

**Four Fictions:
An Argument Against a Charter of Rights**

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If anyone was in doubt about a charter of rights being back on the agenda for Australia, the 2020 Summit held earlier this month provided some much needed clarification. While the call for a charter of rights was one of the headline outcomes from the Summit, the delegates discussing the matter were by no means unanimous in support of the idea, and the supporters themselves were further divided between those who want a bill of rights entrenched as an amendment to the Commonwealth Constitution, and those who think a charter of rights as an ordinary act of Parliament more achievable in the short term.

In the midst of all this, there was a small and illuminating aside which attracted some attention. One delegate, a prominent human rights lawyer whose work in many respects I greatly admire, made the strange suggestion that politicians be prosecuted when they allegedly fail to tell the truth. It was very quickly pointed out in reply that if there were to be any such law it should also apply to lawyers. There is a charming unselfconsciousness about this lawyer's suggestion which does go to one of the central problems of a charter of rights; and that is the easy assumption, that lawyers are more trustworthy when it comes to protecting rights than politicians.

I am not sure that this assumption is readily shared in the general community. Politicians have one very great advantage over lawyers, and especially those lawyers who are appointed to be judges. They regularly have to account for their decisions and actions to the electorate, to ourselves, the voters who have to live within the provisions of their legislation. This remains as one of the great safeguards of freedom and justice in a democratic society. It is strange indeed that some are now claiming that this safeguard is not enough and our rights will only be secure when they are entrusted to unelected judges who are accountable only to the constitution and the law which they themselves interpret and administer.

It is instructive on this point to note that Zimbabwe has a constitutional bill of rights, which among other things protects rights to personal liberty, freedom of conscience and expression, and freedom of assembly, association and movement. The Zimbabwe bill of rights also provides protections against inhuman treatment, deprivation of property, arbitrary search or entry, and discrimination. Just to list these rights against the present situation in Zimbabwe shows how fragile they are. A courageous judge or court could undoubtedly make a difference by faithfully administering the law, but Mugabe's government has largely taken care of that danger. The only thing which might put an end to the abuse of human rights and the destruction in Zimbabwe — and we can only say "might", because there are no guarantees — is a complete change of government. This is something quite beyond the reach of any court order.

The suspicion of majority — that is, parliamentary — rule, the preference for judicial, as opposed to political, determination of fundamental questions, the unacceptable transfer of responsibility from the parliament to the courts, and the unspoken assumptions which inform not only these tendencies but the particular social and political agenda which a bill of rights is intended to implement, are some of critical problems with proposals for a bill or charter of rights. These problem are compounded by confusion over the foundations of human rights, freedom and truth.

Four fictions in a charter of rights

One major intrinsic problem with a charter of rights is that it relies on a number of significant fictions. There are four fictions that I want to highlight.

a) One of the most important is the claim that courts are forums of principle where rights are given their due, while parliament is a forum of political power, where public opinion and government or party policies make compromise the order of the day. Former Chief Justice of Australia Sir Anthony Mason has expressed his support for a constitutional bill of rights exactly in these terms, arguing in 2006 that a bill of rights would better protect basic rights from political interference by replacing “political compromise” with “principled judicial decision-making”¹.

Unfortunately things are not so clear cut. While parliamentary decision making is affected by party politics, lobbying, ambitions for re-election, public pressure and ideology, principle is not regularly vanquished by these considerations. Principle is particularly important in parliamentary decision-making on fundamental issues, as the debates over the rights of refugees and asylum seekers, RU-486 and cloning, and euthanasia, make very clear. Similarly, while courts obviously place great emphasis on principle, it is naïve, if not absurd after forty years of judicial activism, to suggest that considerations of power and ideology, policy and compromise, as well as ambition, political pressure, media and academic flattery, never come into play in the law. Judges themselves have frequently drawn attention to the unacknowledged operation of these various factors in judicial decision making.

The high standard of probity and commitment among judges and politicians in Australia is a blessing we should not take for granted. But as a forum for decisive public answers, parliament has a great advantage over the courts because it is much easier to bell the cat. Genuine public debate exposes the influence of extraneous factors which may or may not work against principled decision making. It allows all those concerned about an issue to have their say about the proper basis in principle for making a determination. This is an important safeguard.

b) Another fiction invoked in the argument for a bill or charter of rights is that decision making by majority vote, either in parliament or in elections, regularly means injustice for the minority or the unequal treatment of some groups in law.

1. Sir Anthony Mason, “Rights Bill a Matter for Judgement”, *The Age*, 29 March 2006.

To the extent that there is truth in this it is in the form of a truism: the danger posed to a minority by majority rule is real when it is taken as the absolute basis for political decision making. But there is another, more present danger and that is the disproportionate influence that organised minorities can have over the political process.

Lenin and the Bolsheviks made the minority *coup d'etat* a matter of political principle. Thankfully this is not our problem today. But modern democracy is inextricably entangled with the influence of powerful minorities in politics. The role not only of the Christian churches but of party factions, sectional interests and lobbyists in the political process is regularly identified as problematic. Other minorities, such as political interest groups, some intellectuals, and journalists (and especially the power of the media generally) are also influential, although typically they are not regarded as a problem.

Since the late 1960s talk of "the tyranny of the majority" has become rather fanciful in Australia. Social and legal reform during this time has been driven overwhelmingly by minority agendas. Even the election of seriously conservative governments with large majority mandates has done little more than slow this trend down here and there.

A great deal of this has been undoubtedly for the good. The rights of Aborigines and indigenous or racial minorities, women (not strictly speaking a minority!), homosexuals, migrants and the poor, the disabled and the elderly needed recognition and protection in different ways.

In Australia most of these developments came about through parliamentary initiative, with majority public support either present from the beginning or accruing as the discussion proceeded. Majority resistance to these measures was completely absent. This is the way democracy works at its best in Australia. When proposals of the political class address genuinely fundamental issues of fairness or justice, the fair-mindedness and decency of ordinary Australians can be counted on for support most of the time.

The bedrock idea of a fair go is not fail-proof, as I shall discuss in a moment. But it is simply untrue to claim that majority rule is the absolute basis of Australian democracy to the exclusion of minority rights or representation. The reality is a much more complex interplay of leadership and agitation, populism and scepticism, principle and compromise. Despite the range of forces working to shape and manipulate consensus and opinion, this complex of factors keeps politics in Australia broadly centrist and strongly favouring the pragmatic and moderate over ideological nostrums and extremism. Compulsory voting and preferential voting also help us to move regularly around the centre.

It helps to understand the game that is afoot in the push for a charter of rights to consider the way "the tyranny of the majority" is used to browbeat majority scepticism about minority agendas. Until very recently same-sex marriage was considered an oxymoron by most people, and I suspect it still is. In the United States 27 states have amended their constitutions to prohibit same-sex marriage, and a number of others have passed statutory prohibitions. This led the academic jurist Ronald Dworkin to criticise the majority of his countrymen for using the law to impose their understanding of marriage (as being between a

man and a woman only) on the homosexual minority². This is, of course, a deliberate distortion of the real situation, in which a minority of the homosexual minority are actively seeking to impose their redefinition of marriage on the rest of the population through spurious rights-claims and judicial fiat.

The tyranny of the majority is also invoked in discussions about the treatment of asylum seekers and laws against terrorism. In both these areas the concern about governments disregarding the rights of individuals or minorities to placate the majority has a more substantive basis. The re-election of the Howard government in 2001 after the Tampa affair and the support for processing asylum seekers outside Australia's migration zone (the "Pacific solution") are often raised in this context.

Certainly the asylum seeker issue highlights where the limits of the ethic of the fair-go among the majority can be encountered. I wonder about the consequences for Australian democracy if we were to suffer a major terrorist attack on our own soil, although the level-headed and clear-sighted public response to the Bali bombings in 2002 should remind us that Australians generally tend to be politically sophisticated rather than politically reactive.

The critical point, however, is that if fear and insecurity are drivers in a political situation, democratic politics offers the only real chance we have for dealing with them. Treating majority fears and opinions condescendingly is no part of the solution. Here we depend on the leadership, wisdom and prudence of democratically elected leaders, in both government and opposition, factors we cannot take for granted and which for that very reason we must always work to encourage. Clear principles about human rights and strong institutions are also required, but hoping that court decisions will make fear and insecurity disappear among the general populace or using them to impose a solution on a worried population may not be good for politics, the courts or respect for law.

c) A third fiction that proponents of a bill or charter of rights rely on is that rights are ultimately about moral beliefs or consensus rather than moral truth. This is a problem to which John Finnis drew attention almost three decades ago³. The shift in the law from moral truth to moral belief became apparent in the late 1950s with Lord Devlin's influential treatment of the enforcement of morals. Devlin accepted that the state may enforce laws against obscenity, for example, but argued that this can no longer be based on the promotion of virtue or a judgement about the right way for people to live. Instead it must be based on the state's interest in preserving the morale and cohesion of society. Shared ideas and values are critical to social cohesion, and for this reason the law

2. Ronald Dworkin, "Three Questions for America", *New York Review of Books*, 53:14 (21 September 2006), 30. Dworkin claims that Americans who oppose same-sex marriage "believe that a majority of citizens has the right, acting through the normal political process, to shape the religious and spiritual character of our shared culture by law. Those who favor permitting gay marriage believe, on the contrary, that a religious and spiritual culture must be shaped organically, by the individual, free decisions of everyone". An astonishing reversal of what is really going on.

3. J. M. Finnis, "A Bill of Rights for Britain? The Moral of Contemporary Jurisprudence". Maccabean Lecture in Jurisprudence, delivered at the British Academy, 30 October 1980, (typescript) 15-17.

should support deeply held and widespread beliefs reprobating obscenity and ensure that they are not flouted.

Devlin grasped at this device to shore up the foundations of law in the wake of the law's repudiation of the law of reason (or natural law) beyond the positive law. How well it has served to shore up laws against obscenity is plain to see in a society awash with pornography and its malign influence in marketing and advertising. But because the law rejected the law of reason and the truth about human flourishing to which it directs us, law is left with nothing else as a basis for human rights than the slender reed of "deeply held and widespread moral belief".

For some this is congenial. If moral consensus is the basis for human rights, then the manipulation and coercion of moral belief can produce new rights such as those to abortion, euthanasia, and the cloning and destruction of human life for research purposes. Political and legal elites are only at ease with this approach, however, because they assume that they will always be in control of it. This is one of the reasons for the despair and panic that was discernible in some places when very different, deeply held and widespread moral beliefs about limiting the rights of asylum seekers came to the fore in 2001 and seemed poised to take the "consensus" on rights in a different direction.

Basing human rights on moral consensus has its advantages in producing new rights, but it also creates problems when it comes to claiming that these rights really are true and inviolable and not just creations of lawyerly ingenuity. As Finnis has observed, "a bill of rights purports to identify certain interests as truly fundamental aspects of human flourishing" which it is unjust to neglect or violate. It is difficult to sustain this claim, which is fundamental to the success of any defence of human rights, without a concept of truth beyond the law and beyond the moral beliefs of the moment. The incoherence of this position "denatures the modern bill of rights"⁴, and reduces it to an instrument enabling the courts to make final determinations about the commitments and principles which comprise the common good. In the absence of any greater authority, human rights become dependent on judicial compulsion for their force and meaning.

d) This brings us to the fourth fiction underlying the push for a bill or charter of rights; namely the "greatly expanded element of make-believe" that is required to keep up the appearance that courts are "doing justice according to law" when they are in fact legislating without opposition on fundamental questions of value and commitment⁵. This is tolerated from time to time because of the deep respect democratic societies have for the rule of law. But if the rule of law becomes the rule of judges we will have a serious problem on our hands.

Interpreting a charter of rights

Basing rights on a consensus of moral belief rather than moral truth places them on an uncertain foundation. This foundation is made even more unstable by the use of the courts to reshape moral beliefs, or to bypass majority beliefs in the

4. Ibid.

5. Ibid. 43-44.

general community. For people who are serious about human rights, this is akin to playing with fire. Rights cannot be inviolable if they are only plastic. They cannot be inherent to the dignity of the person if they are also a stalking horse for a particular social and political agenda. Rights are either a human artifice, or grounded in reality, in truths to be recognised and respected. No one has the authority to abolish human rights in the second hypothesis.

Typically, we want to have to have our cake and eat it; to make up new rights and then proceed as though we haven't. This undermines the credibility of human rights and the credibility of political and legal institutions. Perhaps there are some who imagine that there is no real harm in this because logical contradictions in law and government are often overlooked by ordinary members of the public and seem to have little consequence. This would be a mistake. Everyone in our society understands the advantages of dressing up a demand or a desire for something they want with the word "rights". Astute social engineers are able to use this for their own purposes.

The whole concept of human rights has become so massively dependent on imaginative interpretations of the law, for example from the right to privacy to the right to abortion, that there is little knowing where it might finish up. The experience of human rights instruments overseas makes it very clear that some rights will be interpreted narrowly and some expansively. Exceptions and limitations will be treated in the same way, depending on the particular right to which they are attached⁶.

Naturally I am especially concerned about the fate of the right to religious liberty under a charter of rights. Experience overseas is not entirely encouraging on this score.

In the United Kingdom in 2005, Mrs Veronica Connolly, a pro-life campaigner, sent photos of aborted babies to three pharmacies in an attempt to dissuade them from stocking the morning after pill. The pharmacies complained to the police and Mrs Connolly was charged under the Malicious Communications Act for posting material to people which was "in whole or in part, of an indecent or grossly offensive nature". She was duly convicted and fined, and she appealed to the High Court of Justice. In her appeal Mrs Connolly claimed that the Human Rights Act required the English law against malicious postal communications to be applied in a way consistent with her rights to freedom of expression and freedom of thought, conscience and religion under the European Convention on Human Rights.

In January 2007 the court dismissed this argument, ruling that freedom of thought, conscience and religion is a right which of its nature is likely to cause offence to others and so must be narrowly construed. The limitations for protecting the rights of others placed on this right, and in this case also on the right to freedom of expression, were given an expansive reading, so that the "distress and anxiety" caused to those who saw the photos sent by Mrs Connolly was found to be a violation of their rights. For this reason, the court concluded, "the conviction of Mrs Connolly on the facts of this case was necessary in a

6. Finnis "A Bill of Rights for Britain?" 20.

democratic society"⁷. The House of Lords declined to grant her leave to appeal against this decision.

This case shows what can happen when a bill or charter of rights is interpreted from the premises of a secularist mindset, especially when it is sharpened, as in Europe, by fear of home-grown Islam. Britain's population has had a Christian majority for over 1,000 years, probably for 1,500 years. It is ironic that the Christian right to free speech on a life issue like abortion can be limited so fiercely. In the UK at least one should fear further restrictions on Christian comments in public life as anti-religious elements use the fear of Islamic violence to place limits on all religious groups bold or foolish enough to speak out publicly on issues declared "taboo" by the new political correctness. Presently such issues touch on sexuality, marriage, family and life. In the near future, given the likely developments in bio-technology, we shall be battling against involuntary euthanasia and even compulsory eugenics, as well as human cloning.

Proponents of a charter of rights regularly point to the UK Human Rights Act as a model that should be adopted here. *Connolly v DPP* shows how little protection religious people can expect from anything like the UK Human Rights Act if it were to be implemented in Australia, even for minor and maladroit forms of religious expression and political activity such as Mrs Connolly's.

Conclusion

The push for a charter of rights springs from a suspicion of majority rule, a preference for judicial decision-making on fundamental questions, the imperatives of the particular social and political agenda that a charter of rights serves, and the elitism of privileged reformers — not all of whom are lawyers. And the problems with such a charter are increased by the inability of contemporary law and philosophy to agree on a secure foundation for human rights, freedom and truth.

The different charters of rights currently in force (in Victoria and the ACT) or being offered in Australia seek to provide important protections of some values upon which we all agree. For example, no one wishes to detract from rights to due process and a fair trial. These are not in dispute or under challenge, and already enjoy substantial common law and statutory protection as Chief Justice Spigelman pointed out recently. But even these rights can be made questionable by a charter of rights.

In Canada, the Supreme Court has given these rights a substantive rather than procedural meaning, so that any infringements against them, even when they are procedurally fair, are ruled to be major rights violations. As a consequence the threshold for excluding evidence from criminal trials has been progressively lowered, seriously hampering the administration of criminal justice, and making these rights a matter of controversy⁸. In Australia there is no evidence of serious vindictiveness towards terrorism suspects among the majority of the population at the moment. But this could change very quickly if cases against them begin to

7. *Veronica Connolly v Director of Public Prosecutions* [2007] EWHC 237 (Admin).

8. *Ibid.* 39-40 & 44-46.

fall over; if, for example, an Australian court declares that being compelled to take part in a police line up is incompatible with the right to due process.

So it is not only in areas of life, family, freedom of religion, discrimination and equality that a bill or charter of rights causes trouble. The irony is that the uses to which courts put a bill of rights often generate exactly the hostile majority reaction to rights that this sort of legislation is meant to avert. We don't have a culture war here in Australia in the way the United States does, but a bill or charter of rights could help provoke one.

When it comes to the protection of human rights, it is important to ensure that we are not labouring under illusions. There are major problems with the whole concept of a charter of rights which place worrying question marks over human rights, the rule of law, and the democratic process. The preamble to Canada's 1960 statutory Bill of Rights, superseded by the 1982 constitutional Charter of Rights but still part of Canadian law, expressly recognises that "fundamental freedoms and human rights" are derived from "the supremacy of God, the dignity and worth of the human person". We could learn from this.

In contrast, the Canadian Charter of Rights offers a preamble which is little more than an introductory sentence, and reads: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law". The Australian charters either omit any reference to a foundation for rights or omit a preamble altogether. Ironically, given the fear of the majority discussed here, the federal human rights act being proposed by New Matilda seems to suggest that democracy is the source of human rights.

Rights are best protected by the common law and by parliament when the people are equally aware of their responsibilities. Democratic law-making is imperfect, but preferable to rule by the courts.

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