JUDGES AND HUMAN RIGHTS

ADDRESS BY JUSTICE CHRIS MAXWELL, PRESIDENT OF THE COURT OF APPEAL, TO THE QUEEN'S INN DINNER, QUEEN'S COLLEGE, UNIVERSITY OF MELBOURNE, 4 MAY 2012

Since 1 January 2008, the provisions of the Victorian Charter of Human Rights (more formally, the *Charter of Human Rights and Responsibilities Act 2006*) have been enforceable in Victorian courts and tribunals. For the first time in Victoria's history – and, with the exception of the ACT, the first time in Australian history – Parliament has set out in a legislative charter the rights which the State is committed to protecting.

The Preamble to the Charter begins as follows:

> *"On behalf of the people of Victoria the Parliament enacts this Charter, recognising that all people are born free and equal in dignity and rights.*
>
> *This Charter is founded on the following principles:*
>
> - *human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom."*

And in s 1(2), the first of the purposes of the Charter is:

> *"To protect and promote human rights by –*
>
> *(a) setting out the human rights that Parliament specifically seeks to protect and promote."*

One of the most significant means by which these rights are to be protected is the requirement that a minister introducing a Bill to Parliament must provide to the House, before the Second Reading Speech is given, what is referred to as a "statement of compatibility".[1] The Minister must state whether the Bill is compatible with Charter rights, or if any part of the Bill is incompatible with rights, must specify "the nature and extent of the incompatibility".

The question of compatibility includes consideration of the "reasonable justification" provision in the Charter, which declares that the rights protected under the Charter may be subject only to –

---

1 Charter s 28.

> *"such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom."*[2]

From all reports, these provisions have already had a salutary effect on the machinery of government. They have encouraged the development of a culture of human rights, since legislative proposals now have to be shaped within the parameters set by the Charter. Proposals which are not human rights-compatible are likely to be refined, or abandoned in favour of a rights-compatible alternative.

This unseen power of the Charter – to nullify at source, or at least moderate, rights-infringing legislation – far outweighs the powers of judges under the Charter, to which I now turn.

The Charter gives judges three distinct functions, only one of which could be described as novel. The first is to review the lawfulness of the actions of ministers and government officials. This is work which the Supreme Court has done since its inception. It is known as "judicial review of administrative action". The Charter simply adds a new ground of review, making it unlawful for public officials to act incompatibly with human rights.[3]

Again, it would seem, the main benefit of this provision is to engender a human rights culture within the corridors of government. It is certainly worthy of note that, in the four years since the Charter has been enforceable, there have been only a handful of legal challenges on this ground.[4]

The second function for judges concerns the interpretation of Victorian laws, also an age-old function of courts. Under s 32 of the Charter, provisions of Victorian law must "so far as it is possible consistently with their purpose, be interpreted in a way that is compatible with human rights". In simple terms, this means that, if a provision of a Victorian law is open to more than one interpretation, the Court is obliged to prefer the interpretation which produces the least infringement of human rights.

The third function – which is new – is the corollary of the second. If the Court is unable to interpret a provision of Victorian law consistently with human rights, the Court is able to make a "declaration of inconsistent interpretation".[5] Again in simple terms, this amounts to saying that it is not possible to interpret the provision compatibly with the Charter.

---

2 Charter s 7(2).

3 Charter s 38(1).

4 *Castles v Secretary to the Department of Justice* [2010] VSC 310, [186]; *Giotopoulos v Director of Housing* [2011] VSC 20, [90]; *P J B v Melbourne Health* [2011] VSC 327 [311]–[312].

5 Charter s 36(2).

The making of such a declaration does not affect the validity of the law, however. Its function is simply to identify the infringement of human rights, so that Parliament can decide *whether* it should be rectified. This is the so-called "dialogue model" of human rights protection, by which the sovereignty of Parliament is expressly maintained.

The common law and human rights

What is often overlooked in debates over the Charter is that there was already, in the common law, a well-developed human rights jurisprudence – most notably in the criminal law.

The common law of Australia has a rich tradition, mostly inherited from England but in part developed domestically, of recognising and protecting human rights. This has two important consequences, as follows.

First, the task which the Charter has conferred on courts and tribunals, of considering the scope of human rights and of interpreting legislation compatibly with human rights, is as old as the common law itself.

Secondly, by enacting the Charter, which both defines and qualifies human rights protection, Parliament has asserted legislative authority over a field which hitherto the judges have had all to themselves. Legislating on human rights is not a transfer of power to the judiciary. On the contrary, it is an assumption of power by the legislature.

The task of interpreting and applying human rights is something that, for centuries, the community has relied on judges to perform. As the first Commonwealth Attorney-General, Alfred Deakin, said in 1902, "Many of our most fundamental principles and liberties are founded directly upon judicial decisions."[6]

Statutory interpretation[7]

The common law developed some very strong rules to prevent legislative infringement of basic human rights. As early as 1910, O'Connor J said in *Sargood Bros v Commonwealth*:[8]

> *"It is a well recognised rule in the interpretation of statutes that an Act will never be construed as taking away an existing right unless its language is reasonably capable of no other construction.*"

---

[6] Second Reading Speech on the Judiciary Bill, House of Representatives Hansard, 18 March 1902 p 10983.

[7] I acknowledge the great assistance I have derived (as always) from Pearce & Geddes, *Statutory Interpretation in Australia* (7th ed, 2011).

[8] (1910) 11 CLR 258, 279.

Almost 100 years later, Gleeson CJ said in *Plaintiff S157/2000 v Commonwealth*:[9]

> *"…Courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by an unmistakable and unambiguous language. General words will rarely be sufficient for that purpose. What courts will look for is a clear indication that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment…In the absence of express language or necessary implication, even the most general words are taken to be 'subject to the basic rights of the individual'."*[10]

In *Melbourne Corporation v Barry*,[11] the High Court was dealing with a by-law of the City of Melbourne purporting to prohibit "processions of persons" through the streets except with the previous written consent of the town clerk. By majority, the High Court held that the by-law was invalid. Higgins J said:

> *"It must be borne in mind that there is this common law right [of the King's subjects to pass through the highway, whether singly … or in processions]; and that any interference with a common law right cannot be justified except by statute – by express words or necessary implication. If a statute is capable of being interpreted without supposing that it interferes with the common law right, it should be so interpreted."*[12]

In *re Bolton; ex parte Beane*,[13] Brennan J was referring to the common law of *habeas corpus* when he said:

> *"Many of our fundamental freedoms are guaranteed by ancient principles of the common law or by ancient statutes which are so much a part of the accepted constitutional framework that their terms, if not their very existence, may be overlooked until a case arises which evokes their contemporary and undiminished force."*

His Honour went on to say:

> *"The law of this country is very jealous of any infringement of personal liberty … and a statute or statutory instrument which*

---

9 (2003) 211 CLR 476, 492.

10 His Honour made similar statements in the indefinite detention case, *Al Kateb v Godwin* (2004) 219 CLR 562, 577 [19].

11 (1922) 31 CLR 174.

12 Ibid 206.

13 (1997) 162 CLR 514, 520-1.

> *purports to impair a right to personal liberty is interpreted, if possible, so as to respect that right.*
>
> …
>
> *The Constitution of the Australian Commonwealth does not contain broad declarations of individual rights and freedoms which deny legislative power to the Parliament, but the courts nevertheless endeavour so to construe the enactments of the Parliament as to maintain the fundamental freedoms which are part of our constitutional framework. It is presumed that that is the intention of Parliament, although the courts acknowledge that the balance between the public interest and individual freedom is struck not by the courts but by the representatives of the people in Parliament."*[14]

I cannot leave this topic without reciting the memorable statement from *Maxwell on Statutes*, first cited by the High Court in *Potter v Minahan* and which has echoed down the decades. In *Potter*, O'Connor J said:

> *"It is always necessary, in cases such as this where a statute affects civil rights, to keep in view the principle of construction stated in Maxwell:*
>
>> *'…It is in the last degree improbable that the legislature would overturn fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words,*
>
> *Simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used."*

That statement was endorsed by the High Court in *Bropho*[15] and again in *Coco*.[16]

It can now be seen that there is nothing new, or radical, about s 32 of the Charter which requires Victorian courts and tribunals to interpret all statutory provisions "in a way that is compatible with human rights, so far as it is possible to do so consistently with their purpose."

International law

And then there is the human rights impact of international law. Well before the

---

14 Ibid 523.

15 (1990) 171 CLR 1 at 18.

16 (1994) 179 CLR 427 at 437.

Charter was enacted, I said in the *Royal Women's Hospital*[17] case:

> *"That there is a proper place for human rights-based arguments in Australian law cannot be doubted. As the Hospital's well-researched submission pointed out, over the past two decades Australian courts have been prepared to consider the use of international human rights conventions in:*
>
> *(a) exercising a sentencing discretion;*[18]
>
> *(b) considering whether special circumstances existed which justified the grant of bail;*[19]
>
> *(c) considering whether a restraint of trade was reasonable;*[20] *and*
>
> *(d) exercising a discretion to exclude confessional evidence.*[21]
>
> *In John Fairfax Publications Pty Ltd v Doe,*[22] *Gleeson CJ (as Chief Justice of New South Wales), in considering whether the means of protecting privacy of communication under Part VII of the Telecommunications (Interceptions) Act 1979 (Cth) lacked proportionality, referred to the international recognition of the need for stringent controls in the interests of privacy.*
>
> *There are three important ways in which such instruments, and the associated learning, can influence the resolution of disputes under domestic law*[23]*. This is so notwithstanding that, unless an international convention has been incorporated into Australian municipal law by statute (as has occurred with the Commonwealth's Racial Discrimination Act 1975 and Sex Discrimination Act 1984), the convention cannot operate as a direct source of individual rights and obligations under Australian municipal law.*
>
> *First, the provisions of international treaties are relevant to statutory interpretation. In the absence of a clear statement of intention to the contrary, a statute (Commonwealth or State) should be interpreted and applied, as far as its language permits,*

---

17 (2006) 15 VR 22, 38-9 [72]-[77].

18 *R v Togias* (2001) 127 A Crim R 23, 37 [85] per Grove J; 43 [123] per Einfield AJ; *R v Hollingshed* (1993) 112 FLR 109,115, contra *Smith v R* (1998) 98 A Crim R 442, 448.

19 *Schoenmakers v Director of Public Prosecutions* (1991) 30 FCR 70, 75; see also *Re Rigoli* [2005] VSCA 325.

20 *Wickham v Canberra District Rugby League Football Club Ltd* (1998) ATPR 41–664, [64]-[70]; *McKellar v Smith* [1982] 2 NSWLR 950, 962F.

21 *McKellar v Smith* [1982] 2 NSWLR 950, 962F. See now the much faller list set out by Bell J in *Tomasevic* (2007) 17 VR 100, 114 [73] and fn 49.

22 (1995) 37 NSWLR 81, 89D-F, 90B-C.

23 See generally, H Charlesworth, M Chiam, D Hovell and G Williams, *"Deep Anxieties: Australia and the International Legal Order"* (2003) 25 Syd.L.R. 423.

> *so that it conforms with Australia's obligations under a relevant treaty.*
>
> *Secondly, the provisions of an international convention to which Australia is a party – especially one which declares universal fundamental rights – may be used by the courts as a legitimate guide in developing the common law. The High Court has cautioned that the courts should act with due circumspection in this area, given that (ex hypothesi) the Commonwealth Parliament itself has not seen fit to incorporate the provisions of the relevant convention into domestic law.*
>
> *Thirdly, the provisions of an international human rights convention to which Australia is a party can also serve as an indication of the value placed by Australia on the rights provided for in the convention and, therefore, as indicative of contemporary values.*"

In *Brown v Classification Review Board*,[24] the present Chief Justice of Australia (then a judge of the Federal Court) said this:

> *"The value currently given by the common law to freedom of expression is high. Freedom of expression, particularly the freedom to criticise public bodies, is regarded by the Courts as one of the most important freedoms - Halsburys Laws of England 4th Edition Vol 8(2) para 107. This is no doubt attributable in part to the influence of the body of International Conventions which have accorded the freedom explicit recognition and protection and the designation "fundamental". That designation may be traced from Articles 1 and 55 of the Charter of the United Nations to the Universal Declaration of Human Rights and the International Convention on Civil and Political Rights. It has legislative recognition in Commonwealth statutes - Human Rights and Equal Opportunity Commission Act 1986 (Cth), and the Racial Discrimination Act 1975 (Cth). Courts applying common law principles may be expected to proceed on an assumption of freedom of expression and look to the law to discover exceptions to it - Attorney General v Observer Ltd [1990] AC 109 at 203."*

The debate

There is, however, a continuing controversy about whether these functions under the Charter are appropriate functions for judges. Professor James Allan, Garrick Professor of Law at the University of Queensland, has for some time

[24] (1998) 82 FCR 225, 234-5.

been arguing that the Charter provisions represent an unjustified enlargement of the power of the judiciary, at the expense of the legislature.[25]

In 2011, the government members of the Victorian Parliament's Scrutiny of Acts and Regulations Committee expressed the view in their Report on the Charter that these were not appropriate functions for judges. The Premier and the Attorney-General recently published the Government's response to the Committee's report. The Attorney-General said that the Government believed there was "an ongoing place for the courts in protecting rights in relation to the Charter". How that role should be defined would be the subject of "specific legal advice".

In "The Australian" of 16 March, Professor Allan was highly critical of the Government's response:

> *"One's initial thought on reading this down-the-line cave-in to all the lawyers' and legal academics' vested interests is to describe the Baillieu response in terms of an abject surrender, perhaps the greatest surrender since General Percival gave Singapore to the Japanese."*

And further:

> *"Remember, the whole debate about this Charter revolves around whether this sort of moral decision – about where to draw highly contested social policy lines – ought to be made by our elected legislators or by judges.*
>
> …
>
> *What is the government going to do about the Committee's concerns as to the role of the Courts? Wait for it, because it's almost too shameless to be true. It's going to seek specific legal advice in relation to these issues. Got that? In deciding whether committees of ex-lawyer judges ought to have their role reduced Baillieu is going to ask … lawyers."*

The essential complaint is that issues of human rights should be decided by Parliament, and Parliament alone. As judges are not elected, they are said to lack democratic legitimacy.

The answer to this critique is, I think, straightforward – and uncontroversial. The separation of powers and the functioning of an independent judiciary are a cornerstone of democracy. No conservative theorist would doubt this proposition. The functions I have described – judicial review and the

---

[25] James Allan, "The Victorian Charter of Human Rights and Responsibilities: Exegesis and Criticism" (2006) 30 MULR 906, 908–12.

interpretation of legislation – are functions which Western democracies have always called on their judges to perform.

This constitutional function has become entrenched, and essential to democracy, not because judges have any superior wisdom or moral sensibility but because they are independent – and are seen to be independent. Judges stand apart from the Executive Government and the legislature, and the political pressures to which those arms of government are constantly subjected.

When Alfred Deakin introduced the Bill to establish the High Court of Australia (which became the *Judiciary Act 1903*), he said, "The people did not err in giving the High Court the prominence which it has in the Constitution". By way of support, Deakin invoked the following statement by the great conservative thinker, Edmund Burke:

> *"What is supreme in the State ... ought to give a security to its justice against its power. It ought to make its judicature, as it were, something exterior to the State."*[26]

In 2010, the Court of Appeal published its decision in *Momcilovic.*[27] The Court concluded that s 32 of the Charter was very similar to the common law presumption against interference with rights. What was significant about s 32(1), the Court said, was that:

> *"Parliament has embraced and affirmed this presumption, in emphatic terms. It is no longer merely a creature of the common law but is now an expression of the "collective will" of the legislature. Moreover, the rights which the interpretive rule is to promote are those which Parliament itself has declared, in the Charter."*

As the judgment records, all parties before the Court, including the then Attorney-General, had urged the Court to find that s 32 of the Charter established a bold new rule of interpretation, empowering judges to rewrite legislation if they thought it necessary to do so in order to secure compliance with human rights. As the Court of Appeal noted,[28] this was the approach which had been taken by the House of Lords in a series of cases under the *Human Rights Act 1998* (UK).

The Court of Appeal unanimously rejected those arguments. In the view of the Court, it was perfectly plain from the language of s 32, and from the Parliamentary debates, that Parliament had never intended to give judges the

---

26 Second Reading Speech on the Judiciary Bill, House of Representatives Hansard, 18 March 1902 p 10981.

27 *Momcilovic v R* [2010] VSCA 50; (2010) 25 VR 436, 465 [104]; (2010) 265 ALR 751 (Maxwell P, Ashley and Neave JJA).

28 Ibid [44]–[53].

power to rewrite legislation. The High Court on appeal agreed,[29] pointing out that any attempt to give judges such a power would have been invalid under the Australian Constitution, as purporting to confer on judges a non-judicial function, that of legislators.

---

29 *Momcilovic v R* [2011] HCA 34; 280 ALR 221; (2011) 85 ALJR 957.