A Judge-Made Bill of Rights?
Opportunities and Objections*

Justice Murray Wilcox

You will note the question mark in the title. To those who, like me, on balance favour the development of an Australian Bill (or Charter) of Rights, there is some attraction in the possibility of a Bill being developed incrementally by decisions of the High Court of Australia. Given our lamentable record in keeping our Constitution up to date and the current lack of interest at a political level in amendments expressly protecting human rights, it is easy to believe that judicial creativity represents the only chance that any of us will live to see constitutional protection like that which is now commonplace throughout the world. But there are difficulties about that solution. In my opinion, they outweigh the benefits.

The story so far

Before referring to advantages and disadvantages, it is perhaps useful to sketch in some background. I do not propose to go to cases in detail. They are well known.

The reasons for decisions announced by the High Court on 30 September 1992 in *Nationwide News Pty Ltd v Wills*[1] and *Australian Capital Television Pty Ltd v Commwealth*[2] caused a political outcry. In each case members of the Court held that legislation duly enacted by the Commonwealth Parliament pursuant to its s 51 powers was invalid because of infringement of the implied constitutional right of free communication about political matters. However, as Deane and Toohey JJ pointed out[3], there was nothing novel about the proposition that the Constitution contained implied rights. They went back to Quick and Garran and, even further, to an 1867 decision of the United States Supreme Court[4]. They cited High Court decisions from 1912 to 1992. So what caused the stir? Primarily, I suspect, the fact that, in *Australian Capital Television,* the Justices intruded into a subject with a high political content: election campaign broadcasts.

The politicians were hardly placated when, in October 1994, the Court took the further step[5] of limiting their right to recover defamation damages on the basis of the implied constitutional right. That step is currently subject to reconsideration. However, as the High Court found in relation to the Territory senators, it is difficult to reverse a significant constitutional decision without discrediting the Court itself.

You may recall that in 1975, by a four to three majority, the High Court upheld the validity of 1973 legislation providing for the election of two senators for the Australian Capital Territory and two senators for the Northern Territory[6]. In 1977 the Court reconsidered that decision. Despite the fact that only three of the seven Justices thought the 1975 decision correct, it was reaffirmed by a five to two majority. Gibbs and Stephens JJ, who had dissented in 1975, joined the remnant of the 1975 majority[7] in rejecting the fresh challenge to validity[8]. After making the point that the doctrine of *stare decisis* does not rigidly apply to constitutional decisions, Gibbs J eloquently expressed his dilemma[9]:

> *"No Justice is entitled to ignore the decisions and reasoning of his predecessors, and to arrive at his own judgment as though the pages of the law reports were blank, or as though the authority of a decision did not survive beyond the rising of the Court. A Justice, unlike a legislator, cannot introduce a program of reform which sets at nought decisions formerly made and principles formerly established. It is only after the most careful and respectful consideration of the earlier decision, and after giving due weight to all the circumstances, that a Justice may give effect to his own opinions in preference to an earlier decision of the Court."*

He said it was not enough that a member of the earlier majority[10] had retired and been replaced by a Justice[11] with a different view about validity.

I mention this experience because it is something to bear in mind in considering the advantages and disadvantages of the Court attempting to fill the constitutional rights gap by teasing implications out of the Constitution. It is essential that the Court be quite clear about what it wishes to do; once a right is proclaimed, it is difficult for the Court to go back without undermining itself.

A few days after the *Nationwide News* and *Australian Capital Television* decisions, Justice Toohey presented a conference paper in which he discussed the potential for the High Court to develop an implied bill of rights[12]. He referred to the traditional approach of courts: to read a statute narrowly where it potentially curtailed basic common law liberties, but to give a wide construction to the constitutional heads of power pursuant to which the statute was purportedly enacted. So the Commonwealth Parliament's capacity to curtail common law liberty by legislation relating to the subjects of its legislative power was unlimited - it just had to do so unambiguously.

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1 (1992) 177 CLR 1.

2 (1992) 177 CLR 106.

3. In *Nationwide News* at 70-72.

4. *Crandall v Nevada* (1867) 73 US 35.

5. See *Theophanous v The Herald and Weekly Times Limited* (1994) 182 CLR 104 and *Stephens v West Australian Newspapers Limited* (1994) 182 CLR 211.

6. See *Western Australia v The Commonwealth* (1975) 134 CLR 201.

7. Mason, Jacobs and Murphy JJ.

8. See *Queensland v The Commonwealth* (1977) 139 CLR 585.

9. At 599.

10. McTiernan J.

11. Aickin J.

12. *"A Government of Laws, and Not of Men?"*, a paper delivered at the Conference on Constitutional Change in the 1990s, Darwin, 4-6 October 1992.

Having stated that traditional position, Justice Toohey put a novel proposition:

> *"... it might be contended that the courts should take the issue a step higher and conclude that where the people of Australia, in adopting a constitution, conferred power to legislate with respect to various subject matters upon a Commonwealth Parliament, it is to be presumed that they did not intend that those grants of power extend to invasion of fundamental common law liberties - a presumption only rebuttable by express authorisation in the constitutional document. Just as Parliament must make unambiguous the expression of its legislative will to permit executive infringement of fundamental liberties before the courts will hold that it has done so, it might be considered that the people must make unambiguous the expression of their constitutional will to permit Parliament to enact such laws before the courts will hold that those laws are valid.*
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> *If such an approach to constitutional adjudication were adopted, the courts would over time articulate the content of the limits on power arising from fundamental common law liberties and it would then be a matter for the Australian people whether they wished to amend their Constitution to modify those limits. In that sense, an implied 'bill of rights' might be constructed."*

Opportunities for an implied bill of rights

Many discussions about the advantages and disadvantages of a bill of rights quickly become quarrels about entrenching particular rights. I do not wish to fall into that trap. Yet the case for a bill of rights cannot be separated entirely from its likely content. It is not really possible to consider what scope there may be for a judicially-created implied bill of rights without considering, at least in broad terms, what rights we wish to protect. That subject has been examined in Australia from time to time[13], most recently by the Constitutional Commission which reported in 1988. But it cannot be said that the public debate on these occasions was extensive or informed, or resulted in consensus as to the desirable content of a bill of rights, if one was to be enacted by statute or constitutionally enshrined. Consequently, I will discuss scope by reference to the Canadian Charter of Rights and Freedoms, the instrument the Commission thought to be the best model for Australia.

Leaving aside language rights which are not relevant here, the Canadian Charter deals with five categories of rights (or freedoms). First, fundamental freedoms: freedom of conscience and religion, freedom of thought, belief, opinion and expression (including freedom of the press), freedom of peaceful assembly and freedom of association. Second, democratic rights. Third, mobility rights. Fourth, legal rights and, fifth, equality rights.

In terms of court caseloads, the dominant category is legal rights. These rights mainly concern the criminal process. They cover the full continuum from initial arrest to punishment after conviction. Some are stated in fairly general terms, some are highly specific. The protected rights are of great importance and have enabled the Canadian Supreme Court to build up a considerable body of jurisprudence about the treatment of people suspected of crime. However, the Australian experience suggests that, for the most part, it was not essential to put these protections in constitutional form. In recent years, the High Court has insisted on observance of similar rules, not in its capacity as interpreter of the Australian Constitution, but in its capacity as supreme arbiter of the Australian common law[14]. However, there are exceptions. Section 7 of the Canadian Charter is in very general terms. It provides:

> *"Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."*

This provision has been used to strike down legislation; for example, there are decisions invalidating legislation placing on an accused person an onus of proof and legislation limiting the circumstances under which abortion was lawful[15]. The course proposed by Justice Toohey might enable the High Court to emulate the former decision. The second is more problematical.

The first-mentioned category, fundamental freedoms, is the area where the Australian High Court has been most active - especially in relation to freedom of expression. Yet decisions like *Australian Capital Television* and *Theophanous* depend upon the freedom of citizens to participate in the political process. They are concerned with communications concerning public issues. Section 2 of the Canadian Charter goes further. It includes what the Canadians call *"commercial speech"*, primarily advertising. Is there a basis for finding such a freedom in our Constitution?

It might have been thought that the next Canadian category, democratic rights, was an area offering substantial scope for the implication of constitutional rights. What could be more fundamental to the democratic notions embraced in *Australian Capital Television* etc than equality of voting power, within reasonable margins? However, in *McGinty v Western Australia*[16] the High Court rejected the argument that the Australian Constitution implies voting parity.

The fourth Canadian category, mobility rights, may be

13. See the 1973 *Human Rights Bill* and the 1985 *Australian Bill of Rights Bill*. Both these Bills stalled in the Senate and lapsed when Parliament was prorogued. Both sought to embody into Australian domestic law most of the provisions of the International Covenant on Civil and Political Rights.
14. See for example *Dietrich v The Queen* (1992) 177 CLR 292.
15. See the discussion of s 7 in my book *"An Australian Charter of Rights?"* at 90-114.
16. (1996) 134 ALR 289.

susceptible of development of an implied right in Australia. I suppose the argument is that it is inherent in the notion of Australia as a federation that citizens of one State are free to move to another State and there pursue their vocations. Of course, s 117, interpreted as in *Street v Queensland Bar Association*[17], in any event substantially covers this ground.

The fifth Canadian category is the one that, to my mind, most demonstrates the case for a bill of rights.

Section 15(1) of the Canadian Charter provides:

> *"Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."*

Subsection (2) excludes laws, programs and activities directed to the amelioration of disadvantage.

There is not time to go into the cases that have arisen under s 15. It is sufficient to say it has given a major impetus to people working on behalf of people in disadvantaged groups: women, the disabled, indigenous people, minority language groups, homosexuals, prisoners, people suffering extreme poverty. The story is an exciting one, although there is still a long way to go. But this is also an area where it is difficult to envisage the development of implied constitutional protections. It lies well beyond Justice Toohey's concept of protecting *"fundamental common law liberties"*. What is there in the Australian Constitution to preclude discrimination against minority groups? After all, we have practised it ever since federation.

In summary, it seems to me that there is relatively little scope for implied rights to provide the protections for Australians that have been provided in Canada, and many other countries, by constitutional provisions.

Objections

The major objection to developing a judge-made bill of rights concerns the legitimacy of the undertaking. Australian judges are not elected. We are accountable for our decisions, in the sense that we may be reversed on appeal or criticised by commentators, but we are not politically accountable. In making decisions, we do not consult public opinion. A judge who makes a decision that is at odds with public sentiment is not required to resign or liable to be dismissed. This is, of course, as it should be. Without such independence, it would be impossible for judges satisfactorily to determine disputes involving governments or powerful people. However, the flip side of this situation is that judges have no mandate to determine what values are so important to the community as to warrant constitutional protection. It is one thing to give to judges the task of construing, and applying principles of proportionality to, expressions of values adopted by the people or the Parliament; it is another thing for them also to select the values.

Most judges would be conscious of this point. Once again, the Canadian experience is instructive. In 1960 the Canadian Parliament enacted a statute called the *Canadian Bill of Rights*. It set out some general principles concerning rights and freedoms. It provided that, unless Parliament expressly declared otherwise, every law of Canada - that is, every federal law - should be so construed and applied as not to abrogate those principles. Although Justice Laskin[18] described the Bill in one case as a *"quasi-constitutional instrument"*, it was in law an ordinary statute. This fact, combined with the generality of its terms, seriously undermined its value. Perhaps personalities played a part, but the fact is that, in the 22 years that passed between its enactment and the commencement of the *Canadian Charter of Rights and Freedoms,* the 1960 statute was successfully invoked on only one occasion. The reasons for judgment in the unsuccessful cases make plain the inhibition felt by judges, even at Supreme Court level, in striking down legislation pursuant to such a general authority. Under the Charter, in contrast, the judges have felt no inhibition. The recent Supreme Court judges have taken courage from the fact that the Charter is a constitutional instrument, in the full sense of the word, and is more specific.

A second objection relates to the first. A protection introduced into the law by constitutional amendment or statute may readily be preceded by a widespread inquiry as to its ramifications and consultation with affected interest groups. Although American and Canadian courts liberally allow interventions in constitutional cases, a court intervention falls well short of the degree of consultation available to Parliament.

Finally, judicial development of any set of principles depends upon the vagaries of the list. No pronouncement may be made until a suitable case presents itself; even then, it may go away, as we saw in the recent abortion case. So an important issue may be left unresolved for many years. Or it may be determined in advance of other issues that are logically related to it.

Conclusion

My comments are not intended to be critical of the decisions so far taken by the High Court concerning implied constitutional rights. I seek merely to point out the limited scope for extending that process, so as to embrace all the rights and freedoms most of us hold dear, and the substantial objections to requiring judges to develop the list of protections. This step ought to be taken at the political level, with strong government and parliamentary leadership, and widespread public debate. If that is done, and we achieve a constitutionally inscribed bill of rights, or even a strong and specific statute, the judges may be trusted to do their part in its construction and application. ❑

17. (1989) 168 CLR 461.
18. Later Laskin CJ. See *Hogan v The Queen* [1975] 2 SCR 574 at 597.