

Chapter 33

The Common Law of Evidence and Human Rights*

Introduction

In some constitutions there is protection for “freedom to engage in trade and the professions”. In our law, there is a detailed and rich section of the common law devoted to that subject—the restraint of trade doctrine—and one could compare that body of law with the constitutional protection.

I want in this paper to undertake an equivalent enterprise—to sketch how one can find human rights goals being advanced through the rules of evidence quite independently of whether there are in place any human rights provisions.

There are three connections between the law of evidence and the law of human rights.

First, the rules of evidence in criminal cases reflect various human rights principles.

Secondly, the rules of evidence in civil cases and, to some extent, criminal cases as well, as part of the adjectival law, assist in the enforcement of rules of substantive law which may vindicate human rights.

Thirdly, the rules of evidence, in determining the structure of the trial, set the tone for the entire legal system and, so far as they advance human rights, ensure that the system as a whole is compatible with human rights.

Obviously there are candidates for human rights protection which have nothing directly to do with evidence, for example the right to education, the right to work and freedom of religion. The human rights which the law of evidence protects are relatively narrow, but central.

It is convenient to consider first the forms which explicit legislative human rights protection can take.¹

One form is a bill of rights in the sense of a set of provisions in a domestic constitution protecting individual rights that can be enforced by a court and can restrict the actions of the legislature and executive. One example is the first 14 amendments to the United States Constitution.

Another form is a declaration of rights: a set of provisions in domestic legislation protecting individual rights that can be enforced by a court and can restrict the actions of the legislature and the executive. An example is the *Human Rights Act 1998* (UK), at least in some respects.

A third form is a statement of rights in either a constitutional or a legislative instrument that affirms rights but is not justiciable.

* This is a revised version of a paper delivered at the University of Nottingham on 21 February 2008.

1 COH Parkinson, *Bills of Rights and Decolonisation* (Oxford University Press, 2007) p 8.

This is a preview. Not all pages are shown.