

Executive rule to be feared

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One of Cardinal George Pell's set pieces is about the emptiness and ultimate sterility of relativism, and about how important it is to affirm absolute and immutable truths, not least in the natural law. "Nothing matters more than truth in our society," he told the Press Club in 2005. "Differences about important issues such as war, slavery, abortion, euthanasia are different claims to moral truth, not merely competing preferences. "Some who have never been deprived of truth can give it up too easily, perhaps using talk of relativism or secularism to camouflage their actual commitment to money, success, possessions, power. But these are ambiguous goods, they can be misused and are rarely distributed fairly." Last night, the cardinal was at the Brisbane Institute, denying that there are any absolute truths in human rights. He's against a Bill of Rights: rights are best determined by parliaments according to the moods and flavours of the time.

Those who want a Bill of Rights, he says, rely on a number of "fictions". One is that courts are forums of principle where rights are given their due, while parliament is a forum of political power and compromise, affected by lobbying, public pressure and ideology. Judges themselves are capable of being influenced, cajoled and flattered, he says. It's a fiction that rule by majority vote regularly means injustice to minorities in fact minorities often have disproportionate influence over the political process, he says. For example, advocates for same-sex marriage (implicitly without majority support) have browbeaten parliaments in support of their views. (His opponents might say the same about the success anti-abortion advocates or anti-stem cell people have in trying to frustrate apparent majority opinion on their causes.) The treatment of asylum-seekers and terrorists might give a more substantive basis for fearing tyranny by the majority, though he wondered "about the consequences for Australian democracy if we were to suffer a major terrorist attack on our own soil".

Yet "the level-headed and clear-sighted public response to the Bali bombings of 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 of dealing with them. Treating majority fears and opinions condescendingly is no part of the solution." It was also a fiction to assert that rights were ultimately about moral beliefs or consensus, rather than moral truth.

Likewise, there was a greatly expanded sense of make-believe in keeping up an appearance, in human-rights cases, that courts were doing justice according to law, when in fact they were legislating without opposition on fundamental questions of value and commitment. In other countries, such as Britain, he says, "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 and family and life." Soon, "given the likely developments in bio-technology, we shall be battling against involuntary euthanasia and even compulsory eugenics, as well as human cloning."

He joins other opponents of a Bill, now speaking out because the 2020 Summit called for a Bill. NSW Attorney-General John Hatzistergos is opposed because it upsets his idea of "parliamentary sovereignty", actually not a concept contained within our Constitution, though useful shorthand for the belief that politicians, sensitive to public opinion, will never go too far in trampling on civil rights.

So too, with telling examples of an alleged explosion of stupid rights-oriented litigation on matters ranging from vegetarian menus to naked strollers, is former NSW premier Bob Carr. More traditional conservatives also raise doubts about an "activist" judiciary, inevitably likely to be politicised by their adjudications. They also argue our common law tradition is jealous of human rights, and has a pretty good record of defending them piecemeal.

I have myself been sceptical of the need. But I am changing my mind again, because our politicians are not showing themselves great instinctive protectors of rights, just when they are needed. Certainly not Carr or Hatzistergos. Or previously John Howard and Philip Ruddock, in actions scarcely criticised by those who have now succeeded them. And not only over terrorism and refugee issues but also in developing or exploiting moral panic about the state of crime or vice. The risks are being aggravated by the ever-outreaching power of executive government, by the supine position into which legislatures have been put by modern executives, and by the coordination of incumbency and spin to overwhelm popular criticism. It's not parliamentary rule we ought to fear, but increasingly arbitrary and unaccountable rule by executive government. Proponents of a Bill of Rights do not have to put too much faith, or hope, in judges, activist or not. They have only to argue that a Bill might be a desirable further check and balance on government yet another field of tussle between the executive, the parliament and the judiciary. It's here that there's a need for a fiction a real fiction that authoritarians like George Pell will never understand. The fiction ought to be that power comes from the people, and that the powers of government, at whatever level, or in whatever branch, are only those they have been given. Beyond the sum total of these is a right of personal dignity and autonomy that citizens have not surrendered to the state. It is a fiction, because in history, particularly British history, the rights of which we boast were ones seized from kings, occasionally by beheading them. Our Constitution involves no popular transfer and regrant, of the sort represented by the opening words of the US Constitution: "We the people ...". What the US Constitution says is that its citizens took power from the king, the parliament and the British courts for themselves. They then gave some of the powers to organs of government, at national, state and local level, further subdividing them between different branches such as ministers, parliamentarians and judges. By their Bill of Rights, they reserved some rights and powers such as a right of freedom of speech, a right to due process from all governments. Organs of government can fight over how power was to be exercised and by whom with checks and balances to make sure that each stuck to its own turf. None has the right to interfere with basic rights, or indeed citizenship. But not quite the way that George Pell's organisation arranges things. On all questions, refer to mother. By preference through George, the appointed, if not elected, oracle.

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