Week 1: Basic Concepts

The idea of human rights

- Human rights and freedoms that belong to all human beings - regardless of race, sex, nationality, ethnicity, language, religion or any other status
- Human rights include, for example, the right to life and liberty, freedom from slavery and torture, freedom of opinion and expression, the right to work and education
- *Universal Declaration of Human Rights* (1948)
    - "The General Assembly proclaims this UDHR as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote *respect* for these rights and freedoms and by progressive measures, national and international to secure their universal and effective *recognition* and *observance*…"
- Bill of Rights in domestic law and National Constitutions

Six Issues

1. Identity - what is (the nature of) a human right?
2. Authority - what is the source of human rights and their autonomy?
3. Content - what are the fundamental interests protected by human rights?
4. History - have human rights always existed?
5. Justification - what is the philosophical foundation of our HR regime(s)?
6. Implementation - how can human rights be recognised and observed?

The nature of human rights

- Human rights are rights Human rights are plural
- Human rights are universal
- Human rights have high-priority
    - Human rights have priority over the "general interest"
    - Do (human) rights work as "trumps" or "shields"?
    - A true commitment to human rights is incompatible with a certain type of utilitarian reasoning
    - Act-utilitarianism and the principle of utility (the greatest happiness for the greatest number)

Human rights *qua* rights

- Wesley Newcomb Hohfeld (1879-1918) identifies four (4) different legal positions within the concept of a "right": (i) claim, (ii) privilege, (iii) power, and (iv) immunity
- (i) X has a claim-right against Y with respect to o if and only if Y is under a duty to X to o
- (ii) X holds against Y a privilege to o if X is not under a duty to Y not to o (and, correlatively, Y does not hold a claim against X not to)
- (iii) X has a normative power over Y if X has the ability to alter (through volitional action) Y's normative position
- (iv) X holds an immunity against Y in respect of some aspect of X's normative position, if Y is disabled (lacks power) to alter that position
- Negative and positive rights (consider the difference between "freedom from" and "freedom to")
- Article 2 of the Universal Declaration of Human Rights:
- "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

- Human rights are entitlements that capture and protect our fundamental interests as human beings
- The idea of humanity
- Individual and group rights (e.g., the right to self-determination)

The authority of human rights

- Moral vs legal rights
    - Are human rights moral rights, legal rights or both?
    - Are there authoritative sources for human rights?
- Legal sources and legal interpretation → Legal sources and legal interpretation
    - Constitution of the Republic of South Africa, S39 (1): "When interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law."
- Absolute vs limited rights
    - Are there any absolute human rights?

Content of human rights

- First-generation human rights are civil and political rights, e.g.: the right to life, equality before the law, freedom of speech, freedom of religion, property rights, the right to a fair trial, and voting rights Second-generation human rights are social, economic, and cultural rights, e.g.: the right to be employed (under just conditions), the right to food, the right to housing, and the right to health care
- Third-generation human rights include group and collective rights (some commentators call these rights 'solidarity human rights'), e.g.: the right to self-determination, the right to economic and social development, the right to a healthy environment, the right to natural resources, and the right to intergenerational equity and sustainability

History

- Magna Carta (1215) and English Bill of Rights (1689)
- US Constitution (1789) and US Bill of Rights (1791)
- French Declaration of the Rights of Man and of the Citizen (1789)
- Universal Declaration of Human Rights (1948)
- International Covenant on Civil and Political Rights (1966)
- International Covenant on Economic, Social and Cultural Rights (1966)
- Convention on the Elimination of All Forms of Discrimination against Women (1979)
- Convention on the Rights of the Child (1989)

Philosophical foundations of human rights

- Natural law and natural rights
    - Catholic thinkers
    - Modern theories of natural rights
- Deontological foundation
    - Immanuel Kant
- Utilitarianism
    - Jeremy Bentham (1748-1832)
    - Rule utilitarianism and indirect utilitarianism
- On human rights and indirect utilitarianism

Can human rights be justified?

- "Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense - nonsense upon stilts."
- Jeremy Bentham, Anarchical Fallacies, in J. Bowring (ed.), Works, vol. 2 (1843)
    - Is the idea of human nature just a myth?
    - Are rights selfish?
    - Are rights an instrument of oppression?
    - Are rights a threat to the value of community?
    - Are rights ethnocentric?

Moral relativism and objectivism

- Moral relativism
    - Are moral disagreements rationally resolvable?
    - The distinction between metaethical and normative relativism
- Moral objectivism/realism
    - Are moral statements apt for truth and falsity?
- Arguments against relativism
- On moral relativism and objectivism

Implementing human rights

- From natural law to positive law
- From moral rights to legal rights
- “Positivisation" of HR into domestic law and international law
- Human rights and constitutionally protected rights
- Articles 1-19 of Basic Law for the Federal Republic of Germany
- In Australia, no bill of rights in the Federal Constitution
    - At state level: Human Rights Act 2004 (ACT) and Charter of Human Rights and Responsibilities Act 2006 (Vic)
- On the relationship between international and domestic human rights regimes, see Samantha Besson, 'Human Rights and Constitutional Law - Patterns of Mutual Validation and Legitimation', in Rowan Cruft, S. Matthew Liao and Massimo Renzo (eds), Philosophical Foundations of Human Rights (Oxford University Press, 2015) 279-299.

Limitations clauses

- Limitation clauses are constitutional provisions that permit the partial limitation of some constitutional rights
- Canadian Charter of Rights and Freedoms, S1 (Guarantee of rights and freedoms): "Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." (emphasis added)
- What are the conditions under which constitutionally protected human rights can be limited?
- European Convention on Human Rights, Article 15
- Charter of Human Rights and Responsibilities Act 2006 (Vic), S7 (Human rights what they are and when they may be limited)
- Human rights, limitation clauses, and the principle of proportionality

Wong D. 'Relativism' in P Singer (ed) A *Companion to Ethics* (1993) 624-635.

- Moral relativism is a common response to the deepest conflicts we face in our ethical lives.
- **Meta-ethical relativism** → Moral relativism, as a common response to such conflicts, often takes the form of a denial that any single moral code has universal validity, and an assertion that moral truth and justifiability, if there are any such things, are in some way relative to factors that are culturally and historically contingent.
- **Normative relativism** → holds that it is wrong to pass judgement on others who have substantially different values, or to try to make them conform to one's values, for the reason that their values are as valid as one's own.

METH-ETHICAL RELATIVISM

- Plato attributes to the first great Sophist, Protagoras, the argument that human custom determines what is fine and ugly, just and unjust.
- Another argument given for relativism is premised on the view that the customary ethical beliefs in any given society are functionally necessary for that society.
- The problem with the functional argument, however, is that moral beliefs are not justified merely on the grounds that they are necessary for a society's existence in anything like its present form.
- Despite the weaknesses of these arguments for moral relativism, the doctrine has always had its adherents. Its continuing strength has always been rooted in the impressiveness of the variation in ethical belief to be found across human history and culture
    - Ancient text (Dissoi Logoi or the Contrasting Arguments; Robinson, 1979) associated with the Sophists, it is pointed out that for the Lacedaemonians, it was fine for girls to exercise without tunics, and for children not to learn music and letters, while for the Ionians, these things were foul. Montaigne assembled a catalogue of exotic customs, such as male prostitution, cannibalism, women warriors, killing one's father at a certain age as an act of piety, and recites from the Greek historian Herodotus the experiment of Darius.
- It is sometimes thought that the extent and depth of disagreement in ethics indicates that moral judgements are simply not judgements about facts, that they assert nothing true or false about the world but straightforwardly express our own subjective reactions to certain facts and happenings, whether these be collective or individual reactions
- An understanding of human nature and human affairs is necessary for formulating an adequate moral code. The enormously difficult and complex task of reaching such an understanding could be a major reason for differences in moral belief.
- The mere existence of deep and wide disagreements in ethics, therefore, does not disprove the possibility that moral judgements can be objectively correct or incorrect judgements about certain facts.
- Confucianism, for instance, makes the family and kinship groups the models for the common good, with larger social and political units taking on certain of their features, such as benevolent leaders who rule with the aim of cultivating virtue and harmony among their subjects.
- If the contrast between the two types of morality is real, it raises the question of whether one or the other type is truer or more justified than the other.
- The argument for a relativistic answer may start with the claim that each type focuses on a good that may reasonably occupy the centre of an ethical ideal for human life.
- On the one hand, there is the good of belonging to and contributing to a community; on the other, there is the good of respect for the individual apart from any potential contribution to community.
- Morality
    - Regulates conflict of interest between people

    - Regulates conflicts of interest within the individual born of different desires and drives that cannot all be satisfied at the same time
- A moral relativism that would allow for this kind of constraint on what could be a true or most justified morality might not fit the stereotype of relativism, but would be a reasonable position to hold.

NORMATIVE RELATIVISM

- Requires self-condemnation by those who act according to it
- The birth of cultural anthropology in the late nineteenth century was in part subsidised by colonising governments needing to know more about the nature and status of 'primitive' peoples.
- A more reasonable version of normative relativism would have to permit us to pass judgement on others with substantially different values.
- Even if these different values are as justified as our own from some neutral perspective, we still are entitled to call bad or evil or monstrous what contradicts our most important values.
- Each position has some force, and clearly normative relativism offers no simple solution to the dilemma. What the doctrine provides, however, is a set of reasons for tolerance and non-intervention that must be weighed against other reasons.
- The doctrine applies not only to proposed interventions by one society in another, but also, as in the case of abortion, to deep moral disagreements within pluralistic societies containing diverse moral traditions.
- Relativism has a bad name in some quarters because it is associated with a lack of moral conviction, with a tendency toward nihilism.

Trigg R, *Morality Matters* (2005) ('Introduction') 1-6.

'That is just your opinion'

- Moral arguments are often stopped when someone refuses to consider a position by saying that 'that is just your opinion'. The implication is that anybody's judgement is as good as anyone else's, and that no one has a right to tell others what to do.
- Privacy becomes autonomy and autonomy becomes the right to make your own choices without interference from others
- Morality cannot just be a matter of individual taste. Yet it is not just constituted by the customs and traditions of a particular society.
- Thus claims, which cannot be checked, have no meaning. This view was propagated between the two world wars by the 'Vienna Circle', and it echoed through universities long after the Second World War. One of its main exponents in the English-speaking world was A. J. Ayer, whose book Language, Truth and Logic tried to show that moral statements were merely expressing emotion, evincing one's own feelings and perhaps calculated to stir those of others.
- The issue is whether moral judgements can be made rationally, and should be influenced by anything outside our own arbitrary will. Can they be open to discussion and argument?

A just society?

- John Rawls, attempted to meet this problem by envisaging social cooperation as taking place under a framework agreed by citizens, before they know their own place in the society. He put forward what he termed 'the idea of the original position',
- The parties to the agreement have to establish a society of free and equal citizens, but they do not know their own position in the society, or what particular beliefs they might hold.
- We are free to make wrong choices, but we cannot avoid the harm that they inevitably bring

- The controversial area of marriage provides a good example. A decision as to whether to marry or remain single is one of our most cherished individual rights. This, if anything does, provides an example of where individual freedom is vital and has to be protected. Yet many extend this idea and regard it as an assault on their individual freedom that they cannot person- ally redefine what marriage is. Do they have to go through a public ceremony to have a relationship recognized? Should long-term partners be treated in the same way as husbands and wives? How long, anyway, is 'long- term'? Can same-sex relationships count as marriage? Whatever the answers to these questions, they involve major questions of public policy, even involving taxation, and concern the kind of society we live in. As such, they cannot be left haphazardly to individual choice.

Waldron J, *The Law* (1990) ('Rights') 88-113.

Rights as moral constraints

- European Convention of Human Rights (ECHR) → expresses is that there are certain things (such as detention without trial, interference with privacy, or censorship of the press) that ought not to be done in the course of normal political life, and there are certain things in particular (such as torture) which ought not to be done at all, under any circumstances, whether in normal times or even in war or public emergency.
- Ronald Dworkin → The institution of rights against the Government is not a gift of God, or an ancient ritual, or a national sport. It is a complex and troublesome practice that makes the Government's job of securing the general benefit more difficult and more expensive, and it would be a frivolous and wrongful practice unless it served some point

Rights and respect for individuals

- Social policy is supposed to be oriented towards the well-being of the whole society and everyone in it
- As we pursue goals like prosperity, order, economic growth, and so on, we accept that some people will suffer losses while others benefit. For example, some people lose the enjoyment of their property when a new motorway or airport is built, and though they can use the new facility along with everyone else, they may sometimes still be left worse off overall in the long run
- People who believe in rights believe that there are limits on the losses that any individual should have to bear in the pursuit of social policy; they believe that there are limits on the sacrifices that may reasonably be demanded of any person in society.
- We must abandon any social goals that require us to impose losses or harms that exceed those limits.
- The job of declarations like the ECHR is to mark those limits and to caution us against transgressing them.

Utilitarian argument against rights

- Utilitarians say that the overall aim of social policy is to bring about the greatest amount of happiness or satisfaction summed (and in some versions averaged) over the whole population, and to minimise the amount of suffering and dissatisfaction, again summed (or averaged) across the whole population.
- Utilitarianism is often decried as nasty or amoral, but here it is parading its merits as a theory of fairness and respect, denying that anything more in the way of human rights is required to capture the importance of those values.

Distinction between acts and omissions

- The distinction between acts and omissions is often invoked when defenders of human rights face arguments from social utility.

- Utilitarians say that we have to take responsibility for what happens if we act in one way rather than another.
- Defenders of rights deny that and say that we are responsible not for everything that happens but only for the things we do.
- The distinction between acts and omissions may make some sense in personal morality, where issues of conscience and integrity come to the fore, but it is hard to accept as an account of political morality.
- Though we want our politicians and officials to be good people, we don't want them to place greater weight on their own moral purity than on the welfare and suffering of those who are affected by their choices.
- That is partly because they are acting for all of us, not only on their own account.
- They have a responsibility to consider all the consequences of their decisions and to evaluate the difference that their choices make to the well-being of those committed to their care.
- Utilitarianism gives a somewhat more attractive account of the responsibilities of political office than the self-absorbed morality which distinguishes acts and omissions.

Week 2: Rights Protection

- Constitutional Bill of Rights
- Statutory Bills of Rights
- Common Law Rights
- Different legal mechanisms for preventing legislatures from violating human rights or forcing them to protect human rights where they have omitted to do so

Constitutional protection

- Legislating in conflict with human rights will be invalidated by the judiciary
- Constitutional rights plus strong-form judicial review
- Courts decision cannot be overridden by the legislature
- Arguments against strong-form judicial review
    - Waldron: Rights are contested
    - Decisions about rights should therefore be made through the democratic political process
    - Strong-form judicial review is a form of disenfranchisement
    - We can trust parliamentarians for the most part to make impartial and good decisions
- **Countermajoritarian difficulty** → what justifies courts in substituting their views as to what is just for the majority's views?

Defences of strong-form judicial review

- Democracy is not the only important value (Moore)
- Alternatively, Waldron has an inadequate conception of democracy. Democracy should not be identified with majoritarian decision-making (Ely, Dworkin)
- Alternatively, strong-form judicial review is a way of making sure that majorities act in accordance with their long-term interests, rather than the political pressure of the moment (Ackerman)
- Courts are more suited than legislatures to serious deliberation about the rights and interests at stake (Michelman)

Statutory Bills of Rights

- Retain parliamentary sovereignty (right to make or unmake any law whatever and no person/body can invalidate Parliament's decision)

- Statutory bills of rights are ordinary legislation and can be amended or repealed in the normal way
- Courts cannot strike down legislation which unjustifiably infringes a right in the bill of rights
- Statutory bills require the political branches of government to consider the rights implications of legislation before it is enacted
- Courts must provide an interpretation of legislation which conforms to human rights, to the extent that this is possible. If this is not possible, courts have the power to make a declaration of incompatibility

Presumptions of statutory interpretation/the common law principle of legality

- At common law, it is presumed that the legislature does not intend to take away fundamental rights and freedoms
- This presumption is rebutted by clear language
- **Common law constitutionalism** → the strength of the presumptions is ratcheted up to such an extent that they constrain the legislature from passing certain laws that are morally repugnant. In this way, the common law comes to represent a 'deeper constitutional morality' than the laws passed by Parliament

IV rights protection in Australia

1. Constitutional protection
    a. Apart from the handful of limitations contained in the Constitution, Parliament has the unlimited legal power to infringe human rights
2. At state/territory level, statutory bills of rights
    a. *Human Rights Act 2004* (ACT)
    b. *The Charter of Human Rights and Responsibilities Act 2006* (VIC)
    c. *R v Momcilovic* [2010]

- Relevant charter provisions
    - Section 25(1) → a person charged with a criminal offence has the right to be presumed innocent until proven guilty according to law
    - Section 32(1) → so far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights
    - Section 36(2) → if in a proceeding, the Supreme Court is of the opinion that a statutory provision cannot be interpreted consistently with a human right, the Court may make a declaration to that effect in accordance with this section
- s5 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic): the occupier of premises in which drugs are found is deemed to be in possession of those drugs unless he/she satisfies the court to the contrary.
- The Court of Appeal in Momcilovic: it is not possible to interpret s 5 other than as imposing a legal burden of disproving possession, which infringes the right to be presumed innocent. The Charter does not create a special rule of interpretation.
- Furthermore, the infringement on the right to be presumed innocent cannot be justified under the limitation clause (s 7(2) of the Charter).
- Hence the Court made a declaration that s 5 of the Drugs Act was inconsistent with human rights.
- The UK HRA provides:
- Section 3(1): So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.
- *Momcilovic v The Queen* [2011] HCA 34
- It was argued that sections 32(1) and 36(2) of the Charter were invalid because they conferred functions on the Victorian Supreme Court which impaired its institutional integrity. These sections were therefore contrary to Chap III of the Constitution. These arguments were rejected, although not unanimously.

- Six justices held that s 32(1) is a valid rule of statutory interpretation because it does not licence courts to make new law.
- A smaller majority (four justices) held that the declaration power is also valid.
- Although it is not a judicial function, it is 'compatible with the
- institutional integrity of the Victorian Supreme Court and its status as a repository of federal jurisdiction pursuant to Ch III of the Constitution'.
- Heydon J held that the whole Charter was invalid.

3. Presumptions of statutory interpretation: See the Durham Holdings case, in which Kirby J rejected the common law constitutionalist position and asserted the more orthodox view about the presumptions of statutory interpretation. He said that there are no common law rights that are so fundamental as to be immune to legislative infringement.
4. Political/non-justiciable protection at national level:
    - Establishes a parliamentary committee to scrutinise Commonwealth bills to examine whether they are compatible with human rights.
    - All bills introduced into the federal Parliament must be accompanied by a compatibility statement, assessing whether the bill is compatible with human rights.
    - This statement may be used by the courts in interpreting legislation.
    - The rights are the rights contained in seven treaties: International Convention on the Elimination of Racial Discrimination; International Covenant on Economic, Social and Cultural Rights; International Covenant on Civil and Political Rights; International Convention on the Elimination of Discrimination against Women; Convention against Torture; Convention on the Rights of the Child; Convention on the Rights of Persons with Disabilities.
    - Do we have a bill of rights in all but name?

Walters M, 'Common Law, Reason and Sovereign Will' (2003) *53 University of Toronto Law Journal 65* (65-74 only)

- The history of ideas is circular - or at least seems so in relation to com- mon law ideas concerning law and legislative authority. Practical constitutional problems in common law **/** parliamentary jurisdictions are once again prompting theoretical concern about the extent to which judges may enforce unwritten norms over legislative will."
- **Trevor Allan's Book Constitutional Justice: A Liberal Theory of the Rule of Law**
    - Consolidates his arguments in this respect and offers a compelling and controversial interpretation of the common law constitutional tradition.
- Jeffrey Goldsworthy argues that judges who question the doctrine of parliamentary sovereignty are being misled by Allan's version of constitutional history
- Unlike McIlwain's work, Allan's *ConstitutionalJustice* is not a work of constitutional history as such; it is, instead, an argument of normative constitutional theory that seeks to identify the basic tenets of 'liberal constitutionalism' through a comparative analysis of the constitutional and administrative law of modern common law jurisdictions
- Allan's conception of the rule of law includes the familiar formal criteria identified by Fuller - namely, that law must consist of general, prospective, public, clear, consistent rules; governmental discretion must be exercised pursuant to law and must comply with rights of natural justice or due process; and individuals must have recourse to independent judicial tribunals empowered to uphold these principles
- Allan argues that the point of the formal criteria of the rule of law in a 'liberal' or 'constitutional' society is not to ensure that law is efficient in directing human behaviour but to ensure that governmental power is justified by some defensible conception of public good consistent with the equal dignity and moral autonomy of each individual in that society

- The role of the individual in Allan's theory of the rule of law is far more complex than this brief summary suggests. Allan says that it is in the process of reasoned justification that law's claim to moral authority and legitimacy lies: the purpose of insisting upon law's compliance with the rule of law is to obtain the consent of each individual for each law, so that legal and moral obligations do not diverge
- In equating the jurisprudential necessity of the rule of law with a justiciable constitutional rule, Allan also distances himself from at least certain parts of the explanation provided by Finnis of the natural law claim, *lex iniusta non est lex.*

R v Momcilovic [2010] VSCA 50

Facts

- The applicant, Vera Momcilovic, was convicted of one count of drug trafficking in the County Court. The drugs were found in the applicant's apartment. Pursuant to s 5 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) ('DPCS Act'), the applicant was deemed to be in possession of the drugs unless she 'satisfie[d] the court to the contrary'. Thus, s 5 of the DPCS Act imposes on a defendant the legal burden of disproving possession and, when read in conjunction with s 73 of the Act, means that 'upon proof by the prosecution that a drug of dependence was found "upon any land or premises occupied by" that person, then unless he/she satisfies the Court to the contrary, he/she is deemed to be in possession of that drug.'
- The applicant appealed against conviction and sentence. The appeal against conviction proceeded on the ground, among others, that s 32 of the *Charter* requires that s 5 of the DPCS Act be interpreted as placing only an evidentiary burden on an accused.
- The Human Rights Law Resource Centre was given leave to appear as amicus curiae and make written and oral submissions on the application of the *Charter*. The Attorney-General and the Victorian Equal Opportunity and Human Rights Commission also intervened in the proceeding, pursuant to ss 34 and 40 of the *Charter*, respectively.

Decision

The Court refused the appeal against conviction, holding that it was not 'possible' to interpret s 5 consistently with the right to the presumption of innocence. Accordingly, the Court notified the Attorney-General and the Commission of its intention to issue a Declaration of Inconsistent Interpretation.

<u>Statutory Interpretation under the *Charter*</u>

- Section 32(1) of the *Charter* requires that 'So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights'.
- The Court held that this provision does not 'create a "special" rule of interpretation, but rather forms part of the body of interpretive rules to be applied at the outset, in ascertaining the meaning of the provision in question'.
- Instead, the Court characterised s 32(1) as a 'statutory directive' that requires all persons engaged in the task of statutory interpretation to 'explore all possible interpretations of the provision(s) in question, and adopt that interpretation which least infringes *Charter* rights'. The Court concluded that
- We reject the possibility that Parliament is to be taken to have intended that s 32(1) was only to operate where necessary to avoid what would otherwise be an unjustified infringement of a right. The Human Rights Law Resource Centre's submission to this effect was correct.
- In reaching this conclusion, the Court endorsed the decision of Elias CJ in *Hansen* [2007] 3 NZLR 1.
- Accordingly, the Court held that, when it is contended that a statutory provision infringes a *Charter* right, the correct methodology is as follows [35]:

- Step 1: Ascertain the meaning of the relevant provision by applying s 32(1) of the *Charter* in conjunction with common law principles of statutory interpretation and the *Interpretation of Legislation Act 1984* (Vic).
- Step 2: Consider whether, so interpreted, the relevant provision breaches a human right protected by the *Charter*.
- Step 3: If so, apply s 7(2) of the *Charter* to determine whether the limit on the right is justified.

- If the limitation is not demonstrably justified pursuant to s 7(2), a Court may issue a Declaration of Inconsistent Interpretation.
- The Court distinguished this approach from that of the House of Lords in *Ghaidan*, stating that, 's 32(1) was not intended to create a "special"' rule of statutory interpretation' and concluding that:
    - our view that s 32(1) does not permit a departure from the intention of the enacting Parliament is reinforced by the fact that s 32(1) requires provisions to be 'interpreted' compatibly with human rights. 'Interpretation' is what courts have traditionally done.

- In the present case, the Court held that the reverse onus established by s 5 of the DPCS Act was 'not so much an infringement of the presumption of innocence as a wholesale subversion of it', contrary to s 25 of the *Charter*. The Court iterated, however, that 'the choice between a legal burden and an evidentiary burden is a legislative choice' and that it is not 'possible' for a Court to substitute an evidentiary onus for the legal onus: 'If that substitution is to be made, it is a matter for Parliament'.

<u>Reasonable Limitations under the *Charter*</u>

- The Court next considered whether the limitation on the presumption of innocence imposed by s 5 of the DPCS Act was 'demonstrably justified' in accordance with s 7(2) of the *Charter*.
- On this issue, the Court endorsed the approach of Dickson CJ in *Oakes* [1986] 1 SCR 103, regarding the need for clear, cogent and persuasive evidence in order to demonstrably justify a human rights infringement. After highlighting that there was no evidence before the Court to 'establish that effective prosecution…depends on the reverse onus', the Court stated:
    - this was a case where evidence was required. The mere assertion that the reverse onus was essential to the effective prosecution of trafficking offences could never have been sufficient by itself to establish that fact. There may be circumstances where the justification for interfering with a human right – and for doing so by the particular means chosen – is self-evident, but they are likely to be exceptional. The government party seeking to make good a justification case under s 7(2) will ordinarily be expected to demonstrate, by evidence, how the public interest is served by the rights-infringing provision. The nature and extent of the infringement of rights sought to be justified will usually determine how much evidence needs to be led, and of what kind(s).
    - In the absence of evidence, the Court concluded that there was no demonstrable justification (or even a reasonable justification) for reversing the onus.

<u>Declarations of Inconsistent Interpretation under the *Charter*</u>

- Having reached the conclusions above, the Court notified the parties of its intention to make a Declaration of Inconsistent Interpretation under s 36(2) of the *Charter*.
- Significantly, the Court noted that, contrary to the approach under the *Human Rights Act 1998* (UK), such Declarations should not be seen as a 'last resort' but rather, as reflected in parliamentary debates about

the *Charter*, as 'epitomising the intended relationship between the courts and the legislature' in the dialogue model. On this point, they concluded that

- the making of a declaration of inconsistent interpretation accords more closely with this conception of dialogue,
- and in particular with the avowed purpose of 'giving Parliament the final say', than would an expanded view of 'interpretation' which allowed courts to depart from the plain meaning of a statutory provision and the intent of Parliament thereby conveyed. Under the Charter, the concept of the 'final say' is given direct expression in the obligation of the responsible Minister to table in Parliament a written response to a declaration of inconsistency.
- If a Declaration is made, s 37 of the *Charter* requires that the Attorney-General table this Declaration, together with his written response, in Parliament within six months.

Held that

- s 32(1) of the *Charter* is not a 'special' rule of statutory interpretation, but rather a statutory directive that requires all persons engaged in the task of statutory interpretation to 'explore all possible interpretations of the provision(s) in question, and adopt that interpretation which least infringes *Charter* rights';
- The issue of 'justification' pursuant to s 7(2) arises only if it is not 'possible' to interpret legislation compatible with human rights;
- Any infringement of human rights should be 'demonstrably justified' by clear, cogent and persuasive evidence;
- Where an infringement can not be demonstrably justified, the Court should grant a Declaration of Inconsistent Interpretation, such declarations being 'central' to and 'exemplifying the dialogue model of human rights legislation'.