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HUMAN RIGHTS AND CRIMINAL JUSTICE

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INTRODUCTION

I have been asked to address in 40 minutes an area that has been the subject of whole books and myriad papers since before the invention of the printing press. Whatever I do will be selective and inadequate, but I hope it might refer you elsewhere for more.

The inspiration for the choice of this topic, made by the organisers, is the theme in your Legal Studies course: "The extent to which law reflects moral and ethical standards". That leads to the way in which human rights are considered (or not) within the criminal justice system and law, which is my topic.

I am restricting a little my treatment of the subject today because I have done it all before. And to this audience. It probably escaped the attention of the organisers – or maybe they thought a refresher was needed – but in 2004 I spoke (for my second time to your second conference) to this audience on the topic "Morality, Ethics and Commitment to the Law". (I suspect that many of you were not in attendance.) Not only that, but in 2011 (just after my retirement as DPP) I spoke on "Criminal Justice and Human Rights". So the least I could do for today was to reverse the nouns.

So here is my third take on what is an enduring subject. Maybe the first and second papers are somewhere in your archives – and not a great deal has changed substantially in 19 years.

MORALS AND ETHICS

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FOOTNOTE: I am privileged to be a Life Member of the Legal Studies Association and the only non-teacher to be so (as far as I know). This is the 19th conference I have addressed in 21 years, having been overseas in 2010 and having provided a handout in 2020 at the height of the COVID-19 pandemic. I am heartened by the dedication you show to the education of our students in matters that will help them to understand and work to support the legal institutions, principles and processes that help to make ours a good – and a safe – community.

Morals and ethics are different; but they overlap, which is why the words often appear together. To me, morals are concerned with right and wrong, good and bad (themselves flexible and loaded terms).

Ethics are principles (indeed, moral principles, which is where the notions meet) that guide behaviour.

Morality may be thought of as something personal and internal at an individual level, but also at a general or common level; whereas ethics are concerned with external standards for conduct. We talk of "legal ethics" or "medical ethics" which are codes that reflect common morality in those areas.

Ethical codes should reflect the moral principles of the organisation or sector making the rules, grounded in common morality.

LEGAL MORALITY

A preliminary question to address might be the extent to which the law should reflect or incorporate morality. A convenient starting point for that ancient debate may be the so-called Hart-Devlin Debate of the 1960s in England. (Much has been written about it, including by the protagonists. I dealt with it in some detail in the 2004 paper I have mentioned.)

It has been said (initially by John Stuart Mill in the mid-19th Century) that, essentially, people should be free to do whatever they like unless it causes harm to others – then the criminal law (and law generally) may step in to prohibit and deal with it. Moral wrongfulness in the absence of harm, he said, is not a justification for legal coercion.

Patrick Devlin[2] argued in a lecture in 1959 that morality is a foundation of society and its existence. Without morality there is no society. "Immorality then, for the purpose of the law, is what every right-minded person is presumed to consider to be immoral". The law must be based on the society's morality. If you break this common morality, you must be punished, because your immoral act may influence members of your society and you, yourself. Immoral acts such as abortion, prostitution, fornication or homosexual acts must be forbidden by the law. Sin must be punished in order to maintain the integrity of society. Individuals must be punished into goodness. (You see here some influence of the church…)

Herbert (H L A) Hart[3], in a series of lectures in 1962, argued that there are many personal or individual moralities in society. He said that "No doubt we would agree that a consensus of moral opinion on certain matters is essential if society is to be worth living in"; so a common moral consensus may provide a foundation for law. But to legally enforce one set of moral principles to the exclusion of others would be contrary to the pluralistic nature of the society in which we live and not every immoral act therefore should be punished. (More of this is to be found in my 2004 paper.)

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[2] A High Court Judge in England. His seven lectures are reproduced in "The Enforcement of Morals", Patrick Devlin (Oxford University Press, 1965)

[3] Professor of Jurisprudence at Oxford University. Lectures reproduced in "Law, Liberty and Morality", H L A Hart (Oxford University Press, 1963)

This debate took part in the context that the Wolfenden Committee in England had recommended in 1957 that homosexual acts between consenting adults in private should be decriminalised. That occurred ten years later.

The law has had to grapple often with whether or not conduct that does not pass the harm to others test should be criminalised and there is a wide range of such conduct that has received the attention of the criminal law over the centuries, including: homosexuality, adultery, incest, bigamy, bestiality, prostitution, suicide, abortion, duelling, obscenity, drug and alcohol use.

HUMAN RIGHTS I

In more modern times and in civilised societies we have been rescued from some of this debate by the development of human rights. It provides a different framework for examining both substantive and procedural criminal law (including, for example, forms of law enforcement and punishment, including the death penalty). Hart had referred indirectly to human rights, at least in the substantive law context, in 1961[4] when he wrote of natural law being "universally recognized principles of conduct which have a basis in elementary truths concerning human beings, their natural environment, and aims". Breach of those principles should be sanctioned, he said.

I do not propose to give a history of human rights. Suffice to say that the French **Declaration of the Rights of Man and of the Citizen** of 1789 kicked off the modern development and a series of moves and events in various places took us to the **U**N **Universal Declaration of Human Rights** of 1948 and a succession of UN and regional instruments thereafter (see the **Annexure**). Of particular interest to you, as teachers, is the UN **Convention on the Rights of the Child** of 1990 which also has implications for the way in which children are dealt with in criminal justice.

CONTEXT

Any person brought before the criminal justice system, in any jurisdiction, has a right to be treated fairly and every accused person has the right to have a fair trial. The principles of the rule of law must be observed. The human rights of that person and of all others involved in the process must be protected when being dealt with officially, as at other times throughout life.

Human rights are necessarily bound up in notions of fairness. In the words of the UN **Vienna Declaration** of 1993 human rights are universal, indivisible, interdependent and interrelated and should be promoted in a fair and equitable manner. They are protected in the operation of the rule of law.

In criminal justice, human rights principles must also be taken into account when discretionary decisions need to be made – see my book.[5]

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[4] "The Concept of Law", H L A Hart (Oxford University Press, 1961)
[5] "Discretion in Criminal Justice", Nicholas Cowdery (LexisNexis, 2022)

THE RULE OF LAW

There are two principal features of the rule of law. It does not mean just “rule by law”.

- The people (including the government) should be ruled by the law and obey it.
- The law should be such that the people will be able and willing to be ruled (or guided) by it.

Those features are interconnected with the work of police, prosecutors and public law officers. They must have the confidence of the community they represent as they enforce the law that is made by the people and with their consent and which is intended to operate in their interest.

If the rule of law applies in large part, the climate and processes will exist for the protection and enforcement of human rights – those rights that are enjoyed by humans simply because they are human beings. That climate will be one of acceptance, observance and incorporation into domestic law of those international standards and their enforcement in everyday life in the legal processes that apply.

Human Rights are bound up in the rule of law. In 2004 then Secretary-General of the UN, Kofi Annan, said of the rule of law:

> *“For the United Nations, the rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated,* ***and which are consistent with international human rights norms and standards****. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”* [**emphasis** added]

HUMAN RIGHTS II

Human rights remain first and foremost moral rights grounded in the autonomy of the human being, the full development of the human personality, respect for other persons and cultural and utilitarian considerations. International and domestic instruments describe the rights that we all possess simply by being human.

The prescription of human rights constitutes a minimum definition of what it means to be a human in a full and developed sense in any morally tolerable form of society – to lead a human life, to become a whole person. The law gives shape to the realisation of that definition, it provides a framework, but it does not supply the moral content – the sense of duty, responsibility and care that must come from within human beings and be exercised towards others. Their individual and common morality, perhaps.

A BALANCE

A working paper prepared for the Tenth UN Congress on the Prevention of Crime and the Treatment of Offenders held in Vienna in April 2000 stated:

> *"Ever since the advent of modern democracies, criminal justice systems have had the dual function of holding offenders accountable to society for their misdeeds and holding the criminal authorities accountable for their punitive actions against the offender. A balance must be struck between crime control and due process."*

Traditionally in the common law system that balance has been between the rights of the accused on the one hand and the rights (and expectations) of the community, which accuses, on the other hand. The community as a whole is the victim of the crime, although individual members of the community may have been more directly victimised.

In civil law systems the same adversarial description does not fully apply, although the underlying principles are the same. The community does not bring the charge against the accused for resolution by the court. Typically the court, an independent entity with its own prosecution arm, brings the accused before it to examine the issue of guilt. The accused is not opposed by the community as such – but may be opposed by the individual victim of the alleged crime.

But the accused person is only one party to the criminal justice process in any system. Police and other investigators are involved early. Victims of crime are often involved. Witnesses must be treated sympathetically to the rights that they enjoy. Other officials – prosecutors, lawyers, judges, juries, court attendants, prison officials among them – also deserve to have their rights protected.

FAIRNESS TO THE ACCUSED

Fairness to the accused may be measured: largely by the extent to which a jurisdiction complies with Article 14 of the **International Covenant on Civil and Political Rights** (1976) through its constitution and substantive and procedural laws and processes applied. Many criminal justice systems now guarantee at least the following rights:

- the right not to be subject to arbitrary arrest, detention, search or seizure;
- the right to know the nature of the charge and the evidence;
- the right to counsel;
- the presumption of innocence;
- the standard of proof of beyond reasonable doubt;
- the right to a public trial by an independent court;
- the right to test the prosecution evidence (eg by cross-examination);
- the right to give and call evidence; and
- the right to appeal.

In some circumstances (for example, in relation to transnational or organised crime) the rights of the accused are often eroded. If a community feels particularly threatened by some form of illegal conduct (eg. terrorism), rights may be more readily compromised, in the name of expediency or in the name of revenge (but often out of fear or ignorance).

OBSTACLES?

There are still some law enforcement officials and prosecutors, no doubt, who see human rights and compliance with the rule of law as obstacles; perhaps not obstacles in the way of pursuing any particular agenda, but obstacles in the way of securing the conviction of those who are "obviously" guilty. (Of course, if police and prosecutors could know before trial who was guilty, we would not need trials.)

We have human rights standards in force that prevent the things I am about to describe from happening (at least in our jurisdiction); but if we did not have those standards, a prosecutor intent on "winning" – an omniscient and infallible prosecutor, of course! – might be able directly or indirectly and obviously unfairly:

- to investigate or direct the investigation of crime without restriction: to be able to go anywhere and search anything, to watch and listen to all and sundry by surveillance devices and telephone intercepts, to question and detain anybody, to seize property – all without warrant;
- to detain suspects at will and be able to deny them bail (or conditional release);
- to interrogate suspects without restriction and to require them to answer;
- to prevent a suspect's access to legal advice;
- to undermine and destroy those who dissent against the social order, to target and remove "troublemakers";
- to have juveniles dealt with in adult courts and prisons;
- to bow to political pressures in deciding whether to proceed;
- to delay trials until conditions were right for the prosecution;
- to excite the media to spread prejudicial pre-trial publicity about the accused person;
- to conduct trials in private or in special tribunals, away from the gaze of those connected with the accused and from public commentators;
- to have the judiciary constantly on one's side;
- to refuse to cooperate with and to obstruct the defence at every turn and to disclose nothing about the case in advance;
- to require an accused person to pay for his or her own interpreter, where translation is necessary;
- to be able to prove the prosecution case by easy shortcuts – indeed, to require the defence to disprove matters or even to prove innocence;
- to be able to rely on illegally and improperly obtained evidence;
- to be able to have inferences of guilt drawn from the silence of the accused;
- to have the accused shackled in court or removed, at whim;
- to have available and serving the needs of the prosecution the severest possible punishments, even by way of extrajudicial killings.

Such a system would be one where human rights enjoyed no official status or protection and there were no proper standards of conduct to be observed that were consistent with the rule of law.

What prevents such a system from operating with impunity? The rule of law, human rights and internationally recognised standards of fairness – reflected in provisions such as Articles 9, 10, 14, 17 and 19 of the **ICCPR**. These are mighty obstacles to abuse by the criminal legal system and should be reflected in the domestic law of every country. It is possible to have law and order without human

rights; but it is not possible to enjoy human rights without the rule of law supporting principled law and order.

In NSW the principal legislation addressing rights in the course of criminal investigation is the **Law Enforcement (Powers and Responsibilities) Act** 2002 [LEPRA].

RIGHTS

The instruments in force – treaties and legislation – enable us to spell out the following summary of rights enjoyed by any person during passage through the process of criminal investigation, trial and punishment. (There may be more!)

1 Right to respect for private life, home and correspondence
2 Invasion of privacy only with process of law (search, interceptions by warrant)
3 Right to be treated with humanity and to freedom from torture
4 Right to be notified of charges in a language that is understood
5 Right to legal assistance
6 Right to be presumed innocent
7 Right to silence – not to be forced to testify against oneself or to confess guilt
8 Duty of investigators to keep records of interrogation
9 Right to adequate time and facilities to prepare one's defence
10 Right to be tried by a competent, independent and impartial tribunal established by law
11 Right to a fair hearing
12 Right of access to court or tribunal
13 Right to equality of arms with the prosecution and to an adversarial process
14 Access to witnesses and the right to call, examine them or have them examined
15 Right to a public hearing
16 Right to a public, reasoned and transparent judgment
17 Right to be tried without undue delay or in a reasonable time
18 Right to defend oneself in person or by a lawyer of one's choice
19 Right to effective legal assistance in death penalty cases (not an issue in Australia)
20 Right to free legal aid
21 Right to privileged communications with one's lawyer
22 Right to be present at trial
23 Prohibition on the use of evidence obtained unlawfully or improperly
24 Right to free assistance of an interpreter
25 Freedom from retrospective laws
26 Freedom from double jeopardy
27 Right of an effective appeal
28 Right to compensation in the event of a miscarriage of justice
29 Right to be punished only in accordance with internationally accepted standards.

SOME REFORMS

At a macro level human rights have influenced substantive criminal law reform in significant ways.

I have mentioned the decriminalisation of homosexual intercourse between consenting adults in private. Australia eventually followed the UK changes (in NSW on 22 May 1984 the "abominable

crime of buggery" was abolished); and same sex marriage was introduced nationally in December 2017.

Adultery and prostitution are not criminalised.

Incest and bestiality remain criminal – as does bigamy. So do various manifestations of obscenity.

Suicide and attempted suicide are no longer crimes; but aiding, abetting, inciting or counselling suicide or attempted suicide are crimes.

Abortion and voluntary assisted dying are now (or soon will be in NSW for VAD) lawful.

The recreational use of certain drugs remains a crime.

We have abolished the death penalty in Australia (and corporal punishment).

In procedural laws there have been some gains and some sticking points. Conditions have been introduced for the strip searching of children and a separate juvenile justice regime applies – Children's Court and juvenile detention included. But we are still arguing over the age of criminal liability for children.

And by retaining juries, we enable general community values and standards to be imported into decisions of guilt or non-guilt.

ANNEXURE

UN INSTRUMENTS

The UN (and some regional) instruments that apply to the criminal justice process are directed towards achieving fair trials and preserving the human rights of all persons involved. Human rights provisions have a practical effect on the way in which criminal investigations and trials are conducted. The principles expressed must be given effect by substantive and procedural laws in order to become binding, but the willingness of police and prosecutors, above all, to see them enforced can achieve a great deal. The principles influence the way in which discretion is exercised.

Without formal and binding adoption into domestic law, these instruments are known as "soft law". The extent to which they are enforceable or persuasive in a domestic jurisdiction will depend upon local law. They are in most cases treaties. In some countries they become part of the domestic law simply by accession; in others they must be specifically enacted (as a treaty or by the principles being adopted into domestic law) in order to become binding. In some Commonwealth jurisdictions the **Bangalore Principles** of 1988 enable (or perhaps require) courts to take the international instruments into consideration to fill gaps or resolve ambiguities in domestic law.

The UN instruments may be grouped in the following way and there are guides to a fair trial published by various organisations (a few of which are now a little outdated or no longer available online).

Guides

- Lawyers Committee for Human Rights (now Human Rights First): **What is a Fair Trial? A Basic Guide to Legal Standards and Practice (2000)**

- Norwegian Institute of Human Rights: **Manual for Trial Observations (1995)** – now Chapter XIII of Manual on Human Rights Monitoring: http://www.ohchr.org/Documents/Publications/training7part1315en.pdf

- Amnesty International: **Fair Trials Manual (1998)**:

- International Association of Prosecutors: **Human Rights Manual for Prosecutors (2nd edition, 2009)** – available to non-IAP-members for purchase

- IBA: **Human Rights Training Manual for Lawyers and Judges**:

- **The Status and Role of Prosecutors: A United Nations Office on Drugs and Crime and International Association of Prosecutors Guide (2014)** **http://www.unodc.org/documents/justice-and-prison-reform/HB_role_and_status_prosecutors_14-05222_Ebook.pdf**

- ECtHR **Guide on Article 5 of the Convention – Right to Liberty and Security:** http://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf

- ECtHR **Guide on Article 6 of the Convention – Right to a Fair Trial (criminal limb):** http://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf

UN Instruments

UN instruments are available at: http://research.un.org/en/docs/ga/quick/

General

- **Universal Declaration of Human Rights (1948)**
- **International Covenant on Civil and Political Rights (1966 in force 1976)** and **First Optional Protocol**
- **Convention on the Elimination of All Forms of Racial Discrimination (1969)**
- **Declaration on the Rights of Mentally Retarded Persons (1971)**
- **Declaration on the Rights of Disabled Persons (1975)**
- **Convention on the Elimination of All Forms of Discrimination against Women (1979)**
- **UN Standard Minimum Rules for the Administration of Juvenile Justice [*Beijing Rules*] (1985)**
- **Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1987)**
- **Convention on the Rights of the Child (1990)**
- **UN Guidelines for the Prevention of Juvenile Delinquency [*Riyadh Guidelines*] (1990)**
- **Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care (1991)**
- **International Guidelines on HIV/AIDS and Human Rights (1997)**

Investigation

- **Code of Conduct for Law Enforcement Officials (1979)**
- **Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (1989)**
- **Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990)**
- **Declaration on the Protection of All Persons from Enforced Disappearances (1992)**

Trial

- **Basic Principles on the Independence of the Judiciary (1985)**
- **Guidelines on the Role of Prosecutors (1990)**
- **Basic Principles on the Role of Lawyers (1990)**

Imprisonment/Punishment

- **Standard Minimum Rules for the Treatment of Prisoners (1955)**

- **Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1982)**
- **Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty (1984)**
- **Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988)**
- **Second Optional Protocol to the ICCPR (1989)**
- **Basic Principles for the Treatment of Prisoners (1990)**
- **UN Rules for the Protection of Juveniles Deprived of their Liberty (1990)**
- **UN Standard Minimum Rules for Non Custodial Measures [*Tokyo Rules*] (1990)**

Other international instruments

- **Rome Statute of the International Criminal Court (1998)**: http://untreaty.un.org/cod/icc/index.html ; http://www.icc-cpi.int/Menus?ICC?Ian+en-GB
- **Statute of the International Criminal Tribunal for the Former Yugoslavia**
- **Statute of the International Criminal Tribunal for Rwanda**
- **Standards of the International Association of Prosecutors**: www.iap-association.org; Standards available at: https://www.iap-association.org/Spanish/Documentacion-de-la-IAP/IAP-Standards/Professional-Responsibility/IAP_Standards

Regional instruments

- **European Convention for the Protection of Human Rights and Fundamental Freedoms**
- **Council of Europe Recommendations [REC(2000) 19] on the Role of Public Prosecution in the Criminal Justice System**: http://www.coe.int/document-library/default.asp?urlwcd=https://www.coe.int/ViewDoc.jsp?id=376859
- **Venice Commission Report on the Independence of the Judicial System:** https://www.venice.coe.int/webforms/events/ (home page)
- **American Convention on Human Rights**
- **African Charter of Human and Peoples' Rights**