

# **RIGHTS, LIBERTY, FREEDOM - CIVIL, NATURAL, HUMAN, ETC**

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**to  
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## **Introduction**

There is an area of discussion which, over the years, has seen the use of varying terminology. The discussion has involved reference at various times to freedom, to liberty, or to rights. The use of the varying terminology has reflected different emphases thought to be achieved by a particular writer or speaker. The area covered by the discussions has also varied from time to time. In dealing with the subject, I will attempt to deal with three (3) distinct categories. I will talk about one's rights or liberties as they presently stand. What can we do in particular situations as a result of the protection of the law as it stands? I will also discuss the concept of rights and liberties as a philosophical call to arms. Various writers have and continue to talk of human rights or basic freedoms in terms of moral rights which every citizen in the world, even those currently suffering oppression, were entitled to, so that such rights should be struggled for or where they were currently present, should be defended with great fortitude.

Thirdly, these important rights have been discussed in terms of ensuring that they always did apply and were available to every citizen. Thus, there have been attempts made at various stages to make protection of certain basic rights part of the fundamental law of a country. The amendments to the United States Constitution come within this category, as does this Bill of Rights in the Canadian Constitution. A similar type of Bill of Rights was proposed for Australia but this issue has been dropped at least for the time being.

## **Your Legal Rights**

Because they actually exist and derive from the law, one's present rights are often discussed as legal rights. In their totality, they are constituted by every effect the current law has. Thus, mundane things, such as the right to borrow from the Brisbane City Council library, or the right to form a limited liability company, come within this category. However, I will confine my discussion to some of those matters which have been considered important in terms of protecting the citizen from oppressive State power.

## **Arrest & Detention**

A person can only be arrested where the law authorises his arrest. In some cases a person can only be arrested where a warrant has been issued by a Justice of the Peace authorising the arrest. In other cases a person can be arrested without a warrant. When a person has been arrested, there is a requirement that the person arrested be taken, forthwith, before a Justice of the Peace to be charged with the offence. Therefore, further investigative procedures

involving the suspect must cease once the arrest has occurred.

When a person is being questioned by police, he or she may refuse to answer any questions and if that choice is made, the Court will not at a subsequent time draw any adverse inference against the person because of his or her refusal to answer the questions. This is called the right to silence.

Except in limited circumstances, there is no power in the police to detain a person except by way of arrest. Therefore, if a police officer asks a person to accompany them to the station to assist them in their enquiries, the citizen can quite properly decline to go unless and until the police officer exercises the option to arrest the person. A major exception to the principle is the breathalyser legislation contained in Section 16A of the Traffic Act, which gives police officers a right to take a driver whom they suspect of being under the influence of alcohol, to a police station for the purpose of administering a breathalyser test. This is dependent either upon the person declining a roadside breath test or undergoing a roadside breath test which indicates the alcohol level is above the legal limit.

There is also a power to detain a person for the purpose of searching them including the taking of the person to a police station for the purpose of that search. This power is contained in the Drugs Misuse Act and is dependent upon a suspicion that the person detained may have an illegal drug on their body. Similar powers relate to searches for firearms. There is also special legislation relating to the mentally ill.

The lack of any general power to detain a person for the purpose of police questioning leads to a discussion of the layman's belief that they have one free telephone call. If a person is simply taken to the police station for the purpose of questioning, they have no particular right to a telephone call, but of course, if they are not arrested, they are at liberty to leave the police station at any time. If they have been arrested then the ability to make telephone calls or otherwise depends on the watchhouse keeper's attitude to bail.

## **Name & Address**

There is no general duty for a citizen to supply name and address to a police officer. There are, however, a number of specific statutes which give a police officer a duty to obtain the name and address and some statutes in fact, make it an offence not to supply proof that the name and address is genuine. The most important Act in this regard is the Traffic Act where a police officer is given power to demand name and address where he or she is investigating a traffic accident, offence or incident and it is thought useful to have the name and address for the purpose of that investigation. Other Acts where specific powers are given in certain circumstances include The Drugs Misuse Act, The Firearm and Offensive Weapons Act and The Liquor Act (involving persons drinking on unlicensed premises and suspected underage drinkers).

The Traffic Act is, also, an important exception to the right not to answer police officer's questions. A police officer investigating a traffic offence may require a person to produce a driver's licence either on the spot or within 48 hours. There is also a requirement in respect of an accident to provide information as to who was the driver of a vehicle involved in a traffic accident.

Commonwealth legislation on importation, namely the Customs Act, also creates an obligation for a person to give information to Customs Officers which that person has, about the import or export of drugs.

### **Searches of Premises**

Unless there is specific authority, police officers have no power to enter premises without the consent of the occupant; to do otherwise would constitute them as trespassers. There are certain circumstances in which a person has an authority to enter private property. They include: for the purpose of apprehending someone who has escaped from custody; to prevent violence or other breaches of the peace; to investigate possible offences under The Traffic Act and to stop excessive noise from domestic premises pursuant to Section 33 of The Noise Abatement Act.

Police may not search premises unless they have a warrant from a Justice of the Peace which will only be granted upon a Justice of the Peace being satisfied that there are reasonable grounds for suspecting that there is on certain premises anything with respect to an offence which they suspect has been committed or which may be intended to be used for the purpose of committing an offence.

One of the exceptions to the prohibition against searches without warrant is where the police officer suspects on reasonable grounds that a person on the premises or in a vehicle has an illegal weapon. The other major exception relates to illegal drugs. Section 18 of The Drugs Misuse Act now has a detailed code governing the obtaining of warrants including by telephone. The Section provides (in Subsection 12) that a police officer may search without a warrant if he reasonably believes that the drugs would be concealed or destroyed unless the place is searched immediately. There is a safeguard provided however, in Section 20 of The Drugs Misuse Act, that a police officer must record in a register of searches, details relating to the search including the reason why a warrant was not obtained. The entry made in the register will be available to the person who was the subject of the search.

### **Rule of Law Etc**

As well as the specific rules that relate to searches, detention, arrests and other exercises of state power, our civil liberties are protected and dependent upon general principles such as the rule of law. The rule of law is essentially a principle that our rights are affected by laws and not by arbitrary decisions of persons. Persons are still required to enforce and administer the law but they, themselves, including police and the Courts and Parliament and the Government, are regulated and subject to the law. Thus, and oppressive or unjust law can be passed but only if it goes through the proper processes. Judges will have discretions to make decisions with regard to people's lives, but they can only do so within the bounds laid down by the particular law that they are enforcing. Police have power to interfere in persons' lives but only if there is a particular cause and, if it can be shown that they have overstepped the limits of their power, they themselves are subject to the sanctions of both the criminal law and orders for damages. The principle requires that there are no persons in the community such as secret police who can exercise brute power without being answerable to the Courts and to the law. It means that when a citizen sees an abuse of power he or she may seek a remedy from the Court.

Our rights are also dependent upon the principle of equality before the law. If a person commits murder, he is subject to arrest and prosecution whether he be an unemployed youth, bricklayer, police officer, judge or politician. One of the crucial duties of citizens including bodies such as the Queensland Council for Civil Liberties, is to be watchful to ensure that the rule of law and equality before the law are principles which are observed in practice and are not mere academic principles which fail through lack of appropriate enforcement.

I hope the above is sufficient to illustrate that at least in one sense when one talks about one's rights, one is talking about concrete enforceable legal principles. The Queensland Council for Civil Liberties regards it as important that community education does occur, by which people come to understand the rules that regulate the exercise of legal power within the community. We are anxious to promote a clear understanding and to remove any of the myths that grow up from time to time. We are of the view that maintenance of one's legal rights is promoted by a knowledge of same by the general community and the appropriate exercise of same when occasion requires. I now turn to consider what, in a historical sense, has been the source of many of our current concrete existing legal rights – namely the philosophical debates and the political struggles down the years on the subject of rights and liberties.

## **Moral Rights**

Citizens chafing under oppressive Governments have sought to set up moral standards for Governments restricting the manner and extent to which Governments interfere and regulate the lives of citizens. The philosophical basis underpinning the set of standards varies from time to time. Earlier writers have sought to set up the concept of natural law, which provided for natural rights of citizens. Where a municipal Government wrongly restricted and failed to protect those natural rights then the law created by that Government was itself illegitimate being in breach of natural law.

## **John Stuart Mill**

Other writers, in particular Jeremy Bentham and John Stuart Mill based their moral prescriptions for government upon a concept of utilitarianism, which sought to promote the greatest happiness or the greatest good within a community. In this century, international organisations have sought to have their member countries agree on fundamental principles concerning the conduct of government and have sought to provide an international law base by way of treaties and conventions for such principles.

A focus of much of the disputation by John Stuart Mill was the moral basis for any intervention by government in the lives of its citizens. In *On Liberty* (1859) he set out the following principle:

“... the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.”

The application of Mill's principle is not dependent on having an unrepresentative government law nor destroyed by having a government elected by universal franchise. This is confirmed by Professor Hart in his book *Law, Liberty and Morality* (1963) where he writes:

“The central mistake is a failure to distinguish the acceptable principle that political power is best entrusted to the majority from the unacceptable claim that what the majority do with that power is beyond criticism and must never be resisted. No one can be a democrat who does not accept the first of these, but no democrat need accept the second.”

The concerns of Mill and Hart are different to those bread and butter issues of the powers of law enforcement which I discussed earlier. There has not been a universal consensus adopting the Mill principle. Paternalist legislation such as those laws requiring the wearing of seatbelts in motor vehicles receives wide acceptance. There, also, seems to be a fairly broad acceptance of some laws prohibiting the availability of obscene material and certain hard drugs. However, in all areas where the law creates victimless crimes such as censorship; control of drugs; prostitution; and gambling, Mills' principle is still very much alive. Although many members of the community will accept that other factors will outweigh that principle, there is still a very strong onus required by the community to establish that the particular piece of paternalist legislation is necessary for other reasons. Legislators are required to very strongly justify the rights of individuals to make their own mistakes and to control their own lives in these areas. Despite our self-appointed role as the champion of civil liberties, the Council itself is prepared to acknowledge that there is some room for paternalism in government policy-making although we also maintain that the Mill principle is a very important factor to which attention must be paid in this area.

## **Declaration of Independence**

One of the more persuasive expressions of certain basic moral rights is contained in the Declaration of Independence of the 13 United States of America. The document emerged from a political struggle between the American colonies and the British Government and much of it had to do with a lack of representation and to taxation to which the colonists were opposed. Before setting out a detailed series of complaints against the British Government, the Declaration turns to certain general moral principles as follows:

“We hold these truths to be self evident; that all men are created equal; that they are endowed by their creator, with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute a new government. Laying its foundations on such principles, and organising its powers in such form, as to them shall seem most likely to effect their safety and happiness...”

## **Universal Declaration of Human Rights**

Amongst the international documents which set out claims to basic rights and freedoms is the

Universal Declaration of Human Rights passed by the General Assembly of the United Nations Organisation in 1948. The Declaration is an important statement. Article 1 insists that human beings are born free and equal in dignity and rights. Article 2 states that the rights and freedoms set forth in the Declaration are to apply to everyone without discrimination on the basis of race, colour, sex, language, religion and goes on to prohibit other forms of discrimination. The document champions equality before the law and the rule of law including a fair system of courts. It opposes itself to any form of slavery and to cruel inhuman and degrading punishments. It refers to rights to privacy and freedom of movement within and without one's own country. The right to own a property is championed as is the right to marry with only one's own free and full consent. Important political rights are championed in Articles 18 and the following. Article 18 refers to freedom of thought and religion; Article 19 refers to freedom of opinion and freedom to express that opinion; Article 20 refers to freedom of assembly and association and Article 21 refers to the right to take part in the government of one's own country through a democratic process.

The Articles that follow Article 22 concern economic and social rights. These are contrasted with the civil and political rights to which I have earlier referred. Economic and social rights relate to a reasonable lifestyle and a freedom from want. For example, Article 22 refers to the right to social security; Article 23 refers to a right to work and a free choice of employment and just and favourable conditions of work and protection against unemployment while Article 24 refers to the right to rest and leisure including reasonable limitation of working hours and periodic holidays with pay.

It is sometimes argued that the economic and social rights contained in these Articles should be dealt with completely differently to those which have gone before. The ability to provide a decent lifestyle including such things as holidays with pay, will often be dependent on a nation's overall resources. What is an appropriate standard of living will also depend largely on the resources of the country and its citizens as a whole. It is sometimes argued that to attempt to prescribe economic and social rights will result in impractical and meaningless prescriptions. On the other hand, it is argued that there is really no excuse for governments not to provide the basic freedoms to form their own opinions and to take part in the political process and no excuse for a government to fail to restrain itself from events such as arbitrary arrest and detention and to fail to provide fair and impartial court systems and an appropriate rule of law.

## **Negative Freedoms**

The civil and political rights are sometimes referred to as negative freedoms as opposed to positive rights contained in economical and social rights. Of negative freedoms Sir Isaiah Berlin said the following:-

“...The area within which the subject – a person or group of persons – is or should be left to do or be what he is able to do or be, without interference from other persons.”

The various areas of the Universal Declaration of Human Rights have been followed up by committees of the United Nations and more detailed enforcement covenants and treaties have been subsequently arrived at. One would particularly mention the International Covenant on Civil and Political Rights and the International Covenant on Economic and Social Rights, each of which were adopted by the General Assembly in 1966.

The activities of the international community in providing for human rights by way of these multi-party treaties has particular significance in Australia because of the Federal structure of our Government. The power of the Commonwealth Parliament is limited to the specific heads of power set out in the Constitution. However, provided that a particular exercise of power comes within one or more of those heads of power the provisions of the Commonwealth Parliament then override any inconsistent State legislation.

### **External Affairs Power**

One of the Commonwealth Heads of Power is contained in Placitum (xxix) of Section 51 of The Commonwealth Constitution. This is the external affairs power. The potential of the external affairs power to enlarge the Commonwealth's ability to legislate within its own boundaries, was signalled as early as 1936 in the case of *R.v Burgess ex parte HENRY* (1936) 55 CLR 608 in the joint judgment of Evatt and McTiernan, JJ. at page 684 when they said:-

”...It is true that the Commonwealth law [The Air Navigation Act 1920] relates to acts, things, matters and persons within the Commonwealth. But there is no necessary antithesis between that and a valid law with respect to “external affairs”. So long as a Commonwealth enactment clearly relates to a matter specified in Section 51 of the Constitution, it is nothing to the point that it also relates to matters not therein specified. Therefore the real question is – what is comprehended by the expression “external affairs”. It is an expression of wide import. It is frequently used to denote the whole series of relationships which may exist between states in times of peace or war. They also include measures designed to promote friendly relations with all or any of the nations...”

The wide view of the external affairs powers has been confirmed in modern times in the Franklin Dam case and in the Queensland case of *Koowarta -v- Bjelke-Petersen* (1982) 39 ALR 417. The Commonwealth Government has in recent years sought to exercise powers deriving from its participation in international treaties. One such treaty, passed by the General Assembly of the United Nations on 23rd December, 1965 and open for signature by member nations on the 7th March, 1966 is the INTERNATIONAL CONVENTION ON THE ELIMINATIONN OF ALL FORMS OF RACIAL DISCRIMINATION. Having obtained the necessary number of signatures, the Convention came into effect on the 2nd January, 1969. Australia ratified the Convention on 28th September, 1975. Giving effect to the Convention in Australia is a valid exercise of the external affairs power. This is the basis of the Racial Discrimination Act of 1975 and the Convention itself is set out as a schedule to that Act.

### **Racial Discrimination Act**

Section 9 of the Act outlaws racial discrimination in the following terms:-

“Is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political,

economic, social, cultural or any other field of public life.”

The human rights involved are defined as including those set out in Article 5 of The Convention. Article 5 provides a long list of human rights including to work, to free choice of employment, to just and favourable conditions of work, to form and join trade unions, to freedom of opinion and expression, to freedom of thought, conscience and religion and to freedom of peaceful assembly and association. The Act goes on to make specific prohibitions of racial discrimination in the areas of employment, terms of employment, dismissal, right to join trade unions, providing services by employment agencies, land, housing and accommodation, access to public places and advertising. A complaints procedure is provided for in the Act. This is now administered through the Human Rights and Equal Opportunities Commission. Civil action, which can result in damages, injunctions and other relief, cannot commence until the conciliation procedure has been tried and has failed.

The Racial Discrimination Act is an example of another development in human rights theory and practice. Whereas the very earliest concerns with basic liberties were involved with restraining the Government and restricting it to as small a role as possible, the concern with human rights contained both in the Convention and the Act see a role in Government in positively restraining certain sorts of behaviour in order to ensure basic rights to other persons. This process involves a recognition that there are trade-off effects in the preservation of rights and liberties. It also involves a recognition that, in modern society, individuals and private groups of individuals can have adverse effects on a person's basic rights and liberties as well as the forces of the State. In one sense this recognition is not new in that most theories of human rights recognised the Government would have a role in protecting its citizens from one another. This is recognised in the Mill principle which I set out before. Legislation such as The Racial Discrimination Act does contain this differing emphasis away from a minimalist approach to Government action to one where the Government is actively involved in preserving basic human rights and, in doing so, preventing other persons from having complete or absolute freedom of action.

## **HREOC**

There are other examples of international treaty action on human rights having a domestic effect in Australia. The Human Rights Commission Act 1981, as amended, is directed to implementing the International Covenant on Civil and Political rights and three (3) declarations directed to human rights but more restricted in their focus. The declarations are The Declaration of the Rights of the Child (20th November, 1959); The Declaration on the Rights of Mentally Handicapped Persons (20th December, 1971) and The Declaration of the Rights of Disabled Persons (9th December, 1975). The activities of The Human Rights and Equal Opportunities Commission in terms of enforcing this Act are more restricted than in the Racial Discrimination field. Its powers are, essentially, persuasive only, and its operations restricted to the operations of the national Government and its instrumentalities.

The functions of the Commission are set out in Section 9 of the Act. There is a duty to examine Commonwealth legislation (and, when requested, proposed Commonwealth legislation) to report on any inconsistencies with human rights. The major complaint initiated duty invokes a duty to enquire into any act or practice that may be inconsistent with or contrary to any human right. Act or practice is defined by Section 3 as being acts done or

practices engaged in by or on behalf of the Commonwealth or an authority of the Commonwealth. The Commission can also, either on its own initiative or when requested by the Minister, report to the Minister as to laws that should be made, or action that should be taken by the Commonwealth, on matters relating to human rights. The second function is a duty, only when requested by the Minister to report as to what action needs to be taken by Australia to comply with relevant international agreements.

The Commission has a more active role in its duty to administer the Sex Discrimination Act 1984. This Act is directed to putting into effect in Australia the Convention on the Elimination of All Forms of Discrimination against Women adopted by the General Assembly on 18th December, 1979. The Sex Discrimination Act directs itself against discrimination on the basis of sex, marital status or pregnancy and against sexual harassment in employment and education. The Act contains specific sections making unlawful acts of discrimination on the grounds of sex, marital status or pregnancy against employees of various kinds, by employment agencies, and in the provision of goods and services, accommodation etc. Sexual harassment is defined and made unlawful in a similar set of circumstances. There is currently a Queensland case of alleged sexual harassment in which the Commission has made an Order for damages, which Order is now in the process where the complainant is seeking to enforce the Order by Application to the Federal Court. The Federal Court has held that there will have to be a rehearing of the whole matter before enforcement can go ahead.

International treaties are also seen to be relevant to the question as to whether the Commonwealth Parliament can legislate to prohibit unfair electoral legislation in the States and action may ensue in this area in the fairly near future. The International Labour Organisation, which is based in Geneva, has developed a number of agreements over the years and it has been suggested that these will form a basis for the Commonwealth Government to overrule State legislation in the industrial relations area which has been enacted prior to and since the SEQEB dispute which occurred in 1985.

It seems to me that quite apart from the practical results in Australia where international covenants can give rise to particular powers in the Commonwealth Government, the statements of philosophers and other writers and the transactions of international organisations have had a significant effect in political debate around the world on the question of human rights. The Queensland Council for Civil Liberties often bases its analysis of particular legislative proposals on the values that have been advocated in the area of basic liberties and human rights over the years including in such documents as The Universal Declaration of Human Rights. The values have had such strong support in certain areas that at times attempts have been made to entrench such values into the fundamental law of a country so that all other Government action can be judged against statements of fundamental liberties. It is to that aspect of the matter that I now turn.

## **Bills of Rights & Other Doings**

The British pride themselves on having an unwritten constitution. Their parliament is regarded as being sovereign and is not restricted by any fundamental law dedicated to human rights or liberties. Although this is true, it has been affected somewhat by Europe's entering of the European Economic Community, which has its own provisions protecting human rights. Equally, English history itself is marked by the setting out of formulations of basic

rights and freedoms. An important example is the Magna Carta of 1215 which foisted basic concessions upon King John. Equally important statements are contained in the Bill of Rights of 1688 which was supplemented by the Act of Settlements in 1701.

I referred earlier to the Declaration of Independence by the thirteen (13) American colonies. Some sixteen (16) years later on 15th December, 1791, some time after the difficult compromises involved in forming a political union had been achieved, the thirteen (13) states committed themselves and their posterity to a Statement of Human Rights enshrined in the United States Constitution and enforced by the Courts against both State and Federal Governments.

The provisions are the first ten (10) amendments to the Constitution. Article 1 is that which provides for freedom of religion, freedom of speech and of the press and of the right to assemble and to petition the Government for a redress of grievances. Many of the others address themselves to a fair and impartial law enforcement process itself based on the rule of law. The ten (10) amendments have been added to from time to time some of which amendments address themselves to civil rights issues. An example is the Anti-slavery Provision of the Thirteenth Amendment which is intimately connected with the American Civil War of that era. There seems to be no doubt that these protections of human rights have engendered in the United States a greater awareness of basic human rights and a tendency to cut back on restrictive government actions. The injustices of the McCarthy era of the late 40's and 1950's shows however that there can be serious abuses of human rights notwithstanding some form of protection within the Constitution. A constitutional document is not a substitute for a commitment to decent treatment of other citizens by the populous as a whole.

### **Canadian Bill of Rights**

The Canadian Constitution now has a Bill of Rights within it. It is not entrenched in the way that the Amendments to the United States Constitution are. The Canadian Parliament can overrule parts of the Bill of Rights provided the specific piece of legislation specifically set out that intention. Notwithstanding that there is lack of entrenchment, it would seem that the Canadian Bill of Rights has also had an important effect in lifting awareness of the values of protecting fundamental liberties.

The Commonwealth Constitution does provide for freedom of religion. Apart from that there is no Bill of Rights in either Commonwealth or State Parliaments in Australia. There have been proposals to incorporate a Bill of Rights similar to that of the Canadian Constitution into Commonwealth law. However, it has met with resistance, on the basis that it was in some way anti-democratic or that it was in some way deficient because it did not provide for absolutely every human right. The Council is of the view that people in Australia generally would benefit from having a Bill of Rights in the Constitution. It would raise an awareness of the importance of protecting basic human rights and would make it more difficult for governments when tempted by some particular political objective to impinge upon matters such as the freedom of assembly or freedom of speech. Notwithstanding the absence of a Bill of Rights, the Council for Civil Liberties will continue to promote these values and, hopefully, a future era will see a Bill of Rights introduced. It seems to me that the legislation that I have mentioned earlier such as The Racial Discrimination Act and The Sex Discrimination Act have raised the public awareness in the areas in which they operate.

PREPARED ON BEHALF OF THE QUEENSLAND COUNCIL FOR CIVIL LIBERTIES  
BY STEPHEN KEIM, VICE PRESIDENT

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