

## THE UNIVERSAL DECLARATION OF HUMAN RIGHTS – 60 YEARS ON: AN OVERVIEW

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**The University of South Australia, 10 December 2008**

We meet to celebrate Human Rights Day which marks the anniversary of the adoption of the Universal Declaration of Human Rights by the General Assembly of the United Nations on 10 December 1948.

I have been asked to attempt a brief appraisal of that document – on its historical significance and on its enduring effects during the past 60 years.

No more readable account of the genesis of the Universal Declaration has been written than that of Professor Mary Ann Glendon of Harvard in her book “A World Made New – Eleanor Roosevelt and the Universal Declaration of Human Rights”.<sup>2</sup> Mrs Roosevelt did not herself draft significant parts of the Declaration but through the force of her personality and skilful diplomacy during the course of its evolution in the UN Human Rights Commission saw what at first seemed an unpromising project through to a successful conclusion. The true architects of the Declaration were Professor René Cassin of France and Dr. John Humphrey of Canada, aided significantly by Charles Malik of Lebanon, Chang Peng-Chun of China, and Carlos Romulo of the Philippines. The varied backgrounds of these scholarly and culturally sensitive people enabled a document to be written that was truly universal in scope, aspiration and resonance. That provenance has profound implications for the notion of cultural relativity sometimes invoked to decry existing human rights instruments as representing only “Western” values and as promoting neocolonialism.<sup>3</sup>

Australia did not play a prominent role in the drafting of the Declaration, although Australia’s Foreign Minister, Dr. H.V. Evatt played an essential role in the drafting of the UN Charter and in

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<sup>2</sup> Random House, New York, 2001.

<sup>3</sup> It may be relevant to record here that René Cassin was a secular Frenchman of Jewish background, Charles Malik was a Greek Orthodox Arab with a deep knowledge of Islamic culture in his homeland, P.C Chang was a diplomat with a wide experience of Islamic and Confucian societies, and Eleanor Roosevelt was a Protestant Christian who said her prayers every night.

the strengthening of its early steps.<sup>4</sup> Australia was represented in the Human Rights Commission, which drafted the Universal Declaration, by the bluff and plain speaking Colonel W.R Hodgson, no doubt under instructions from Dr. Evatt. Colonel Hodgson's constant theme was to lament the absence of enforcement mechanisms in the Declaration. Dr. Evatt was President of the General Assembly, and presided at the meeting when the Universal Declaration was adopted in 1948.

The Universal Declaration was intended to be a first, and not a final, step in the realization of one of the UN Charter's proclaimed purposes set out in article 1 of the Charter: respect for "human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion." It was intended that civil, political, economic, social and cultural rights be first identified and presented in a coherent fashion.<sup>5</sup> At a later stage attention could be devoted to devising means by which these rights could be enforced. As it happened, it was not until 1966 that the next two building blocks were added, in the shape of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

Does this mean that the Universal Declaration was a mere precursor or an incomplete step along the way to a fuller flowering of statements of human rights for all? My answer to that is "Not at all". It stands not only as a towering achievement in its own right, but also as a unique source of principles more compelling even than the provisions of the many instruments on human rights that have since been adopted, and which contain enforcement provisions. As René Cassin later wrote, the title "Universal" meant that the Declaration was morally binding on everyone, not only on the governments that voted for its adoption. The Universal Declaration, in other words, was not an "international" or "intergovernmental" document; it was addressed to all humanity and founded on a unified conception of the human being.<sup>6</sup>

The key to an understanding of the binding quality of the Universal Declaration is not only moral but also in legal terms lies in the word "Declaration". It is not a treaty or convention. It is not a document to be signed or ratified, or which nowadays in Australia would come before the Joint Standing Committee on Treaties (JSCOT). It was presented to the General Assembly as a

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<sup>4</sup> Dr. Evatt did, however, play a significant but little recognized role in 1947 in urging, unsuccessfully, the incorporation of human rights provisions in the Peace Treaties between the United Nations and the European Powers formerly allied with Germany in World War II. This effort may, however, be regarded as having been a precursor of the European Convention on Human Rights, 1950, with its associated Court. See J.G. Starke, "Australia and the International Protection of Human Rights" in K.W. Ryan (ed), *International Law in Australia*, 2<sup>nd</sup> ed., Law Book Co. of Australia, Sydney, 1984, 136 at 143-144.

<sup>5</sup> René Cassin compared the Declaration to the portico of a classical temple. He depicted it in the form of a drawing, which came to be known as "Cassin's Portico". It is reproduced by Glendon at 172 and used as a guide to the content of the Declaration in the chapter following.

<sup>6</sup> Quoted by Glendon, 161.

declaratory statement of principles for adoption by it. Nowadays such declarations, if during their drafting they appear to command in excess of two-thirds of the members of the General Assembly, are presented and carried without a vote (“adopted by consensus”) but in the case of the Universal Declaration its provisions were put to the vote article by article and then as a whole. This served to strengthen even further the authority of the document. By virtue of its genesis, its adoption without dissent, its direct language not subject to a right of reservation (as is usually possible with treaty documents), the incorporation of its provisions in a number of national constitutions adopted in the postcolonial period, and its invocation on numerous occasions in other UN declarations and resolutions, the Universal Declaration came to be regarded as an unchallenged statement of fundamental human rights.

The mood in the Palais Chaillot in Paris, where the meeting was held, was tense, since the Cold War had begun, the Berlin airlift was in progress, and the members of the Soviet bloc were making late difficulties with the drafting of certain provisions, including article 13(2) (“Everyone has the right to leave any country, including his own, and to return to his country”). They also protested against the interference in the internal affairs of Member States of the UN implied by many of the provisions. Nevertheless when the final vote came the Soviet Union and its allies merely abstained, much to the relief of Mrs Roosevelt and her international collaborators. The roll call, taken just before midnight on 10 December revealed 48 States in favour, none against, and 8 abstentions.<sup>7</sup> Two delegations were not present for the vote. This represented a highly successful outcome. The absence of any negative votes strengthened the authority of the Declaration as a truly universal statement.

The UN Human Rights Commission then turned to the task of drafting the subsequent instruments that had always been intended to follow the adoption of the Universal Declaration, namely the twin Covenants with the “teeth” so ardently desired by Colonel Hodgson. But progress was slow and impeded always by the ideological division between East and West. Enforcement by any form of international scrutiny or process was always going to be anathema to the Soviet bloc. It was only 18 years later that the two Covenants emerged.

Before examining further the Covenants of 1966 and the other superstructure later erected on the foundation of the Universal Declaration, it is worthwhile to examine the impact of the Universal Declaration on Australia in the period after 1948 and until 1972. It must be said that

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<sup>7</sup> Six of the abstentions were from the Soviet Bloc, including Yugoslavia. South Africa abstained because of the provisions on racial discrimination (the Nationalist Malan Government having recently taken power there). Saudi Arabia abstained because of the provisions on religious freedom. It is interesting to note that the other Islamic countries voted in favour of the declaration. Muhammad Zafrullah Khan of Pakistan (later a judge of the International Court of Justice) declared that the freedom to change beliefs was consistent with the Islamic religion, and cited a passage from the Koran in support: Glendon, 168.

that impact was minimal in terms of its practical effect on the work of parliaments, the executive, and the courts. The first comprehensive study of Australian law and practice in international law, "International Law in Australia", was published for the Australian Institute of International Affairs in 1965.<sup>8</sup> It contained 21 chapters, each dealing with a separate aspect of international law as it impacted on Australian law and practice. Not one chapter was devoted to human rights. There are but two references to the Universal Declaration in the entire book. One is in the context of the slow progress since 1948 towards a binding instrument, in which it is said that Australia, together with Canada and the United States, would insist on the insertion of a federal clause in any such instrument, since the matters covered by the Universal declaration and the proposed Covenant lay largely within the province of the States under the Australian Constitution. The other is in relation to the legal force of General Assembly resolutions in which the author of the chapter on Australia's commitments under the UN Charter recounted a debate in the UN Sixth Committee between Australia's Solicitor-General Sir Kenneth Bailey, who denied that General Assembly resolutions could of themselves create binding obligations, and Professor Lachs of Poland (later to become a judge of the International Court of Justice) who argued that certain resolutions could, even if not *lex perfecta*, come to have "an important and decisive influence in the field that it covered." That status, in Lachs's opinion, should be accorded to the Universal Declaration and also to the Declaration on Colonialism of 1960.<sup>9</sup>

Which view of the Universal Declaration is correct? The current (1992) edition of *Oppenheim's International Law*, widely regarded as the most authoritative if (perhaps, because) the most cautious general treatise, states that:

"The Declaration has been of considerable value as supplying a standard of action and of moral obligation. It has been frequently referred to in official drafts and pronouncements, in national constitutions and legislation, and occasionally – with differing results – in judicial decisions. These consequences of the Declaration may be of significance so long as restraint is exercised in describing it as a legally binding instrument. However, in the years since its adoption, the widespread acceptance of the authority of the Declaration has led some to the opinion that

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<sup>8</sup> Edited by Professor D.P. O'Connell, Stevens, London, 1965. The preface was written by Sir Garfield Barwick, Chief Justice of the High Court of Australia. Compare also the brief section of 9 pages devoted to human rights out a total of 985 pages by the authors of Australia's first teaching casebook in international law: W.E. Holder and G.A. Brennan, *The International Legal System: Cases and Materials with Emphasis on the Australian Perspective*, Butterworths, Sydney, 1972, 304-313.

<sup>9</sup> R.L. Harry, "Australia's Commitments under the United Nations Charter", *ibid.*, 65 at 74-75.

while the Declaration as an instrument is not a treaty, its provisions may have come to be the embodiment of new rules of customary international law in the matter.”<sup>10</sup>

I prefer a more categorical conclusion, and also one that substitutes the term “general international law” for “customary international law.” Custom, as the product of state practice combined with *opinio juris*, does not describe at all appropriately the process whereby principles, such of those of human rights, emerge as universally binding. The legal status of the prohibition against torture, for example, is not something that one should assess in terms of the number of practitioners and abstainers, especially when the former category rarely, if ever, admit to such practices.<sup>11</sup> The better approach is to consider *opinio juris* alone (which might or might not reflect reality on the ground) deriving from the natural law and the dictates of humanity. Such an approach is reflected also in that taken by the International Court of Justice in the *Barcelona Traction case*<sup>12</sup> which referred to certain obligations of States which by their very nature are the concern of all States and are thus obligations owed *erga omnes*. “Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law...; others are conferred by international instruments of a universal or quasi-universal character.”

This describes very well the character of the Universal Declaration. While not every word in the Declaration is of equal weight, the basic rights of the human person as expressed in that document have achieved recognition as binding on all members of the international community (*erga omnes*). It is thus to be respected and applied by all States even if they are not parties to the many treaty-based instruments relating to particular human rights. This view of the Universal Declaration had become commonly accepted by 1970 and remains so today.

The two separate Covenants designed to complete the work of the Universal Declaration in structural terms were opened for signature and ratification in 1966. The International Covenant on Civil and Political Rights deals with the traditional “negative” rights and freedoms covered by articles 3-21 of the Universal Declaration (labelled by Cassin in his “Portico” as “life, liberty and personal security, rights in civil society, and rights in the polity”) and are peremptory in character. The International Covenant on Economic, Social and Cultural Rights deals with and

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<sup>10</sup> Oppenheim’s International Law, 9th ed. by Sir Robert Jennings and Sir Arthur Watts, Longmans, London, 1992, Vol. 1, Part 2, 1003-1004.

<sup>11</sup> Cf. the approach of the International Court of Justice in appraising the customary nature of the rule against forcible intervention in the *Nicaragua case: Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, Nicaragua v. USA, Merits, (1986), Judgment of the Court, para. 186.

<sup>12</sup> *Barcelona Traction, Light and Power Company case*, Belgium v. Spain, International Court of Justice Reports, 1970, 3, Judgment of the Court, para. 34.

greatly expands articles 22-27 of the Universal Declaration and is, by contrast, aspirational in character, calling for the progressive realisation of the provisions.

Australia ratified the International Covenant on Economic, Social and Cultural Rights on 10 December 1975 but did not ratify the International Covenant on Civil and Political Rights until 13 August 1980. This was not for want of trying by the Whitlam Government in the period 1973-1975. The Human Rights Bill of 1973 proposed a radical approach to the implementation of human rights in Australia on a national basis, thus sweeping away the objections of the States. By invoking the International Covenant on Civil and Political Rights (and indirectly the Universal Declaration on which the Covenant was based) the government proposed to justify its legislation under the external affairs power of the Constitution. The Bill foundered in the Senate against the determined opposition of the States. Nevertheless, the need for Australia to give effect to its international obligations in the field of human rights had been perceived and accepted by a broader cross-section of politics, and thus it was under the Fraser Government that a new approach was taken in the form of the Human Rights Commission Act, 1981. Rather than to confront the States by legislating in what they perceived to be their reserved domain of legislative powers, the Commission was essentially an advisory body which examined and reported on Commonwealth and State laws and practices which might be thought to be contrary to Australia's international obligations under the Covenant and certain other instruments. Its first chair was Dame Roma Mitchell of South Australia. That Commission was later replaced by the present Human Rights and Equal Opportunity Commission (HREOC).

Even without a statutory Bill of Rights directly implementing the Universal Declaration or the Covenant on Civil and Political Rights, Australia was sufficiently confident to ratify the Covenant in 1980, albeit subject to a declaration that "Australia has a federal constitutional system in which legislative, executive and judicial powers are shared or distributed between the Commonwealth and the constituent States. The implementation of the treaty throughout Australia will be effected by the Commonwealth, State and Territory authorities having regard to their respective constitutional powers and arrangements concerning their exercise." This statement was termed a declaration, not a reservation; hence, there was no attempt to avoid the international responsibility of Australia for the actions of its State or Territory authorities.<sup>13</sup> The main significance of Australia's adherence to the Covenant in terms of realizing the aims of the drafters of the Universal Declaration was Australia's acceptance of the monitoring role of the Human Rights Committee established under the Covenant and the obligation to report to

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<sup>13</sup> As exemplified by the Toonen case (1994), the first to reach the Human Rights Committee under the Optional Protocol, when Australia merely reported, but did not defend, the arguments of the Tasmanian authorities for retaining on its statute books a law penalising same-sex relations between consenting adults.

that Committee at regular intervals on its record in human rights and on any factors impeding the full implementation of the Covenant. These may not have been the teeth that Colonel Hodgson wanted to see back in 1948, but the “naming and shaming” function of the reporting process cannot be dismissed as insignificant. Australia took a further confident step into the realm of international monitoring and enforcement by ratifying the Optional Protocol to the Covenant on 25 September 1991. The Protocol allows individuals to bring to the Human Rights Committee complaints that Australia has violated in relation to them provisions of the Covenant. Individuals must first have exhausted all available avenues of redress in the Australian courts. The Committee may then issue its “Views” on whether the complaint is justified.

It should be not be accepted uncritically that the Human Rights Committee (and the other treaty committees established under other human rights instruments such as CERD, CEDAW, the Torture Convention, and the Convention on the Rights of the Child) are inscrutable sources of authority or infallible in their judgments. Australia has rightly questioned some concluding observations of some of the committees, based on their evaluation of complicated matters, such as aboriginal land rights, but at least the opinions of the committees demand respect and should prompt a reconsideration by Australia. It is similar with the Views of the Human Rights Committee under the Optional Protocol where Australia has contested some of the findings of that Committee.

The issue whether the Commonwealth had the power to override the States in the matter of human rights, as enshrined in international instruments, was settled by the High Court of Australia in the case of *Koowarta v. Bjelke-Petersen*, where by a majority the Court upheld the validity of the Racial Discrimination Act (Commonwealth) under the external affairs power of the Constitution.<sup>14</sup> Armed with this constitutional authority the Commonwealth could have proceeded to the enactment of a national Bill of Rights for Australia, based on the Universal Declaration and the Covenant. But that step was not taken under the Fraser Government, consistently with its philosophy of cooperative federalism, nor has it been taken since by successive governments.

The realization of the rights contained in the Universal Declaration, the Covenant, and other human rights instruments to which Australia has become a party since 1972, has largely been achieved through a combination of methods. These consist principally of law reform, as to which both federal and State bodies have been actively engaged, and in the courts where increasing resort has been had to international instruments as an influence on the interpretation of Australian law, both enacted and unenacted (common law). A leader in this

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<sup>14</sup> (1982) 153 CLR 168.

judicial (and judicious) approach has been Justice Michael Kirby, first in his capacity as President of the NSW Court of Appeal, and more recently as a justice of the High Court of Australia.

Does Australia need a national Bill of Rights? Can we go on as we have since the failure of that proposal in 1973? Some might think that we have been doing reasonably well without one, and that little by little we have been filling the gaps in the protection of the individual. However, some major issues have arisen as the result of determined legislation, particular in the field of migration, which some have thought would have been better addressed in terms of human rights legislation of superior status. Justice Kirby was once of the opinion that a Bill of Rights was unnecessary, and that the courts could do the job, exercising their interstitial power to “legislate” within the legitimate leeways of judicial choice. More recently he has changed his mind. He now believes that a Bill of Rights would be salutary in compelling both governments and courts to have regard to their provisions.

I too now believe that a Bill, or Charter, of Rights, especially at the national level, is a project whose time has come. It is pleasing that a national consultation is currently in progress with a view to preparing the way. A tipping point for me was the decision of the High Court of Australia in the case of *Al Kateb*, where by a majority the Court held that the legislation under which a failed asylum seeker was held could not be interpreted so as to allow release where it was practically impossible to find a country to which the plaintiff could be deported.<sup>15</sup> This had the practical consequence of his indefinite detention. This would clearly be contrary to the Universal Declaration and the Covenant, which forbid “arbitrary” (meaning “unreasonable”, not “unlawful”) detention. Had a Bill of Rights been in place, the Parliament would have had to think more than twice about such a draconian enactment, or to have entered a statement of derogation (depending upon which model of a Bill of Rights might be adopted) drawing public attention to the inconsistency and thus attracting a political cost.<sup>16</sup>

What are we to think of the recent initiatives of the ACT and Victoria of enacting their own Bills of Rights? The same arguments for their existence can be made as by Justice Kirby for a national Bill, but as a stop gap measure. If a national Bill of Rights is passed, then they would become largely redundant. It is a little too early to judge how successful these Bills have been in countering violations of human rights and what they have to offer by way of guidance to the drafting of a national Bill of Rights.

To sum up:

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<sup>15</sup> *Al Kateb v. Godwin* (2004)219 CLR 562. Chief Justice Gleeson and Justice Kirby dissented.

<sup>16</sup> See also the views of the out-going President of HREOC, Justice John von Doussa, that he now believes that a Bill of Rights is essential to the protection of human rights in Australia and that the old argument that the current system is working well does not stand up: *The Australian*, October 9, 2008, p.15.

1. The Universal Declaration of Human Rights stands even today, 60 years after its adoption by the United Nations, as the single most important statement regarding human rights, and as one of history's most influential documents on any subject. It has achieved unchallenged status as binding on all States under general international law. The subsequent Covenant on Civil and Political Rights of 1966, which built upon and elaborated the provisions of the Universal Declaration, presently has 162 parties. There are thus 30 other States recognized by the United Nations that have not ratified the Covenant (such as, in our region, Singapore and Malaysia). For them the Universal Declaration is an unavoidable source of obligation since it does not depend on signatures or acts of ratification.
2. Although slow at first to react to the challenges posed by the Universal Declaration Australia has in the past 35 years become a party to the major international instruments regarding human rights that have built upon that foundation. It has also accepted further voluntary obligations, as under the Optional Protocol to the International Covenant on Civil and Political Rights. By the standards set by the Universal Declaration and subsequent human rights instruments Australia is travelling reasonably well. We can thank our stable political institutions, a history of dedication to the rule of law, and a free and vigorous media.
3. Yet more remains to be done to realize fully the vision of 1948. There are gaps in our law and practice that parliaments have failed to remedy or that the courts have failed to redress (or have been prevented from redressing). The time has come for a national Bill of Rights. The existence of a Bill of Rights, in whatever form, will present a highly visible and unavoidable roadblock to hasty legislation, a protection against insensitive decision-making by the executive, and a salutary guide to courts and tribunals.
4. In writing a Bill, or Charter, of Rights, the utmost care must be taken not to depart from the essential wording of the Universal Declaration and the instruments based on it. (These include the European Convention on Human Rights, 1950). However tempted one might be to improve on the wording, the danger arises that Australian courts might then be deprived of the ability to take into consideration the decisions and opinions of other judicial institutions interpreting and applying the same words. These include the national courts of other countries, and such international courts as the European Court of Human Rights. This is, of course, potentially a two way exchange, in which Australian jurisprudence could helpfully influence the decisions of courts and tribunals elsewhere.

