MLL302: Human Rights Law Exam Notes

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Introduction: Absence of Comprehensive Rights Regime in Australia (chapter 1)

1.1 Constitutional Protection of Rights

When certain human rights are enumerated in a constitution and protected by **constitutional guarantees** of judicial enforcement and judicial review, they are called **'fundamental' rights**. For they protect the most fundamental interests of individuals and as such, have been placed **beyond the power** of any organ of the state, whether executive or legislative, to violate them.

Such an enumeration of 'justiciable fundamental rights' in a constitution represents a fetter on legislative and executive powers by dint of judicial review. If any legislation or executive measure is adopted in contravention of a constitutionally entrenched human right then the judiciary has the authority to **strike down** such legislation/ measure.

1.2 Statutory Protection of Rights

The idea underlying such protection is to improve on existing legal protection of rights while not placing them beyond the reach of majorities. Thus, statutory bill of rights offers **weak form** of protection. For, in the first place, unlike fundamental rights, the guarantees of rights contained in an ordinary statute can be **taken away** by the **Parliament** at its whim through ordinary law-making procedure.

In this context, the observations of Chief Justice Munir of Pakistan in the in the case of *Jibendra Kishore A Chowdhury and others v the Province of East Pakistan and others*: '[I]t is not only technically inartistic but a **fraud on the citizens** for the makers of a constitution to say that a **right is fundamental but that it may be taken away by the law**.'

Secondly, whereas constitutionally entrenched rights impose a fetter on legislative (and executive) powers by means of **judicial review**, statutory bills of rights either:

a) provide that legislation should be **interpreted in a manner** that is **consistent with the bill of rights** but only so far as it is possible to do so. The law in question **cannot** in any event be **overridden by the bill of rights** (See the *New Zealand Bill of Rights Act 1990* s 4); or
b) state that if the Parliament passes any legislation which contravenes any of the rights protected by the bill then the judiciary is only empowered to make a **declaration of incompatibility** to the effect that the offending legislation is incompatible with a right guaranteed by the bill (see *Human Rights Act 1998* s 4 of the UK). Furthermore, such a declaration **does not affect the validity of the offending legislation**.

Statutes are by far the most **important source** of human rights protecting in Australia.

- Most statutory interpretation principles are common law derived.
- **Legislative instrument** refers to **delegated legislation** in this unit

1.3 Common Law Protection of Rights

The practice of incorporating a justiciable list of fundamental rights in the written constitutions of the new nations of the Commonwealth, being influenced essentially by American constitutionalism, has been **criticised in Britain**, which does not have a written constitution with constitutional guarantees of certain rights.

In Britain, it was believed **until very recently** that rights are **better protected** by the **Common Law**, which is In light of the above discussion it can be concluded that **statutory bills of rights** are primarily **interpretive instruments**. They seek to uphold parliamentary supremacy by **preventing courts** from striking down **democratically passed legislation** which are inconsistent with human rights considered to be a **'vibrant source of human rights'** (George Williams and David Hume, *Human Rights under the Australian Constitution* (OUP, 2nd ed., 2013) 33.).

Leading British Constitutional author Sir Ivor Jennings took pride in claiming the supremacy of the British approach to the rights of the people, where '[t]he so-called liberties of the subject are really implications drawn from the two principles that the subject may say or do what he pleases, provided he **does not transgress the substantive law,** or **infringe the legal rights of others**, whereas public authorities (including the Crown) may do nothing but what they are authorised to do by some rule of common law or

statute. Where public authorities are **not authorised to interfere** with the subject, he has **liberties**.' He claimed that, 'in spite of the American Bill of Rights, that liberty is even better protected in Britain than in the United States'.

R v B, MA [2007] SASC 384 Gray and Sulan JJ, at [21], summarised the **interpretative approach** to legislation which affects common law rights as follows:

> "The rationale if the presumption against the modification or abolition of **fundamental rights or principles** is to be found in the assumption that it is 'in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general systems of law, without expressing its intention with **irresistible clearness**; and to give any such effect to general words, simply because they have that meaning in their widest or usual or natural sense, would be to give them a meaning in which they were not really used' ".

Daniels Corp v ACCC (2002) 213 CLR 543, at [49], McHugh J observed:

> "Courts do not construe legislation as **abolishing, suspending** or **adversely affecting rights**, **freedoms and immunities** that the courts have recognised as fundamental unless the legislation does so in **unambiguous terms**. In construing legislation, the courts begin with the **presumption** that the legislature **does not interfere with those fundamental rights, freedoms and immunities unless it makes its intention to do so unmistakably clear**…"

James Spigelman's 'Common Law Bill of Rights"

- The phrase itself expressly suggests there exists a rights framework of rights within the common law, that also suggests;
    - The common law bill of rights has its **own set of rights** it tries to protect
    - For this bill of rights to have any **meaningful effect**, the courts must have some mechanism to **protect,** or **enforce** these rights. They do this via the principles of **statutory interpretation**
        - There is a **tension** between the courts and parliament (and more specifically the government)
            - It is noted that this framework is **surprisingly strong** (consider **political** consequences)
        - Courts protect these rights using an **interpretive approach** that reads legislation in a way that preserves or does not disturb these rights (or to the least possible extent).

Meaning of Ambiguous

1. A word or statutory phrase can be ambiguous when it has **more than one** meaning
2. In the context of statute interpretation, ambiguity occurs when it is **not clear** in **what circumstances the statute applies**
    - The **purpose** and the **wording** of the legislation may be **perfectly clear**; the controversy surrounds whether it is **applicable to the facts before the court**

Natural law theorists assert that human rights **pre-exist law;** we have human rights that are **innate** (i.e. the mere fact that you are human gives one inalienable human rights) and where human-made law **conflicts** with natural law; the **latter trumps.**

- If they pre-exist law, where do they come from? A higher natural power i.e. God.
- Natural law theories **formed the basis** of the drafting of two very important human rights documents; the American Bill of Rights (more broadly the American Constitution) and the French liberation of rights.

2.0 Absence of a Comprehensive Rights Regime in Australia

Although the framers of the 1901 Commonwealth Constitution adopted many aspects of US Constitution, the idea of entrenching a bill of rights in the Commonwealth Constitution was **rejected** by them. This was in part because such a justiciable bill of rights would have overridden laws that **discriminated on the basis of race**, such as laws that banned Chinese people from working on the goldfields or in certain occupations. In this context, the remarks made by John Forrest, the then Premier of Western Australia, in the Convention Debates are worthy of quote:

> It is of no use for us to shut our eyes to the fact that there is a great feeling all over Australia against the introduction of coloured persons. It goes without saying that we do not like to talk about it, but still it is so. I do not want this clause [guaranteeing certain rights] to pass in a shape which would undo what is about to be done in most of the colonies, and what has already been done in Western Australia, in regard to that class of persons.

Instead of outlawing discrimination on the basis of race, the Commonwealth Constitution contained a provision that expressly allows the Commonwealth Parliament to enact laws that discriminate on account of race. This provision in section 51(xxvi) has **never been removed** nor has another provision in section 25 of the Constitution that recognises that the States may **disqualify people from voting** on account of their race.

The very few rights that are claimed to enjoy protection under the Commonwealth Constitution are mainly expressed as restrictions on federal and state power. For instance:

a) the Commonwealth Parliament under s 51(xxxi) is prohibited from acquiring one's property without compensating on just terms for such acquisition.
b) the Commonwealth Parliament is prohibited under s 116 from passing any law establishing a religion or preventing the free exercise of religion;
c) states are prohibited under s 117 are prohibited from discriminating on the basis of state residence.

The Constitution under s 80 also guarantees a **trial by jury** for indictable commonwealth offences. The prevailing interpretation of s 80 suggests that it may be, as articulated by Barwick CJ in *Spratt v Hermes* (1965) CLR 226 at 344, 'a **mere procedural provision**' **rather than a substantive human right**. Furthermore, the decision of the High Court in *Brown v R* (1986) 160 CLR 171 indicates that the guarantee under s 80 **may not be a right** at all. For in this case, the Court held that it is possible for an accused to **waive his or her rights** under s 80 and instead opt for a trial without jury. Brennan J at page 201 observed that the guarantee under s 80 was designed for benefit of the wider community, rather than the individual accused. In addition to these rights, the High Court has found the **right to freedom of political communication** implied from the text and character of the Constitution.

The absence of an adequate constitutionally entrenched right protection regime was keenly felt towards the end of World War II as nations sought to come to grips with the horrors of that conflict and since then the Australian Bill of Rights debate has spanned a number of long-running battles:

- In 1944, Australians rejected a referendum proposal put by the Curtin Labor government to insert guarantees of free speech and expression and to extend to the States the guarantee of religious freedom contained in section 116 of the Constitution.
- In the 1970s, federal Parliament **failed** to pass the Whitlam Labor government's Human Rights Bill 1973, which would have incorporated the International Covenant on Civil and Political Rights (ICCPR), 1966 into Australian law.
- In the 1980s, federal Parliament failed to pass the Hawke Labor government's Australian Human Rights Bill 1985, which again sought to incorporate the ICCPR into Australian law.

It is evident that every Australian federal Labour Government since the World War II has attempted to introduce major changes to national protection for human rights. Thus it does not come as a surprise that when the Rudd government was elected in 2007, it also went down the same path.

It established the **National Human Rights Consultation Committee** chaired by Father Frank Brennan ('the Brennan Committee') on 10 December 2008- the 60th anniversary of the Universal Declaration of Human Rights to consider 'how best to recognize and protect the human rights and freedoms enjoyed by all Australians'. The Brennan Committee found Australian human rights law to be **inadequate.**

It recommended a number of measures, including a **national human rights act**. With regard to the nature of the human rights act, the committee recommended it to be based on the **'dialogue model'** which enumerates a list of human rights and entrusts the three branches of the government, namely the executive, the legislature and the judiciary, with specific responsibilities to **protect** and **promote rights**.

To this end, the committee was influenced by **dialogue models** in New Zealand and the United Kingdom. Importantly, the committee further recommended for insertion in the proposed human rights act a list of **non-derogable rights**. [In this context, it is pertinent to mention that the concept of non-derogable human rights is premised on the idea that there are certain human rights that are **'too fundamental and too precious' to be suspended under any circumstances.** The principle of non-derogation imposes negative duties on the state apparatus, i.e. the duty to secure the unhindered continuation of the non-derogable rights by refraining from the adoption of any measures which interfere with these rights. It is generally considered that four non-derogable rights— the right to life, the right not to be subjected to torture, cruel and degrading treatment, the right to freedom from slavery, and the right to protection from retroactive laws — which are common to the European Convention on Human Rights and Fundamental Freedoms (ECHR), 1950, the ICCPR, and the American Convention on Human Rights (ACHR), 1969, 'express fundamental value for human beings' and, as such, bind the 'international community of states as a whole'.]

However, on 21 April 2010 the government through its **formal response**, in a document titled 'Australia's Human Rights Framework' ('AHRF'), to the Brennan Committee Report announced that it would **not proceed** with enactment of a **national human rights act,** which was the principal recommendation of its own enquiry. It is noteworthy that in the foreword to the 'AHRF' the then **Attorney-General** stated that the government had to put off the idea of a national human rights act on the basis that such a law would be **'divisive'**. It should be pointed out here that it reached this conclusion in clear defiance of the evidence produced by its committee that there is clear and strong community support for the idea. Thus, Australia now remains as the **only democratic nation in the world without some form of national Bill of Rights.**

- Recent failed referendum attempts have seemingly 'scared' both **major parties** from implanting such uniform legislation

The **'Australian Human Rights Framework'** is premised on five key principles and emphasises on:

- **reaffirming a commitment to the human rights obligations** under the **seven core United Nations human rights treaties** to which Australia is a party, i.e. the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights; the Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment; the Convention on the Rights of the Child, and the Convention on the Rights of Persons with Disabilities.
- the importance of **human rights education**;
- enhancing Australia's domestic and international **engagement on human rights issues**;
- **improving human rights protections** including greater parliamentary scrutiny; and
- achieving **greater respect for human rights principles** within the community.

The Framework includes a number of key commitments, including:

- investing over $12 million in a comprehensive suite of **education initiatives** to promote a greater understanding of human rights across the community;
- establishing a new **Parliamentary Joint Committee on Human Rights** to provide greater scrutiny of legislation for compliance with our international human rights obligations;
- requiring that each new Bill introduced into Parliament is accompanied by a **statement of compatibility** with our international human rights obligations;
- **combining federal anti-discrimination laws** into a single Act to remove unnecessary regulatory overlap and make the system more **user-friendly**; and
- creating an annual NGO Human Rights Forum to enable comprehensive engagement with non-government organisations on human rights matters.

The Australian Human Rights Framework was partly implemented through the enactment of the **Human Rights (Parliamentary Scrutiny) Act 2011 (HRPSA)** on 7 December 2011.

Instead of creating a charter of rights act, the *HRPSA* establishes:

- a new **Parliamentary Joint Committee on Human Rights** (PJCHR) comprised of five members of the Senate and five members of the House of Representatives; (see s 4 & 5 (1))
- a new requirement under s 8 that a Bill introduced into Parliament must be accompanied by a '**statement of compatibility',** which is to include an assessment of whether the Bill is compatible with Australia's human rights obligations under:
  a) the International Convention on the Elimination of all Forms of Racial Discrimination done at New York on 21 December 1965 ([1975] ATS 40);
  b) the International Covenant on Economic, Social and Cultural Rights done at New York on 16 December 1966 ([1976] ATS 5);
  c) the International Covenant on Civil and Political Rights done at New York on 16 December 1966 ([1980] ATS 23);
  d) the Convention on the Elimination of All Forms of Discrimination Against Women done at New York on 18 December 1979 ([1983] ATS 9);
  e) the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment done at New York on 10 December 1984 ([1989] ATS 21);
  f) the Convention on the Rights of the Child done at New York on 20 November 1989 ([1991] ATS 4);
  g) the Convention on the Rights of Persons with Disabilities done at New York on 13 December 2006 ([2008] ATS 12).

The **statements of compatibility** with human rights are contained in the **explanatory memorandum** for Bills.

It is noteworthy that a **failure to comply** with the new 'statement of compatibility' requirements in relation to a Bill that becomes an Act **will not affect the validity, operation or enforcement of that Act or any other provision of a Commonwealth law** (s 9(4)). Furthermore, a statement of compatibility **will not bind any court or tribunal** (s 9(3)). In other words, if a piece of legislation is inconsistent with Australia's human rights obligations there is **nothing in the *HRPSA* that would affect its validity**. Thus, this brings to fore the question whether the *HRSPA* actually furthers the goal of safeguarding the essential human rights of Australians.

The Brennan committee's recommendation was for a **legislative charter of rights** – why?

- Australia's **political landscape** makes adverse amendments to these laws particularly **difficult** and **unfavourable amongst voters**.

The Brennan committee also recommended **only political** and **civil rights** be included in the charter (**not social** or **economic**).

- Strange as the Australian people **indicated a concern** about the protection of the latter
- Brennan committee decided that social and economic rights are **inherently** within the domain of the **government** and **not** the **courts.** Social/cultural and economic rights are intrinsically the role of the political arms of government. Courts are **not** the **suitable/appropriate mechanism** to handle such political matters, nor do they have the **expertise** or resources equipped to handle such issues.

Patchwork quilt – **no one single legal document** that applies to all Australians in regards to the protection of human rights.

- Multiple sources of legal protection
- (is this a negative statement or a statement of fact?) – legal fact, but a problem
    - Problems with having a variety of sources protecting human rights within the country:
        - One document containing a comprehensive overview of all rights is more accessible to the general public for them to **understand** and become **familiar** with
    - In jurisdictions such as the US and NZ, their respective bill of rights are not the only legal sources of legal rights e.g. common law
        - Specific problem for Australia's patchwork quilt system of human rights;
            - In a federation you can have some overlap and inconsistency

Distinction between sections 7(a) and 7(b) of the *HRPSA* with regards to the committee's functions?

- Bills and Acts

Definition of '**human rights**' within the Act?

- Those rights contained in the 7 international treaties to which Australia is a signatory.

What rights aren't defined as human rights (for the purpose of the parliamentary joint-committee's report)?

- Constitutional rights, statutory rights and common law rights
    - Are **not to be considered** by the **Parliamentary committee**.

No Act that has been passed since 2011 has been accompanied with a statement of compatibility indicating that the legislation is **not** compatible with human rights. The committee has noted that these statements have so far, **not worked** as they originally intended; for the most part, these statements have **lacked analysis** as the '**why'** the legislation is compatible.

The framework of analysis adopted for the statement of compatibility outlined for the *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2015* is the **proportionality analysis.**

- The essence of the proportionality analysis is to provide **evidence-based justification** for a **legislative measure that may limit and/or abrogate a human right.**
- It requires the person/body limiting the right (in this case a government department) to undertake an evidence-based analysis to provide justify:
    1. Why the government is taking the measures outlined in the Bill; and
    2. Why those measures limit or abrogate human rights and how that limitation/abrogation is justified.

The **burden** is on the government/institution to provide the evidence-based justification that is purporting to, or limiting the right and demonstrate the measures are proportional.

The **first limb** of this test is usually not controversial as the person/institution must establish a **rational link** between the objectives and purpose of the Bill and the measures taken.

The **second limb** of this test involves the person/institution showing that the human rights infringes are the **minimum necessary** in order to give **effective operation** of the Bill.

The **third analysis** (usually **dependent** on the achievement of the first two limbs) of the test involves deciding whether the **substantive outcomes** and **purposes** of the Bill **outweigh** the **infringements to the human rights** that arise.

The parliamentary joint-committee report was **primarily aimed** at the Minister, members of government, drafters of legislation, the public and the members of parliament to **create political pressure** on decision-makers.

- These committees act under **pressured circumstances** to show their findings due to the speed in which Bills are tabled.

The *HRPSA* does **not** provide for rights scrutiny made by the **judiciary** at **federal** level.

- **Courts do have a role** in the **Victorian** (and **ACT**) **charters.**

4. Sources of Rights (Other than the Constitution) in the Absence of a Comprehensive Rights Regime in Australia

In addition to limited guarantees of rights contained in the **Commonwealth Constitution**, guarantees of certain forms of rights can be found in Australia through the following sources:

a) **Legislation:** The following statutes in Australia has been instrumental in prohibiting discrimination on the basis of race, sex and disability:
   a. *Racial Discrimination Act 1975*
   b. *Sex Discrimination Act 1984*
   c. *Disability Discrimination Act 1992*

b) ***Common Law:*** The founders felt that relying on common law protection of rights by following in the footsteps of the UK would be sufficient. However, in doing so the founders overlooked: a) the growing need for greater protection of rights in a 'more complex and pluralistic world'; and b) the absence of systematic protection of rights under the common law.

Notwithstanding the issues concerning the effectiveness of **common law** in protecting rights, in Australia it has developed strong **fair trial** (due process), **property and personal liberty rights**. In addition and importantly, judges have developed **common law rules** of **statutory interpretation** that are applied, where possible, to **protect and promote human rights**. The most important of these are the **principal of legality** (or **fundamental rights presumption**) the general content of which is outlined in the textbook extracts of the High Court decisions in *Bropho v Western Australia* and *Daniels Corp v ACCC* and the **presumption of legislative consistency with international law.** The latter (at least in Australia) is generally applied where a statute is **unclear** or **ambiguous on its face**, whereas the application of **principle of legality does not** require **legislative ambiguity.**

The **criminal law** has been **codified** in all states other than SA, NSW and VIC, whereby a **combination** of statutory and common law rules govern offences such as murder, rape, manslaughter, assault etc. that **secure** a **number of fundamental rights** in operation.

5. Overview of the Charter of Rights in ACT and Victoria

Both these charters incorporate most of the civil and political rights contained in the International ICCPR, which is the 'most important universal instrument' on human rights with 167 state parties and which Australia **ratified** in 1981. Both Acts require those who **interpret** and **apply legislation** to do so in a way that is **compatible** with human rights to the extent that this is possible,

but subject to the proviso that the interpretation must be **consistent with the purpose of the legislation** (see Human Rights Act 2004 (ACT) s 30; Charter of Human Rights and Responsibilities 2006 (Vic) s 32(1).).

- Essentially the **operation** of the legislation **takes priority** over its compatibility with human rights.

Since the charters of rights are **not entrenched** in the Constitutions of the ACT and Victoria, the Supreme Courts of these jurisdictions **lack the authority** to **strike down legislation** that are enacted in contravention of the human rights contained in **these charters**. However, the Supreme Courts in these jurisdictions have been **empowered** under their respective charters to issue **statements of incompatibility** or a **declaration** in respect of legislation which are **inconsistent with human rights**.

The charters are referred to as a **meta-statues** as they operate in a special capacity of applying to **all Victorian legislation** (past, present and future) while still being an **ordinary Act** of Parliament.

- The **difficulty** in amending these charters is a **political consequence**, **not** a **legal one**.

The authors correctly note that the rights protected in the Australian charters are expressed in **broad, abstract** and often **aspirational terms**: right to freedom of expression, right to freedom of religion etc. In this way, **it is not clear what these rights require in any given context until a court or government body interprets and applies the right.** Consequently, the authors on page 6 claim that '[a]s we shall see in this book, rights charters often have **very little**, if any, **positive impact on enhancing rights**. Certainly, this has been the experience with the Victorian Charter.'

- This claim is **not evidenced** by any **practical examples**, making it a **mere assertion** by the author

Unlike other statutes, the charters **do not create free-standing legal rights or interests** (s 39 of the Vic Charter) i.e. an individual **cannot commence a court action based solely on the rights of the Charter** (a rights argument can however **piggy-back** an existing (**successful**) **legal claim** in order to be considered by the court).

- Although they ostensibly state that certain rights **exist,** they **do not** provide a **legal foundation** for those rights. Instead, the Charters **operate as interpretive tools** regarding the **constructing and meaning of statutes.**

6. Absence of Positive Rights - Welfare Benefits, Free Health Treatment and Education in the ACT and Victorian Charters

As pointed out earlier, most of the rights enshrined in the ACT and Victorian charters are the civil and political rights derived from the ICCPR. On the other hand, most economic, social and cultural rights **do not find a place in Australian rights charters.**

In Australia, individuals have a number of **positive rights** which have legal status which relate to important areas of **human flourishing.** These relate to the areas of welfare, health and education and involve **a party acting** to give rise to the right.

- Australia has a national welfare system: *Social Security Act 1991* (Cth)
- All Australians are entitled to government funded free health care
    - Australian law recognises that there is a right of access to public emergency health services
- Australians are entitled to free education to the end of secondary school and HECS for university students.

What are Human Rights and The Origins of the Human Rights Movement (chapter 2)

2.010: No Accepted Definition of Human Rights & 2.020: The Concept of Rights

As we shall see, much of what constitutes human rights law is the process and determination of rights disputes arising when there is a **clash of rights** or a claim is made (usually by the State) that a **collective or community good must override or limit a right in a particular circumstance**. So to think about the fundamental nature and content of rights provides us with an important theoretical and normative foundation that will assist in understanding their **scope** and **practical application** in **any given context.**