

HUMAN RIGHTS SYMPOSIUM

PRESENTED BY JUSTICE KOURAKIS
SUPREME COURT OF SOUTH AUSTRALIA

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Most people here, and indeed in the community generally, are likely to answer the question are you in favour of a “Charter of Human Rights” with a resounding yes. I suspect however that is because, at least amongst people who are not lawyers or human rights activists, the question is understood to mean are you in favour of respecting fundamental human rights. However, if people were asked, would you prefer that judges or parliamentarians who are answerable to you made the laws and decided the administrative issues where the balance between public security and human rights is in dispute, I suspect that, lawyers and human rights activists apart, the answer of many people is likely to be very different.

I have been asked to address you on institutional and remedial issues raised by a charter, particularly as they impact on the executive arm of government. The hypothetical opinion poll questions I have formulated raise the most fundamental of those institutional issues. It is the affect that a charter would have on the existing balance of power between the arms of government. I have largely ignored the remedial issues. You will all have, in any event, the benefit of Professor Lindell’s more detailed and analytical survey of the range of alternative constitutional models for the adoption of a charter and the particular remedial implications of the choices that might be made.

I would like to make some preliminary remarks about the Australian system of government. First the essential nature is not a constitutional monarch but parliamentary democracy with monarchical symbols. The Australian system of responsible and representative government comprises a democratically elected Parliament from which is selected an administration, which remains responsible to it for the way in which it exercises executive power. I will refer to the accountability of Parliament and the executive to the people as the democratic principle accepting, as I do, that the principle incorporates some notion of restraint by the majority in the way in which it exercises its will against minority groups.

The first thing I wish to observe is that lawyers are naturally attracted to human rights advocacy. The attraction has deep historical roots. The common law judges played an important part in the struggle of parliament to wrest sovereign power from the monarch in the 17th century. However, it must be remembered that Lord Coke's ambition to win supremacy for the common law was never fulfilled. The revolution in 17th century England replaced judicial subservience to the Crown with judicial subservience to Parliament, and the century or so of constitutional monarchy that followed eventually gave way to the parliamentary supremacy we now know.

It is understandable then that the first reaction of lawyers who despair at the erosion of human liberties and the almost daily trespasses committed against human rights is to call for the courts to be given an ever-increasing role as the protector of the people. However before that course is adopted, careful consideration must be given to the way in which it will shift the balance of power to which I have referred.

For my last historical note I will cross the Atlantic because the ideas with which we are now grappling are not new. They were debated in the cauldron of political and constitutional ferment that saw the birth of the American Constitution. Writing in Federalist paper No. 78 Alexander Hamilton said:

Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honours, but holds the swords of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgement; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgement.

This simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the Executive. For I agree that "there is no liberty, if the power of judging be not separated from the legislative and executive powers". And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments; that as all the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as, from the natural feebleness of the judiciary, it is in continual jeopardy of

being overpowered or, influenced by its coordinate branches; and that as nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security.

I wish to emphasise the important truth stated in that passage that there is no liberty if the power of judging be not separated from the legislative and executive powers. As universally accepted as that truth is, it is often only understood as a precept against the standing or political executive arrogating to itself the power of judging. To my mind however there is a converse problem that arises if the judiciary are to be given some measure of executive power.

Just as tenure or “permanency in office” to use Hamilton’s expression is an indispensable protection when the judiciary is confined to judging, it compromises the democratic principle if the judiciary is also to exercise executive functions purportedly on behalf of the people to whom it is not responsible.

So, how precisely is it that a Charter of Human Rights breaches the separation of powers described by Hamilton and what are the consequences of that on the three arms of government and the democratic principle. Let me use the Victorian Act as a model.

Charters of human rights generally have a clause such as that which appears in s 7(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). It provides:

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including-

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

Section 38 of the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic) provides that:

... it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.

The section operates as a limit on the power and jurisdiction of administrative decision makers. It is a restriction that is justiciable. It will fall for the courts to determine it. Unlike the jurisdictional limits ordinarily policed by judicial review the boundary drawn by s 38(1) necessarily requires a consideration of the substance and merit of the decision. Whether or not a legislative restriction on the freedom of speech, movement, assembly or cultural practice is demonstrably justified in a free and democratic society requires a value judgement. It is a value judgement that requires an assessment to be made of the social utility of both the activity restricted and the public purpose that the limit is calculated to achieve. The conferral of a power and function of this nature on Australian courts is a radical shift from the balance that our Constitution has been thought to require. In his article, *The principle behind common law judicial review of administrative action – the search continues*, the late Justice Selway wrote:

... the Commonwealth Constitution, and in particular the separation of judicial power within it, necessarily limits the extent of permissible judicial review. In particular the separation of judicial power justifies and requires the distinction between jurisdictional and non-jurisdictional errors and the distinction between invalidity and merit review in Australian administrative law. This constitutional basis for judicial review, combined with the discipline of a written Constitution, also explains why recent developments in English and New Zealand common law in relation to judicial review are not appropriate or applicable to Australia.

Charters of human rights would introduce legislatively the common law developments in England and New Zealand that Justice Selway thought to be inappropriate. Australia does not have a happy experience with the introduction of foreign beasts.

In *Attorney-General v Quinn*,¹ Brennan J said:

The duty and jurisdiction of the Court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the Court avoids administrative injustice or error, so be it; but the Court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.

¹ (1991) 70 CLR 1 at 35-6.

That passage echoes the remarks of Marshall CJ in *Marbury v Madison*² where he famously declared that:

It is emphatically the province and duty of the judicial department to say what the law is.

But

The province of the Court is ... not to inquire how the executive perform duties in which they have a discretion.

There are several important consequences that flow from the change that a charter would bring to this accepted orthodoxy. The first two observations are negative and the third and fourth positive.

Firstly, if judges exercise administrative power in those very controversial cases which test their reasonable limits that are demonstrably justified in a free and democratic society the judges and the courts in which they sit will necessarily become embroiled in public and political controversy. Their judgements will be made on politically disputed ground. All citizens can claim an equal right to speak and be heard on the fundamentally political question of where those limits should be drawn. A judge's view is not entitled to any more respect, in the political sense, on that question than any other citizen. The rights of all persons to call into question judicial decisions on these matters is constitutionally guaranteed. A political culture in which judges' decisions on these matters are accepted political targets will inevitably undermine public confidence even in those decisions of judges made in the exercise of what is truly judicial power.

Secondly, the exercise by judges of judicial power necessarily weakens executive government. Hamilton also had strong views on the importance of a powerful "single" executive.³ He thought that a "vigorous executive" was a necessary element of good government which was essential to the protection of the community.

Hamilton argued against Cabinet responsibility and in favour of the presidential exercise of power. There was of course at that time no thought that the exercise of executive power might be shared with the judiciary. Given his opposition even to the shared responsibility for the exercise of executive power with a Cabinet, Hamilton would, I think, have been horrified at the thought of the delay and uncertainty that

² [1803] 1 Cranch 137.

³ Federalist No. 70.

would be caused if the exercise of executive power were to be shared with the judiciary.

Now for the positive. In my view the single most important contribution to good government made by the introduction of a Charter of Human Rights is that the threat of judicial challenge to administrative action based on it creates the practical necessity to train the decision makers. By all accounts where it has been undertaken the re-education and correction of administrative officers has proven to be a massive undertaking. No one would doubt however that those who exercise executive power should pay careful attention to the effect of their decisions on human rights.

There is a further important advantage I think for good government in the enactment of a Charter of Human Rights. I was first alerted to it in a discussion with a Minister of the ACT government about the effects on the ACT government of the enactment of its Charter. Reforming governments not infrequently meet resistance from the public service. The objections raised to reform are often that the implementation will be expensive or disruptive to good government. It might for example be argued that it is necessary to impose a blanket policy in an area of government administration although that policy will in its particular application to some individuals constitute a denial of a charter right. In a charter a reforming Minister has a new weapon in his or her arsenal to deploy against the conservative and authoritarian elements of the public service. I have been told that the decision of the High Court in *Minister of State for Immigration and Ethnic Affairs v Teoh*⁴ was used in a similar way. In *Teoh* the High Court held that ratification by Australia of the Convention on the Rights of the Child gave rise to a legitimate expectation that administrative decisions in Australia would treat the best interests of children as a paramount consideration and that that fundamental human right would not be compromised without first giving interested parties a right to be heard on whether that rule should be departed from. Understandably a Minister who was more inclined to allow asylum seekers to remain in Australia than his departmental advisors would find that decision very helpful. I remind you in passing that decision later attracted some criticism in *Re Minister for Immigration and Multicultural and Indigenous Affairs ex parte Lam*⁵ where Gummow and McHugh J made the following points:

In Australia, the existence of a basic law which is a written federal constitution, with separation of the judicial power, necessarily presents a frame of reference which differs from both the English and other European

⁴ (1994) 183 CLR 273.

⁵ (2003) 214 CLR 1

systems referred to above. Considerations of the nature and scope of judicial review, whether by this Court under s 75 of the Constitution or otherwise, inevitably involves attention to the text and structure of the document in which s 75 appears. An aspect of the rule of law under the Constitution is that the role or function of Ch III courts does not extend to the performance of the legislative function of translating policy into statutory form or the executive function of administration.

This demarcation is manifested in the distinction between jurisdictional and non-jurisdictional error which informs s 75(v). Selway J has accurately written of that distinction:

‘Notwithstanding the difficulty, indeed often apparent artificiality, of the distinction, it is a distinction between errors that are authorised and errors that are not; between acts that are unauthorised by law and acts that are authorised. Such a distinction is inherent in any analysis based upon separation of powers principles.’⁶

However, in the case law a line has been drawn which limits the normative effect of what are unenacted international obligations upon discretionary decision-making under powers conferred by statute and without specification of those obligations. The judgments in *Teoh* accepted the established doctrine that such obligations are not mandatory relevant considerations attracting judicial review for jurisdictional error. The curiosity is that, nevertheless, such matters are to be treated, if *Teoh* be taken as establishing any general proposition in this area, as mandatory relevant considerations for that species of judicial review concerned with procedural fairness.

The reasoning which as a matter of principle would sustain such an erratic application of "invocation" doctrine remains for analysis and decision. Basic questions of the interaction between the three branches of government are involved. One consideration is that, under the Constitution (s 61), the task of the Executive is to execute and maintain statute law which confers discretionary powers upon the Executive. It is not for the judicial branch to add to or vary the content of those powers by taking a particular view of the conduct by the Executive of external affairs. Rather, it is for the judicial branch to declare and enforce the limits of the power conferred by statute upon administrative decision-makers, but not, by reference to the conduct of external affairs, to supplement the criteria for the exercise of that power.⁷

I next turn to consider the effect of the enactment of the Charter of Human Rights on the legislature. The first matter to observe is that provisions like s 32 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) require that all statutory instruments be interpreted, so far as it is possible to do so consistently with their purpose, in a way that is compatible with human rights. That legislative command can be seen as a legislative amendment of all pre-existing legislation and a prospective interpretative provision that will attach itself to all future legislation. It is as if the charter rights and the obligation to have regard to them in the construction of the statute have been re-enacted as a part of every piece of Victorian legislation past and future. However the amendment is in necessarily broad terms. It is not only that the human rights themselves are stated at a high level of abstraction and generality.

⁶ *Re Minister for Immigration and Multicultural and Indigenous Affairs ex parte Lam* (2003) 214 CLR 1 at 24-5, [76]-[77].

⁷ *Re Minister for Immigration and Multicultural and Indigenous Affairs ex parte Lam* (2003) 214 CLR 1 at 33-4, [100]-[101].

The rights apply only within those reasonable limits which can be demonstrably justified in a free and democratic society. That is a very subjective standard.

There are two difficulties about the use of the charter to construe legislation that I wish to touch on. Let me introduce my point by again referring to Alexander Hamilton. Justice McHugh, in the keynote address to the conference of the Australian Bar Association held (in Florence) in 2004, suggested that Hamilton had understated the power of the judiciary. McHugh J supported his view by reference to the influence exerted by the judiciary, and in particular, the supreme constitutional courts of nations bound by a written constitution, as the interpreters of constitutional instruments. I think that it could be argued that the interpretation of the distribution of powers affected by a constitution usually reflects social and economic reality and that the scope for activist judicial interpretation that is inconsistent with that reality, is much more limited than is commonly thought. The process by which judges are influenced by those realities and the way in which they transpose them onto the text of a written constitution is a large topic in itself. However the point I wish to make here is that I respectfully agree with McHugh J that the judiciary wields significant power as the final arbiter of the meaning of the Constitution. But I suggest that the power it wields arises from the fact that in a significant number of cases in substance, although not in form, the Court is engaged in constitutional amendment - a supreme law making and not judicial function. A degree of defacto law making is an inevitable and arguably desirable function of judicial construction of statutes. It necessarily falls within the accepted concept of judicial power. It is particularly necessary in the case of constitutions that cannot be easily amended and are intended to sketch only the broad outline of the division of powers and responsibilities that are meant to define a nation over a long period of time.

The point I wish to make is that the interpretative provision of charters of human rights in my view authorise an element of lawmaking that goes beyond, although perhaps not a great distance, beyond the degree of lawmaking that our common law tradition has found acceptable.

The interpretative requirement creates a level of uncertainty in the application of statute law that is I think, undesirable. The meaning of statutory provisions can with some degree of certainty be ascertained from the text and the context of the legislation as a whole including the mischief to which it is directed. I accept that even that process involves what is in substance a legislative element where a choice is presented by that process and where it is necessary to give some particularity to the

general language of the statute. However in jurisdictions that have enacted a charter after that interpretative exercise is completed the meaning of the legislation so ascertained may be found to conflict with one or more charter rights. There are really no objective textual or contextual criteria that a court can use to resolve that conflict. Of necessity the resolution depends on the Court making a value judgement that is largely policy based about where the balance between the competing legislative commands should be set. In a very real sense then a Charter of Human Rights empowers unelected and tenured public officers to determine whether a law should be pushed back because it would otherwise go further than can be demonstrably justified in a civilised society. The flag cases make an interesting case study.

In *Texas v Johnson*⁸ Johnson burnt the American flag at the 1984 Republican convention protesting the policies of President Regan. He was convicted of desecrating the national flag. It was accepted that his conduct was expressive conduct and prima facie protected by the first amendment guarantee of free speech. A narrow majority (Justices Brennan Marshall Blackman and Scall) further decided that there was not a sufficiently important governmental interest in prohibiting political expression in this form. In particular it held that the offence was not calculated to preserve the peace and that preserving the flag as a symbol of nationhood was an impermissible purpose because it was directly incompatible with the principle of free speech.

Justice Kennedy concurred apologising to the American people for having to make such a painful judgment. Chief Justice Renquist and Justices White and O'Connor dissented, referring to the place played by the flag in various conflicts and describing it as "the visible symbol embodying our nation". A bench of the Hong Kong Constitutional Court⁹ which included former Australian Chief Justice Sir Anthony Mason, reached the opposite result holding that it was constitutional to prohibit the desecration of the national flag. The Court relied heavily on the social political circumstance of Hong Kong's recent reintegration with main land China.

In New Zealand in *Hopkins v Police*¹⁰ the Supreme court held that the offence of burning the flag with an intention to dishonour it was inconsistent with the freedom of expression protected by its charter but burning the flag with an intention to vilify it was not.

⁸ (1989) 491 US 397.

⁹ *HKSR v Ng Kung Siu* [1997] 14 KCFA.

¹⁰ (2004) 3 NZLR 704.

I will defy anybody to explain these contradictory results by reference to legal reasoning or indeed any objective criterion.

Deference

In jurisdictions which have adopted a charter that is judicially enforced a question of deference inevitably arises. The question is this. To what extent should the courts give deference to the declarations of the Parliament and the executive of the limits that can be placed on the enjoyment of human rights in a democratic and civilised society. The question will arise for example when a court is asked to read down at law to conform with the charter that has been made after full parliamentary debate of the same issue. Absolutists who give paramount weight to the human rights would argue none at all. Relativists who give more weight to the democratic principle would argue that courts should approach their task obsequiously. My view for what it is worth is that if it is accepted that courts in exercising a human rights jurisdiction are exercising a significant degree of legislative or executive power the separation of powers doctrine demands a substantial measure of deference.

I appreciate that where charters leave parliamentary supremacy intact it is open to Parliament to more clearly express its intention if a court gives its legislation an operation that is inconsistent with its intent. This process has been described as a dialogue between the judiciary and the Parliament on the weight that should be given to human rights. Both “the dialogue” and the capacity of courts to declare a law incapable of a consistent construction and therefore incompatible with human rights creates an alternative political voice to that of Parliament. True it is that the declaration is legally ineffective if provisions like s 36 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) are enacted. Nonetheless casting the courts in the role of the community’s and Parliament’s moral conscience is problematic for the reasons that I have been given.

There is yet another way in which a charter may impinge on the legislative and the executive. Section 28 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) requires a member of Parliament who proposes to introduce a Bill into a house to cause a statement of compatibility to be prepared in respect of that Bill. Most Bills, and nearly all Bills that have any chance of being enacted, are introduced by a member of the executive. Section 28(1) accordingly imposes a significant, and I am told, generally onerous obligation on the responsible Minister and his or her staff.

Considerable resources have been expended in training officers of the public service on the preparation of those statements.

Plainly there is some benefit in having the responsible Minister turn his or her mind to the question of the extent to which proposed legislation interferes with human rights. It is also desirable that parliamentary debate is fully informed about the effect of proposed legislation on human rights. However the fact that the statement is prepared for, and at the direction of, the Minister is in my view a serious shortcoming. The statement can be politically massaged so that the extent of inconsistency with a human right is minimised and the need for a limit to protect civilised society maximised.

Informal debate before a Bill that adversely affects human rights is enacted is in my view very important. The most effective way to protect human rights is to foster and preserve a political culture that respects human dignity and values those rights which are commonly accepted to be fundamental. The parliamentarians who represent the community can do much to support that culture. Real and meaningful debate about legislation and how it can be improved is essential. A statement prepared at the instigation of a member of the executive who has an interest in a particular outcome is unlikely to analyse the effects of the legislation on human rights as closely as it should be.

This brings me to my proposal of an alternative model to judicial enforcement of human rights. I suggest that State and Commonwealth Human Rights and Equal Opportunity Commissions can be more effective in protecting and promoting human rights than the courts. First the standing of those Commissions should be enhanced by maintaining the Commonwealth practice of appointing highly respected members of the judiciary as presidents and extending the practice to States. Moreover they should be joined on the Commission by deputy presidents who are community leaders in other fields.

Next I suggest that Human Rights Commissions and not Ministers should be charged with the responsibility of examining Bills and reporting to Parliament on the extent to which the proposed law infringes or derogates from fundamental human rights.

Section 11 (1)(e) of the *Human Rights and Equal Opportunity Act 1986* (Cth) presently confers on the Human Rights and Equal Opportunity Commission the function of examining proposed enactments to ascertain whether they would be

inconsistent with any human right, but only if the Minister requests it to do so. In my view State and Commonwealth Human Rights and Equal Opportunity Commissions should be empowered to do so of their own motion and their reports should be tabled before debate on the Bill is concluded.

I think to that an expanded Human Rights Commission is more likely to protect encroachment on human rights by bureaucratic administrative decision making than judicial enforcement. Legal cases are expensive to bring. They are out of the reach of most citizens. In those jurisdictions with a Charter of Human Rights there are a disproportionate number of cases brought by persons from privileged backgrounds or accused persons on legal aid. Even though corporations are in some charters denied a remedy for breach of a protected right it must be remembered that corporations necessarily benefit from a favourable construction of legislation made in an action brought by natural persons. Relatively few are brought by people living on "Main Street" to use the in vogue North American expression or from "working families" to use the contemporary description of the Australian working class. I doubt that establishing public interest legal aid centres to bring these actions will help. What is needed is a system of cost effective administrative review. A Human Rights Commission charged with that function will be more accessible to the public and provide them with greater protection. Moreover there is a structural problem in judicial review of administrative action for compliance with the charter. Courts can only act on, individual cases where a complaint is brought. A Human Rights Commission on the other hand could conduct investigations on its own motion. It would operate as a human rights auditor. Furthermore because courts can only act on a case by case basis they have a natural tendency to focus on the injustice to the individual and to ignore what are in some cases very important countervailing public interests – like the public interest in efficient government and the very security of its citizens.

My concluding comment is this. Neither the best written constitution nor the most strident Bill of Rights can guarantee a free society. The constitutions of the former communist block countries were impressive documents but were in fact a fraud on the world and their own citizens. The first amendment of the constitution of the United States did not prevent a narrow majority of the Supreme Court from upholding the conviction of members of the Community Party for conspiracy to organise a group advocating the overthrow of the government because they represented a "clear and present danger" to the government and the public (*Dennis v United*

*States*¹¹). On the other hand the High Court of Australia held legislation prohibiting the Communist Party to be unconstitutional even without the benefits of a Bill of Rights. The enactment of the charter and the imposition of responsibility on the courts to enforce it can only ever be the second string in the defence of human rights. The first must always be to defend and extend the tolerant political culture that Australia has for the most part enjoyed.

¹¹ (1951) 341 US 494.