FOREWORD

By Andrew Naylor *

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This issue of the Court of Conscience journal explores the relationship between the rule of law and human rights. It is appropriate to reflect for a moment on that relationship within the Australian context.

The catastrophes of the First and Second World Wars were the impetus for the United Nations Charter, the founding document of the United Nations. The Charter was a security pact but also a plan to improve economic and social conditions and to provide relief from poverty and unemployment.[1] Three years later the Universal Declaration of Human Rights (UDHR) was adopted under Australia's own Dr Herbert Evatt, then President of the UN General Assembly. The Declaration gave expression, for the first time, to rights that have come to be regarded as fundamental including the right to life, liberty and security of the person (Art 3), the right to a standard of living adequate for health and well-being and the right to food, clothing, housing and medical care (Art 25). The Preamble to the UDHR noted that it is "disregard and contempt for human rights" that "have resulted in barbarous acts which have outraged the conscience of mankind". Member States "pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms". In 1966, the General Assembly adopted the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These seminal documents, together with the Charter and the UDHR, remain foundational to international human rights law and jurisprudence.

In 1951, while the community of nations was making advances in the protection of human rights, the High Court of Australia declared that the *Communist Party Dissolution Act 1950* (Cth) was invalid because it was not authorised by the defence power under s 51(xxxix) of the *Constitution*. In giving his reasons as the leading member of the majority, Justice Dixon observed that the rule of law in Australia is an assumption on which the *Constitution* is based.[2] The rule of law envisaged by Justice Dixon is given expression in the form of the common law of Australia. Together with the Constitution and federal, state and territory laws, the common law forms part of a "single system of jurisprudence in Australia". [3]

Chapter III of the *Constitution* gives practical effect to the rule of law by creating an independent, federal judicature.[4] The independence of the judiciary is essential to the proper functioning of Australian society under the rule of law. Neither the legislature nor the executive is permitted to exercise the judicial power that is exclusively reposed in Ch III courts. This helps to ensure equality before the law for all and that Australia's rule of law complies with Art 7 of the UDHR, which provides that all are equal before the law and are entitled to equal protection before the law without discrimination.

Few human rights are expressly provided for in the *Constitution*. They are the right to vote (s 41), protection against the acquisition of property on unjust terms (s 51(xxxi), the right to trial by jury (s 80), freedom of religion (s 116) and a prohibition on discrimination on the basis of state of residence (s 117). In 1992, the High Court recognised the existence of an implied right to freedom of political communication. [5]

The principle of legality, which forms part of the rule of law under Chapter III of the *Constitution*, has the effect that the courts will not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms unless such an intention is clearly manifested in unambiguous language.[6] Significant caution is, however, required when applying this principle.[7] *Al-Kateb v Godwin* (2004) 219 CLR 562 demonstrated that the principle of legality affords no protection to unlawful non-citizens who are indefinitely detained under s 196 of the *Migration Act 1958* (Cth).The detention of persons in this way contravenes the prohibition in Art 9(1) of the ICCPR on detention

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'HRCA Members', The Human Rights Council of Australia (Web Page, 12 October 2023) <https://www.hrca.org.au/what-is-hrca/members/>.

that is arbitrary. The need to restrain arbitrariness in the exercise of governmental power is central to the purpose of the rule of law. Yet indefinite immigration detention is, unfortunately, permitted under the rule of law in Australia because it is not regarded as punitive but rather administrative detention authorised by the *Constitution*.[8] The common law does not offer a remedy or fill the gap.

Statute law may and does modify the common law. Federal and State parliaments may, within the scope of their authority to make laws, legislate for rights of the kind recognised at international law. For example, s 22 of the *Children (Detention Centres) Act 1987* (NSW) prohibits forms of punishment for misbehaviour by detainees of youth detention centres where those punishments constitute treatment of a kind that is cruel, inhuman or degrading. In so doing, the NSW Parliament has given statutory expression to the prohibition on cruel inhuman or degrading treatment in Art 5 of the UDHR, Art 7 of the ICCPR and Art 16(1) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). The enactment of s 22 of the *Children (Detention Centres) Act* is an example of the implementation into domestic law of an obligation at international law, made necessary by Australia's ratification of the ICCPR and CAT on 13 August 1980 and 8 August 1989, respectively.

At the same time, there are rights provided for in international human rights instruments that have been ratified by Australia which do not form part of the rule of law in Australia. In addition to the lack of a prohibition on indefinite immigration detention, a significant proportion of refugees and asylum seekers are not permitted access to Medicare, social services or unemployment benefits, in contravention of Arts 6, 9 and 12(d) of ICESCR. Queensland recently attempted to suspend its human rights legislation to allow for children to continue to be held in adult detention facilities, in contravention of Art 37 of the Convention of the Rights on the Child (CRC).

Constitutional reform was recently attempted in the context of the right to self-determination provided for by Art 1 of the ICCPR and ICESCR. Had it passed, the recent referendum to amend the *Constitution* to establish a Voice to the Australian Parliament would have implemented into Australian domestic law an aspect of this right for Australian's First Nation's peoples. The failure of the referendum does not excuse the federal government from its obligation at international law to find other ways to implement the right to self-determination for First Nations peoples. No reservation was made to Art 1 when the ICCPR was ratified, and none has since been lodged. Evidently, First Nations peoples themselves must be consulted in relation to further reforms.

There have been previous inquiries into whether Australia should enact a comprehensive Human Rights Act to fill the gaps in Australia's rule of law where protection of human rights is lacking. The issue is being considered again as part of an inquiry into Australia's human rights framework by the Parliamentary Joint Committee on Human Rights.

There are failures, too, in the international human rights system. One such failure is embedded in the UN Charter. Article 23 of the Charter established the Security Council. The Security Council is the mechanism through which the UN maintains international peace and security. This function is essential to the protection of human rights. The Council must act promptly and effectively. The inability of the Security Council to quell the conflict in Ukraine and, in so doing, to protect the lives and livelihoods of the people of Ukraine, stems from the fact that Russia, as one of its permanent members, has a right of veto over resolutions of the Council. The right of veto was given to permanent members in recognition of the important part that they played in the formation of the UN. It was expected that the permanent members would continue to play an important role in the maintenance of international peace and security. Russia's conduct in invading Ukraine in February 2022, in contravention of Art 2(4) of the Charter, stands in stark contrast to the role that was expected of it when the Council was established in 1945. Demonstrably, the Security Council is made moribund when one of its permanent members becomes the aggressor.

There is much to commend when it comes to both the rule of law in Australia and the international human rights framework. Both are essential as measures for the protection and promotion of fundamental human rights. Australia's judicial system is of the highest calibre. At the same time, neither the rule law in Australia nor the international human rights framework is perfect. The authors of the papers collected in this issue have carefully considered the interplay between the rule of law and human rights in contexts as diverse as the rights of indigenous peoples, the use of the death penalty in Egypt and governance of the internet. The papers invite us to consider how the vital rule of law and human rights systems upon which we all depend, might be improved for our collective betterment.

[1] The Times, 17 April 1945.

[2] Australian Communist Party v The Commonwealth (1951) 83 CLR 1, 193. See also South Australia v Totani (2010) 242 CLR 1 [73] (French CJ).

[3] Lange v Australian Broadcasting Corporation (1997) 189 CLR 520, 564 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

[4] Thomas v Mowbray (2007) 233 CLR 307, 342 [61] (Gummow and Crennan JJ).

[5] Nationwide News Pty Ltd v Wills (1992) 177 CLR 1; Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106.

[6] Al-Kateb v Godwin (2004) 219 CLR 562 [19] (Gleeson CJ) ('Al-Kateb v Godwin'). See also Thomas v Mowbray (2007) 233 CLR 307 [208] (Kirby J).

[7] Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd (2017) 255 CLR 352 [67] (Gageler J).

[8] Al-Kateb v Godwin (n 6).


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