THE RULE OF LAWYERS

A Bill of Rights could lead to an elected judiciary, argues **Alan Anderson**

In polite society, the human rights lobby enjoys a status similar to that of Greenpeace, Nelson Mandela and the United Nations: its faults may be legion, but it is the height of bad manners to point them out at dinner parties. Nonetheless, if we are to foster the robust public debate that a successful liberal democracy requires, we must occasionally distress our more sensitive dinner companions by serving up a generous slab of sacred cow.

We should be particularly forthright in attacking institutions which harbour anti-democratic sentiments behind a veil of public respectability. Despite its unimpeachably good intentions, the human rights lobby holds a disturbing conviction that the imposition of its ideology should not be impeded by vulgar popular opinion.

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Throughout the West, civil rights activists have long seen the courts as a more receptive forum than the electorate for the adoption of their proposals. That a movement composed substantially of lawyers should seek to implement its vision of society through the courts is surely a cause for concern. The belief that an enlightened judicial class should conjure up imaginary new rights to frustrate the popular view on topics such as immigration and aboriginal reconciliation may flow from a charitable impulse, but it is hardly a democratic one.

With the High Court now significantly less inclined to activism than in recent decades, Australian rights advocates are exploring new avenues to advance their cause. Through the importation of amorphous concepts from international law, especially the ill-defined 'human rights' enumerated in international instruments, these advocates are seeking to create laws so ambiguous that judges are forced to supplement them with personal prejudices. Simultaneously, we have begun to hear criticisms that the judiciary is insufficiently

'representative', and calls for reform of the judicial appointment process.

The latter campaign is a logical corollary to the former. If the judiciary exists to interpret the law, to practise a dry and esoteric art, then its demographic composition is unimportant. But if the role of judges comes to resemble that of the legislature, then they too should be representative of the broader community.

Of course, despite its rhetoric, a truly representative judiciary is the last thing the rights lobby wants. The true vision of the activists is a rights-driven expansion of the judicial role, with a 'representative' judiciary appointed by an allegedly apolitical commission stacked, in practice, with members of a left-leaning legal clique.

This model, towards which other common law jurisdictions have made significant strides, represents a stark and unappealing alternative to liberal democracy.

Expansion of the judicial role

The debate over judicial activism pre-dates the current rights lobby. Judicial activists have long heaped scorn on the concept that there is a distinction between making and interpreting law, correctly noting that judges must often inform dry statute with personal experience. Perhaps judges, not poets, are the unacknowledged legislators of the world. Yet if the strict legalism advocated by the late Chief Justice Sir Owen Dixon is a myth, it is nonetheless a useful one. British jurist and political philosopher Lord Devlin explained:

> It is facile to think that it is always better to throw off disguises. The need for disguise hampers activity and so restricts the power. Paddling across the Rubicon by individuals in disguise who will be sent back if they proclaim themselves is very different from the bridging of the river by an army in uniform and with bands playing.[1]

It is absurd to assert that a small zone of ambiguity between two concepts—making law and interpreting law—which, in most cases, are readily distinguished, renders meaningless the separation of powers or absolves judges of their responsibility to show deference to the plain meaning of statutes.

Finding Australians unreceptive to this jurisprudential sophistry, the activists' latest ploy has been to deprive statutes of plain meaning. The ambiguous 'human rights' which they seek to import from international law into Australian law leave judges little option but to fall back on personal prejudices to derive a meaningful interpretation.

This campaign is enjoying considerable success. The Australian Capital Territory last year introduced Australia's first Bill of Rights. Victoria is poised to follow. With staunch opponent Bob Carr removed from the New South Wales political scene and state Liberals in disarray around the country, other dominoes will almost certainly fall.

Australian advocates of the Bill of Rights concept, whether at a state or national level, deride concerns of judicial tyranny as exaggerated and alarmist. After all, they say, their modest proposals remain subject to parliamentary override.

Yet experience in the United Kingdom and Canada demonstrates the disingenuousness of this argument: overriding a legislated Bill of Rights may be technically possible, but it is rarely politically feasible. The rhetoric of the rule of law will be hypocritically employed by the legal lobby to oppose parliamentary override of any political opinion dressed in the clothes of judicial pronouncement.

Further, Australian activists such as Professor George Williams have openly acknowledged that they see the measures implemented in the ACT, and soon to be implemented in Victoria, as merely a first step on the journey towards a more comprehensive and binding instrument.[2]

In any case, judicial activists have a tendency to expand legislatively or constitutionally enshrined rights in ways unforeseen by the original draftsmen. Could the authors of the US Bill of Rights have anticipated that imaginative and magniloquent courts would find an unwritten and broad right to privacy in the 'penumbras, formed by emanations' of the constitutional rights to due process, to freedom from unreasonable searches and against self-incrimination, then locate an unwritten right to abortion in the penumbra of the privacy right's own mystical emanation?[3]

The problem with 'rights'

There is no consensus over what 'rights' human beings possess. Even the most uncontroversial rights, such as freedom of speech, are the subject of

heated debate, as no right is unqualified. In Victoria, the very government that is now manoeuvring to introduce a Bill of Rights enacted legislation, in the form of the *Racial and Religious Tolerance Act 2001*, which curtails that most basic right in an unprecedented manner.

Other proposed 'rights' are similarly, if not more, ambiguous and must obviously be subject to qualifications, the scope of which will be controversial. The resolution of such controversy lies in the balancing of competing interests, a task traditionally performed by elected representatives equipped with significant resources for research and policy development. To empower an unaccountable judiciary to determine such balances of interests, not from the disinterested perspective of the policy-maker but in the heat and emotion of individual cases, is to assign it a task for which its members are wholly unsuited.

The philosophical basis of our current system provides a more generous and beneficent interpretation of human rights than the most enthusiastic rights activist. Under this tradition, I do not derive my rights from an instrument, a list of specific rights enumerated by government. Rather, we start from the proposition that I possess an inherent and unqualified right to do whatever I please. However, by living in our society, I submit this right to a set of restrictions which are agreed with my fellow citizens through the democratic compact. Rather than having to petition government for particular rights, I hold an absolute, unlimited, general right. Government must petition me, as an elector, for permission to restrict that general right.

This tradition of rights has given rise to contemporary Australian society, in which we enjoy far greater freedom from arbitrary government intervention in our affairs than the members of almost any other society in the world. Certainly, there are isolated instances where administrative systems fail, causing what most of us would regard as violations of rights. Yet it is a profoundly adolescent reaction to such individual cases as Cornelia Rau and Vivian Alvarez to suggest that they reflect a structural flaw in our entire philosophy of rights. Rather, they reflect the inherent imperfectability of all human systems.

Equally puerile is the oft-advanced argument that recent anti-terrorism legislation demonstrates the need for a Bill of Rights.[4] Rather, it demonstrates that the overwhelming majority of the public, faithfully represented by the Commonwealth Government, has an honest difference of opinion with civil libertarians regarding the scope of the threat of terrorism and the appropriate response.

Setting aside one's own view on that topic, the naïve belief that a Bill of Rights can eliminate abuses of human rights caused by administrative or legislative errors does not bear scrutiny. Even citizens of the former Soviet Union enjoyed the benefit of an extensive Bill of Rights, which must have been a comforting thought on cold Siberian nights in the Gulag.[5]

The wisdom of judges

Many rights advocates harbour a thinly-veiled contempt for the Australian electorate. A typical example is Chris Sidoti of the Human Rights Council of Australia, whose criticism of the major parties' immigration policies was entitled 'A Nation of Thugs'.[6] The goal of such activists is plain: the implementation by judicial fiat of a policy agenda which runs contrary to the beliefs of most Australians. It is frustration with the perceived conservatism of the Australian electorate that is the true wellspring of the push for express rights.

For instance, recent years have seen a marked divide between the vision of the criminal justice system held by the overwhelming majority of Australians—one fulfilling protective, deterrent, punitive and even retributive purposes—and the vision held by the majority of lawyers and legal academics—one primarily or exclusively fulfilling a rehabilitative purpose. Even the most rudimentary Bill of Rights, in the hands of a judge of modest imagination, would provide ample opportunity to assert the supremacy of the lawyers' vision without the troublesome process of persuading the electorate.

Where Bills of Rights have been grafted onto other common law jurisdictions in recent times, the results have been disturbing. In the United Kingdom, local councils have been prevented from evicting Gypsies from illegal campsites on public land,[7] while the detention of dangerous non-citizen terrorist suspects was ruled illegal on the grounds that the rules governing their detention discriminated against them on the basis of citizenship.[8] In Canada,

the courts have constrained government's capacity to restrict welfare entitlements for various groups, including persons cohabiting with affluent partners, on the grounds of prohibited discrimination.[9]

In South Africa, under a constitution which epitomises the vision of rights activists, the judiciary demonstrated the danger of removing policy decisions from the context of the executive and legislative arms' responsibilities to the broader community. Moved by the misfortune of disadvantaged applicants, judges dictated that the government reprioritise the nation's health budget[10] and reallocate public housing resources[11] to help them. Needless to say, no judge identified those non-litigants whose access to government resources was to be curtailed to fund the courts' largesse.

In the United States, the Bill of Rights has been a tool of the Right as well as the Left, gun ownership being a prominent example. This reflects both its vintage and its genuinely American origins, which distinguish it from the fashionable genuflections to international law crudely appended to other common law jurisdictions. The US Bill of Rights is blessedly free of activist jargon and its interpretation was partially settled in an age pre-dating both the scourge of political correctness and the Left's capture of the legal profession.

Nonetheless, interpretations of freedom of religion as prohibiting students from voluntarily praying in public in government schools,[12] of the right to due process as incorporating an effective right to abortion,[13] and of equal protection at law as requiring measures such as mandatory bussing of black children into white-dominated schools,[14] demonstrate that even the US Bill of Rights is susceptible to wanton abuse.

Most rights activists favour judicial determination of such questions because, privately at least, they believe that unaccountable judges, as members of our enlightened legal elite, will make wiser policy decisions than elected representatives, who are focussed on the ignorant fears and superstitions of the electorate. I believe they are wrong.

In June, George Williams suggested that the Australian electorate's perception of the risk of terrorism is exaggerated, and that federal anti-terrorist laws demonstrate the need for a Bill of Rights as 'human rights lack legitimacy in political debate' (which means that the public accords certain rights less importance than Professor Williams, the right to life not being among these).[15] Days later, the London Underground was brought to a standstill by a series of terrorist bombings. Weeks later, Melbourne was identified in an Al Qaeda video as one of two target cities.

Civil libertarians are slow learners. When Prime Minister Howard rushed through an amendment to anti-terrorism legislation on November 3rd, the usual suspects lined up to denounce him for exaggerating the risks,[16] in stark contrast to the strong public support for stronger anti-terrorism measures.[17] The next week, police apprehended terrorist suspects in Melbourne and Sydney and revealed that they had been in the final stages of planning a major attack.

This reflects a phenomenon which has been the subject of much recent research: distributed decision-making or, in the language of one author, 'the wisdom of crowds'.[18] This theory explains the success of democratic government and free markets as flowing from the superiority of an enormous body of relatively independent decision-makers, each with limited information, over a small coterie of 'expert' decision-makers whose knowledge is individually much greater, but collectively less.

History is replete with examples of well-intentioned elites who sought to suppress the demotic urges of the general populace and administer society for the common good. In practice, the imperfect knowledge and imperfect intentions of the administrators have seen these models fail with such reliability that we may fairly conclude that such models are inherently flawed.

Political feedback, through elections, and economic feedback, through markets, are the best mechanisms we have yet discovered for conforming decisions on the governance of society and the allocation of its resources to the aspirations and desires of its members.

The Australian political dynamic

Assume, for the sake of argument, that our legal elite really does know better. Australian advocates of enhanced judicial power would still be mistaken to think that Europe's culture of judicial rule could be replicated here.

One structural difference is compulsory voting. Many European voters, resigned to impotence in the

face of a homogeneous political elite and an expansive view of the judicial role, do not vote. In Australia, the disillusioned must vote, and their disillusionment would ultimately give rise to politicians promising to defeat the mechanisms which frustrated the popular will on emotive issues.

More broadly, Australia's political culture does not lend itself to placid acceptance of the judicial imposition of unpopular policies. The success of Europe's elites in implementing the neo-socialist agenda of the European Union, partly by judicial means, is not exportable. The European project relies upon long traditions of aristocratic government to minimise dissent. Continental democracy is in its infancy. European conservatism, even of the British variety, is profoundly elitist in character, with Margaret Thatcher an aberration in Conservative Party history—the exception that proves the rule.

Australia's conservative movement, like that of the United States, possesses a reactionary, populist character which differentiates it from its aristocratic European counterparts. In the United States, activist decisions on school bussing and abortion gave rise to the conservative backlash that has made a judicial philosophy of 'strict constructionism' a prerequisite for Republican appointments to the Bench. Australian conservatives will be no more willing to yield political battlefields to an 'enlightened' judicial class.

Similarly, the wider Australian electorate has proven consistently mistrustful of agendas imposed by its intellectual elites. From the republic to reconciliation to border protection, voters have time and again defied those opinions which find favour amongst the intellectual classes. Australians will be equally resistant to the imposition of judicial rule.

Judicial appointment mechanisms

How will Australia's political culture respond to these pressures? The true implications of the Bill of Rights project will not manifest themselves to the electorate until such instruments are firmly in place; that is the political virtue of their ambiguity and of the pernicious abuse of a term, 'right', which has only positive connotations for a people schooled in the Anglo-Australian tradition. As it is politically unappealing to argue for the abolition of 'rights', the battleground will inevitably shift to a US-style debate over judicial composition.

The vision of Australian rights activists is dependent on a sympathetic judiciary, and combines a Bill of Rights and the consequent judicial activism with some sort of judicial appointments commission, ensuring that suitably *bien pensant* types populate the Bench.[19] Such a model has been adopted in the United Kingdom.

While Attorney General Philip Ruddock has expressed satisfaction with Australia's present system of executive appointment,[20] Shadow Attorney General Nicola Roxon recently suggested the establishment of just such a commission.[21] She shares with the activists the shallow vision of a 'representative' judiciary, which extends only to ensuring that the requisite proportions of women, gays and blacks sit on the Bench.

Roxon portrays a judicial appointments commission as a sensible compromise on the scale of transparency between the secrecy of the Australian system of executive appointment and the public and searingly politicised confirmation hearings before the US Senate. Her use of this metric is a disingenuous bid to disguise the violence her proposal would do to our democracy.

A superior analytical model is a spectrum of democratic accountability.

At one extreme is the model applied by some US states: direct popular election of judges. We can think of this as a single 'degree of democratic separation'. Moving along the scale, we come to the systems which obtain in Australia and in relation to the US Supreme Court: popular election of those who appoint judges, representing two degrees of democratic separation. The judicial appointments commission interposes an extra layer between the judiciary and the public: the people elect the politicians who appoint the commissioners who select the judges. This represents three degrees of democratic separation.

While two degrees of democratic separation may be justifiable to secure the rule of law against the risk of populist sentiment influencing individual cases—and even this argument is weakened by a rights-driven jurisprudence which expands the judicial role and exacerbates the need for accountability—there is no rational justification for the addition of another intervening layer. The only plausible motivation is a desire to weaken democratic accountability.

When judges increasingly interfere in matters of policy on behalf of a legal elite well to the left of the Australian electorate, the conservative reaction will be to criticise the judiciary. Australian legal commentators think they have witnessed such a trend to date in response to cases such as *Mabo* and *Wik*. They should visit the United States and view the partisan television campaigns run against prospective judicial nominees by political lobby groups. The more that judges are embroiled in politics, the more they can expect to be treated like politicians.

In the face of a judiciary empowered and inclined to undermine 'populist' policy, especially one selected by a judicial appointments commission complicit in the scheme, the temptation for Australian conservatives would be to call for the reform of the judicial appointment mechanism. Given the difficulty of advocating a return to the secretive executive appointment model that obtains in contemporary Australia, the direct election of judges would be the most politically savvy proposal.

Australian rights activists should not be under any illusion that Australian conservatives would refrain from such calls, should they be confronted with a hostile and politically empowered judiciary. Like its American cousin, Australian conservatism embodies a radical element that overrides its deference to traditional institutions which conservatives perceive as corrupted. And just as 'rights' are politically difficult to oppose, so is 'democracy' in the context of a politicised judiciary.

If judges are to wield the power to halt conservative political agendas, then it is inevitable that political conservatives will seek to colonise the judiciary. In Australia's political culture, as in the United States, they will often succeed.

Conclusion

The destination to which Australian advocates of a Bill of Rights seek to lead us is an undesirable one. Unaccountable judges are no more likely than dictators or Politburos to prove wise and benevolent if given power to review the wide range of policy judgments currently and correctly reserved to our elected representatives.

Yet activists will not heed calls for restraint on the grounds that their Utopian dream is flawed. As always, the dream will persist until its flaws are exposed by harsh reality—by the facts of life, which, as Margaret Thatcher reminds us, remain resolutely conservative. Although that process is already well-advanced in Europe, we can expect that Australian activists, like Marxist professors confronted with the fall of communism, will be the last to acknowledge the failure of elitist judicial rule.

Instead we should ask that these activists consider, in the context of the Australian political culture they so despise, the likely consequences of the fight that they are picking. The road they have embarked upon leads not to Europe, but to America. I suspect that they, like most of us, prefer Australia.

Endnotes

1 Lord Devlin, 'Judges and Lawmakers', *Modern Law Review* 39:1 (1976), 11.
2 George Williams, 'The ACT Bill of Rights is just the first step in the right direction', *The Canberra Times* (1 July 2004).
3 *Griswold v. Connecticut* 381 US 479 (1965); *Roe v Wade* 410 US 113 (1973).
4 George Williams, 'Terrorism laws an inferior copy', *The Age* (27 October 2005).
5 *Constitution of the USSR*, 1977, Chapter 7.
6 Chris Sidoti, 'A Nation of Thugs', Address at Sydney University, 27 September 2001.
7 *Chapman v United Kingdom* (2001) 33 EHRR 18, 399; *Connors v United Kingdom* (2004) 40 EHRR 189.
8 *A (FC) v Secretary of State for the Home Department* [2004] UKHL 56.
9 *Falkiner v. Ontario (Ministry of Community and Social Services)* (2002) 59 OR (3d) 481.
10 *Minister of Health v Treatment Action Campaign and Others* 2002 (10) BCLR 1033 (CC).
11 *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC).
12 *Santa Fe Independent School District v Doe* 530 US 290 (2000).
13 For a good summary, see Mark R Levin, 'Death by Privacy', *National Review Online* (14 March 2005).
14 *Green v County School Board of New Kent County* 391 US 430 (1968).
15 George Williams, 'How terror is straining our legal system', *The Age* (27 June 2005).
16 'The doubting Thomas critics of the PM's anti-terror laws', *The Australian* (9 November 2005).
17 David Humphries, 'Voters say yes to terror Australis', *Sydney Morning Herald* (25 October 2005).
18 James Surowiecki, *The Wisdom of Crowds* (Doubleday, 2004).
19 George Williams, 'Judicial appointments are political appointments', *The Australian* (16 November 2004).
20 Philip Ruddock, 'Selection and Appointment of Judges', Lecture at Sydney University, 2 May 2005.
21 Nicola Roxon, 'Courting Trouble at Club Judge', *The Age* (22 September 2005).