

Human rights-based judicial review: it seems a good idea at the time

TOM CAMPBELL contends that problems exist with a proposed bill of rights.

SUPERFICIALLY, it is easy to make an apparently powerful case for adopting a national bill of rights for Australia. First, identify some shameful examples of governmental human rights abuse over the past decade or so. Then demonstrate that courts in other countries have been able to remedy similar abuses overseas where they do have a bill of rights. Contrast this with the examples of the pusillanimous legalism of Australian judges. Point out that Australia is the only modern democracy without a bill of rights. Finally, recommend enactment of a bill of rights to prevent similar violations in the future. So why not? It may have

some benefits and what harm can it do?

Equally superficially, it is tempting to try a knock-out response along the following lines. First, identify the least-enlightened constitutional rights decisions of the Supreme Court of the US, the paradigm bill of rights polity. Then highlight the historic triumphs of democracy over the oppressive, chauvinist and hierarchical government of powerful minorities. Point out that judicial review of legislation is frequently used to block socially progressive legislation and illustrate how constitutional courts make highly contentious moral decisions about disputed frontier issues such as

abortion, same-sex marriage, capital punishment, and voluntary euthanasia, all of which are a far cry from the dire intrusions into the traditional liberties the spectre of which is used to mount the case for court-based decision-making on human rights issues. Finally, reassert the evident truth that human-rights based judicial review is incompatible with one of its own basic rights: political equality.

Unfortunately the matter is not that simple. Majority decision-making can produce systematic unfairness in government. Elected politicians do have a (perfectly legitimate) interest in retaining power, which works against open government and in favour of >



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short-term expedients. On the other hand, there is reason to think that bills of rights not only raise false hopes of human rights progress, but actually make matters worse. Taking key moral decisions out of the hands of elected governments arguably diminishes the sphere of electoral accountability, distorts the functions of courts in securing the rule of law, corrupts the judicial process by encouraging legally arbitrary methods of reasoning, and undermines the salience of human rights discourse in the political arena.

To put all this in perspective, one important fact needs to be kept in mind. There is no marked difference between the overall substantive human rights record of those democracies that have and those democracies that do without bill of rights. No judgment on this matter can be very decisive since there is reasonable disagreement as to what are and what are not violations of human rights, but, overall, if bills of rights make a difference it cannot be said to be a major difference. Arguably Australia went backwards during the Howard era, but so did other democratic regimes faced with immigration and terrorist concerns. This is not to say that the human rights status quo in Australia is acceptable. In my opinion, it is not. But, in relative terms, Australia's human rights record is not particularly deficient, an important comparative point that gets lost when we focus anecdotally on particular human rights failures in Australia and selected judicial interventions elsewhere. The issue to be addressed is not whether Australia's human rights performance is better or worse than that of, say, the United States or Sweden, but whether that performance would be better or

worse with the addition of a bill of rights.

ENTERING this debate we need to be clear as to what sort of mechanisms we are talking about. Is it 'strong' judicial review, the American model, where courts can override legislation which they consider violates human rights? Or is it 'weak' judicial review, the British model, where courts are required to interpret ambiguous (or in some jurisdictions linguistically pliable) legislation so as to minimise any perceived violation of human rights, and issue 'declarations of incompatibility' if they decide that a piece of legislation violates human rights standards, declarations that have no legal effect in that the legislation in question remains valid until it is (although it may not be) amended by the legislature?

Fears for democracy and the rule of law may be assuaged by the assurance that it is only the British model that is on the table. We are used to courts interpreting poorly-drafted legislation to see that it does not impinge on deeply-rooted common law rights unless the legislation explicitly and clearly requires this. And, if declarations of incompatibility can be ignored by governments, then they cannot be said to make serious inroads on the sovereignty of parliaments.

If the British model were all that weak, it could hardly be worth having. In fact, so-called 'weak' judicial review can be used to produce outcomes similar to the stronger versions. It is politically difficult for declarations of incompatibility to be ignored because the very existence of this mechanism presents the courts as the politically-neutral defender of human rights correcting the excesses of inhumane governments. Moreover, the creative judicial

interpretation encouraged by the UK *Human Rights Act* 1998 can, in the hands of 'activist' judges, be used to make substantial changes in the law. That this does not routinely happen is a testament to the general awareness of judges that such activism is democratically illegitimate and will be subject to persistent public criticism, rather than because 'weak' judicial reviews is inherently feeble.

The philosophical issue underlying the controversy about human rights-based judicial review, both strong and weak, is that it invites courts to adopt a basically political mode of reasoning, albeit one which has a distinctly moral form and a definitively legal outcome. Thus, arriving at a declaration of incompatibility requires deciding, first, if a human right has been restricted. This often cannot be done without coming to a view about the nature and value of the interest that the right is intended to protect, be it expression, ownership, mobility or whatever is the subject matter of the right. Once this is done, it then has to be decided whether or not that restriction is justified, in that it is necessary and proportional to the benefit that the legislation in question will bring. Proportionality cannot be assessed, however, without determining the negative moral weight to be attached to the restriction on the right and the positive moral weight that should be given to the benefit that results from this restriction. These are inherently evaluative and political questions to which legal expertise has no special relevance. They involve moral judgments that require to be made when deciding what the law should be, which should not intrude in legal fora when deciding what the law is.

At this point current debates about bills of rights get caught up

in the increasingly ambivalent idea of the 'rule of law'. The (positivist) rule of law case against bills of rights is that legislatures should make laws, and judges should apply them. This is a type of separation of powers that enables governance of a country to be in accordance with law. But not just any sort of law. Not the particular commands of rulers. Not the broad moral values of a culture. But law as a system of rules, rules that are general not particular in form, rules that are clear not obscure, rules that are specific not vague, prospective not retrospective, intelligible not obscure and do-able not impractical. The moral significance of the positivist rule of law is that it is not only the most effective way of governing a complex society but it is also the fairest, in that it limits the arbitrariness of government by requiring that its power be exercised via rules that apply to everyone and can be known and taken account of in advance of acting.

Governance through good positive law is both the most effective and the fairest method of governance in a large-scale society. Moreover formally good positivist laws can empower citizens and their representatives to govern in a way that approaches to the democratic ideal that all those affected by a binding decision should have an equal say in its making. In so far as the people or their representatives make rules that are obscure and have to be made clear by those who interpret and enforce them, or enact rules incorporating terms that require moral judgment to be made before they acquire concrete meaning, then the polity is not a democracy but a juristocracy.

Now, of course, lawyers and others involved in the practice of law, point out that actual laws are inevitably somewhat imprecise, vague and unclear in ways that require the constant attention of courts, and that moral opinion inevitably, therefore, seeps into judicial reasoning. Quite so. The rule of good positive law is an ideal which cannot be fully realised. But that does not mean that we should

not to pursue that ideal as far as we can. And it certainly does not mean that we should deliberatively enact laws, constitutional or otherwise, that put in place general moral principles to be used by a small number of unelected persons to decide controversial political issues after engaging in ostensibly 'legal' argument.

Proponents of judicial review have a rather different conception of the 'rule of law' in which the emphasis is on the substance of the law more than its form. Here 'rule of law' means in effect having laws that have a particular approved content, laws that are good in substance and not just clear, specific and prospective. On this (natural law) view, the rule of law is held to require adherence to basic human rights such as equality and respect. Going along with this larger view of the rule of law is the assumption that whatever constitutes the rule of law is a matter for courts, not legislatures, to determine and enforce. Holding something to be part of the rule of law or 'the principle of legality' is thought to entail that it should be dealt with outside the political process by those whose function and expertise is in legal matters.

DO SUCH conceptual squabbles about the proper meaning of 'the rule of law' really matter? Maybe not that much if courts, in the expectation of public criticism, choose not to act out the implications of the natural law approach. This is one reason why it is important to constantly draw attention to the democratic and other deficits of human rights-based judicial review, which for all its apparent attractions as a way of dealing with the humans rights failures of actual democracies, is not such a good idea when the collateral damage of such a transfer of political power to courts is taken into account. The most unfortunate side-effect which flows from such attempts to make judges into moral guardians is the message it sends about who is responsible for articulating and protecting human rights. A discourse that was developed as a means of political

protest and democratic mobilisation becomes the subject of esoteric debate in largely inaccessible tribunals. Political activism that should be focused on altering public opinion and electing governments committed to justice and rights becomes transferred to mounting legal arguments and running test cases to obtain through the courts what they have failed to secure democratically. In the process law and judicial appointments are politicised, thus undermining the impartiality that is so important for their primary tasks of applying laws to particular circumstances.

That said, I conclude this polemic with what may read like a capitulation. The focus of my critique has been on human rights-based judicial review. However, some of the mechanisms that go with bills of rights do not involve this mechanism. The requirements that government departments pay attention to human rights matters in the course of their administration, that government ministers when presenting bills to a legislature have to affirm that their proposals are human rights compatible, that parliamentary scrutiny committees examine proposed legislation from a human rights perspective, that there be independent human rights commissions to investigate and report on human rights abuses and human rights reform—all of these and more are important devices for enabling polities to enhance respect for human rights through the political process. None of them require human rights-based judicial review and all of them could benefit from the enactment of an Australian bill or charter of rights that involves courts only after legislatures have passed the laws the implementation of which is the proper function of courts.

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