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Assessing the Need for a Constitutionally-Entrenched Bill of Rights in Australia

Abstract

This article discusses the Bill of Rights issue in an Australian context. It firstly examines the advantages and disadvantages of adopting a Bill of Rights in order to assist in establishing whether this document is necessary in Australia. It then considers the ways in which a Bill of Rights has been implemented in the United Kingdom, South Africa and Canada in order to determine which implementation approach would be most suited to Australia in the event that a Bill of Rights is adopted.

Keywords

bill of rights, australia, constitution, rights, united kingdom, UK, canada, south africa,

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ASSESSING THE NEED FOR A CONSTITUTIONALLY- ENTRENCHED BILL OF RIGHTS IN AUSTRALIA

RAYLENE D'CRUZ

Introduction

[i] Australia is one of few modern democracies that do not have some form of a Bill of Rights. Australia is a stable society but there is ongoing debate as to the need for a document which enshrines rights and cannot be tampered with by the different arms of government. Important issues pertaining to the rights of, for example, asylum seekers, minorities and children, are directly dealt with in Australia. As such, focus is placed on how human rights as a whole can be protected.

[ii] This essay has two parts. The first part discusses the advantages and disadvantages of adopting a Bill of Rights in order to help establish whether this document is necessary in Australia. The second part examines the strengths and weaknesses of different approaches to implementing a Bill of Rights in countries which currently have such a document. This will assist in determining which approach would be most applicable should Australia decide to adopt a Bill of Rights.

Does Australia Need a Written Form of Rights?

[1] The first issue is whether a written document enunciating human rights is of value in the Australian context.

[2] One main reason cited for the resistance in Australia to a Bill of Rights is that the language could be constructed widely and judicial interpretation gives judges an influence that they do not deserve, given that they are unelected members of government.¹ People are unwilling to confer even more power on the judiciary, especially in light of certain judgments, which have

¹ Sir Harry Gibbs, 'The Protection of Rights in Australia' (2001) 47 *National Observer* 13.

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been greatly criticised. One example is the case of *R v Bernasconi*.² Here, it was held that s80 of the Australian Constitution, which enunciates an express right to a trial by jury for any offence against any law of the Commonwealth, does not apply to an offence against the Commonwealth that was committed in a Territory. This made it lawful for a person to be tried without a jury in Papua New Guinea. A judgment of this kind demonstrates that judicial discretion could negatively affect issues of human rights if dealt with by the courts. However, because of such discretion, it can be said that a Bill of Rights is essential.

[3] Connected to this idea is the view articulated by Kirby J that a fixed set of rights could both ignore new issues arising with respect to rights and protect those that are no longer important.³ A Bill of Rights is seen as a fixed and inert document so it would arguably only address issues that were of concern at the time of adoption. Due to constant changes in societal values, Australians are reluctant to confine human rights to such a narrow scope. This fear is well-founded, and it is perceived that Parliament could address human rights issues more aptly since it is more adaptable to change and can remain abreast with the needs of society.

[4] There is also a strong tradition in the principle of parliamentary sovereignty in Australia and this principle could be restricted by a Bill of Rights. It could possibly indicate a '*vote of no confidence in our legislatures and our people*'.⁴ Coupled with this is the fact that the democratic process works quite well and the need for change often goes unnoticed when it is unaccompanied by palpable problems. The fundamental framework of democracy ensures that 'bad' legislators can be voted out of office, one of the cornerstones of a democratic society. A Bill of Rights would not have that same type of flexibility.

[5] However, there are also many persuasive arguments as to why a Bill of Rights is crucial. The most important seems to be that since all other modern democracies have a Bill of Rights, Australia is now '*threatened with a degree of intellectual isolation that many would find*

² (1915) 19 CLR 629.

³ Michael Kirby, 'A Bill of Rights for Australia - But Do We Need It?' (Speech delivered at the Legislative Council Chamber, Queensland, 4 October 1994).

⁴ Ibid.

disturbing.⁵ Pressure is steadily mounting on Australia to better protect the rights of its citizens and others such as asylum seekers.⁶ Given the current climate of uncertainty due to the war on terror, a document securing rights for the people should not be undervalued. The United Kingdom, despite its strong links with parliamentary sovereignty and not having a written constitution, established a Bill of Rights through the *Human Rights Act 1998*. There was extensive internal and external pressure on the British Government to enact these changes⁷ and Australia should be prepared to face this pressure as well. As Australia's standing in the global community develops, so does the need to adapt to the norms of modern, fair democracies.

[6] As alluded to earlier, discretion given to both the judiciary and legislature could be used to reflect ideals enunciated in a Bill of Rights. Although the language used in describing human rights issues is seen as ambiguous, this may be an advantage. '*Democracy and human rights are defined by ongoing political struggles*',⁸ so this element of flexibility ensures that the law will develop in accordance with the changes in the views of society, despite having its roots in a Bill of Rights. In the absence of a Bill of Rights thus far, the judiciary has gradually recognised a few implied rights from the Constitution. An example of such a right arising can be found in the case of *Dietrich v The Queen*,⁹ where a common law right to a fair trial was recognized.¹⁰

[7] Recently, however, many have criticised the ability of the Parliament to ignore human rights and the reluctance of judges to challenge the Parliament on these grounds. McHugh J recently stated that:

⁵ Spigelman JJ, 'Access to Justice and Human Rights Treaties' (2000) 22 *Sydney Law Review* 141, 150 cited in Megan Davis and George Williams, 'A Statutory Bill of Rights for Australia? Lessons from the United Kingdom' (2002) 22 *University of Queensland Law Journal* 1, 1.

⁶ Megan Davis and George Williams, 'A Statutory Bill of Rights for Australia? Lessons from the United Kingdom' (2002) 22 *University of Queensland Law Journal* 1, 17; Katharine Gelber, 'High Court Review 2004: Limits on the Judicial Protection of Rights' (2005) 40 *Australian Journal of Political Science* 307.

⁷ Davis and Williams, above n 6, 2-3.

⁸ Julie Debeljak, 'Rights Protection Without Judicial Supremacy: A Review of Canadian and British Models of Bills of Rights' (2002) 26 *Melbourne University Law Review* 285, 305.

⁹ (1992) 177 CLR 292.

¹⁰ See also *Polyukhovich v Commonwealth* (1991) 172 CLR 501; *Australian Capital Television Pty Ltd v The Commonwealth* [1992] HCA 1.

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It is not for courts, exercising federal jurisdiction, to determine whether the course taken by Parliament is unjust or contrary to basic human rights. The function of courts in this context is simply to determine whether the law of Parliament is within the powers conferred on it by the Constitution.¹¹

[8] The danger arising from such practice is that the people do not have a voice if judges become unwilling to recognise fundamental rights. One example of how legislation is infringing on fundamental rights is seen in *Fardon v Attorney-General (Queensland)*.¹² In this case, there was debate as to whether legislation allowing the Supreme Court to order the continued detention of serious sex offenders once their original sentence had been served was constitutionally valid if the person presents a serious risk of re-offending. In effect, a person could be kept in prison in the absence of committing a new crime and without the need to show mental illness or other symptoms which would normally justify extended detention. This legislation was held valid by the High Court. Kirby J, the only dissenting judge, pointed to the fact that this sort of legislation could ‘*expand to endanger freedoms protected by the Constitution*’.¹³ In the absence of a Bill of Rights, there is no barrier in place to curb such a threat.

[9] Rather than politicise the judiciary, a Bill of Rights would have the effect of placing ‘values of our society above the political party debate’.¹⁴ This is a principle that cannot be emphasised strongly enough. The respective Bills of Rights in Canada and the United States of America have often been criticised because judges are in positions of high power and have the ability to abuse the system.¹⁵ Naturally, there is a need to balance the powers of each arm in the system. By enshrining the rights of the people in a document that cannot be easily changed, the inherent political nature of the government will have to give way to the genuine concerns of the people.

[10] The awareness of the purpose of a Bill of Rights encourages contemplation on the need for such a document. In such a culturally diverse country, a Bill of Rights ‘*for the protection of*

¹¹ *Al-Kateb v Godwin* (2004) 208 ALR 124, 145.

¹² (2004) 210 ALR 50.

¹³ *Fardon v Attorney-General (Queensland)* (2004) 210 ALR 50, 83-84.

¹⁴ Kirby, above n 3.

¹⁵ Terence Ison, ‘A Constitutional Bill of Rights - the Canadian Experience’ (1997) 60 *The Modern Law Review* 499, 504.

all people' would be more than beneficial.¹⁶ While drafting the Constitution of the Republic of South Africa, the government embarked on the mammoth task of educating the public of their newly-found rights. A 'plain language initiative' was conducted to explain the Constitution in the country's 11 official languages, and the multi-media education campaign is said to have reached 65% of South Africans. This campaign culminated in a National Constitution Week, where events were attended by 600,000 people and 7 million copies of the Constitution were distributed.¹⁷ A Bill of Rights could help Australians learn about their own rights, and would hopefully engender further tolerance, understanding and respect for fellow citizens.

[11] From the reasons explained above, it seems clear that a document enunciating rights is desired by the people. The next important question to ask is what form this document would take.

What Form Would the Bill of Rights Take?

[12] In order to assess what form of a Bill of Rights would be most suitable for Australia, the different forms currently in existence in other countries will be analysed. The applicability of each method to Australia will then be considered.

United Kingdom

[13] The United Kingdom is a party to the European Convention on Human Rights and Fundamental Freedoms (the "ECHR"). This treaty had no direct influence on domestic English law but, as of 1966, citizens were able to take grievances to the European Court of Human Rights.¹⁸ As the grievances mounted, so did the pressure for the ECHR to be given more effect in English law.¹⁹

[14] Thus, in 1998, the government enacted the *Human Rights Act 1998*. The courts are now instructed to interpret legislation consistently with the Convention, '[s]o far as it is possible to do

¹⁶ Kirby, above n 3.

¹⁷ Alex Reilly, 'The Many-Headed Beast' (2000) 25 *Alternative Law Journal* 58, 61.

¹⁸ Davis and Williams, above n 6, 2.

¹⁹ Conor Foley and Keir Starmer, 'Foreign Policy, Human Rights and the United Kingdom' (2000) 32 *Social Policy and Administration (Amnesty International)* 464.

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so'.²⁰ If they cannot be reconciled, the courts can declare the legislation 'incompatible',²¹ at which point Parliament may decide to amend or repeal the law.

[15] The ties between the Australian and English legal systems are clear, which would make it logical for Australia to enact legislation in the same way that the United Kingdom did. Australia has signed the International Convention on Civil and Political Rights (the "ICCPR"), so legislation could be enacted that mirrors the rights enunciated in this convention. This was attempted in 1973, but the Bill failed, partly due to the fact that Australia was not a party to the ICCPR at the time (Australia ratified the treaty in 1980).²²

[16] The British model has already been used in the Australian Capital Territory, the first State in Australia to enact a Bill of Rights, through the enactment of the *ACT Human Rights Act 2004*. The British model was used because the Consultative Committee favoured the process of interaction '*between the three arms of government and the community*'.²³ By having dialogue, as opposed to automatically repealing questionable legislation, rights are better protected and encompass a broader review process.

[17] However, it is for this same reason that protecting human rights by way of statute has been criticised. For example, the United Nations Committee on Human Rights criticised the *New Zealand Bill of Rights Act 1990* because of the Government's failure to repeal earlier inconsistent legislation and because the Act has '*no higher status than ordinary legislation*'.²⁴ It is seen as a negative characteristic that the courts cannot invalidate laws that are inconsistent with fundamental rights. As such, it is appropriate to examine a system in which it would be possible to invalidate such laws.

²⁰ *Human Rights Act 1998* (UK) s3.

²¹ *Ibid* s4.

²² Davis and Williams, above n 6, 14.

²³ Thomas Poole, 'Bill of Rights in Australia' (2004) 2 *Oxford University Commonwealth Law Journal* 197, 199.

²⁴ Janet McLean, 'Legislative Invalidation, Human Rights Protection and s4 of the New Zealand Bill of Rights Act' (2001) *New Zealand Law Review* 421, 422.

South Africa

[18] The Constitution of the Republic of South Africa was certified by the Constitutional Court in 1996. This was a document borne out of “national crisis”, namely the apartheid regime that ravaged the country for decades, so its enactment was seen as a reactive measure to right the wrongs of the past.²⁵ Hence, the principle of ‘[h]uman dignity, the achievement of equality, and the advancement of human rights and freedoms’²⁶ is the ‘most deeply entrenched of all provisions in the Constitution’.²⁷

[19] The Bill of Rights is constitutionally entrenched, so the judiciary must declare conflicting legislation inconsistent, and there are a number of remedies available to resolve such a situation.²⁸ These include the possibility of invalidating the legislation or ‘reading in’ words or phrases in order for the legislation to be legalized.²⁹ Fundamental to all remedies is the principle that the judiciary shall interpret legislation to ‘promote the values which underlie an open and democratic society based on freedom and equality’.³⁰

[20] Although there is a clear protection of human rights here, it does not seem likely that the Australian Constitution could be amended to include provisions such as this. This is due to ‘the difficulty in securing assent to referenda in Australia’.³¹ The South African Bill of Rights was incorporated at the same time the Constitution was enacted, so in this sense, Australia and South Africa are vastly different. In Australia, only 8 out of 44 proposed amendments to the Constitution have ever been passed.³² This difficulty means that this approach to human rights protection might not be applicable to Australia.

²⁵ Lourens WH Ackerman, ‘The Legal Nature of the South African Constitutional Revolution’ (2004) *New Zealand Law Review* 633, 643.

²⁶ *Interim Constitution of the Republic of South Africa (1994)* (South Africa) s1.

²⁷ Ackerman, above n 25, 645.

²⁸ *Constitution of the Republic of South Africa (1996)* ss172 (1)(a) and (1)(b).

²⁹ See, eg, *National Coalition for Gay and Lesbian Equality v Minister for Home Affairs* 2000 (1) BLR 39 (CC).

³⁰ *Constitution of the Republic of South Africa (1996)* (South Africa) s35(1).

³¹ Gibbs, above n 1.

³² Davis and Williams, above n 6, 14.

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Canada

[21] In Canada a different approach was used, combining two different methods of entrenching human rights. In 1960, the *Canadian Bill of Rights* was enacted to bring human rights issues into the realm of the Courts. However, it has been noted that the Bill of Rights was only used by ‘*various judges ... from time to time*’,³³ and hence was not a solid manifestation of human rights protection. The government then passed the *Canadian Charter of Rights and Freedoms* in 1982, partly because they wanted to unite the country and discourage the Quebec separatism movement.³⁴ This Charter marked the entrenchment of human rights in Part I of the Constitution, meaning legislation inconsistent with the Charter could be declared as having no effect.³⁵ This does not mean that the *Canadian Bill of Rights* was repealed; rather, the rights protected in it can still be enforced.³⁶

[22] This approach is useful, as it steadily integrates the principles of human rights into the law. It ensures that both society and law makers are well accustomed to the rights before they are entrenched into the Constitution. However, problems still exist with this system. It has been criticised widely for being inefficient and for having no ‘*broad-scale beneficial effects*’.³⁷ These are serious concerns, but this approach seems the most sustainable and beneficial in the long-term.

Conclusion

[23] The only concrete deduction that can be made from this analysis is the belief that a Bill of Rights is necessary in Australia. Although some arguments against the enactment of such a Bill are valid, for example, that judicial discretion may be too wide and the principle of parliamentary sovereignty will be undermined, the consequences of an unprotected society seem too grave, given that even basic rights could be threatened. Australia stands alone in its apathy towards human rights protection and there is a serious danger that Parliament could take advantage of this seeming indifference.

³³ David Mullan, ‘The Role for Underlying Constitutional Principles in a Bill of Rights World’ (2004) *New Zealand Law Review* 9, 10.

³⁴ Charles R Epp, ‘Do Bills of Rights Matter? The Canadian Charter of Rights and Freedoms’ (1996) 90 *The American Political Science Review* 765, 768.

³⁵ *Constitution Act (1982)* (Canada) s52(1).

³⁶ See, eg, *Singh v Minister of Employment and Immigration* [1985] 1 SCR 177.

³⁷ Ison, above n 15, 511.

[24] If a Bill of Rights were to be enacted, there are different forms which such a document could take. There is no right answer as to which system is most suitable, since they all have their strengths and flaws. Having said this, the gradual approach applied in Canada seems most suitable, as it encompasses both methods of integrating rights into the legal system. It shows that a Bill of Rights need not necessarily be entrenched initially, but that this would be the ultimate goal in order to have a fair and protected society. Perhaps the best solution would be that suggested by Kirby J when he said:

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.³⁸

³⁸ Kirby, above n 3.