



The Tuesday Report

Right way hard to judge

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JOHN Howard was listening to radio in the US in November when an interview with a Baptist minister caught his attention.

The minister noted that Barack Obama would be the 44th president of the United States, but sitting jurist John Roberts was just the 17th chief justice of the US Supreme Court.

His point, roughly, was that elected representatives of the people were disposable, but unelected custodians of the courts could hang around without having to get regular re-endorsement.

And US judges have more power and influence in many areas than elected members of Congress, or the president.

That sent a shudder through Mr Howard, someone who, despite his legal training, fears the courts gaining similar authority in Australia.

The source here of that out-of-proportion judicial authority, reaching into family affairs and moral issues, could be a Bill of Rights.

``The concept of a Bill of Rights has superficial appeal," Mr Howard said in Perth on August 26 as he delivered the 2009 Menzies Lecture.

``It all sounds so beguiling. Compile a list of fundamental rights on which we would all find ready agreement, entrench them in the Constitution, and live in harmony ever after. It is not anywhere near as simple as that."

Frank Brennan is a Jesuit priest, not a Baptist minister, and that's not the only difference he would have with the man Mr Howard listened to on American radio.

Prof Brennan, professor of law at the Australian Catholic University, is chairman of the National Human Rights Consultation Committee, which, it was revealed last week, has urged the Government to take action in a number of areas of promotion and protection of human rights.

Recommendation 18 read: ``The committee recommends that Australia adopt a federal **Human Rights Act.**"

This means we are now headed for an intense national debate over how our rights should be guarded, and by whom: members of parliament, or members of the bench?

Prof Brennan will give his side of the debate in a National Press Club address in Canberra tomorrow.

An unlikely combination of Liberal and Labor types will be working against the recommendation, with forecasts that a Bill of Rights would allow everything from marriage to adoption to religion to become constitutional issues decided by courts rather than by elected representatives carrying out a community's wishes.

You will hear a constant theme from the dissenters related to the narrowing of decision making that would follow.

``This is very much a process that has been driven by a small group of lawyers and academics and political activists. It's very much a triumph of the elites," Liberal senator George Brandis, SC, said last week.

In his address, Mr Howard continued along another theme -- the complexity of the issue.

``We might all agree that freedom of speech, or freedom of religion, are unarguably fundamental rights," he said. ``The problem is we don't all agree on what, in every case, constitutes freedom of speech or freedom of religion."

Mr Howard, who likes his philosophers old and pithy, quoted Jeremy Bentham on a list of absolute rights: ``Rhetorical nonsense -- nonsense on stilts."

In practical terms, an individual might need a lawyer to find out if they are indeed exercising religious freedom or something proscribed by the Australian Constitution.

Back to Senator Brandis: ``This is a fundamental rebalancing of the Constitution away from the elected arms of government, that is the Parliament and the executive of government, towards the unelected arm of government, the judiciary.

``And it should not proceed without the people's consent."

He and former New South Wales Labor premier Bob Carr want a referendum before any Bill of Rights legislation is considered.

``There's no doubt at all that lawyers would be laughing all the way to the bank if this were to be enacted, and there is a big cost in this," Senator Brandis said.

``It's not just the financial cost to the legal system of paying all these lawyers, but there is also the cost to the judicial system of clogging up the courts with claims.

``[This] has been the experience in other jurisdictions."

It would have been interesting to have seen how the intervention into Northern Territory Aboriginal communities would have fared under a Bill of Rights.

The Howard government suspended the Racial Discrimination Act to intervene and protect the basic rights and entitlements of Aboriginal children.

That judgment might not have been possible under a Bill of Rights.

Mr Howard's last word was: ``I oppose a Bill or Charter of Rights on orthodox democratic grounds."

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