

What's so wrong with a judiciary dealing with rights?

Crikey, 30 April 2008

Barrister Stephen Keim writes:

The prospect of a Bill or Charter of Rights got close to top billing at the recent 2020 Conference, provoking a flood of reaction.

Catholic Archbishop George Pell stirred the pot last night on the issue at the Brisbane Institute. "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," he told the audience.

Noting that Zimbabwe has a bill of rights -- and look what it's done for them -- he argued that "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."

But is this right? For many years, the main argument against a Charter was the strength of the common law to protect us from repressive governments. But decades of repressive legislation have convinced even great common lawyers like Sir Gerard Brennan and Sir Anthony Mason of the limitations of the protection that the common law can provide.

And what's so wrong with an "unelected judiciary" applying a Bill of Rights anyway? Opponents like to argue that a charter of rights is somehow undemocratic in essence. But that is to misunderstand both the nature of democracy and the modern concept of such charters.

Our idea of democracy is more than simply that the majority decides what happens in our society. Democracy involves a number of accompanying ideas about the way in which we make decisions and the respect we show for the rights of people, including those who, for the moment, do not constitute part of the majority. These people might include asylum seekers picked up at sea by Norwegian ships; members of an unpopular religion; or voices of criticism a government would rather not hear.

So it is not undemocratic for the community, either through its elected representatives or a referendum, after reflection, to set down in a charter some of those values which form such an important part of a free and democratic way in which we want to be governed.

To reject this argument leads, ultimately, to simple majoritarianism. This form of making decisions has been practised in the 1990s in the Balkans. Even a pusillanimous international community* eventually acted to bring that example to an end.

The issue of "unelected judges" misses the point. A charter of rights is more about the procedure by which we decide than who makes the decision. A procedure in which, in a relatively calm atmosphere, a person with no axe to grind in the particular dispute makes the decision after those who are involved have had the chance to put forward both evidence and argument has much to recommend it.

The anti-discrimination Acts which have operated in most States and Territories and at national level for the past thirty years provide a guide as to how a charter of rights will

operate. Not many parents of a child with disabilities would be content to have a bureaucrat decide whether their child should be entitled to be educated in a mainstream classroom or not. Equally, bureaucrats are not well suited to deciding whether HIV positive prisoners must be kept segregated or whether gay women should be entitled to participate in an in-vitro fertilisation program.

In most such sensitive cases, politicians are unlikely to want to wrestle with an issue which may involve a just result in reality but a campaign nightmare in the hands of an unscrupulous opponent.

Modern forms of charters of rights do not prevent parliaments changing the basic statement of values (that is, the terms of the charter) or overruling the specific decision if, after the fact, they regard it of sufficient importance. Thus, even the majoritarian sentiment is not offended.

Besides, unelected judges constitute only the most obvious way by which we give effect to Plato's idea of the "philosopher monarch". Many aspects of our society are run by people appointed because they are considered, by their training and their innate skills, to be most qualified to make decisions in that area. Governors and heads of public servant departments are but two examples.

We will always have what happened in Srebrenica in July 1995 on our conscience. There isn't even any John Howard "It wasn't our generation" nonsense to ease the pain.