Common Law v Human Rights: Which Better Protects Freedoms?

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The common law and human rights both provide important protections for individuals, groups and society in general. Along with this benefit, however, both human rights and the common law have shortcomings with their protections able to be limited or lost for many reasons, depending on (for example) the particular subject matter, the remedies required, statutory intervention, or the parties involved. Any lawyer wanting to assist in the protection of rights and freedoms must remain cognisant of both human rights and the common law because the best outcome requires the considered use of both.

On 9 June 2011, Australian Lawyers for Human Rights (ALHR) held a discussion seminar in the Perth CBD entitled *Common law v human rights: which better protects freedoms?* The topic was deliberately provocative and vague, to provide an opportunity for speakers to focus on areas they consider of interest in protecting freedoms either through common law or human rights. The seminar was generously hosted by Allens Arthur Robinson and over 60 people attended to hear a lively discussion from Justice Carmel McLure, Kanaga Dharmananda SC, Associate Professor Mary Anne Kenny and barrister John Cameron. The event was chaired by ALHR's President, Stephen Keim SC. The following article is based on a discussion paper prepared for the event, together with some additional points and observations that arose through the event. This article seeks to assist in increasing practitioners' awareness of the operation of common law and human rights. The article is divided into a number of areas, contrasting the operation of common law and human rights in relation to each area.

WHICH 'COMMON LAW'; WHAT 'HUMAN RIGHTS'?

'The common law' is unique to each jurisdiction. This article is largely restricted to the common law of Australia. However, the potential for difference shows the common law's ability to 'fine-tune' principles to the particular context of the jurisdiction which is less feasible with international human rights standards.

'Human rights' also has different understandings. While various human rights standards have been incorporated into Australian law through legislation, the more interesting question is: what relevance have those human rights standards which have not been so incorporated? For example, international human rights treaties ratified by Australia but not specifically enacted in national law (for example, *International Covenant on Economic Social and Cultural Rights*[2]) or declarations of the UN General Assembly (for example, *Declaration on the Rights of Indigenous Peoples*[3] or perhaps even more controversially the *Declaration on the Right to Development*[4]).

INTERACTION WITH LEGISLATION

The standard notion of parliamentary sovereignty holds that, where a parliament passes a law within its jurisdiction, then that law must be enforced by the courts, regardless of its consistency with the common law or human rights. However, where the inconsistency is not clear, there is often room for debate on what the common law or human rights may provide outside the statute's specific terms.

The common law has principles of statutory interpretation, some of which support or are consistent with human rights[5] such as: no retrospective liability,[6] and the assumption that personal rights are not infringed unless specifically indicated.[7] However, other common law interpretative principles can operate inconsistently with human rights, such as the Crown not being bound by statute unless expressly stated or necessarily implied.[8]

There are differing views as to the role for human rights where those rights are not specifically incorporated by statute.[9] The High Court has ruled that "absent statutory or executive indications to the contrary" there is a legitimate expectation that administrative decision-makers will act in conformity with a treaty (including a human rights treaty) ratified by Australia.[10] More recent Federal Court authority appears to expand this principle to apply not just to treaties but also to declarations that the Australian Government has supported.[11] Statutes that are intended to give effect to an international human rights treaty are also beneficially construed.[12] While there is persistent disquiet with the notion that international human rights standards have any application other than where specifically incorporated in a statute[13] there appears growing judicial support for giving human rights standards a wider application, as indicated in a recent unanimous full Federal Court decision:

> *"[C]ourts should favour a construction of legislation which conforms with Australia's obligations under a treaty or convention, particularly where the legislation is enacted after, or*

in contemplation of, the entry into or ratification of the relevant international instrument. The canon of construction applies where the legislative provision is ambiguous, although there are strong reasons for rejecting a narrow view of the concept of ambiguity. [Additionally, there is an interpretative] presumption ... that parliament does not intend to abrogate human rights and fundamental freedoms unless it makes its intention clear by unmistakeable and unambiguous language."[14]

Legislation has incorporated principles from both the common law[15] and human rights.[16] Where this has occurred, the domestic binding authority of the relevant principle then derives from the statute and not the common law or human rights. There is, however, an intriguing difference if that relevant statutory incorporation is lost. Where a statute modifies the common law, and the statute is then repealed, the common law will revive.[17] For a human rights standard, if the statutory provision is the only domestic protection for that, the repeal of that provision will mean the standard is domestically 'lost'.

PROVISION OF REMEDIES

The common law is already defined and ready to be used by courts (with the exception that some lower courts may not be able to grant some remedies). This includes trial by jury, evidentiary rules, natural justice,[18] and remedies against misuse of public power (for example, mandamus and certiorari). The common law, to explain it to Gen Y, is effectively 'plug and play'.

Human rights standards, on other hand, vary considerably in their specificity and applicability. Some areas are clear and well defined (for example, no torture) while others are more vague (for example, "States ... recognise the right of everyone to the enjoyment of the highest attainable standard of ... health"[19]). Various human rights standards are expressed in general terms[20] – entirely sensible given they apply worldwide – and they need other disciplines and experience to identify the detailed requirements applicable in particular instances.[21] A further vagary is that there are different ways that a nation can implement human rights standards.[22] This makes it more difficult to identify what human rights specifically requires of the nation and when that is breached.

Where there is no domestic incorporation of human rights, the standard 'remedy' is a complaint to the relevant treaty body. This is a dynamic the common law lacks (where, if the highest national court rules against you, there can be no further review of that decision) but its potential should not be overstated. A complaint to an international treaty body does not provide a quick and effective remedy for the complainant. Certainly, a complaint and its outcome *may* contribute to law reform or improved government policy and can even clarify/emphasise Australia's relevant human rights obligations, but it will not provide a direct remedy for the complainant(s) for a variety of reasons.

- Decisions[23] of the human rights treaty bodies are not directly enforceable in Australia.[24] The Commonwealth Government may ignore the eventual decision.[25] Accordingly, any international complaint work may best be conceived as part of a strategy to push for legislative change.
- The complaint procedure can take one to four years.[26]
- For a complaint to be admissible, the complainant must have exhausted all domestic remedies.[27]
- Complaints are only possible for a specific range of rights and are not available for all rights in international treaties (for example, the ICESCR didn't provide for complaints until 2009,[28] and complaints under ICCPR can only be based on articles 6–27[29]).

RETROACTIVITY

Under human rights, where a new standard is developed, that standard only applies from that time forward and cannot be used to adjudge previous actions as having breached that human rights standard.[30] However, if the matter can be conceived of as an ongoing violation, it is a breach of the relevant standard even where the activity began before that standard was binding on the country.[31]

Under the common law, the situation is less clear and potentially involves greater protection (or greater liability, depending on your perspective). A recent decision by the South Australian Court of Appeal suggests that a change in the common law operates retrospectively so that events which 'complied' with the common law at the time they occurred, can subsequently be litigated as breaching the law if the common law later changes.[32] This case was granted special leave to appeal to the High Court, which was heard on 27 September 2011,[33] but no decision has yet been made.

ROLE OF CORPORATIONS

For many common law rules, there is no distinction between an individual and a corporate entity (exceptions include the privilege against self-incrimination[34]). Both are equally entitled to the various common law protections.

Generally, human rights accrue only to a human and cannot be claimed by a corporation. Many human rights standards cannot logically be applied to a corporation (for example, sexual equality, right to education, freedom of conscience). However, other human rights are more amenable to protecting corporate interests (for example, freedom of speech, right to privacy, property rights[35]). In Australia, the two jurisdictions which have enacted human rights laws (Victoria and the ACT) have specifically indicated these apply only to humans.[36] There is a difference in the European human rights regime (where companies have gained human rights protections of property against tax laws[37]) and in Canada (for example, health warnings on a company's tobacco products were held to violate freedom of expression[38]). The question is not always easily answered, as demonstrated by the need to obtain a High Court ruling on whether a company can claim the privilege against self-incrimination which is available to natural persons.[39]

COMMONWEALTH-STATE RELATIONS

Australia, as a federal nation, has complexities arising from the various governments within the national system. This has implications for both human rights and the common law.

The normal way for international human rights standards to become binding on Australia is where the Commonwealth executive ratifies the relevant treaty. At that point, international

law considers the Australian state must implement and observe the treaty's terms. However, domestically more is required and this raises federal issues. By virtue of the national Constitution giving Commonwealth Parliament power to legislate regarding external affairs, the Commonwealth can legislate these human rights standards throughout the country. The ratification of the international human rights treaty will, therefore, often give the Commonwealth jurisdiction over the area which it would not otherwise have under its Constitutional powers. Inconsistent state laws are overridden by virtue of the national Constitutional provisions.

This process is consistent with how international human rights approaches the issue: at international law, human rights standards are relevant to all forms of government (executive, legislature and judiciary) as well as to sub-national levels of government.[40] A nation's human rights obligations cannot be 'avoided' or 'excused' because of domestic legal arrangements.[41] The 'nation' in international law can be in breach of its human rights obligations if a domestic court or parliament makes a law that is contrary to human rights, even where the nation's constitution binds the executive to follow that law.[42]

As for the common law, Australia has one common law which applies throughout the country (unlike other federal states, like the US, where each state has its separate common law). Therefore, where the High Court expounds the common law, this applies to all jurisdictions in Australia. However, given the legislative powers of each state parliament, common law protections are vulnerable to extinguishment by state legislation.

VIOLATOR: STATE OR OTHER PARTY?

Here, the common law has substantially better protection than human rights, because the common law has long provided various rules and protections of individuals against violation, regardless of who was responsible for that violation.[43]

Human rights has traditionally focused only on the state, and specified obligations for what the state must, and must not, do.[44] There is less attention to violation of human rights by non-state actors.[45] This is changing with recent increased attention to human rights responsibilities of businesses. But many of the established procedures still remain resolutely focused on the state, for example, for a complaint about an ICCPR breach to be admissible to the Human Rights Committee, it must be in relation to the actions of a State not an individual.[46]

INTERACTION WITH THE EXECUTIVE

The common law includes various rights and immunities for 'the Crown', such as immunity against coercive orders,[47] and the various prerogative powers.[48] The common law also identifies various governmental matters as 'non-justiciable', such as decisions and actions in making treaties, declaring war, dissolving parliament, or mobilising the armed forces. Various of these prerogatives and immunities have been amended by statute or constitution, to increase government accountability, but the common law principles presumably remain and, if the relevant statutory provision were repealed, would revive.

Human rights does not make such a distinction about government action. It specifies the standards to be met, and if these are not, considers the state in breach regardless of whether the default is legislative or executive (or even judicial). Human rights standards must be met and are not 'off limits' simply because they are executive (in)action.

GROUP RIGHTS

Both the common law and human rights offer considerably less protection to groups than they provide to individual rights. This is partly due to the fact that both institutions (common law and human rights) often prioritise an individual's interests where these conflict with broader group interests. For example, a complaint about breaches of the International Covenant on Civil and Political Rights cannot be made in relation to article 1 (self-determination).[49]

However, the accommodation of group rights is increasing in both institutions; for example, in relaxed standing rules for environmental groups; and in strengthened Indigenous rights.

COMMON LAW'S 'SKELETAL PRINCIPLE'

The significance of common law's approach to rights is not only of academic interest but has practical consequences. In native title jurisprudence, for Indigenous customs to be recognised (and therefore protected) as 'native title' they must not "clash with the general objective of the common law of the preservation and protection of society as a whole".[50] Or, as it has also been put, "recognition [of Indigenous rights as native title] by our common law ... would be precluded if the recognition were to fracture a skeletal principle of our legal system".[51] Accordingly, determining the common law's 'basic principles' may be necessary in these cases.

INTERACTION OF COMMON LAW AND HUMAN RIGHTS

The two areas influence each other, and some protections are supported by both common law and human rights. Examples abound (for example, habeas corpus, personal protections, judicial independence) and it is often these examples which are espoused by common law champions to show what a beneficent institution the common law is. However, there are also aspects which are ignored in such a narrative, where the common law has been below human rights standards (for example, the rights of women, minorities[52]).

Human rights have contributed to the development/change of some common law principles[53] (for example, native title, marital rape). There are, however, other areas of inconsistency between human rights and common law, with prominent examples being freedom of speech and religious belief. These two issues create highly divergent opinions. Whether one considers the common law restrictions (for example, defamation[54] and failing to oppose restrictions on religious practices) are better than human rights may well depend on one's ideology. Some critics of human rights are influenced by religion or ideological positions which oppose particular rights for individuals or groups.

SOCIETAL ENGAGEMENT AND RESPONSIBILITIES

There is repeated emphasis on the importance of increasing public awareness and engagement on issues of protections and responsibilities. During the ALHR event, there was vigorous discussion and audience engagement on the role of political debate around human rights issues. Given the necessary parliamentary sovereignty that democracy involves, attention turned to what processes or checks can help in avoiding a simple 'majority rule' and oppression of people and groups who lack political power. There is a need for an informed electorate in addition to an independent judiciary and strong legal profession.

CONCLUDING OBSERVATIONS

The common law has a far narrower range of topics it addresses, but offers more effective remedies within those areas. Human rights are broader but offer less immediate protection within Australia's domestic legal system. Any lawyer wanting to assist in the protection of rights and freedoms must remain cognisant of both human rights and the common law because the best outcome for the individual, the collective and/or society in general will require the considered use of both

AUSTRALIAN LAWYERS FOR HUMAN RIGHTS

ALHR, a voluntary non-government organisation, is a network of over 2,000 Australian lawyers, legal academics and law students active in practising and promoting awareness of international human rights standards in Australia. ALHR undertakes training, information and submissions to promote the practice of human rights law in Australia. In Western Australia, ALHR's activities are coordinated by its co-convenors, Breony Allen and Tiffany Henderson. Those in Western Australia's legal community are encouraged to join ALHR or contribute to its activities. There is general information available on ALHR at its website[55] and on ALHR's Facebook group.[56] To enquire about ALHR in WA, please contact Tiffany or Breony at wa@alhr.asn.au

NOTES

1. In House Counsel, *Yamatji Marlpa Aboriginal Corporation*; Honorary Lecturer, *Centre for Energy, Petroleum and Mineral Law and Policy*; Committee Member, *Australian Lawyers for Human Rights*; Board Member, *Centre for Native Title Anthropology*. The author is grateful for comments by Breony Allen and Tiffany Henderson on an earlier draft, but accepts sole responsibility for any errors. The article does not represent the official position of any of the organisations with which the author is associated.
2. [1976] ATS 5 (ICESCR). Treaty finalised 1966, entered into force 1976, Australia ratified 1975.
3. Text available http://www.un-documents.net/a61r295.htm Declaration adopted 2007, Australia initially voted against the declaration but subsequently changed that and supported the declaration in 2010.
4. Text available http://www2.ohchr.org/english/law/rtd.htm
5. And indeed have even been referred to as a common law "bill of rights": J Spigelman, "The Common Law Bill of Rights", 2008 McPherson Lectures: Statutory Interpretation & Human Rights (2008).
6. For example, *Accolade Autohire Ltd v Aeromax* [1998] 2 NZLR 15.
7. See J Spigelman, "Statutory Interpretation and Human Rights", Pacific Judicial Conference (2005).
8. *Bropho v Western Australia* [1990] HCA 24.
9. Australia is not like countries with a monist doctrine of international law (where ratified treaties automatically become a binding law usable by domestic courts). In Australia, international human rights are generally only understood as applicable domestically after their incorporation through domestic statute.
10. *Minister for Immigration v Ah Hin Teoh* [1995] HCA 20. The High Court has suggested that *Teoh's* "legitimate expectation" principle may be reconsidered in the future: *Re Minister for Immigration and Multicultural Affairs: Ex parte Lam* [2003] HCA 6.
11. For example, *Lin v Rail Corporation NSW* [2011] FCA 261, [35] per Rares J; *Lin v Rail Corp NSW* [2011] FCA 546 @ [18]-[19], Buchanan J.
12. For example, *IW v City of Perth* [1997] HCA 30.
13. For example, see comments by Callinan J in *Western Australia v Ward* [2002] HCA 28 @ [956]–[963]. Although his Honour was in the minority on the decision of this case, the majority did not refer to human rights principles in their reasoning, so Callinan J's comments on this aspect cannot be discounted.
14. *Cheedy (Yindjibarndi People) v Western Australia* [2011] FCAFC 100, [77] per North, Mansfield & Gilmour JJ. This quote is their Honour's summary of the trial judge's reasoning, but the Full Court approved this reasoning, see [108], with the Full Federal Court explaining: "If a provision has a clear meaning then that meaning either reflects Australia's international obligations or it does not. There is no scope for the application of any canon of construction to establish the meaning. But where there is more than one possible meaning of the provision, the canon of construction favouring Australia's international obligations is available to identify the intended meaning. In other words, the canon of construction only has work to do where the provision is open to more than one interpretation. This is the reason for the reference in the judgement in *Teoh* to the use of the canon of construction for the purpose of resolution of ambiguity. [107].
15. For example, *Evidence Act 1995* (Cth) s59 (hearsay rule); other examples of statutory enactment of common law principles include many criminal laws; and Constitutional protections of judicial independence and to a jury trial.
16. For example, *Racial Discrimination Act 1975* (Cth) s10 (equality before law); other examples of statutory enactment of human rights include: privacy laws protecting right to privacy; employment laws protecting rights such as fair wages and conditions of work; civil and criminal procedure laws about the right to a fair hearing; constitutional protections of religious freedom.
17. *Smith v Marshall* [1907] HCA 33.
18. For example, protections where a statutory power prejudices rights or interests: *Annetts v McCann* [1990] HCA 57.
19. ICESCR (n2 above) art 12(1).
20. Human rights feature various generic adjectives – like "appropriate" health facilities, "adequate' food", "generally available" education – but provide less detail on what these specifically require: see ICESCR ((n2 above) arts 11(1) and 13(2) and Committee on Economic Social & Cultural Rights, *General Comment 14: The right to the highest attainable standard of health* (2000), [12(a)].
21. For example, "it is public health [writing and analysis] and not an immutable principle of human rights which suggests under what circumstances a government should be held accountable for specific conducts … or results … relating to an aspect of health": Alicia E Yamin, "Beyond compassion: the central role of accountability in applying a human rights framework to health", *Health and Human Rights*, 10/2 (2008).
22. For example, by directly providing the necessary materials/services itself, or by facilitating a system whereby these are provided by others: Andy Norton and Diane Elson, *What's behind the budget? Politics, rights and accountability in the budget process*, Overseas Development Institute (2002) Overseas Development Institute; Colin Harvey, Aoife Nolan, Rory O'Connell, Mira Dutschke and Eoin Rooney, *Budgeting for Social Housing in Northern Ireland: A Human Rights Analysis*, QUB School of Law (2010) QUB School of Law.
23. The treaty systems use terms more neutral than "decisions" and prefer "views", "opinions", "suggestions", or "recommendations".
24. Sarah Pritchard and Naomi Sharp, *Communicating with the Human Rights Committee*, Australian Human Rights Information Centre (1996) p24.

Anne Bayefsky, *The UN Human Rights Treaty System in the 21st Century*, Kluwer Law International (2001) p155 and text to fn54. This lack of binding decisions is at the choice of the international system (*ibid.* p164).
Under the CERD Rules "The State party concerned shall be invited to inform the Committee in due course of the action it takes in conformity with the Committee's suggestions and recommendations": CERD, *Rules of Procedure*, United Nations (1989) r95(5).
The outcome of a HRC complaint where the Committee considers a state has violated the ICCPR is that the HRC makes this view and adds observations about the remedies to which the victim is entitled and the state is asked to inform the Committee, within three months, of the measures taken to give effect to the Committee's views: Elizabeth Evatt, "Individual Communications under the Optional Protocol to the International Covenant on Civil and Political Rights" in *Indigenous Peoples, the United Nations and Human Rights*, Sydney (AUS) (1998), p106.

25. This happened following the 1998 amendments to the *Native Title Act*, some of which were found to be in breach of Australia's human rights obligations. The Government made no changes as a result of this. The relevant decisions are described in ATSISJC, *Native Title Report 2000*, Australian Government (2001), chapter 1.
26. Michael O'Flaherty, *Human Rights and the UN: Practice before the Treaty Bodies*, Kluwer Law International (2002), p41. Note, however, the UN's human rights secretariat has written in relation to CERD "As relatively few communications come before this Committee, your claim will typically be resolved more quickly, probably within a year. If a decision is required only on admissibility, it may be taken within an even shorter period": OHCHR, *Complaint Procedures*, United Nations (2002). Bayefsky says "Few cases are submitted to CERD ... On the other hand, the [HRC] has a backlog... [and] on average inadmissibility decisions are taken in two and a half years and final views take four years": Anne Bayefsky, *The UN Human Rights Treaty System: Universality at the Crossroads*, (2001), p26.
27. ICERD (n2 above), art 14(7)(a). Human Rights Committee *Rules of Procedure* (2001) r90(f).
28. With the opening for signature of an optional protocol to allow complaints.
29. The HRC cannot accept a complaint under (for example) article 1 (self-determination): *Chief Bernard Ominayak and Lubicon Lake Band v. Canada* UN doc CCPR/C/38/D/167/1984, para 32.1. Note, however, article 1 can be referred to in a complaint because the other articles (for example, article 27 – protection of culture) are to be "construed and applied in the light of the other [ICCPR] provisions ... in so far as they may be relevant to the particular case": *Lovelace v Canada* UN doc CCPR/C/13/D/24/1977, para 16.
30. For example, *Lovelace v Canada*, para 10.
31. This follows the reasoning in the HRC decision *Lovelace v Canada* (*ibid.*). Also note the HRC's decision in *Toonen v Australia*, where the legislation complained of was passed prior to the allowed complaint period and the last prosecution under the laws was in 1984. Australia conceded that the existence of the laws exposed Toonen to current prosecution (para 6.3) and the HRC found the laws breached ICCPR. It is possible to complain about a violation in the past "as long as it continues to the present": Hilary Charlesworth, "Individual Complaints: an overview and admissibility requirements" in *Indigenous Peoples, the United Nations and Human Rights*, 74, The Federation Press (1998); Michael O'Flaherty, *Human Rights and the UN: Practice before the Treaty Bodies*, Kluwer Law International (2002).
32. "[W]hen the common law changes, by virtue of a decision of a court, that change operates on events that have already occurred and on events that are yet to occur ... if the common law was changed then, in according with current doctrine, it changed with retrospective effect": *R v P, GA* [2010] SASCFC 81 @ [86] & [89] per Doyle CJ & White J.
33. *PGA v The Queen* [2011] HCA Trans 267.
34. *Environment Protection Authority v Caltex Refining* [1993] HCA 74 per Mason CJ & Toohey J @ [39], Brennan J @ [14], McHugh @ [4].
35. For example, international human rights protection of property imposes a limitation on the Commonwealth legislating to impede a company's mineral rights: *Newcrest Mining v Commonwealth* [1997] HCA 38; 190 CLR 513, 658–660 per Kirby J.
36. *Human Rights Act 2004* (ACT) s6; *Charter of Human Rights and Responsibilities Act 2006* (VIC) s6(1).
37. *Case of Darby v Sweden* (1990) at [31]; see also Lee 2004.
38. *RJR-MacDonald Inc. v Canada (Attorney General)* 1995 CanLII 64.
39. *Environment Protection Authority v Caltex Refining Co* [1993] HCA 74.
40. The Universal Declaration of Human Rights is now considered a customary norm of international law. The specific treaties (ICCPR, ICESCR and other human rights treaties) where joined by a state, include an obligation to ensure that the obligations are met by all public authorities and institutions (for example, ICERD, *International Convention on the Elimination of All Forms of Racial Discrimination*, (1965), arts 2.1(a) & 6; HRC Concl Obs: Australia, *Concluding Observations: Australia*, United Nations (1994), [542]). Internal laws, such as laws enacted by sub-national governments, cannot justify failure to perform a treaty (for example, Ian Brownlie, *Principles of Public International Law*, Oxford University Press, 2008, pp34–35; VCLT, *Vienna Convention on the Law of Treaties*, (1969), art **27**.
41. VCLT, *Vienna Convention on the Law of Treaties*, (1969), [27]; Gen Comm 9, *General comment No 9: The domestic application of the Covenant*, United Nations (1998), [3].
42. For example, CERD, *Decision 2 (54) on Australia*, United Nations (1999); Aus Gov, *Additional Information pursuant to Committee Decision: Australia*, United Nations (1999), para [32] & [59]; Australian Government, *Comments of the Government of Australia on decision 2 (54) adopted by the Committee on the Elimination of Racial Discrimination on the special report of Australia*, United Nations (1999), para [112].
43. For example, protections exist regardless of the violator's identity in common law rules of criminal liability (now codified into statute in many jurisdictions), nuisance, negligence.
44. Although where a company's impacts on human rights are such as to indicate a breach by State for failing to prevent that, is a failing on the State's part: *Franz Nahlik v Austria* UN doc CCPR/C/57/D/608/1995, para 8.2.
45. For example, UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, United Nations Human Rights Council (2011).
46. Human Rights Committee, *Rules of Procedure*, United Nations (2001), r90(b); Michael O'Flaherty, *Human Rights and the UN: Practice before the Treaty Bodies*, Kluwer Law International (2002), p92 point (a).
47. See *Maguire v Simpson* [1977] HCA 63 per Stephen J at [11].
48. See, for example, *Ruddock v Vardalis* [2001] FCA 1329 at [33]–[41] per Black CJ (in dissent on the outcome) and at [177]–[191] per French J.
49. Gen Comm 9, *General comment No 9: The domestic application of the Covenant*, United Nations (1998), para 32.1. Note, however, that article can be referred to in a complaint because the other articles (for example, article 27 – protection of culture) are to be "construed and applied in the light of the other [ICCPR] provisions ... in so far as they may be relevant to the particular case": Hilary Charlesworth, "Individual Complaints: an overview and admissibility requirements" in *Indigenous Peoples, the United Nations and Human Rights*, 74, The Federation Press (1998), para 16.
50. *Western Australia v Ward* [2002] HCA 28 @ [21].
51. *Mabo v Queensland (No 2)* [1992] HCA 23 per Brennan J at [43]. Note, however, the use of this phrase has been queried – Kirby J in particular has criticised it: for example, "Skeletal principles are not immutable. When they offend values of justice and human rights, they can no longer command 'unquestioning adherence'. A balancing exercise must be undertaken to determine whether, if the rule were overturned, the disturbance would be disproportionate to the benefit flowing from the overturning": *Western Australia v Ward* [2002] HCA 28 at [585]; see also *Fejo v Northern Territory* [1998] HCA 58 footnote 159.
52. For example, in some circumstances the common law (and not statute) has been held to have extinguished native title e.g. the vesting of a conservation reserve in WA: *Western Australia v Ward* [2002] HCA 28 per Gleeson CJ, Gaudron, Gummow & Hayne JJ at [249] & [256].
53. For example, *Hill v Church of Scientology of Toronto* [1995] 2 SCR 1130.
54. For example, see *WIC Radio Ltd v Simpson* 2008 SCC 40.
55. http://www.alhr.asn.au
56. http://www.facebook.com/groups/25114190776