RESTORING the RULE OF LAW through a national bill of rights

By Dr Wendy Lacey

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Since 11 September 2001, we have witnessed Australian legislatures increasingly trample on rights and freedoms that – for those of us fortunate to live in liberal democracies – were previously taken for granted. For the most part, the legislative initiatives of the Howard government were upheld by the Gleeson High Court – many of which included serious incursions into individual rights and freedoms, from WorkChoices to anti-terrorism legislation.

Anti-terrorism legislation was able to erode the right to a lawyer, the right to know the government's case against you, the right to communicate with family members, and many others.[1] Our national government can detain children for years on end in detention centres located in remote desert regions.[2] It is also free to detain indefinitely those illegal immigrants whom it cannot deport.[3] And the unprecedented and draconian measures that have recently permitted the government's 'emergency' intervention in the Northern Territory are bound to have lasting negative effects.[4]

Throughout this period, the High Court has come under intense criticism, both from within[5] and without,[6] for the perceived abrogation of its role as the guardian of the Constitution. However, it would be short-sighted solely to blame the Gleeson Court for the legislative excesses of the Howard government.

The time has come for a national Bill of Rights. Because of Australia's legal conservatism, and the technical positivistic approach that tends to dominate judicial decisions, change can only come about through a statutory national Bill (or Charter) of Rights. Until Australia's judges are required to engage with human rights standards through such an instrument, we have no benchmarks for measuring legislative incursions into our basic rights and liberties. The significance of a Bill of Rights lies not only in articulating general human rights standards, but also in ensuring that governments must publicly account for and justify any interference with those standards. Improved accountability is therefore the principal democratic aim of a statutory Bill of Rights.

HUMAN RIGHTS AND THE AUSTRALIAN JUDICIARY

The human rights debate in Australia has always been highly politicised, and has always featured the argument that a Bill of Rights would confer too much power on the judiciary. The notion of a judicial power-grab plays on concerns that an unelected judiciary could determine the content of specific rights. But those who raise these concerns rarely acknowledge the role that the judiciary already plays in this regard, or the limitation placed on that role by our constitutional framework.

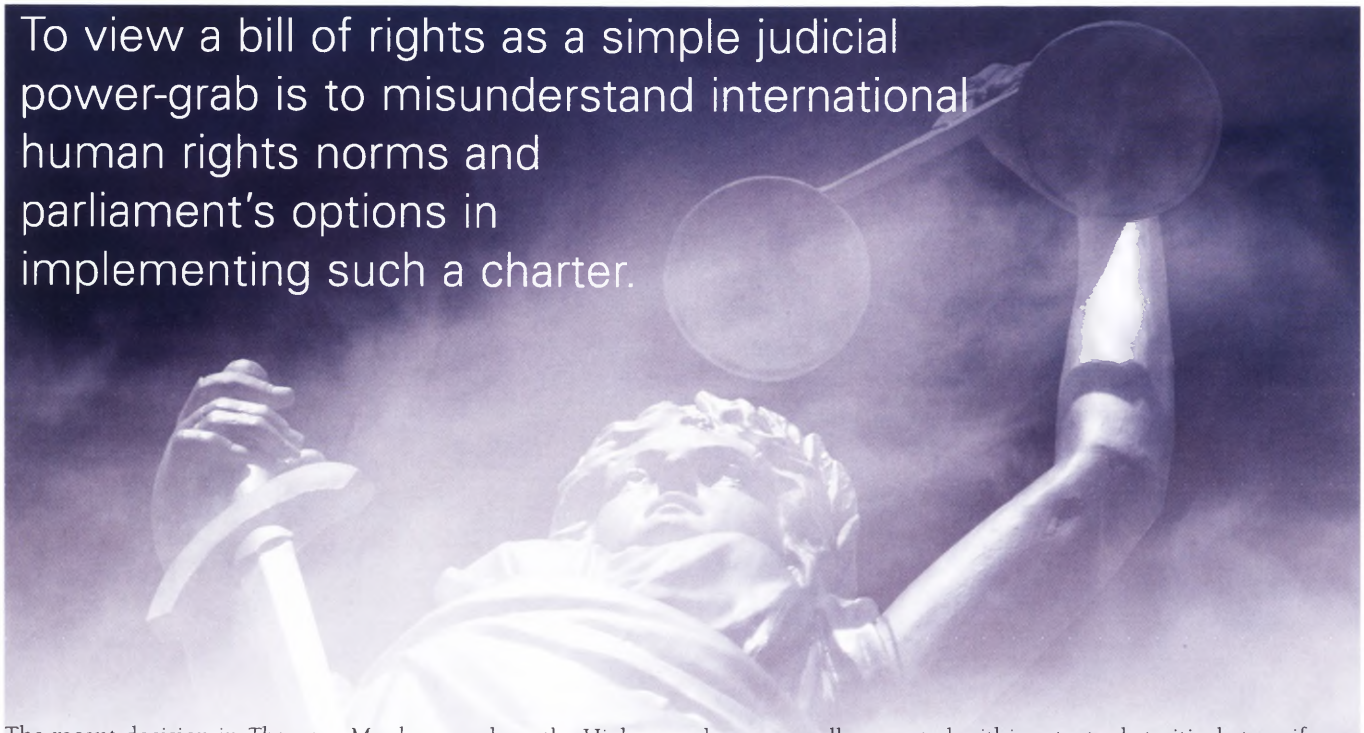
Take the right to a fair trial, for example. That right has long been adhered to at common law. Although numerous statutes contain provisions dealing with evidence and procedures directed at ensuring the fairness of trials, you will not find the words 'every person charged with a criminal offence is entitled to a fair trial' in any statute book. To find those words, one must look to the common law. Yet, judges have always stopped short of dictating to governments the actual content of the right to a fair trial. In the case of *Dietrich*,[7] the High Court refused to hold that the right required governments to provide defendants with legal counsel at public expense. The High Court instead chose to stay criminal proceedings in serious criminal matters where a defendant is unrepresented at trial. What the decision in *Dietrich* demonstrates is that the courts are extremely careful not to perform the role of the executive government or parliament.

An entrenched separation of powers in a written Constitution is, therefore, a powerful restraint on the judiciary, which loses its legitimacy if it breaches that separation. This assessment applies equally to judges at the state level, despite the absence of an entrenched separation of powers between the executive, the legislature and the judiciary. The Constitution – whether federal or state – will continue to govern the manner in which any Bill of Rights is interpreted by the courts. Australian judges are not about to begin writing the budget by telling government where it must be allocating resources, for example. Nor is that role carried out in a legal vacuum, giving individual judges the power to impose their own personal preferences and values. A substantial body of case law and commentary from other jurisdictions and international bodies is available for them to refer to.

Improved accountability is a principal democratic aim of a statutory bill of rights.

The role of the judiciary in implementing a Bill of Rights is essentially twofold: to identify breaches of human rights (and, in some circumstances, to award remedies for those breaches); and to interpret laws and perform other judicial tasks as consistently with the Bill of Rights as possible.

Australian judges are generally quite conservative. The late Justice Perry, of the South Australian Supreme Court, once described the Australian judiciary as suffering from a 'virulent strain of legal positivism'.[8] The dominance of legal positivism has itself emerged as a threat to human rights, because it treats the text of the Constitution as the foundation of the rule of law in Australia,[9] rather than the supreme manifestation of the rule of law that rests on a broader, but less explicit, foundation.[10] Consequently, the powers conferred on the federal parliament have been construed so widely by the Gleeson High Court that it is now difficult to envisage any practical limits on the scope of legislative power. >>



To view a bill of rights as a simple judicial power-grab is to misunderstand international human rights norms and parliament's options in implementing such a charter.

The recent decision in *Thomas v Mowbray* – where the High Court upheld the constitutional validity of the control order regime under anti-terrorism legislation – represents the latest in a line of cases that make a mockery of the concept of limited government at the federal level.

That fact alone would not represent so great a problem if governments were reluctant to exercise their powers to their full extent, or if parliament was more effective as an institution in ensuring government accountability and proper legislative scrutiny. During the Howard years, however, we witnessed an ever-increasing desire on the part of government to use legislative powers to their full effect. Parliament's role was also diminished as a consequence of the Coalition's control of both Houses and the continuing failure of the opposition to challenge the government on matters of national security.

But parliament is not the only institution that has failed Australians by not preventing the erosion of fundamental rights and freedoms. Criticism of the judiciary is also justified, for the courts have appeared in recent years (to invoke the words of Lord Atkin)[11] 'more executive-minded than the executive'. And, unlike parliament, which is effectively controlled by the government of the day and, more often than not, by the prime minister,[12] the judiciary is supposed to be completely independent of the executive. But, following the decision in *Thomas v Mowbray*, where the court said it was acceptable for courts to order the home detention of citizens who have not been convicted of any offence, our understanding of 'judicial independence' has shifted.

The problem is this: when faced with extraordinary legislative measures that infringe basic rights and freedoms, the High Court has maintained its positivistic stance, determining the law's validity against the constitutional text alone. With the exception of Justice Kirby, High Court judges have generally operated within a textual straitjacket, as if any engagement with 'human rights' considerations effectively amounts to interpretive heresy, since the constitutional text is virtually devoid of substantive rights.

Judicial approaches that espouse a broader, less positivistic, view of constitutionalism, or that expressly engage with the human rights issues raised in specific High Court cases, tend to be found only in minority decisions, or at the margins of a judge's obiter comments. Generally, we can find such approaches only in the dissenting opinions of Kirby J. However, Gleeson CJ's adherence to the 'principle of legality' has also enabled his Honour to adopt a rights-protective stance on occasion.[13]

The current state of constitutionalism, and the way it is approached by the majority of judges, has often failed to preserve liberty. The courts, in adopting a positivistic stance, have also failed to stand between legislatures and citizens by enforcing the notion of limited government. Most Australians would assume that liberty, legality and limited government constitute fundamental assumptions at the core of the Constitution. But, in relying too heavily on the formal text of the Constitution, the High Court has undermined the fundamental assumptions upon which it rests. Consequently, the system of government envisaged by the Constitution has been weakened.

HOW TO PROTECT HUMAN RIGHTS

Importantly, the various international human rights instruments, upon which modern Bills of Rights tend to be based, envisage different methods for protecting human rights. Specifically, the human rights conventions to which Australia is bound do not envisage a uniform role for the courts in protecting rights – so to speak of a judicial power-grab is also to misunderstand the nature of international

human rights norms. Remedies for the breach of human rights are intended to be administered by the courts (which, in those Australian states that have implemented statutory Bills of Rights, have generally involved declarations of incompatibility). However, different human rights envisage different levels of protection by domestic courts.

For example, some human rights merely require the judicial oversight (that is, judicial review) of certain executive decisions. Examples in the International Covenant on Civil and Political Rights (ICCPR) include those relating to arbitrary arrest and detention (Article 9) and, potentially, to the deportation of aliens (Article 13). The Convention on the Rights of the Child (CRC) requires the judicial review of decisions by competent authorities to separate children from parents against their will (Article 9) and judicial involvement, where appropriate, in cases where protective measures are taken to prevent violence, harm, and abuse (Article 19). Children deprived of their liberty are also entitled under CROC to challenge the legality of that detention before a court (Article 37).

In other circumstances, only national courts have the authority to sanction certain actions (such as sentencing an offender to the death penalty under Article 6 of the ICCPR and declaring an arrest or detention under Article 9 lawful or not).

The protection of human rights, therefore, does not always fall within the sole domain of 'judicial power' – at least not from an international law perspective. A more detailed examination of international human rights law reveals not just the rights to be protected, but the manner in which they should be protected – bearing in mind that international instruments tend to stipulate the essential minimum requirements in this regard.

The decision by Australia to implement a Bill of Rights would not involve a simple transfer of power from elected politicians to unelected judges. Statements to this effect reveal a distinct lack of understanding about the nature and content of international human rights norms. Furthermore, they are misleading about parliament's power to decide which rights are actually included in a Bill of Rights, as well as the limits that may be placed on the courts' power to award remedies for breaches of those rights. For example, it is entirely consistent with international law for any Australian parliament to limit that power to non-coercive remedies, such as making a declaration that a breach has occurred.[14]

However, one issue that needs to be addressed in the campaign for a national Bill of Rights is whether a UK-style enactment would be constitutionally valid in Australia.[15] Problems may arise if Chapter III courts are given the power to issue a 'declaration of incompatibility' where legislation is inconsistent with the Bill of Rights, as under the UK Act.[16] Federal courts can exercise jurisdiction only where a 'matter' arises[17] and, as Lindell[18] and Stellios[19] have already noted, in order for a declarations of incompatibility to amount to a 'matter', a relaxation in constitutional jurisprudence on this issue would be required. In this context, the New Zealand and Canadian models would be useful benchmarks in developing a national instrument.

CONCLUSION

To ensure that governments are forced to account for any erosion or suspension of rights, Australia needs a Bill of Rights at the federal level. Until judges are legislatively required to engage with human rights, adherence to legal positivism will continue to ensure that such considerations remain at the margins of Australian jurisprudence. While the rule of law has not completely disappeared from the Australian constitutional landscape, the technical positivistic approach of the High Court has tended to favour a narrow form of legality over the concepts of liberty and limited government. Until basic rights and liberties are articulated and protected within a positive legal instrument, legislative and executive action will be measured only against the text of a Constitution that is virtually devoid of substantive rights. And those who fear that a Bill of Rights would unleash a judicial power-grab are failing to acknowledge that the judicial application of a Bill of Rights in Australia will always be counter-balanced by our written Constitution and tradition of legal positivism. ■

Notes: **1** *Criminal Code Act* 1995 (Cth), Divisions 104 & 105. **2** *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365. **3** *Al-Kateb v Godwin* (2004) 219 CLR 562. **4** *Northern Territory National Emergency Response Act* 2007 (Cth). A constitutional challenge to the intervention has been instituted in the High Court: *Wurridjal & Anor v The Commonwealth of Australia* [2007] HCATrans 630 (1 November 2007). **5** *Thomas v Mowbray* [2007] HCA 33 (2 August 2007), [386]-[387] (Kirby J). See article on p43 of this edition of *Precedent*. **6** B Nicholson, 'Kirby Lashes Judges Over Terror Case Ruling', *The Australian*, 3 August 2007; 'Editorial: The High Court Changes the Balance of Power', *Sydney Morning Herald*, 15 November 2006; K Davidson, 'Blame the High Court, Not the Pollies, For Partisan Ads', *The Age*, 24 May 2007. **7** *Dietrich v R* (1992) 177 CLR 292. **8** Hon JW Perry, 'The Use and Application of International Law in Australia and in Decision-Making', paper presented to the Law Society of South Australia, Adelaide, 29 October 2003, p18 (copy on file with author). **9** M Allars, 'Of Cocoons and Small "c" Constitutionalism: The Principle of Legality and an Australian Perspective on *Baker*', in D Dyzenhaus (ed), *The Unity of Public Law*, Hart Publishing, Oxford (2004), p307. **10** For an alternative, substantive account of the rule of law, see: TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law*, Oxford University Press, Oxford, 2001; D Dyzenhaus, 'Form and Substance in the Rule of Law: A Democratic Justification for Judicial Review', in C Forsyth (ed), *Judicial Review and the Constitution*, Hart Publishing, Oxford, 1994, p141. **11** *Liversidge v Anderson* [1942] AC 206. **12** See Sir Gerard Brennan, 'Principle and Independence: The Guardians of Freedom' (2000) 74 *Australian Law Journal* 749, pp755-6. **13** See, for example, *Al-Kateb v Godwin* (2004) 219 CLR 562 [19]. **14** See, for example, the *Human Rights Act* 2004 (ACT). **15** *Human Rights Act* 1998 (UK). **16** In contrast see, *Human Rights Act* 2004 (ACT); *Charter of Rights and Responsibilities Act* 2006 (Vic). **17** *Commonwealth of Australia Constitution Act* 1900, ss75, 76. **18** G Lindell, 'The Statutory Protection of Rights and Parliamentary Sovereignty: Guidance From the United Kingdom?' (2006) 17 *Public Law Review*, 188. **19** J Stellios, 'State/Territory Human Rights Legislation in a Federal Judicial System', paper presented at the Protection of Human Rights Conference, University of Melbourne, Melbourne, 25 September 2007.

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