THE EVOLVING NATURE OF THE RIGHT TO LIFE: THE IMPACT OF POSITIVE HUMAN RIGHTS OBLIGATIONS

Paul Harpur[*]

I Abstract

This article will explore how Australia has recognised that positive obligations exist in relation to the right to life. While positive obligations are associated with capital punishment and the right to health, the positive aspects of these rights are unenforceable. Even where the right to life is recognised as a law of the *jus cogens*, this right is generally unenforceable. Despite the problems with enforcement, human rights have been utilised by Australian courts as a guide to contemporary community values. This article will explore the broad Australian judicial support for using human rights as a guide when exercising judicial discretion.

II Introduction

The negative conceptualisation of human rights has been slowly evolving, so that now human rights contain both positive and negative obligations. This article will explore how positive human rights are enforceable in Australia and in particular it will focus on how positive obligations associated with the right to be free from the death penalty and the right to health care are enforceable. While positive human rights obligation may be increasingly recognised, positive human rights are largely unenforceable. This article will explore how the right to life may be regarded as a law of the *jus cogens*. The general intention is that the laws of the *jus cogens* are not subject to derogation, however despite this, manifestations of the right to life are subject to derogation. While positive manifestations of human rights are largely unenforceable, these rights do provide a guide to contemporary community values. This value framework has impacted upon how judges exercise their discretion in interpreting the Australian common law. While the majority of the human rights relied upon to influence the common law are negative rights,

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* Paul Harpur LLM LLB (Hons) BBUS (HRM, Solicitor PHD Candidate, Queensland University of Technology); I would like to thank my Doctoral Supervisors, Prof Dr Des Butler and Dr Sara Davies, Faculty of Law, QUT, for their helpful comments in developing this article.

positive rights, such as the right to health care, can now be regarded as representing contemporary community values.

III Negative and Positive Rights

During the 18th and 19th centuries rights were used predominately to restrain government action.[1] A strongly libertarian approach to rights does not oblige the government to take any positive action and to merely refrain from conduct. The negative approach propounded by strict libertarians is personified by the USA Supreme Court in *DeShaney v Winnebago County Dept. of Social Services* ('*DeShaney*').[2] In the *DeShaney* case, a boy was seriously beaten by his father. The Supreme Court held that the State's child workers had no obligation to the boy, commenting that the State merely had an obligation 'to protect the life, liberty, and property of its citizens against invasion by private actors.'[3]

Negative human rights merely oblige the state to refrain from acting: 'the state shall not'. Positive human rights oblige the state to devote resources and generally take active steps to ensure the rights are realised.[4]

IV The Right to Life and the Death Penalty – Positive Obligations?

The main libertarian conception of the right to life is through the death penalty.[5] The death penalty involves the government positively removing a convicted felon's right to life.[6] The right to life, in its negative manifestation, prohibits governments from the use of capital punishment.

In its negative manifestation, the right to life prevented nations from executing people. Even from this negative manifestation of the right to

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1 These rights are often referred to as 'first generation rights': see Uche U Ewelukwa 'Litigating the Rights of Street Children in Regional or International Fora: Trends, Options, Barriers and Breakthroughs' (2006) 9 *Yale Human Rights & Development Law* Journal, 85-143, at 118.

2 *DeShaney v Winnebago County Dept of Social Services,* (1989) 109 SCt 998.

3 *DeShaney*, (1989) 109 SCt, 1003.

4 Michael L Perlin, Szeli, Krassimir Kanev, Gabor Gombos, Katalin Peto, Eszter Kismodi, Sydney M Cone, Eric Rosenthal, Paul Dubinsky, Ginger Lerner-Wren, Bruce J Winick, Robert D Dinerstein and Elizabeth Shaver Duquette 'International Human Rights Law and the Institutional Treatment of Persons' (2002) 21 New York Law School Journal of International & Comparative Law, 339-411, at 421-422.

5 Stephan Kinsella 'Inalienability and Punishment: A Reply to George Smith' (1999) 14 *Journal of Libertarian Studies* 1, 79-93, at 79.

6 For a discussion of justifications for the removal of a felon's life see Morton Winston 'The Death Penalty and the Forfeiture Thesis' (2002) 1 *Journal of Human Rights*, 357.

life, positive obligations can flow. Australia has ratified the *International Covenant on Civil and Political Rights* ('ICCPR') and the *Second Optional Protocol to the International Covenant on Civil and Political Rights* ('*Second Protocol*'),[7] and has repealed the death penalty, through the *Death Penalty Abolition Act 1973* (Cth). Australia accepts nations that continue to use the death penalty have positive obligations placed upon them. Most significantly, the *Second Protocol* imposes positive obligations upon nations which have reserved the right to utilize the death penalty during war time. Those nations must notify the Secretary-General of the United Nations of the text of any acts which authorise the death penalty and what measures the government have implemented to lead to the abolition of the death penalty.[8] Those nations must also notify the Secretary-General of the United Nations if their nation goes to war.[9] As Australia has ratified the *Second Protocol*, it could be argued the Australian government has acknowledged positive rights can exist under the right to life.

Australia has recognised that nations which continue to impose the death penalty have positive obligations to ensure internationally acceptable judicial processes are followed. Australia has ratified the ICCPR. Article 6(2) of the ICCPR requires nations to impose the death penalty according to the law, and only after a 'final judgement rendered by a competent court'. Article 14 of the ICCPR requires nations to presume all accused persons are innocent until proven guilty according to law.[10] When charging a person, the charge must be given in a language the person understands, interpreters must be provided where necessary, accused persons must have the opportunity to present witnesses in their defence and there must be a right of appeal.[11]

What is required under Article 14 of the ICCPR was further illuminated by the United Nation's Economic and Social Council's *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death*

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7 *Second Optional Protocol to the International Covenant on Civil and Political Rights* ('*Second Protocol*'). This was ratified by Australia on 2 October 1990 and came into force for Australia on 11 July 1991.

8 *Second Protocol* art 2(2) and art 3. Nations have an obligation to abolition the death penalty in *Second Protocol* at 40.

9 *Second Protocol* art 2(3).

10 *International Covenant on Civil and Political Rights*, opened for signatures 16 December 1966, ATS 23 entered into force (except Article 41) 23 March 1976: entered into force for Australia (except Article 41) 13 November 1980) (Article 41 came into force generally on 28 March 1979 and for Australia on 28 January 1993); ('ICCPR') art 14(2).

11 ICCPR art 14(5).

Penalty ('*UN Safeguards*').[12] Article 3 of the *UN Safeguards* called for all nations to guarantee a fair trial, considering the role of legal representation,[13] the role of prosecutors and how accused people should be detained humanely.[14] Australia has recognised the legitimacy of the United Nations and the Economic and Social Council through enacting the *Charter of the United Nations Act 1945* (Cth).[15]

V How Enforceable is the Right to be Free From the Death Penalty in Australia?

In the *Abolition Act 1973* (Cth) it is clear that the death penalty is not to be used in Australia.[16] Therefore, no person can be lawfully executed by the Australian government. Australia has recognised that positive obligations can flow from the right to life in respect to the death penalty, however how enforceable are these positive obligations?

Rush v Commissioner of Police ('*Rush*') examined the extent of the positive obligations placed upon Australia in respect of the death penalty.[17] In *Rush*, Mr Rush attempted to argue Australia's obligations under the *ICCPR*, *Second Protocol* and under the *Abolition Act 1973* (Cth) meant that the Australian government had a positive duty to ensure he was not exposed to the possibility of being subjected to the death penalty.[18] When Mr Rush left Australia for Indonesia the Australian Federal Police ('AFP') had him under surveillance, and the AFP notified the Indonesian authorities Mr Rush was likely to be trafficking drugs. Mr Rush was subsequently arrested by the Indonesian authorities for the possession of drugs, charged, convicted and sentenced to death.

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12 *Safeguards Guaranteeing the Protection of the Rights of Those Facing the Death Penalty*, ESC Res 1996/15, 45th plen mtg, 23 July 1996. See also Economic and Social Council resolutions 1745 (LIV) of 16 May 1973, 1930 (LVIII) of 6 May 1975, 1990/51 of 24 July and 1995/57 of 28 July 1995. See also United Nations General Assembly resolutions 2857 (XXVI) of 20 December 1971 and 32/61 of 8 December 1977.

13 See also Basic Principles on the Independence of the Judiciary, 7th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, UN Doc A/CONF.121/22/Rev.1 at 59 (1985), at chap I, sect. B.3.

14 See also Standard Minimum Rules for the Treatment of Prisoners, First United Nations Congress on the Prevention of Crime and the Treatment of Offenders UN Doc A/CONF/611, annex I, ESC Res 663C (1955) Geneva, at annex I, sect. A.

15 *Charter of the United Nations Act 1945* (Cth) s 5 ('*Charter*'). This section approves the *Charter*; Article 7 of the *Charter* recognises the Economic and Social Council.

16 *Abolition Act 1973* (Cth) s 4. The death penalty was abolished in state jurisdictions by *Criminal Code Amendment Act 1922* (Qld), *Crimes (Amendment) Act 1955* (NSW), *Statutes Amendment (Capital Punishment Abolition) Act 1976* (SA), *Criminal Code Act 1968* (Tas), *Crimes (Capital Offences) Act 1975* (Vic) and *Acts Amendment (Abolition of Capital Punishment) Act 1984* (WA).

17 *Rush v Commissioner of Police* (2006) 150 FCR 165; ('*Rush*').

18 *Rush*, (2006) 150 FCR 165, 181.

Mr Rush argued members of the AFP had, inter alia, acted 'without lawful authority in making decisions and taking actions which exposed [Mr Rush] … to the death penalty in Indonesia'.[19] Finn J considered the fact Mr Rush's argument would require a significant reading down of section 8 of the *Federal Police Act 1979* (Cth).[20] Finn J held that section 8 provided the AFP powers to provide information to other nations in order to combat heroin importation into Australia. His Honour noted such disclosures were additionally authorised under the *Treaty Between Australia and the Republic of Indonesia on Mutual Assistance in Criminal Matters* and under a Commonwealth Government ministerial direction made under section 37(2) of the *AFP Act.*[21] Finn J considered whether Australia had a positive obligation under its human rights obligations to ensure its citizens were not exposed to the death penalty in foreign nations. Finn J held human rights 'imposes no obligation on a Contracting Party vis-à-vis a non-contracting party in respect of the formers' dealings with the latter in relation to offences in the latter jurisdiction which can attract the death penalty.'[22]

While Finn J refused to find the Australian government was bound by positive duties in relation to Mr Rush's right to be free from the death penalty, internationally the existence of positive rights under the right to life and the death penalty is clearer. While Australian law, as interpreted by Finn J in *Rush*, holds the Australian government has no positive obligation to be concerned with the death penalty in third nations, the European Union has taken a polar opposite approach. The *Guidelines to European Union Policy Towards Third Countries on the Death Penalty* ('*Guidelines*') places positive obligations to raise the death penalty when the European Union is in dialogue with third nations.[23] When engaging in such dialogue with third nations, the *Guidelines* compel the European Union to advocate for the abolition of the death penalty in third nations' jurisdictions and, where the death penalty continues to be used, to advocate for the judicial process to meet international standards and to be open to public and international scrutiny. Where a third nation has the intention of performing an execution, where the minimum judicial standards have not been met, then the European Union and all its members are empowered to make specific demarches.

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19 *Rush*, (2006) 150 FCR 165, 181.

20 *Rush*, (2006) 150 FCR 165, 183; *Federal Police Act 1979* (Cth); ('*AFP Act*').

21 *Rush*, (2006) 150 FCR 165, 183-185.

22 *Rush*, (2006) 150 FCR 165, 181.

23 *Guidelines to European Union Policy Towards Third Countries on the Death Penalty*, 3 June 1998, European Union.

The libertarian approach to only accept negative rights has been challenged in international human rights discourse. Where the USA Supreme Court previously held the State had no obligation to prevent a father from beating his son, the European Court of Human Rights reached a polar opposite conclusion. In *A v United Kingdom*, the court determined that the United Kingdom government was in violation of two boys' rights to be free from torture and cruel treatment when authorities failed to protect the boys from child abuse.[24] The European Court of Human Rights adopted a positivist approach, providing the United Kingdom had an obligation to act to enforce the boy's human rights.

Waldron has observed the right to be free from arbitrary detention is a negative right.[25] Despite this fact, governments are required to prevent arbitrary detention at the hands of public and private entities. Waldron concludes, even strictly negative rights often attract positive duties. Cancado J of the Inter-American Court of Human Rights, with Trinidade and Abreu-Burelli JJ concurring, has determined that the right to life includes the positive obligation on states to ensure their citizens can live with dignity. Without such a right, their Honours held that they would be totally 'dehumanised'.[26]

Despite the approach of the international community, Australia currently has no scope for positive obligations in the right to be free from the death penalty. Australia accepts under human rights obligations that it cannot execute people, and has enshrined such laws in statute. According to the interpretation adopted in Rush, the right to be free from the death penalty only requires the Australian government to restrain from executing any of its citizens. According to Rush however, this right does not oblige the Australian government from taking steps which will result in an Australian citizen being executed by a foreign nation.

VI Right to Health – Positive Obligations?

Unlike negative human rights, positive human rights, such as the right to health care, require states to devote resources to ensure the right is

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24 *A v United Kingdom* (1998) VI European Court of Human Rights 2692.

25 J Waldron 'Nonsense Upon Stilts? - A Reply' in J Waldron (ed) *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man* (Methuen: New York, 1987) 151 at 157.

26 *Villagran Morales v Guatemala (The 'Street Children' Case)* (2001) Inter-American Court of Human Rights (ser. C) No. 77, P 21 (May 26, 2001). See for discussion Uche U Ewelukwa 'Litigating the Rights of Street Children in Regional or International Fora: Trends, Options, Barriers and Breakthroughs' (2006) 9 *Yale Human Rights & Development Law Journal*, 85; Alicia Ely Yamin 'Not Just a Tragedy: Access to Medications as a Right' (2003) 21 *Boston University International Law Journal* 325.

discharged. Even if states refrain from restricting citizens access to health care, this will not ensure the right is realised.

The right to health care is a positive duty which branches off from the right to life.[27] The World Health Organization has declared that the 'enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being'.[28] *Universal Declaration of Human Rights* (*'UDHR'*) Article 25 supports the concept of the right to health care, where it provides 'everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care…'.

Article 12 of the *ICESCR* is more express.[29] Article 12(1) requires nations to ensure 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'. Article 12(2) then explores the scope of states' positive obligations more fully, by providing that states must take steps which 'shall include those [steps] necessary for ... the prevention, treatment and control of epidemic, endemic, occupational and other diseases' and 'the creation of conditions which would assure to all medical service and medical attention in the event of sickness.'[30]

The importance of the right to health is reflected in the preamble to the Constitution of the World Health Organization which states that health is a principle 'basic to the happiness, harmonious relations and security of all peoples'.[31] Yamin has concluded that the right to life requires 'access to medications … non-discrimination in access to health services, as well as action which goes beyond the health sector'.[32] Jackman has argued, in 'practical terms, a right to life and to security of the person is meaningless without access to health care, both in a preventative sense, and in the event of acute illness'.[33] Without health care, citizens would not be in a position to enjoy social, economic or civil rights. Indeed, where health care and intellectual property rights are in contrast, it has been argued that a person's right to health care should defeat conflicting claims to property rights.[34]

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27 Tamara Friesen 'The Right to Health Care' (2001) 9 *Health Law Journal,* 205.

28 World Health Organization, *Health-for-all policy for the twenty-first* century, Fifty-First World Health Assembly WHA51.7, Agenda item 19, art 1(1998).

29 International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976); (*ICESCR)*.

30 For discussion see Alicia Ely Yamin 'Not Just a Tragedy: Access to Medications as a Right' (2003) 21 *Boston University International Law Journal* 325-383, 336.

31 *Constitution of the World Health Organization*, posited 22 July 1946, 1948 ATS 7, entered into force generally and for Australia 7 April 1948.

32 Yamin, above n 30, 338.

33 Martha Jackman 'The Regulation of Private Health Care Under the Canada Health Act and the Canadian Charter' (1995) 6 *Constitutional Forum* 54, 56.

34 James Thuo Gathii 'Rights, Patents, Markets and the Global AIDS Pandemic' (2002) 14 *Florida Journal of International Law,* 261-271.

The *Convention on the Rights of the Child* ('*CROC*') contains numerous positive obligations upon states in relation to child welfare.[35] CROC requires nations to ensure the facilities and services for child welfare 'must conform with the standards established by competent authorities' in relation, inter alia to safety and health.[36] Through ratifying the *CROC*, nations acknowledge children have the right to life, and to the maximum possible extent, nations must ensure 'the survival and development of the child'.[37] Nations are required to take all legislative, administrative, social and educational measures to ensure children are not exposed to abuse.[38] The obligation to provide health services for disabled children even has a requirement that, in certain circumstances, the services should be provided free of charge.[39]

Torres argued, even though the right to health had developed as a positive requirement for states under international law, this right was still not enjoyed in many developing nations.[40] Even though the right to health was not legally enforceable in many nations, there remained a moral obligation upon nations to take positive steps to ensure their citizens right to health.[41]

Australia has recognised the connection between the right to life and the protection of people's right to health in the Third and Fourth Reports to the United Nations Human Rights Committee.[42] In the Third Report under the section dealing with the right to life in Article 6 of the *ICCPR*, Australia explained it was protecting this right by supporting programs to minimise HIV Aids infections in children, targeting awareness programs for high risk sections of the community and providing free medication.[43]

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35 *Convention on the Rights of the Child*, opened for signature 20 November 1988, [1991] ATS 4 (Entry into force generally 2 September 1990) ('CROC'). Entry into force for Australia 16 January 1991.

36 CROC, above n 35, art 3; see also art 18(2).

37 CROC, above n 35, art 6(2).

38 CROC, above n 35, art 19.

39 CROC, above n 35, art 23(3).

40 Mary Ann Torres, *Access to Treatment as a Human Right:A Discussion of the Aspects of the Right to Health Under National and International Law in Venezuela. Cruz Bermudez, et al v. Ministry of Health Supreme Court of Venezuela* (LLM THESIS, University of Toronto, 2000).

41 Friesen, above n 27, at 205.

42 Australia's third periodic report under the International Covenant on Civil And Political Rights to the United Nations Human Rights Committee, March 1987 - December 1995 ('Third Report');Australia's third periodic report under the International Covenant on Civil And Political Rights to the United Nations Human Rights Committee, January 1996 - December 1996 ('Fourth Report');The Fourth Report is the most recent report issued: Australian government's Department of Foreign Affairs and Trade Australia's *reporting under ICESCR and ICCPR* (1996) <http://www.dfat.gov.au/hr/reports/icescr-iccpr/> at 27 May 2007.

43 Third Report, above n 42, 319-318.

More broadly, the report explains how Australia has a program of immunising children, in attempt to improve the health of all Australian children.[44] The Fourth Report provides details of how the Australian government was attempting to improve the health of indigenous Australians, through indigenous health programs.[45]

VII How Enforceable is the Right to Health?

As well as existing in human rights law, the right to health is becoming increasingly enforceable through litigation. In those nations which constitutionally protect the right to health care, such as in South Africa through section 27(1) of the *Bill of Rights*, the right to health is clearly enforceable.[46] Where the right to health is not constitutionally protected, the right to health can still be enforceable. In the United Kingdom for example, the Court of Appeal in *R v North East Devon Health Authority, ex parte Coughlan* ('*Coughlan*') enabled a disabled person to successfully prevent the National Health Service from closing a nursing home.[47] The applicant successfully argued the Health Department had promised she could live in the nursing home for the rest of her life, and the closure would be a violation of the disabled woman's legitimate expectation under Article 8 of the *European Convention on Human Rights*.[48]

The decision in *Coughlan* relied upon the doctrine of legitimate expectation. The doctrine of legitimate expectation, as applied in England, has no application in Australia. Sir Anthony Mason has commented 'it would require a revolution in Australian judicial thinking to bring about an adoption of the English approach to substantive protection of legitimate expectations'.[49] Treaties which have been ratified but not

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44 Third Report, above n 42, 339-342.

45 Fourth Report, above n 42, 46-55.

46 See for example, Minister of Health, Member of the Executive Council for Health, Eastern Cape, Member of the Executive Council for Health, Free State, Member of the Executive Council for Health, Gauteng, Member of the Executive Council for Health, Kwazulu-Natal, Member of the Executive Council for Health, Npumalanga, Member of the Executive Council for Health, Northern Cape, Member of the Executive Council for Health, Northern Province, Member of the Executive Council for Health, North West v Treatment Action Campaign, BR Haroon Saloojee, Children's Rights Centre (2002) South African Constitutional Court.

47 *R v North East Devon Health Authority, ex parte Coughlan* [2000] 3 All ER 850 ('*Coughlan*').

48 See for discussion Elizabeth Palmer 'Should Public Health Be a Private Concern? Developing a Public Service Paradigm in English Law' (2002) 22 *Oxford Journal Of Legal Studies*, 663, 669-670.

49 Hon Sir Anthony Mason AC KBE 'Procedural Fairness: Its Development and Continuing Role of Legitimate Expectation' (2005) 12 *Australian Journal of Administrative Law* 2, 103, 108.

passed into law have been held to be legally enforceable in Australia through the doctrine of legitimate expectations.[50] Four of the High Court justices in *Minister for Immigration and Multicultural Affairs; ex parte Lam* ('*Lam*') however questioned whether the doctrine of legitimate expectation had any application in Australia.[51] Finn J in *Rush* expressly refused to recognise the doctrine of legitimate expectation.[52] *Rush*'s case is particularly relevant to this discussion, as the applicant attempted to argue the right to life should be actionable under the doctrine of legitimate expectation.[53] Mr Rush claimed, inter alia, members of the AFP 'failed to satisfy the applicants' substantive legitimate expectations as Australian citizens that the Australian government and its agencies and public officers would not act in such a way as to expose them to the risk of the imposition of the death penalty'.[54] In rejecting this argument, Finn J explained 'In light of the decisions of the High Court in *Teoh* and in *Lam* it is clear that the doctrine of substantive legitimate expectation is for the present not part of Australian law.'[55]

The rejection of the substantive doctrine of legitimate expectation does not mean human rights have no influence in Australian law. Skene has argued a patient in Australia 'who asserts that he or she has a right to treatment may argue that recent developments in human rights law support such a right'.[56]

Practically this right is not enforceable. While Australia has recognised the right to life includes a positive obligation to realise a right to health, this right is not enforceable in Australia. Two cases which went before the United Nations Human Rights Committee ('UNHRC') demonstrate this point. Australia has enabled people to complain about Australia's violation of the *ICCPR* to the UNHRC. Australia can elect to either accept or reject the UNHRC's judgment however. In two cases concerning health, the Australian government has elected not to uphold applicants' right to health.[57]

One of the cases which went before the UNHRC was *Bakhtiyari v Australia.*[58] *Bakhtiyari v Australia* concerned asylum seekers from

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50 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353.

51 *Minister for Immigration and Multicultural Affairs; ex parte Lam* (2003) 195 ALR 502.

52 [2006] 229 ALR 383.

53 [2006] 229 ALR 383, at 398.

54 [2006] 229 ALR 383, at 398.

55 [2006] 229 ALR 383, at 343.

56 Loane Skene, *Law and Medical Practice: Rights, Duties, Claims and Defences* (2nd ed, Australia: Butterworths, 2004) 2.113.

57 *First Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature on 19 December 1966, [1991] ATS No 39.

58 *Bakhtiyari v Australia* (2003) UN Doc CCPR/C/79/D/1069/2002; Ryszard Piotrowicc *'Bakhtiyari* Case: Balance Between Asylum Seekers and States 'Rights' (2005) 79(6) *Australian Law Journal*, 334.

Afghanistan. Mr Bakhtiyari was recognised to be a refugee and granted asylum in May 2000. Mrs Bakhtiyari and their children came to Australia in January 2001. Mrs Bakhtiyari and the children applied for asylum and were placed in immigration detention. The claims of Mrs Bakhtiyari and the children were dismissed. Subsequent to this, the Australian government decided to revoke Mr Bakhtiyari's visa. The Bakhtiyaris appealed the government's decision on their asylum case to the UNHRC.

While the UNHRC case was still pending, the continuing detention of the Bakhtiyari children was heard by the Family Court of Australia. The Bakhtiyari family was reunited in immigration detention in January 2003. The Bakhtiyari children's psychological health deteriorated and they engaged in self-harm. On an application bought before the Family Court, the Family Court ordered the children to be released from detention to protect their mental health.

In the appeal case, the Bakhtiyaris claimed the detention of the family was damaging their mental health. The UNHRC held that the long term detention of children constituted a violation of Article 24 of the *ICCPR, in circumstances where such* detention was damaging the children's mental health. In this case, it was held that the detention was damaging the Bakhtiyari children's mental health, therefore Australia was in breach of the *ICCPR*.

The Australian government refused to accept the UNHRC's judgment. The Australian government continued to prosecute their appeal against the Family Court's decision to release the children from detention. In 2004 the High Court determined that the Bakhtiyari children should be held in detention with their parents.[59] On 30 December 2004 the entire Bakhtiyari family was deported to Pakistan.

In *Madafferi v Australia,* Mr. Madafferi entered Australia on a tourist visa, but remained in the country illegally for a time.[60] By 1996 he was married to an Australian citizen with four children. Mr Madafferi was living on a spouse Visa, but was removed into immigration detention when the Australian government became aware of outstanding warrants for his arrest in Italy. Mr Madafferi was able to finalise these warrants, nevertheless Australia insisted on holding Mr Madafferi in immigration detention with a view to deporting him.

Mr. Madafferi appealed to the UNHRC on various grounds, including his detention was injuring his mental health. In *Madafferi* the UNHRC held

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59 *Woolley, Re; Ex parte Applicants M276/2003 by their next friend GS* (2004) 210 ALR 369. See for a further discussion of this case: Tania Penovic 'Children's Rights Through the Lens' (2006) 20 *Australian Journal of Family Law* No, 2.

60 *Madafferi v Australia* (2004) UN Doc CCPR/C/81/D/1011/2001 ('*Madafferi*').

Australia had breached Article 10(1) of the *ICCPR* as Australia was failing to uphold Mr Madafferi's right to be treated with humanity while in detention because Australia had returned Mr Madafferi to detention when he was suffering mental health problems. Australia rejected the UNHRC's judgment and continued to detain Mr Madafferi.[61]

VIII THE RIGHT TO LIFE AND *JUS COGENS*

The wide acceptance of the fundamental nature of the right to life has resulted in claims that this right has developed into a law of the *jus cogens* or peremptory norm.[62] The *Vienna Convention on the Law of Treaties* does not provide a list of laws which constitute the *jus cogens*. Rather than defining this list, the *Vienna Convention on the Law of Treaties* provided the International Court of Justice with the jurisdiction to determine what laws constitute laws of the *jus cogens*.[63] The International Court of Justice has determined the right to life is a norm, of which derogation is not permitted. President Bedjaoui, Vice-President Schwebel and Judges Oda, Guillaume, Shahabuddeen, Weeramantry, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Ferrari Bravo and Higgins and Registrar Valencia-Ospina in an Advisory Opinion held:

> The Court observes that the protection of the *International Covenant of Civil and Political Rights* does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities.[64]

The argument that the right to life is a law of the *jus cogens* is provided additional weight through the approach of other judicial bodies. In *Al-Adsani v the United Kingdom* the European Court of Human Rights, sitting as a Grand Chamber, unanimously accepted the right to be free from torture was a law of the *jus cogens*.[65] The applicant in this case

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61 *Madafferi*, above n 50, at 7.

62 Sam Blay 'The Nature of International Law' in Sam Blay, Ryszard Piotrowicz, and Martin Tsamenyi (eds) *Public International Law: an Australian perspective*, (2nd Ed, Melbourne: Oxford University Press, 2005) 15-18.

63 Article 66 of the Vienna Convention on the Law of Treaties. See for discussion Paul Gormley 'The Right to Life and the Rule of Non-Derogability: Peremptory Norms of *jus cogens*' in B G Ramcharan (ed) *The Right to Life in International Law* (Dordrecht: Martinus Nighoff Publishers, 1985) 120 – 159, 135.

64 *Legality of the Threat or Use of Nuclear Weapons* (8 July 1996) 95 International Court of Justice, advisory opinion, Jurisdiction of the Court to give the advisory opinion requested under Article 65, requested by the General Assembly of the United Nations under article 65(1) of the Statute of the International Court of Justice, at 25.

65 *Al-Adsani v the United Kingdom* [GC], no 35763/97. ECHR 2001-XI ('*Al-Adsani*'), per the Majority at 59 and 60.

alleged he had been abducted by Kuwaiti government backed individuals and tortured.[66] He attempted to sue the perpetrators in Kuwait. When that failed the applicant commenced proceedings in the United Kingdom.[67] The matter was subsequently appealed to the Grand Chamber. While the majority refused to subrogate national sovereignty to laws of the *jus cogens*,[68] Judges Rozakis and Caflisch, joined by President Wildhaber and Judges Costa, Cabral Barreto and Vajic, held a law of the *jus cogens* triumphs all laws of lesser importance. As state immunity had been waived or contracted out of by states on numerous occasions, state sovereignty could not be a law of the *jus cogens*.[69] Applying these conclusions to the facts, the minority held:

> The acceptance therefore of the *jus cogens* nature of the prohibition of torture entails that a State allegedly violating it cannot invoke hierarchically lower rules (in this case, those on State immunity) to avoid the consequences of the illegality of its actions. In the circumstances of this case, Kuwait cannot validly hide behind the rules on State immunity to avoid proceedings for a serious claim of torture made before a foreign jurisdiction.[70]

It has been contended that the laws of the *jus cogens* have developed to include rules 'prohibiting torture,[71] and the rules safeguarding notions of the right to life and to family'.[72] Gormley has claimed the right to life has a sacrosanct position as one of the most important laws of the *jus cogens*.[73]

Hannikainen asserts there is sufficient evidence to classify five categories of norms as peremptory:

(1) the prohibition of aggressive use of armed force between states,
(2) respect for the self-determination of peoples,
(3) respect for basic human rights, including the right to life,
(4) respect for basic rules guaranteeing the international status, order and viability of sea, air and space outside national jurisdiction, and
(5) respect for the basic norms of the international law of armed conflict.[74]

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66 *Al-Adsani*, above n 65, the Majority at 13 and 14.
67 *Al-Adsani*, above n 65, the Majority at 14-20.
68 *Al-Adsani*, above n 65, the Majority at 61.
69 *Al-Adsani*, above n 65, the Minority at 2.
70 *Al-Adsani*, above n 65, the Minority at 3.
71 *Regina v Bow Street Metropolitan Stipendiary and Others; Ex Parte Pinochet Ugarte (No. 3)* [2000] 1 AC 147; [1999] 2 All ER 97; Joanne Kinslor 'Non-Refoulement and Torture: the Adequacy of Australia's Laws and Practices in Safeguarding Asylum-Seekers from Torture' [2000] 6 *Australian Journal of Human Rights* 2, 161.
72 Blay, above n 59, 17.
73 Gormley, above n 60, 154.
74 (1989) 109 S.Ct. 998 at 1003.

IX What Manifestations of the Right to Life is *Jus Cogens*?

The right to life has various manifestations. While some aspects of the right to life are regarded as having *jus cogens* status, other manifestations do not enjoy such status. The right to life is not a law of the *jus cogens* in every circumstance. The discussion regarding the death penalty and the right to health care demonstrate that in certain respects, the right to life is consistently violated by states, thus in these areas the right to life is unlikely to have *jus cogens* status. In respect of genocide however, the right to life certainly has *jus cogens* status.

An ever increasing number of nations have ratified the *Rome Statute of the International Criminal Court* ('*Rome Statute*').[75] Australia has acknowledged the importance of laws against genocide through ratifying the *Rome Statute* and through enacting the *International Criminal Court Act 2002* (Cth),[76] which facilitates Australia's compliance with the *Rome Statute*.[77] The *Rome Statute*[78] and the Commonwealth *Criminal Code 1995*,[79] introduce the following offences:

(a) The crime of genocide;
(b) Crimes against humanity;
(c) War crimes;
(d) The crime of aggression.[80]

Kim observes that the range of offences in the *Rome Statute* reflect the consensus of international law.[81] The adoption of these offences reflects and support the contention, that the right to life in the form of genocide is a pre-emptory law of the *jus cogens*.

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75 Rome *Statute Of The International Criminal Court*, open for signatures 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) (entered into force for Australia 1 September 2002); '*Rome Statute*'. For a current list of signatory nations see the International Criminal Court's website at <http://www.icc-cpi.int/asp/statesparties.html> at 28 March 2007.

76 The *ICC Act*.

77 Sub-section 3(1) of the *ICCC Act*; for a discussion of the implementation of the *Rome Statute* into Australian law see for example: Gillian Triggs 'Implementation of the Rome Statute for the International Criminal Court: A Quiet Revolution in Australian Law' (2003) 25 *The Sydney Law Review*, 507-535.

78 *Rome Statute*, art 5(1).

79 *Criminal Code 1995* (Cth), Division 268.

80 *Rome Statute*, article 5(1).

81 Young Sok Kim *The International Criminal Court: A Commentary of the Rome Statute* (2000) Doctorate of Juridical Science, University of Illinois at Urbana-Champaign.

Ohlin explores whether the death penalty is available to courts trialling war criminals for genocide, or whether the death penalty is unlawful as it is a law of the *jus cogens*.[82] In the setting up of the International Criminal Tribunal for Rwanda, all nations agreed genocide was clearly a law of the *jus cogens*. Rwanda however disagreed with the European powers' opinion on the death penalty, and argued the death penalty was too widely practiced by nations to be elevated to a pre-emptory norm. Rwanda unsuccessfully contended that all people responsible for the Rwandan Genocide should be subject to the death penalty.[83] This demonstrates the conflict in identifying precisely what manifestations of the right to life can be elevated as laws of the *jus cogens*.

For the purposes of this article, there is no dispute that in form of genocide, the right to life has *jus cogens* status.[84] As explored below, the right to be free from the death penalty and the right to health care has variable acceptance across the committee of nations. As a consequence these manifestations of the right to life clearly do not have *jus cogens* status. Nevertheless, in some circumstances government sponsored killings can constitute a breach of the law of the *jus cogens*.

In the *Street Children* case the right to life was accepted to be a law of the *jus cogens*.[85] In this case the *jus cogens* status was held to extend to protect children from governmental sponsored murder. The government of Guatemala had authorised the murder of street children. The Inter-American Court of Human Rights found the Guatemala government guilty of violating the children's right to life and awarded damages against the country of Guatemala.

X ENFORCEABILITY OF THE RIGHT TO LIFE AS A *JUS COGENS*

Despite the fact the right to life is widely recognised as a law of the *jus cogens*, the right to life is often unenforceable. For example, in *Democratic Republic of the Congo v Rwanda* the state parties accepted that genocide constituted a law of *jus cogens*.[86] In this case Congo alleged

82 Jens David Ohlin 'Applying the Death Penalty to Crimes of Genocide' (2005) 99 *American Journal of International Law* 747-794.

83 Ohlin, above n 83, 748-749.

84 Marko Milanovic 'State Responsibility for Genocide' (2006) 17 *European Journal of International Law,* 553-611.

85 *Villagran Morales v Guatemala (The 'Street Children' Case)* (2001) Inter-American Court of Human Rights (ser. C) No. 77, P 21 (May 26, 2001), 309.

86 *Democratic Republic of the Congo v Rwanda* (2002) request for the indication of provisional measures order, ICJ 12610, at 40; See also Ryszard Piotrowicz 'Reservations about Jurisdiction at the International Court of Justice (2006) 80(6) *Australian Law Journal*, 351.

Rawanda had committed genocide. However Rwanda argued that, since they had not ratified those parts of the *Genocide Convention* which gave the International Court of Justice jurisdiction to hear a complaint of genocide, even though genocide was a law of the *jus cogens*, the International Court of Justice had no jurisdiction to hear a complaint of genocide against Rwanda. President Guillaume, Vice-President Shi, Judges Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Hoc Dugard and Mavungu and Registrar Couvreur of the International Court of Justice, agreed genocide enjoyed peremptory status, nevertheless they held the International Court of Justice had no jurisdiction to hear a complaint of genocide against Rwanda.[87]

The right to life, in virtue of the right to be free from the death penalty, has been held to be subject to derogation by the International Court of Justice. For example, in *Mexico v the United States of America*, the International Court of Justice continued its approach of granting a provisional order preventing the USA from executing a foreign national.[88] In this case the court expressly acknowledged the USA had the right to execute prisoners.[89] Despite the right to life being recognised as *jus cogens* in many respects, this does not mean the right to life is always enforceable.

XI Human Rights as a Standard to Judge Conduct Against – Judicial Acceptance

Without doubt legally enforceable human rights would afford the strongest avenue to enforce human rights. This approach has been adopted in all western liberal democracies, except Australia. For example, bills of rights exist in Canada,[90] the European Union,[91] New Zealand,[92] United Kingdom[93] and the United States of America.[94] Donnelly explains how human rights can be used as a standard: 'charges of human rights

87 (2002) ICJ 12610, at 71 and 72.

88 *Mexico v United States Of America,* request for the indication of provisional measures order (2003) ICJ Reports 91, present, at 59, per President Guillaume, Vice-President Shi, Judges Oda, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Ooijmans, Rezek, Al-Khasawneh, Buergenthal and Elaraby and registrar Couvreur.

89 (2003) ICJ Reports 91, at 48.

90 *Canadian Charter of Rights and Freedoms 1982*.

91 *Charter of Fundamental Rights of the European Union*, 2000 OJ (C 364) 2000 (Proclaimed by the European Parliament, the Council and the Commission on 7 December 2000).

92 *Bill of Rights Act 1990* (NZ).

93 *Human Rights Act 1998* (UK).

94 *Bill of Rights USA*.

violations are among the strongest complaints that can be made in international relations.'[95]

The concept of human rights being a guide to community values, and thus a standard against which to judge laws and conduct is provided creditability by the approach of Australian courts. For example, while Australian courts do not directly enforce human rights, Australian courts have accepted that human rights can constitute a guide as to contemporary community values.

International treaties and universal rights can be used by courts to develop the common law and used to indicate contemporary values.[96] The notion that human rights law has an impact on domestic law is well settled. Dixon J held in Chow Hung Ching v The King 'international law is not a part, but is one of the sources of English law.'[97]

Brennan J expressed similar sentiments in *Mabo v Queensland (No 2)*:

> the common law does not necessarily conform with international law, [nevertheless] international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human right ...[98]

In *Minister for Immigration and Ethnic Affairs v Teoh* Mason CJ and Dean J held:

> It is accepted that a statute is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law.[99]

In *U v U,* Gummow and Callinan JJ, with Gleeson CJ, McHugh and Hayne JJ concurring, explained human rights do have an impact on Australian law.[100] Their Honours considered both Australian and human rights law when determining the balancing of parents' and children's rights. Their honours felt their conclusions were 'reinforced by a proper analysis of this case in terms of the principles of international human rights law … [as] [s]uch principles may influence local law on such questions.[101]

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95 Jack Donnelly *Universal Human Rights in Theory and Practice* (2 Ed, USA; Cornell University Press, 2003), at 1.

96 *Royal Women's Hospital v Medical Practitioners Board of Victoria* [2006] VSCA 85.

97 (1948) 77 CLR 449, 477.

98 (1992) 175 CLR 1 42, per Brennan J, with Mason CJ and McHugh J agreeing.

99 (1995) 183 CLR 273, 287.

100 *U v U* [2002] HCA 36, 161.

101 (1995) 183 CLR 273, 161.

The impact human rights have upon Australian law was succinctly summarized by Maxwell P in *Royal Women's Hospital v Medical Practitioners Board of Victoria*.[102] His Honour explained:

> the provisions of an international convention to which Australia is a party — especially one which declares universal fundamental rights — may be used by the courts as a legitimate guide in developing the common law. The High Court has cautioned that the courts should act with due circumspection in this area, given that … the Commonwealth Parliament itself has not seen fit to incorporate the provisions of the relevant convention into domestic law. … the provisions of an international human rights convention to which Australia is a party can also serve as an indication of the value placed by Australia on the rights provided for in the convention and, therefore, as indicative of contemporary values.

Treaties declaring fundamental human rights have been used to guide the common law manner for a considerable time in Australia, for example:

- By Grove J and Einfield J in *R v Togias*,[103] Miles CJ in *R v Hollingshed,*[104] Perry J in *Walsh v Department of Social Security*[105] and Bleby J in *Smith v R*[106] when exercising a sentencing discretion.
- By French J in *Schoenmakers v Director of Public Prosecutions*[107] and by Maxwell P and Charles JA in *Re Rigoli*,[108] when determining whether special circumstances existed to grant bail.
- By Miles CJ *Wickham v Canberra District Rugby League Football Club Ltd*[109] *and Miles J in McKellar v Smith*, when determining if a restrain to trade was reasonable.[110]
- By Miles J in *McKellar v Smith* when exercising his discretion whether or not to exclude confessional evidence.[111]

Significantly for this article, Australian courts have utilized positive rights to influence the common law. For example:

102` *Royal Women's Hospital v Medical Practitioners Board of Victoria* [2006] VSCA 85.
103 *R v Togia* (2001) 127 A Crim R 23 at 37 [85] per Grove J; at 43[123] per Einfield AJ.
104 *R v Hollingshed and Rodgers* (1993) 112 FLR 109 at 115, per Miles CJ. See also Matthew Groves 'International Law and Australian Prisoners' (2001) 24(1) *University of New South Wales Law Journal* 17.
105 (1996) 67 SASR 143.
106 *Smith v R* (1998) 98 A Crim R 442 at 448.
107 *Schoenmakers v Director of Public Prosecutions* (1991) 30 FCR 70, 75.
108 *Re Rigoli* [2005] VSCA 325, per Maxwell P at 5 and Charles JA, 10.
109 *Wickham v Canberra District Rugby League Football Club Ltd* (1998) ATPR 41-664 [64]-[70].
110 *McKellar v Smith* [1982] 2 NSWLR 950, 962.
111 *McKellar v Smith*, above n 109, 962.

- Kirby J in *Jago v District Court (NSW)* held there was a right to a fair trial in Australia which required positive conduct upon the Australian government.[112]

- Brennan J and Toohey J in *Dietrich v The Queen* held the right to a fair trial required the state to provide legal aid in certain cases.[113]

- Mason CJ and Dean J in *Minister Of State For Immigration And Ethnic Affairs v Teoh* held people have a legitimate expectation that the state would act in the best interests of the child, in all administrative decision making, in accordance with Australia's international human rights obligations.[114] To fulfil this obligation, Australia was required to take positive action to determine what the best interests of the child were.

- Tamberlin J in *Ji Kil Soon v Minister for Immigration & Ethnic Affairs* found there was a positive obligations upon states to ensure people enjoyed an adequate standard of living.[115]

- Preston CJ in *Telstra Corporation Limited v Hornsby Shire Council*, considered human rights factors when applying the precautionary principle, in determining the ecological sustainability of the health risks associated with future electromagnetic outputs from a Telstra development.[116] When granting such a permit, Preston CJ considered there was an obligation on government to ensure ecological sustainable development, as well as the human rights of food, water, health and shelter.

XII CONCLUSION

The negative conceptualization of human rights is being replaced by a human rights matrix which incorporates both positive and negative obligations. This article has examined how positive rights have developed in respect of the right to life. Internationally the right to be free from the death penalty requires nations to ensure judicial processes are followed when a person is executed, and in some jurisdictions, this obligation appears to go as far as enabling the government to actively agitate for the total abolition of capital punishment. In Australia however, based upon

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112 (1988) 12 NSWLR 558, 569.

113 (1992) 177 CLR 292, per Brennan J at 321; per Toohey J, 360.

114 (1994) 183 CLR 273, per Mason CJ and Dean J at 289 and 304; Toohey and Gaudron JJ concurring with McHugh J dissenting.

115 *Ji Kil Soon v Minister for Immigration & Ethnic Affairs* (1994) 37 ALD 609.

116 *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133, 113, 114 and 182.

the *Rush* decision, the right to be free from the death penalty attracts no positive obligations.

Similar to the right to be free from the death penalty, the right to health care has broad international support. Support for the right to health care can be sourced from international public organizations and from the conduct of states, such as Australia. Australia has ratified relevant conventions and acted to realise this right. As a positive human right, the right to health care obliges Australia to devote resources to ensure citizens can realise the benefits of this right.

While the right to health care is a substantive human right in some foreign jurisdictions, in Australia this right is unenforceable. Pursuant to current international laws, it is unlikely the right to health care would be enforceable. The right to health care derives from the right to life. International courts have failed to enforce even the most egregious breaches of the right to life. For example, the International Court of Justice held it had no jurisdiction to judge if Rwanda had committed genocide, as Rwanda had not ratified the *Genocide Convention*. The fact the law against genocide was a law of *jus cogens* was immaterial. In some jurisdictions the right to health care may be enforceable, but in Australian courts this right is not enforceable.

The lack of enforceability of positive human rights does not mean these rights do not have an impact upon Australian laws. Australian courts have consistently adopted human rights as a guide to direct the development of the common law. When governments accept the legitimacy of human rights, courts have held governments are indicating those human rights reflect community values within Australia. Therefore, even though a positive human right, such as the right to health care, has limited enforceability in Australia, the fact Australian governments have accepted this right will result in Australian judges utilising this positive obligation to guide their discretion in interpreting the common law.