

PART I

Introduction

1

Historical and Juridical Background

Religious and Cultural Tradition

Respect for human dignity and personality and a belief in justice are rooted deep in the religious and cultural traditions of the world. Hinduism, Buddhism, Judaism, Christianity and Islam all stress the inviolability of the essential attributes of humanity. Many of the moral values that underpin the contemporary international law of human rights are an integral part of these religious and philosophical orders.¹ Witness the following conversation between the Buddha and his disciple, the Venerable Upali (circa 500 BC), in which was enunciated the rule of natural justice:

- Q: Does an Order, Lord, that is complete carry out an act that should be carried out in the presence of an accused monk if he is absent? Lord, is that a legally valid act?
- A: Whatever Order, Upali, that is complete carries out an act that should be carried out in the presence of an accused monk. If he is absent, it thus comes to be not a legally valid act, not a disciplinarily valid act, and thus the Order comes to be one that goes too far.
- Q: Does an Order, Lord, that is complete carry out an act that should be carried out by the interrogation of an accused monk if there is no interrogation?
- A: Whatever Order, Upali, that is complete carries out an act which should be carried out on the interrogation of an accused monk. If there is no interrogation, it thus comes to be not a legally valid act, not

¹ See John M. Peek, 'Buddhism, Human Rights and the Japanese State' (1995) 17 *Human Rights Quarterly* 527; L. C. Green, 'The Judaic Contribution to Human Rights' (1990) *Canadian Year Book of International Law* 3; Bassam Tibi, 'Islamic Law/Shari'a, Human Rights, Universal Morality and International Relations', (1994) 16 *Human Rights Quarterly* 277; Abdullahi Ahmed An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law* (New York: Syracuse University Press, 1990).

a disciplinarily valid act, and thus the Order comes to be one that goes too far.²

Contrary to assertions made by some political leaders in Asia that contemporary human rights concepts are Eurocentric in origin and conception, and therefore inconsistent with 'Asian values', Asia's spiritual heritage demonstrates that respect for human rights is an integral part of the traditions of the East. For example, in the course of a ministry of forty-five years, the Buddha expounded a philosophy of life based upon tolerance and compassion in which the human mind was the principal element:

Mind is the forerunner of all evil states. Mind is chief; mind-made are they. If one speaks or acts with wicked mind, because of that, suffering follows one, even as the wheel follows the hoof of the draught-ox.³ Mind is the forerunner of all good states. Mind is chief; mind-made are they. If one speaks or acts with pure mind, because of that, happiness follows one, even as one's shadow that never leaves.⁴

These poetic utterances of the Buddha, recorded in the first century AD from oral tradition, encompassed a wide variety of subjects. The need for an impartial tribunal:

He is not thereby just because he hastily arbitrates cases. The wise man should investigate both right and wrong.⁵

The rejection of penalties that cause unnecessary suffering:

All tremble at the rod. Life is dear to all. Comparing others to oneself, one should neither strike nor cause to strike.⁶

The sanctity of life:

If a person destroys life, is a hunter, besmears his hand with blood, is engaged in killing and wounding, and is not merciful towards living beings, he, as a result of his killing, when born amongst mankind, will be short-lived.⁷

² I. B. Horner, trans. *The Book of the Discipline (Vinaya-Pitaka), Volume IV: Mahavagga or the Great Division IX* (London: Luzac & Co Ltd, 1962), 466–8.

³ Narada Thera, trans. *The Dhammapada* (Colombo Apothecaries' Co Ltd, 1972), verse 1.

⁴ Narada Thera, trans. *The Dhammapada*, verse 2.

⁵ Narada Thera, trans. *The Dhammapada*, verse 256.

⁶ Narada Thera, trans. *The Dhammapada*, verse 130.

⁷ Narada Maha Thera, *The Buddha and His Teachings* (Colombo: Associated Newspapers of Ceylon Ltd, 1972), 309.

The futility of victory at war:

A man may spoil another, just so far
 As it may serve his ends, but when he's spoiled
 By others he, despoiled, spoils yet again.
 So long as evil's fruits is not matured,
 The fool doth fancy 'now's the hour, the chance!'
 But when the deed bears fruit, he fareth ill.
 The slayer gets a slayer in his turn;
 The conqueror gets one who conquers him;
 The abuser wins abuse, the annoyer, fret.
 Thus by the evolution of the deed,
 A man who spoils is spoiled in his turn.⁸

The importance of ahimsa, or non-violence:

Hatreds do not cease through hatred:
 through love alone they cease.⁹

The recognition of the supremacy of the human person:

By oneself, indeed, is evil done;
 by oneself is one defiled.
 By oneself is evil left undone;
 by oneself, indeed, is one purified.
 Purity and impurity depend on oneself.
 No one purifies another.¹⁰

The equality of the sexes:

A woman child, O Lord of men, may prove
 Even better offspring than a male.¹¹

The repudiation of slavery and the caste system:

Birth makes no brahmin, nor non-brahmin makes,
 'Tis life and doing that mould the brahmin true.
 Their lives mould farmers, tradesmen, merchants, serfs.
 Their lives mould robbers, soldiers, chaplains, kings.¹²

⁸ Narada Maha Thera, *The Buddha and His Teachings*, 201.

⁹ Narada Thera, trans. *The Dhammapada*, verse 5.

¹⁰ Narada Thera, trans. *The Dhammapada*, verse 165.

¹¹ Narada Maha Thera, *The Buddha and His Teachings*, 313.

¹² Narada Maha Thera, *The Buddha and His Teachings*, 309.

The reciprocal duties of employers and employees:

A master should minister to servants and employees by

- i. assigning them work according to their strength,
- ii. supplying them with food and wages,
- iii. tending them in sickness,
- iv. sharing with them extraordinary delicacies, and
- v. relieving them at times.

The servants and employees, who are thus ministered to by their master, should:

- i. rise before him,
- ii. go to sleep after him,
- iii. take only what is given,
- iv. perform their duties satisfactorily, and
- v. spread his good name and fame.¹³

And of parents and children:

In five ways a child should minister to his parents . . .

Once supported by them I will now be their support; I will perform duties incumbent on them; I will keep up the lineage and tradition of my family; I will make myself worthy of my heritage.

In five ways parents thus ministered to . . . by their child, show their love for him – they restrain him from vice, they exhort him to virtue, they train him to a profession, they contract a suitable marriage for him, and in due time they hand over his inheritance.¹⁴

The duties of kingship:

The first of the ‘Ten duties of the King’ is liberality, generosity, charity (*dana*). The ruler should not have craving and attachment to wealth and property, but should give it away for the welfare of the people.

Second: A high moral character (*sila*). He should never destroy life, cheat, steal and exploit others, commit adultery, utter falsehood, and take intoxicating drinks. That is, he must at least observe the Five Precepts of the layman.

¹³ Narada Maha Thera, *The Buddha and His Teachings*, 588.

¹⁴ T. W and C. A. F. Rhys Davids (eds.), *The Dialogues of the Buddha* (Pali Text Society, 1977), 180–3; *Sigalovada Suttanta* (The Sigala Homily), cited in C. G. Weeramantry, *An Invitation to the Law* (Sydney: Butterworths, 1982), 248.

Third: Sacrificing everything for the good of the people (*pariccaga*), he must be prepared to give up all personal comfort, name and fame, and even his life, in the interest of the people.

Fourth: Honesty and integrity (*ajjava*). He must be free from fear or favour in the discharge of his duties, he must be sincere in his intentions, and must not deceive the public.

Fifth: Kindness and gentleness (*maddava*). He must possess a genial temperament.

Sixth: Austerity in habits (*tapa*). He must lead a simple life, and should not indulge in a life of luxury. He must have self-control.

Seventh: Freedom from hatred, ill-will, enmity (*akkodha*). He should bear no grudge against anybody.

Eighth: Non-violence (*avihimsa*), which means not only that he should harm nobody, but also that he should try to promote peace by avoiding and preventing war, and everything which involves violence and destruction of life.

Ninth: Patience, forbearance, tolerance, understanding (*khanti*). He must be able to bear hardships, difficulties and insults without losing his temper.

Tenth: Non-opposition, non-obstruction (*avirodha*), that is to say that he should not oppose the will of the people, should not obstruct any measures that are conducive to the welfare of the people. In other words, he should rule in harmony with his people.¹⁵

The relevance of the welfare state:

Planters of groves and fruitful trees
 And they who build causeways and dams
 And wells construct, and watering sheds
 And (to the homeless) shelter give –
 Of such as these by day and night
 For ever doth the merit grow
 In righteousness and virtue might
 Such folk from earth to Nirvana go.¹⁶

And the freedom of thought, belief and expression:

Do not accept anything on mere hearsay (i.e. thinking that thus have we heard it from a long time). Do not accept anything by mere tradition

¹⁵ Walpola Rahula, *What the Buddha Taught* (Bedford: The Gordon Fraser Gallery Ltd, 1959), 1967 edn, 85.

¹⁶ Mrs Rhys Davids, trans. *The Book of Kindred Sayings (Sanyutta Nikaya)*, (London: OUP, 1917).

(i.e. thinking that it has thus been handed down through many generations). Do not accept anything on account of rumours (i.e. by believing what others say without any investigation). Do not accept anything just because it accords with your scriptures. Do not accept anything by mere supposition. Do not accept anything by mere inference. Do not accept anything by merely considering appearances. Do not accept anything merely because it agrees with your pre-conceived notions. Do not accept anything merely because it seems acceptable (i.e. should be accepted). Do not accept anything thinking that the ascetic is respected by us (and therefore it is right to accept his word).

But when you know for yourselves – these things are immoral, these things are blameworthy, these things are censured by the wise, these things when performed and undertaken conduce to ruin and sorrow – then indeed do you reject them.

When you know for yourselves – these things are moral, these things are blameless, these things are praised by the wise, these things when performed and undertaken conduce to well-being and happiness – then do you live and act accordingly.¹⁷

Quite early in his ministry, the Buddha urged his *bhikkus* to travel ‘for the welfare of the many, for the happiness of the many, through compassion for the world, for the welfare, benefit and happiness of gods and man’.¹⁸ This obligation, imposed on his disciples for the purpose of spreading his teachings, carries with it, by implication, the freedom of movement. The *Mahaparinibbanasutta* of the *Dighanikaya* states that, firstly, people must ‘assemble frequently’; secondly, they should ‘assemble peacefully or in unison’ (*samagga samipatanti*), ‘arise peacefully’ (*samagga vutthahanti*) and ‘transact business peacefully’ (*samagga vajjikaraniyani karonti*).¹⁹

Philosophical Thought

This religious and cultural tradition that emphasized the inviolability of the human person was complemented by many strands of philosophical thought that unfolded the concept of a natural law that was equally

¹⁷ Narada Maha Thera, *The Buddha and His Teachings*, 284.

¹⁸ 1 Vinayapitaka 21 (London, Pali Text Society), cited in Horace Perera (ed.), *Human Rights and Religions in Sri Lanka* (Colombo: Sri Lanka Foundation, 1988), 107.

¹⁹ 2 *Dighanikaya* 73, cited in Horace Perera (ed.), *Human Rights and Religions in Sri Lanka* (Colombo: Sri Lanka Foundation, 1988), 175.

inviolable and to which all man-made law must conform.²⁰ Aristotle (384–322 BC) explained that a rule of justice is natural that has the same validity everywhere and does not depend on its acceptance. He distinguished natural law from rules of justice based on convention and expediency, which he compared to standard measures: ‘Corn and wine measures are not equal in all places, but are larger in wholesale and smaller in retail markets. Similarly the rules of justice ordained not by nature but by man are not the same in all places, since forms of government are not the same, though in all places there is only one form of government that is natural, namely, the best form.’²¹

Cicero (106–143 BC) also conceived of a higher law which ‘is of universal application, unchanging and everlasting’. He described it as a law not taught or learnt from books but ‘drawn from Nature herself, in which we have never been instructed . . . but which is inborn in us’.²² ‘For reason did exist, derived from the Nature of the universe, urging men to right conduct and diverting them from wrong-doing, and this reason did not first become Law when it was written down, but when it first came into existence; and it came into existence simultaneously with the divine mind.’ He compared that law ‘made in agreement with that primal and most ancient of all things, Nature’, to ‘the many deadly, the many pestilential statutes which nations put in force. These no more deserve to be called laws than the rules a band of robbers might pass in their assembly.’²³

Over 1,600 years later, Hugo Grotius, in his treatise *De Jure Belli Ac Pacis* (1625), drew upon human reason as the basis of natural law. ‘The law of nature is a dictate of right reason, which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity; and that, in consequence, such an act is either forbidden or enjoined by the author of nature, God.’²⁴ John Locke, in

²⁰ For a discussion of the law of nature, see H. Lauterpacht, *International Law and Human Rights* (Archon Books, 1968 reprint), 73–140.

²¹ Aristotle, *The Nicomachean Ethics*, Books I–X, trans. H. Rackham (London: Heinemann, 1975).

²² C. G. Weeramantry, *An Invitation to the Law* (Sydney: Butterworths, 1982), 197.

²³ Marcus Tullius Cicero, *De Republica*, trans. G. H. Sabine and S. B. Smith (Indianapolis: Bobbs-Merrill, 1976).

²⁴ Hugo Grotius, *Of the Law of War and Peace*, trans. F. W. Kelsey (Indianapolis: Bobbs Merrill, 1957).

his *Second Treatise on Government* (1689), asserted the superiority of natural law over positive law:²⁵

222. . . . Whensoever, therefore, the legislative shall transgress this fundamental rule of society, and, either by ambition, fear, folly, or corruption, endeavour to grasp themselves, or put into the hands of any other, an absolute power over the lives, liberties and estates of the people, by this breach of trust they forfeit the power the people had put into their hands for quite contrary ends, and it devolves to the people, who have a right to resume their original liberty, and, by the establishment of a new legislative (such as they shall think fit), provide for their own safety and security, which is the end for which they are in society.²⁶

In the eighteenth century, the ‘Age of Enlightenment’, a galaxy of European political thinkers – including Montesquieu, Voltaire, Beccaria and Paine – consolidated a doctrine of liberty and equality that had a profound influence on political developments on their continent and beyond. Among them, Jean-Jacques Rousseau, in *The Social Contract* (1762), affirmed that sovereignty remained throughout with the people. ‘So long as a people is constrained to obey, and obeys, it does well; but as soon as it can shake off the yoke, and shakes it off, it does better; for since it regains its freedom by the same right as that which removed it, a people is either justified in taking back its freedom, or there is no justifying those who took it away.’²⁷

Transforming Philosophy into Law

The early municipal codifications of individual rights were compacts between the rulers and privileged sections of the community. For example, the Magna Carta of 1215, signed by King John of England at Runnymede, was exacted by the feudal barons and was intended to protect their interests. It did, however, contain certain provisions which have since been construed to be of general application. For example,

39. No freeman shall be taken or imprisoned, or disseized, or outlawed, or exiled or in any way harmed – nor will we go upon him or send upon him – save by the lawful judgment of his peers or by the law of the land.

²⁵ Positivists argued the supremacy of the law of a sovereign state.

²⁶ John Locke, *Political Writings*, David Wootton (ed.) (London: Penguin Books, 1993).

²⁷ Jean-Jacques Rousseau, *The Social Contract and Discourses*, J. H. Brummfitt and J. C. Hall (eds.) (London: Dent, 1973).

40. To none will we sell, to none deny or delay, right or justice . . .

42. Henceforth any person, saving fealty to us, may go out of our realm and return to it, safely and securely, by land and by water, except perhaps for a brief period in time of war, for the common good of the realm.

Similarly, the English Bill of Rights of 1689 was the basis upon which Parliament negotiated the accession to the throne of William and Mary, Prince and Princess of Orange. Many of its provisions were intended to protect the rights of Parliament, although at least one was more general in nature: '(10) That excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel and unusual Punishments inflicted.'²⁸

While these concessions were obtained by feudal barons and the affluent gentry for themselves alone, the real significance of these charters lies in the fact that each constituted a limitation of the power of the then-absolute monarch. As Lauterpacht has observed, 'the vindication of human liberties does not begin with their complete and triumphant assertion at the very outset; it commences with their recognition in *some* matters, to *some* extent, for *some* people, against *some* organ of the state'.²⁹

Standards founded upon the doctrines of 'social contract' and 'natural law' were embodied in the first domestic Bill of Rights – the Virginia Declaration of Rights 1776. In it, the people of Virginia, through their representatives assembled at a convention, proclaimed that 'all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot by any compact deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety'. The declaration proclaimed a compendium of impressive principles, including: (1) that all power is vested in, and consequently derived from, the people; (2) that when

²⁸ *The Encyclopaedia Britannica* (Macropaedia), vol. VIII, 15th edn, 1977, refers to two earlier codifications: In 1188, the Cortes, the feudal assembly of the Kingdom of Leon (on the Iberian Peninsula) received from King Alfonso IX his confirmation of a series of rights, including the right of an accused to a regular trial and the right to the inviolability of life, honour, home and property; in 1222, the Golden Bull of King Andrew II of Hungary guaranteed, *inter alia*, that no noble would be arrested or ruined without first being convicted in conformity with judicial procedure. C. G. Weeramantry, in his *Invitation to the Law* (Sydney: Butterworths, 1982), cites several edicts of Asoka, the Buddhist emperor of India (269–232 BC), one of which was the Edict of Toleration: 'A man must not do reverence to his own sect or disparage that of another man without reason. Deprecation should be for specific reasons only, because the sects of other people all deserve reverence for one reason or another.'

²⁹ H. Lauterpacht, *International Law and Human Rights* (Archon Books, 1968 reprint), 131.