A Bill of Rights for Australia - But do we need it?

Justice Kirby Collection

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HISTORICAL INTRODUCTION

Constitutional background: Most of the principles of the Australian Constitution are derived from the British and United States constitutions. The British constitution is not unwritten, as is often claimed. It includes a number of fundamental documents, such as the *Magna Carta*, the *Bill of Rights* 1688, the *Act of Settlement*, the *Reform Act*, and so on. But generally, the British constitution has rested not upon written documents but upon the principle of the sovereignty of an elected Parliament.

When the Australian constitution was being designed, there were three elements which marked it off from the United States precedent from which much was derived. The fact that the Federal Commonwealth would be established under the Crown. The fact that the Executive would sit in Parliament. And the rejection of a notion of a general bill of rights.

A proposal for a bill of rights was put forward in the Constitutional Conventions. Mr Richard O'Connor advocated the idea. It was opposed by Mr Isaac Isaacs QC of Victoria. The proposal was lost 19 votes to 23. Fear was expressed that a due process provision in such a bill of rights would undermine some of the discriminatory provisions of the law at that time, including those laws and practices which disadvantaged Aboriginal people and the Chinese in Australia.

Nevertheless, some of the provisions contained in the Australian Constitution are equivalent to bill of rights provisions. Some of them have been very important. These include the promise in s 92 of the constitution that trade, commerce and intercourse would be free. Likewise, the requirement that acquisition of property for the purposes of the Commonwealth, must be on just terms (s 51 (xxxi)). Some other provisions, such as those dealing with jury trial (s 80), freedom of religion (s 116) and non-discrimination amongst Australians in different States (s 117), have, until recently, received interpretations which disappointed some of the proponents of fundamental rights. But the hidden potential was to be found, ultimately, in the power conferred upon the Federal Parliament to enact laws with respect to external affairs. It is this legislative power which has sustained the expansion of federal legislation for the protection of fundamental rights based upon international human rights treaties.

Attempted amendments: Since Federation, a number of attempts have been made to introduce a bill of rights or bill of rights provisions into the Australian Constitution. Inquiries into the constitution in 1929 and 1959 rejected the idea. In 1942, a referendum to enhance the Federal Parliament's powers over post-war reconstruction, proposed, as a trade-off, a constitutional limitation on the abridgment of freedom of expression and extension of protections for freedom of religion to the States. The referendum was, however, defeated.

Likewise, in 1988, the Constitutional Commission established for the Bicentenary of European settlement in Australia proposed the adoption of a charter of human rights. In pursuance of the recommendations of the Commission, the Bicentenary referenda were held. There were proposals for bill of rights protections to cover (amongst other things) trial by jury, freedom of religion and the acquisition of property on just terms by the States. However, these proposals were rejected by the people. The average vote for their inclusion in the Australian constitution scarcely rose above thirty percent in any State.

Statutory rights: Two major attempts have been made in the Federal Parliament to introduce a general bill of rights in the form of a non-constitutional statutory enactment. In 1973, Attorney-General Lionel Murphy introduced his Human Rights Bill. However, this became very controversial in some quarters, was resisted in the Senate and was allowed to lapse. In 1983, Attorney-General Gareth Evans introduced a measure in some ways similar to the Murphy Bill. But it too lapsed and has not been revived.

Notwithstanding these failures, the Federal Parliament during the Fraser Government enacted legislation establishing a national Human Rights Commission. This was replaced, in due course, by the Act which established the Human Rights and Equal Opportunity Commission during the Hawke Government. There have been many specific statutes dealing with human rights questions and the removal of various kinds of discrimination. Some of these have been based upon Australia's ratification of international treaties.

In the common law, decisions of the High Court of Australia sometimes demonstrated, even to sceptical observers, the need for bill of rights protections to override old inherited laws and to reflect notions of fundamental rights and human equality. I refer, for example, to the *Dugan* case, which held that a prisoner, convicted of a felony and sentenced to death, lost his civil rights to sue in the courts. I refer also to the *McInnes* case where the High Court held, by majority, that a prisoner, facing a rape trial, deprived at a late stage of legal representation, had no right to legal counsel and had to do the best he could, representing himself. Unsurprisingly, he was convicted.

More recently, decisions of the High Court of Australia and of the highest courts in Australia have been much more sensitive to the protection of basic rights. In *Mabo v Queensland [No. 2]*, the High Court through Justice Brennan's leading judgment, held that it was proper for courts in Australia to have regard to international human rights jurisprudence in developing the common law and in resolving ambiguities of legislation. It was said that this was an inevitable process, once Australia signed the First Optional Protocol to the *International Covenant on Civil and Political Rights*. This action rendered Australia accountable in the international community for breaches of fundamental rights. This consideration was one which led to the reversal of the *McInnes* case in the decision in *Dietrich v The Queen*. There it was held that, in certain circumstances, a prisoner facing a serious criminal charge, must be provided with legal counsel if to deprive him or her of such expert representation would render a trial unfair. Even more lately, the High Court has found constitutional rights implied in the Constitution. Thus, the right to free public discussion of matters of politics and economics were found, in the *Capital Television* decision, to be

inherent in the very nature of the Australian representative democracy established by the Constitution.

The lesson of these decisions of the nation's highest court is that we are on the path towards a judicially created bill of rights. The common law has always protected certain rights. But its protection against a clearly expressed statute could not always be effective. Against the common law the will of the legislature will ultimately prevail. That is why voices are now lifted, with increasing determination, to suggest that an Australian constitutional bill of rights is necessary, timely and achievable.

THE ARGUMENTS AGAINST

It is not our tradition: Let me summarize the arguments against the introduction of a bill of rights into the Australian constitution. The first argument is that it would represent a turning away from the principle of parliamentary sovereignty which, with federation, is the bedrock principle of our polity. After having won universal suffrage and full democracy, it is said, the introduction of a bill of rights would represent a vote of no confidence in our legislatures and our people. It would insist on putting limitations upon the passage of laws even though willed by the people. If the people have basic rights in their heart, so it is said, it will be reflected in the laws enacted by Parliament. If they do not, it is urged, no piece of paper, such as a bill of rights, will defend those who may be harmed by derogation from fundamental rights. The basic notion of our form of society is that all people enjoy full rights to do whatever they like unless such rights are lawfully taken away from them. At least in a country such as Australia, where parliamentary democracy usually works reasonably well, we can trust the legislators. If they do not act justly, particularly if they act oppressively, they will be dismissed from office at the next election. This is how our democracy has worked in the past. It is how opponents of the bill of rights suggest it should continue to work into the future.

It would politicize the courts: Then it is said that a bill of rights would, as in the United States, politicize the Courts. It would amount to, or produce, a form of judicial imperialism. It would transfer great power from the elected representatives of the people in all their variety, to the judges. But the judges, as recent experience shows, are generally conservative, middle-aged men. They are unelected. A bill of rights would entrench their values in the basic law of the land - to prevail even over Parliament's statutes. It would need a difficult constitutional amendment to change a rule introduced by them. We should not transfer such power to such a group. We should continue our faith in the people.

It would limit rights: To define is to limit. However comprehensive a bill of rights would be, it would require squeezing difficult problems into the artificially limited categories expressed in a written bill of rights. However clever may be the drafter, it would be inherent that any language would expressly state, and thereby confine, the basic rights of the people. James Madison, when first asked to draft the American bill of rights, was reluctant. His question is still valid: "Who will then define the rights of the people?" The problem of bills of rights in the past is that they have tended to concentrate on rights in criminal process and rights of property. But there are other fundamental rights which cannot be so easily expressed and

enforced by the courts. And the duties of people are just as important as their rights. We must be careful before setting-off down the path of an excessively right-prone society.

It ignores differences of regions: Another difficulty is that a bill of rights might be heavy-handed. It would necessarily be uniform throughout our continental country. The experience of Australia has been of varying laws in different regions of this vast territory. There is no necessary reason, so it is said, why a bill of rights should stamp a single approach to sensitive social issues throughout the whole of Australia. Such issues should be determined locally: in sympathy with the will of the people in different parts of the nation. A bill of rights would endanger the variety of social regulation. Human variety, like the variety of animals and plants, is a precious feature of nature and of freedom. Within our Federation, it has permitted experimentation with protective legislation which, when it is seen to succeed, has soon been copied in different parts of the nation. This is the way reforms have been achieved in matters such as anti-discrimination, homosexual law reform, equal opportunity laws and the like. We should continue with this tradition, which is respectful of democratic opinion.

It overlooks new problems: Any bill of rights drawn today would soon be out of date. The problems for human rights vary in the perceptions of different ages. Thus, problems for the future will include those presented by computers, by biotechnology and the human genome project. It is unlikely that an Australian bill of rights would be able to cover, still less cope with, all of the issues of basic rights which need to be dealt with in a true charter of the people's rights. Better to leave these to Parliament, to be dealt with as the need arises.

Frozen attitudes of the past: The other side of this coin is that a bill of rights might entrench attitudes to rights which become out of date with changing times or new technology. Thus, the right to bear arms, which is enshrined in the United States bill of rights, might have been appropriate at the time of the American Revolution. But it is scarcely appropriate today. It has inflicted upon the United States an entrenched constitutional protection of the possession of weapons which is completely unsuitable to the crowded cities of our time where high-powered weapons can do terrible damage. We must beware of freezing the perception of people's rights. We must retain the flexibility of Parliament in defining, reforming and protecting them.

Vulnerable rights and paper charters: Nor is a bill of rights, as such, a sure guarantee against intrusions into fundamental rights. If we compare the treatment of communists in Australia and in the United States in the 1950s, it is significant that the renowned American bill of rights did not protect communists from the legislation which banned them and proscribed their organization. The High Court of Australia held that s 92 of the Australian Constitution gave that protection in Australia. This led to a referendum at which the Government's proposals for enhancing Federal legislative power were rejected by the Australian people. Thus a bill of rights is not always a good protection. This demonstrates once again that the best protection is the building of a society which respects diversity of opinion and lifestyle, and protects its minorities. A piece of paper will not ensure this.

Judges of the common law are enough: A further argument is that judges are already introducing basic rights into the common law. They are doing so by the principle which has

been approved in *Mabo* (above). If a statute is ambiguous, or if there is a gap in the common law, it is now accepted that an Australian judge may have regard to the international jurisprudence of human rights. The judge will not do this if it is contrary to a clear statute enacted by Parliament. This, so it is said, provides the best interaction between fundamental human rights jurisprudence and the democratic right of a Parliament to reflect the will of the people.

Enact specific laws: Proponents of bills of rights are not necessarily opposed to the protection of human rights. For them, the debate is not about human rights, but about the best way of protecting those rights. In their view, a better way to protect basic rights is by the enactment of specific legislation. Such legislation can typically be expressed in far greater detail and specificity. It can deal with the machinery of effective protection which, otherwise, must be left to the courts to discern although they often lack the necessary information and assistance from the two parties before them in a typical case. Thus the enactment of legislation against racial, sexual or other forms of discrimination, will be much more effectively achieved by detailed legislation which establishes practical machinery for conciliation and decision-making, than by a broad remit of power to the courts.

Erosion of the Constitution: Finally, it is said, Australia should stop the erosion of the specifically Australian features of our constitution. We should adhere to the constitution which has served us well in the matter of rights. Our society has a much higher protection of basic rights than most of the countries of the world. This is so despite the fact that virtually every other country enjoys a constitution with beautiful bill of rights provisions. This proves once again, that elected parliamentary democracy is a better protection for human rights, in day to day practice, than a broad statement enacted in the constitution or elsewhere. At least this is so in a mature parliamentary constitutional democracy such as Australia.

ARGUMENTS FOR A BILL OF RIGHTS

Defects of democracy: The proponents of bills of rights acknowledge the power of many of these arguments. But they point out that many of them are based upon false premises. Thus, if democracy worked effectively, there might be no reason for a bill of rights. But often, democracy works most imperfectly. In fact, in Australia, democracy often means, as a matter of practical reality, the election of a majoritarian autocracy for the period of the Parliament. Such "democracy" may overlook grievously the rights of minorities. It may even amount, in effect, to one-party rule. It may overlook fundamental principles such as the independence of the judiciary or the rule of law. It is against this kind of "democracy" that basic rights should be enacted and spelt out in the constitution. Our Parliaments enact so many statutes and authorize so much delegated legislation that it is all too easy to overlook fundamental rights. Against this oversight, we need a constitutional statement which puts certain matters at least beyond even the power of the transient majorities in opinionated Parliaments.

Law is inescapably political: The assertion that a bill of rights would make the courts political is naive. The courts are the third branch of government. To that extent they are already involved in politics, although not usually party politics. A Federal system of government itself introduces a necessary element of politics into the courts. Courts must, of

necessity, decide, in the event of controversy, where power lies, i.e. between the Federal Parliament and the States or elsewhere. What is necessary is a recognition of the inherently political nature of the judicial branch of government and a harnessing of that function to ensure that judges, above party politics, protect the basic fundamentals of all the people living in our form of society.

Judicial action and legislative inaction: Furthermore, it is often the case that Parliaments avoid the really difficult problems, leaving them to be solved, if at all, by the courts. Thus, in the United States, the Congress avoided the solution of basic problems such as racial discrimination, electoral inequality, abortion law and protection of the unborn, and the rights to individual privacy. It was left to the Supreme Court to sort out many of these problems. They could not have been dealt with by the Court except by invoking the bill of rights. In Australia too, it has often been left to the courts to protect and advance basic rights. Thus in *Mabo*, the High Court of Australia reversed the *terra nullius* mythology which had afflicted Australian law since the commencement of European settlement. One hundred and fifty years after representative government was introduced in Australia, it was left to seven unelected judges to remove the patently false assertion that Australia was an empty continent at the time of settlement. Judges by their training, are used to making decisions. Judges do not avoid decision-making. Their duty is to reach conclusions and to express them in reasons and give effect to them in orders. In many neglected areas of fundamental rights, it is essential that the judges be provided with the power to determine difficult questions which Parliament puts into the "too hard basket". This a bill of rights would accomplish.

Ours is a changing community: There is a further reason for adopting a bill of rights today. Whatever may have been the position at the beginning of the century when the Australian constitution came into force, Australia's society today is changing. Its racial composition has altered radically in the past thirty years. The principle of multiculturalism has been adopted by the major political parties in the Federal Parliament. This means that aspects of the unity of the nation which hitherto existed in the essentially monochrome ethnic and cultural composition of its people, cannot now be assumed. Certainly it cannot be assumed that these features will exist forever. In such circumstances, it is not only desirable, but urgent, to express in constitutional form, the basic principles that represent the foundation of the unity of the nation. These principles of civil, political and other rights should be written down and incorporated in the constitution for the protection of all Australians.

Limits of judicial power: Whilst it is true that judges can develop the common law, they are limited in this regard. They depend on the cases which are brought to their courts. Even when cases are brought, the judges are not always able or willing to invoke legal principles to protect basic rights. The High Court itself declared that there was no common law right to privacy. Women's rights have often been overlooked. Prisoners' rights have often been denied. Rights of Australian Aboriginals have often been rejected. So far as homosexuals are concerned, the law until recently punished them, and still does - at least on paper - in Tasmania. Against such clear statutory or common law, the judges may have no adequate tools to protect fundamental rights.[13] Judges must obey the laws and impose the rules established by or under Parliament. They must do so if those laws are clear and applicable, even if fundamental human rights are breached by them. There is a need to provide the

judges with means to redress derogations from fundamental human rights. That is what a bill of rights does.

Putting rights above politics: It is necessary also to put some of the values of our society above the party political debate. That is what a bill of rights can do. It can express the enduring values of a good society. It can do so in the constitutional document which gives the cement to the social cohesion of a true Commonwealth. Without it, our constitution is mechanical. It lacks the expression of the aspiration of the people to live in a free and just society, where freedom and justice go beyond political slogans and shibboleths.

Education of citizens: There is a growing awareness of the ignorance of school children concerning the fundamental features of the Australian political and legal system. Schoolchildren may know the footballers and 'pop' stars. But, according to polls, they are abysmally ignorant of the identity of their political leaders and even more so of their constitution. That is why it is essential to include in the constitution a statement of their basic rights and duties as citizens. This will provide a means of educating the citizens of the future in the fundamental rights of an Australian. It will provide a constitutional reference point. It will thereby contribute to the national identity of Australia.

Ensuring the legitimacy of the people: If it is true that judges are introducing fundamental human rights jurisprudence by the techniques of the common law, and that legislators are enacting laws based upon international human rights principles. But it remains valid to point out that these modes of introducing fundamental human rights, lack the legitimacy of democracy. It is preferable that a charter of human rights should be accepted and endorsed by the people. Then it rests upon the legitimacy of the people's decision. At the moment, the introduction into law of basic rights by judges in their particular decisions or by specific legislation, lacks this element of popular endorsement and legitimacy. That element should now be provided, if it be the will of the Australian people to do so.

A means of empowerment of the powerless: For some disadvantaged people in society, it is essential to provide empowering rights. There are still many in our community who are downtrodden and whose rights have been denied. The Aboriginal Australians are the most obvious group in this class. But there are others, including women, gays, the handicapped, the mentally ill, ethnic minorities, children and others whose basic rights are sometimes overlooked or denied. A bill of rights would provide the means whereby such people could assert and uphold their rights. It would raise the consciousness of the rights of the individual in Australia. It would replace the acceptance of defeat. It would make those with power face up to the enforceable legal entitlements of the disempowered and the disadvantaged. In the words of one observer, it could provide a delicious empowering of people who have hitherto seen the legal system not as a vehicle for freedom, but as an instrument of oppression.[14]

Australia is now virtually alone: Most countries of the world now have bills of rights. Most of them have expressed them in their constitutions. Australia is, in this respect, now one of a small minority of nations which has rejected this idea. In Canada, the *Charter of Fundamental Rights and Freedoms* has been adopted as part of the constitutional law. In New Zealand, a statutory bill of rights has been enacted.[15] Even in the United Kingdom, from

which our basic laws derive, the *European Convention on Human Rights* has its regular impact on the law. The United Kingdom is a party to that Convention. Cases can be taken to the European Court of Human Rights on a complaint about the failure of the United Kingdom to bring its law into conformity with the Convention, which states fundamental rights and freedoms. Australia has no such regional instrument and no such institution. That is why we should commence for ourselves the journey to expressing our basic rights. Of course, many of the countries with bills of rights shamefully deny such rights to their citizens. But this is unlikely to occur in Australia. It is less likely to occur if we agree upon and state our fundamental rights in a national charter. We can draw upon the experience of two centuries our own laws and of the operation of the American bill of rights. We need not copy that or any other bill of rights. We should devise our own. We should do so in full consultation with the people of Australia. In the Australian Capital Territory and in Queensland, discussion has lately been had concerning the introduction of a Territorial or State bill of rights. It is possible that this is one way to proceed. To adopt a local bill of rights by legislation in much the same way as has been done in New Zealand. From the experience which is thereby derived, a confidence may develop which will encourage us to follow the same course in the Federal sphere in Australia.

A CHOICE FOR ALL AUSTRALIANS

No-one says that a bill of rights alone will protect the rights of the people. But nor does majoritarian democracy in Parliament. The modern notion of democracy is more subtle than the primitive idea of according full power to the transient majorities of Parliament by a transient vote in a periodic election, accompanied by media jingles and superficial electoral slogans. Democracy now requires respect for minorities and protection of basic constitutional principles: such as the rule of law, the independence of the judiciary, and regard for fundamental human rights.

The decision to be made upon the bill of rights debate is one for each Australian. It should be made against the knowledge of our history and an appreciation of the strengths of our constitution and the very real protections to rights which it already affords. An informed decision requires an understanding of the arguments for and against an Australian bill of rights. The purpose of this review has been to summarize some of the main arguments on both sides of the ledger. Only when they are weighed, will an informed decision be made by our people. The history of past efforts at constitutional reform are discouraging. But times are changing. Our constitutional arrangements are for us, the people of Australia, to decide. Amongst the current controversies, we should not overlook the bill of rights debate.

FOOTNOTES

* Adapted from an address given in the old Legislative Council Chamber of the Parliament of Queensland, 4 October 1994, to the Queensland Chapter of the Young Presidents' Association

** President of the NSW Court of Appeal; Chairman of the Executive of the International Commission of Jurists

1. See J Quick and R Garran, *The Annotated Constitution of the Australian Commonwealth*, Sydney, Angus & Robertson, 1091, 941.

2. See N O'Neill and R Handley *Retreat from Injustice - Human Rights Law in Australia*, Federation, Sydney, 1994, 79.

3. See H Charlesworth, "The Australian Reluctance about Rights" (1993) 31 *Osgoode Hall LJ* 199, 206; see also e.g. **Racial Discrimination Act 1975** (Cth); **Sex Discrimination Act 1984** (Cth); **Disability Discrimination Act 1992** (Cth).

4. **Dugan v Mirror Newspapers Limited** (1978) 142 CLR 583.

5. **McInnis v The Queen** (1979) 143 CLR 575.

6. (1992) **175 CLR 1**.

7. (1992) 177 CLR 292.

8. **Australian Capital Television Pty Limited v The Commonwealth** (1992) 177 CLR 106. See also **Theophanous v The Herald & Weekly Times Limited and Anor** (1994) 68 ALJR [ ] (HC) forthcoming.

9. See *Mabo*, above n 6, at 42.

10. *Victoria Park Racing & Recreation Grounds Co. Ltd v Taylor* (1937) 58 CLR 479.

11. See O'Neill and Handley, above n 2, 91. See also e.g. *Singer v Berghouse [No. 2]* (1994) 68 ALJR [ ] (HC); *Bryson v Bryant* (1992) 29 NSWLR 188; 16 Fam L R 112 (CA). See comment (1994) 16 Syd L Rev 412.

12. See *Dugan*, above n 4. *Levinge v Director of Custodial Services, Department of Corrective Services* (1987) 9 NSWLR 546 (CA); *R v Perez-Vargas* (1987) 8 NSWLR 559 (CCA), 565.

13. See eg *Young v Registrar, Court of Appeal & Anor [No 3]* (1993) 32 NSWLR 262 (CA), 281; *R v Sandford* (1994) 33 NSWLR 172 (CCA), 177.

14. See Charlesworth, above n 3, 299.

15 *Bill of Rights Act* 1990 (NZ). See O'Neill and Handley, above n2, 44.

16. Australian Capital Territory, Attorney-General's Department, Issues Paper, *A Bill of Rights for the ACT?*, 1993, Canberra.

17. For general discussion of the need for a bill of rights, see e.g. N O'Neill and R Handley, above n 2; M R Wilcox, *An Australian Charter of Rights?*, Law Book Co., Sydney, 1993, 194ff; W Sadurski, Foreword to Symposium, *Constitutional Rights for Australia?* in (1994) 16 Syd L Rev No. 2, 145ff; G Lindell (ed) *Future Directions in Australian Constitutional Law* 1994 and P Alston (ed) *Towards an Australian Bill of Rights*, 1994.

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