanent: China, UK, France, Russia and US

Art 24: has primary responsibility for the maintenance of international peace and security

Primary functions

- to maintain international peace and security (art 24)
- to facilitate peaceful resolution of international disputes (art 33)
- to take preventative or enforcement action to maintain peace and security (art 39)

Art 42: can authorize to use force to restore peace or security eg Iraq 1991

- Can make resolutions condemning specific violations of human rights (eg Rwanda, former Yugoslavia)
- Resolutions can result in creation of international tribunals (eg ICTY, ICTR)

- Can impose sanctions on States which fail to comply with international obligations (eg apartheid South Africa, Iraq. Ramifications)

ii General Assembly arts 9-22

Open to all UN member states

Can make resolutions on any matter within the scope of UN Charter

Art 13: initiate studies and make recommendations for the purpose of ...(b) promoting international cooperation in the economic, social, cultural, educational and health fields, and assisting in the realisation of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion

Human rights bodies established by General Assembly:

1. Office of the UN High Commissioner for Human Rights
 - a. Created in 1993 by General Assembly resolution
 - b. Provides technical assistance to states with human rights education and compliance through measures such as expert advice, training courses and fellowships
2. Human Rights Council
 - a. Established by General Assembly resolution in 2006
 - b. Replaced the Commission on Human Rights (est'd 1946)
 - i. Disbanded/replaced due to degenerated into extremely political forum – less concern about human rights
 - c. Council to "undertake a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States"
 - d. Special Procedures
 - e. Functions:
 - i. Universal Periodic Review
 - ii. Promote universal respect for protection of all human rights for all without discrimination
 - iii. Promote effective coordination and mainstreaming of human rights within UN
 - iv. Promote human rights education, technical assistance and capacity building
 - v. Provide forum for dialogue on thematic issues for all human rights everywhere
 - vi. Undertake Universal Periodic Review of all UN member states
 - vii. Address situations of violations of human rights, including gross and systematic violations
 - viii. Australian membership? See here
3. Economic and Social Council
 - a. Chapter X arts 61-72
 - b. Art 62:
 - i. may make or initiate studies and reports with respect to international economic, social, cultural, educational, health, and related matters and may make recommendations to the General Assembly and beyond.
 - ii. may make recommendations for the purpose of promoting respect and observance of, human rights
 - iii. may prepare draft conventions for submission to the GA.
 - iv. may call international conferences on matters falling within its competence
 - c. Art 68: shall set up commissions in economic and social fields and for the protection of human rights (eg established Commission on the Status of Women in 1946)

iii UN Courts

1. International Court of Justice arts 92-96
2. ICT Yugoslavia (Hague)
3. ICT Rwanda (Arusha, Tanzania)
4. Special Court for Sierra Leone
5. International Tribunal for the Law of the Sea
6. International Criminal Court

f Universal Declaration of Human Rights

Adopted and proclaimed on 10 December 1948 by General Assembly

48 States yes and 8 abstentions: USSR, Belarus, Czechoslovakia, Poland, Ukraine, Yugoslavia, South Africa, Saudi Arabia

Preamble: reflects relationship between human rights and international justice and peace

Herbert Vere Evatt (President, General Assembly): The Declaration has a moral power which is of enormous weight and influence. The statement of the rights represent a goal, or a standard, to which every man can look and with which he can compare what he in fact enjoys. The fact that no country was prepared to vote against the Declaration indicates its compelling moral force

g International Bill of Human Rights

UDHR a common standard of achievement

UDHR standards to be implemented and enforced through:

- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights

UDHR, ICCPR and ICESCR → the International Bill of Human Rights

II HUMAN RIGHTS IN PUBLIC INTERNATIONAL LAW

A International Law

International law → body of law that states recognise as legally binding and that relate to events that transcend national boundaries

States → Brownlie: a territorially-based normative system, political and legal body which:

- regulates and orders conduct within a defined territory
- affords legal protection and regulation in accordance with the rule of law
- provides its citizens with an identity and protection within and beyond its borders.
- protects foreigners within its territory.

B Sovereignty

Sovereignty → States are equal and have legal personality, so they:

- have jurisdiction over a territory and a population
- have a duty of non-intervention in matters which fall within the exclusive jurisdiction of other states
- need to consent to undertaking international obligations
- all equal in having autonomous domestic authority structures concerning the regulation of their borders and what happens within their borders
- free from interference and free to act independently on the domestic stage

UN Charter:

- Art 2(1): UN based on the sovereignty equality of member states
- Art 2(4): all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state

- Art 2(7): Nothing contained in Charter shall authorize the UN to interfere in matters which are essentially within the domestic jurisdiction of any state (NB exceptions where threats to peace, breaches of peace and acts of aggression)

C Public v Private International Law

Private international law → the aspect of a state's domestic law which deals with private cases involving some foreign element

- the branch of domestic law which deals with international issues and regulates transborder relationships between private individuals, corporations and states

Public international law → governs relations between independent sovereign states and seeks to deal with the common interests of humanity

- A body of law concerned with
 - o aviation
 - o laws of the sea
 - o international waterways
 - o postal services
 - o diplomatic and consular relations
 - o trade and finance
 - o laws of war
 - o arrangements states make with one another

Since creation of UN, human rights grafted onto system of public international law.

D Sources of Public International Law

Art 38 (1): Statute of the International Court of Justice prescribes the sources of international law:

- international conventions expressly recognised by states;
- international custom, as evidence of a general practice accepted as law;
- the general principles of law recognized by civilised nations;
- ...judicial decisions and teachings of the most highly qualified publicists of the various nations, as subsidiary means for determination of rules of law.

1 International Conventions

Alston: The prime legal form through which community can realise some degree of stability, predictability and seek to institutionalise ideals like peaceful settlement of disputes and protection of human rights

Vienna Convention on the Law of Treaties, 1969:

- Art 2(1): "Treaty" → an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments
 - o Names include covenants, conventions, charters, exchanges, pacts, protocols
 - o NOT declarations
 - o **Ratification** makes it binding under international law
 - o Bilateral or multilateral
 - o Based on reciprocity

a Main means for development of human rights

Only treaties can create and define the powers or jurisdiction of international institutions in which state parties participate and to which they may owe duties

Human rights treaties are multilateral BUT:

- do not contain obligations owed by one state to another