Why are Australians entitled to rights protection?

A discussion of the rationale behind a bill of rights

By Dr Bede Harris*

Noticeably absent from Australian discourse on human rights protection is consideration of the fundamental philosophical question that needs to be resolved: *'Why are people entitled to the legal protection of human rights?'* Answering the question would make the answers to technical constitutional questions involving the balance of power between the courts and Parliament far more easy to determine.

There are two answers. The first is that, after World War Two, the international community decisively rejected the argument that enactment of a law by an effective government was the sole test of a law's validity. The war crimes trials, and trials under domestic law of Germany, held that laws which transgress fundamental human rights are not valid – in other words, law has to be consistent with some (necessarily supra—legal) value system. This led to promulgation of the International Declaration on Human Rights and other human rights treaties which require their signatories to respect human rights within their own jurisdictions.

None of these documents has a footnote saying: *'These rights are not applicable to democracies'*. Indeed, their drafters had in mind events such as German voters' validation in a referendum in 1934 of Nazi legislation removing civil liberties. It makes no difference whether legislation inconsistent with rights has been enacted by a democratically elected legislature – it is still an abuse of human rights. Australia has ratified all these documents: surely it should apply domestically what it preaches internationally?

The second answer is that, as a matter of logic, protection of individual rights is an objective good. The easiest way to understand this is to refer to the theories of John Rawls, who hypothesised what would happen if people were asked to devise the fundamental rules of a society behind a 'veil of ignorance' – that is, unaware whether, in that society, they would be black or white, rich or poor, man or woman, Muslim or Jew, victim of crime or crime suspect.

Rawls' said that, motivated by a paradoxical mixture of self-interest and empathy, people would logically accept as a basic principle that each person should have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others. Practical implementation of this requires the recognition of civil and political rights.

Opponents of a Bill of Rights argue that that protection of our rights ultimately rests on democracy and that therefore the democratic will should not be subject to control by a Bill of Rights. Characterising democracy as the supreme value logically depends on a more fundamental claim that people have a 'right' to be governed democratically. But what is the source of that right?

Obviously, it must derive from a rights theory superior to democracy itself. If one does not accept the primacy of rights, then one has no touchstone to which to refer in order to justify why oligarchy, aristocracy, or dictatorship should be rejected as forms of government. In short, democracy depends on the protection of freedom rather than freedom depending on democracy.

Moving to constitutional specifics, those who reject a Bill of Rights argue that it would give excessive power to an unelected judiciary over the elected Parliament and thus, by extension, over the individual. In reality, what a Bill of Rights would do is redress the power imbalance between the individual and the government, by giving the individual the power to challenge the government, with the courts acting as umpire.

Often stated in conjunction with this argument is that which says that human rights abuses can be remedied through the political process. This is either naïve or cynical. Of what use is it to a victim of legislatively-authorised human rights abuses to be told *"There is an election in three years time – your remedy is to campaign to have the law changed, and, if there is a change in government, and if this issue is a plank in the new government's programme, perhaps the law will be changed"?* The very utility of a Bill of Rights is that it provides the individual with an instant weapon vis-à-vis the government - the ability to go to court to have the infringement of rights remedied, rather than making an entitlement to fundamental rights contingent on the vagaries of party politics.

The next argument is that the courts are ill-equipped to engage in the process of balancing competing social interests. Yet this has been a basic aspect of judicial decision-making throughout the history of the common law – the law of torts, which determines what is 'reasonable' conduct, being a prime example.

Furthermore, such tests have been applied by Australian courts in relation to human rights at least since 1943 when, in a case interpreting the right to freedom of religion in s116 of the Constitution, Justice Starke explicitly stated that, given that the rights protected by the Constitution are not absolute, courts must inevitably balance them against the countervailing legislation. Such is the case in relation to all the express and implied freedoms currently protected by the Constitution.

This leads to the final argument against a Bill of Rights, which is that it would vest the courts with extensive new powers. This is not correct: Parliament was born subject to the provisions of the Constitution, and has always been subject to the power of the courts to declare unconstitutional legislation invalid, including legislation which is inconsistent with the four express rights it contains and other implied freedoms that have been read into it.

At most, what a Bill of Rights would do is increase the *scope*, but certainly not the *nature*, of the functions discharged by the judicial branch. Given that the drafters of the Constitution saw fit to some express rights in it, why not include the full range of rights?

The current terms of reference of the National Human Rights Consultation prohibit it from recommending any model requiring constitutional amendment. Some advocate a document similar to the ACT Bill of Rights and the Victorian Charter, which empower the courts only to declare that a law is inconsistent with the Bill of Rights.

Contrary to what some have argued, such a law would not breach that aspect of the doctrine of separation of powers which says that the courts cannot give advisory opinions. That rule prohibits the courts from making declarations in the abstract – where there are no litigants – or where the law has not yet been enacted. Making a declaration that an enacted law challenged by a litigant is inconsistent with a Bill or Charter would be constitutional. Declaration, as a legal remedy, has long been available to the courts.

However, I hope we go further, and enact a Bill of Rights along the lines of the Canadian Charter – one which the courts can use to invalidate inconsistent legislation, but which Parliament could over-ride as long as it expressly stated it was doing so, a model similar to that required by s10(1) of the Racial Discrimination Act. This is surely not too much to ask – if politicians are going to take away our rights, should they not at least be willing to tell us they are doing so?

ENDS

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