Courts and Constitution Review: the protection of individual rights; & the recognition of Aboriginal customary laws

Presented by
Justice Kearney
16th Annual Conference
Australian Study of Parliament Group
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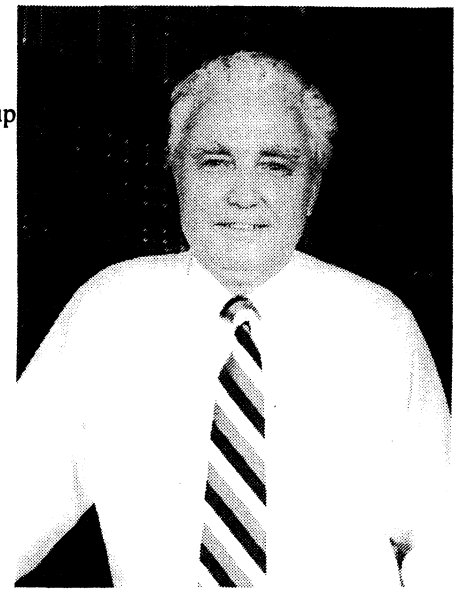

His Honour Justice Kearney

A. The High Court & an "implied Bill of Rights"?

[Abstract: the High Court in recent times has found various individual rights implied in the Australian Constitution. These rights would be better protected by a Bill of Rights, the concept of which now appears to command community support].

The role of the High Court in establishing the limits of the Federal Parliament's constitutional power of law-making is not clearly set out in the Australian Constitution. The existence of power to establish the limits is often based on the justification relied on by Marshall CJ in *Marbury v Madison* (1803) 1 Cranch 137 at 180, the case which established the power of the Supreme Court of the United States of America to declare unconstitutional an Act of Congress. Fullagar J said it was "accepted as axiomatic"; see *Australian Communist Party v The commonwealth* [1951] 83 CLR 1 at p43. In practice, I think, it may fairly be said that constitutional review by the Court has acted as an important constraint on the unprincipled use of state power. For present purposes I simply accept the Court's power of constitutional review; I am here concerned with a particular aspect of its exercise of that power.

It has been said that the "one central problem" for modern constitutional theory is how best to protect individual human rights in a manner consistent with our democratic institutions. The last attempt to do it by legislation - a non-Constitutional Bill of Rights - was scuttled in 1986. I think that there has been a sea-change in opinion since then in Australia about whether it is desirable to entrench the protection of individual and democratic rights in the Australian Constitution.

Formerly, this was thought by many to be quite unnecessary, on the basis that those rights were adequately protected by the combination of the common law with its traditional concern for individual rights, and the effective check which Parliament - answerable to the people through the ballot box - was thought to provide upon the executive. This was the traditional British approach. This system probably never really addressed the question as to how individuals and minorities could have their civil rights protected against an oppressive majority; it seems to have been assumed that the majority would not in fact act oppressively. Democracy in Australia seems to contemplate rule by a majority which respects minority rights.

It now seems that many in Australia - though not yet their parliamentary representatives - no longer have that confidence in parliament and the common law to protect their rights, which they formerly had; instead it seems they have come to favour the constitutional entrenching of the some form of Bill of Rights, with its corollary that the Courts will see that those rights are protected. While traditionally the focus in such provisions was the protection of individual rights, there seems now to be a realization that the responsibilities of the individuals require some emphasis. I understand that the Senate Standing Committee on Legal and Constitutional Affairs is presently considering what these rights and responsibilities should be.

As an illustration of what can occur when the people have not effectively stated in their Constitution their priorities as to rights, see *Wulaign Association Inc. v Minister for Racing and Gaming* 91991) 78 NTR1. In that case the Liquor Act (NT), with the laudable objective of discouraging liquor being brought into restricted areas, provided that a vehicle used to bring in liquor could be seized and (following the conviction of the person using the vehicle for that purpose, if it had not been earlier released) become forfeit. The Act was wide in its scope. For example, a completely innocent owner, whose vehicle may have been stolen from him by the bootlegger, could forfeit his vehicle in this way. The Liquor Commission could return the vehicle to him, by selling it to him or otherwise, provided the Minister approved. No doubt common sense administration of the Act would ensure that injustices were minimized, but the fact remains that a completely innocent person could lose his rights of property in his vehicle without any apparent remedy in the Courts, other than an action for damages against the user whose wrongful conduct deprived him of his property. Legislative provisions such as this, in my opinion, offend against the Rule of Law. Any innocent hapless citizen whose vehicle was forfeited may be left to ponder the words of Riddell J in *Florence Mining Co v Cobalt Lake Mining Co* (1908) 18 OLR 275 at p279:-

"The prohibition 'Thou shalt not steal' has no legal force upon the sovereign [legislatures of Canada]".

It may be that it is absence of adequate constitutional protection for individual rights in the Australian Constitution, and a growing belief that protection of those rights decisions by the High Court, or views expressed by some of the Justices in those decisions. In these cases it has been held, or minority views have been expressed, that Chapter III of the Constitution implies the existence in the Constitution of guarantees of certain individual rights.

Thus in *Polyukhovich v The Commonwealth of Australia* [1991] 172 CLR 501, while a majority (4) of the Justices considered that the making of a retrospective criminal law was not necessar-

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ily a usurpation by the Parliament of the judicial power of the Commonwealth vested in the Federal Courts under Chapter III, two Justices (Deane and Gaudron JJ) took a contrary view, stressing the need to protect the individual from unjust treatment by parliament.

In *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 110 ALR 97, 3 of the 7 Justices (Brennan, Deane and Dawson JJ) considered that individuals could only be imprisoned by a Court order, since punishment is a function which appertains exclusively to the judicial power vested solely in the Chapter III Courts.

In *Dietrich v The Queen* (1992) 109 ALR 385 the majority (5-2) held that the right to a fair trial was fundamental to the criminal justice system and so there was a common law right not to be convicted except after a fair trial. Two of the majority Justices (Deane and Gaudron JJ) considered, obiter, that Chapter III entrenched this right, in relation to Commonwealth offences.

Those were cases in which some of the Justices found that individual rights were implied in particular provisions of the Constitution. In other decisions they have found that rights were implied from the very structure of the Constitution.

Thus in *Leeth v The Commonwealth* (1992) 174 CLR 455, Deane and Toohey JJ, dissenting, held (at pp484 et seq) that a "doctrine of legal equality" of the people was inherent in the constitution as a "necessary implication": all people were subject to ordinary law and all were equal under the law and before the courts. The limits of this doctrine are not easily seen.

In the "freedom of political expression" cases, *Nationwide News Pty Ltd v Wills* (1991-2) 108 ALR 681 and *Australian Capital Television Pty Ltd v Commonwealth of Australia (No 2)* (1992) 108 ALR 577, 6 of the Justices held that a non-absolute freedom of communication in certain respects was necessarily implied in the Constitutional provision for representative government, extending to all matters of public affairs and political discussion. The ambit of these individual rights, considered to be necessary for the efficacy of representative government, has yet to be worked out.

(Mabo v State of Queensland (No 2) (1992) 175 CLR 1 is a further example of the Court's focus on the rights of the individual against the State; it is clear that the common law can be modified by contemporary values of justice and human rights. See, for comparison with the approach in Canada to recognition of aboriginal rights in land, *Delgamuukw v British Columbia* (1991) 79 DLR (4th) 185).

What these decisions, or the views expressed by individual Justices in them (which appear to follow views earlier expressed by Murphy J), show, is an approach to interpreting the Constitution which renders visible hitherto unseen individual rights or guarantees implied therein. This is closely akin to the classic form of judicial lawmaking over the ages. Various commentators have said that what it involves is the creation of an "implied Bill of Rights". It seems fair to say that the Court has clearly moved from the "strict and complete legalism" advocated by Sir Owen Dixon as a technique of constitutional interpretation to a "value-laden decision making process", in a context where it perceives a need to protect the individual against the Sate. Mason CJ said recently:-

"It is inescapable that the Courts have a central role in enforcing fundamental rights."

The question is whether this necessarily ad hoc approach in finding implied rights is preferable to the formulation of individual rights following the type of comprehensive exercise involving the balance of interests which is currently being conducted, for example, by the Senate Select Committee, and the ultimate enshrining in the Constitution in some way of those rights. It would appear to me that there could only be one answer to that question - the latter. Australia is now probably the only common law country in the world without a constitutional or statutory Bill of Rights.

It is an interesting parallel that various Judges in Canada over the period of some 20 years preceding the introduction of the Canadian Bill of Rights as an ordinary statute in 1960 found that individual rights were implied in the Canadian constitution; See *Reference Re Alberta Bills* [1938] 2 DLR 81, and subsequent cases.

It is clear that a judicially enforceable Bill of Rights may involve a very considerable transfer of power to the judiciary, and give rise to allegations such as the "judicialization of public policy making". Further, as the volumes of the Dominion Law Reports bear witness since the introduction of the Canadian Charter of Rights

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and Freedoms in 1982, a judicially enforceable Bill of Rights throws a great work burden on the Courts. Much of the work of the Supreme Court of Canada is now devoted to Charter questions.

The Courts thereby become involved in areas which have hitherto been thought to be the proper preserve of the Executive. Let me give an example. Papua New Guinea has a fully-pledged enforceable Bill of Rights ("Basic Rights") in its Constitution. In *Amaiu v The Commissioner of Corrective Institutions* [1983] PNGLR 87, a prisoner sought to enforce his constitutional rights. He complained of having been kept in solitary confinement, of having been punished by doubling-up, and so on. Bredmeyer J found that the prisoner had been deprived of the "full protection of the law" guaranteed him. What is of interest for present purposes are the orders which his Honour then made to ensure that the prisoners received the Constitution-guaranteed "protection of the law". He ordered that the security wing of the Corrective Institution be closed forthwith and remain closed until new and proper regulations and standing orders had been issued, along lines which he proceeded to specify. He order that all prisoners be move out of the wing that day. He further ordered that certain named officers be barred for 2 years from working in the security wing when it re-opened.

B. The recognition of Aboriginal customary laws

[Abstract: as the Northern Territory moves to Statehood, one matter to be addressed is the recognition of Aboriginal customary laws. The Courts have taken a cautious approach, and in the field of sentencing, have never included customary sanctions as part of sentencing orders].

I turn to the second part of this paper, which relates specifically to the Territory. It no longer deals with constitutional review by the Courts, but is directed to the linkage between the Courts and a particular aspect of individual rights, in the context of the Territory's move to Statehood, which has been on the agenda for some time. The Select Committee on Constitutional Development of the Legislative Assembly, first established in 1985, has carried out over the years a very considerable amount of work and public consultation, and has prepared a number of Discussion papers and Information papers on matters which will have to be addressed to prepare for the entry of the new Sate into the Federation, as well as its Constitution.

The Discussion Paper on a proposed State Constitution takes up the topic of Aboriginal Rights and discusses whether there should be some particular recognition in the Constitution of Aboriginals' place in society, as well as entrenched provisions to protect their lands. It also takes up and discusses the question of Human Rights and the Constitution.

Discussion Paper No 4 raises for public debate the question whether Aboriginal customary law should be recognized in the new State Constitution, so that it would become one of the sources of the new State law. The paper discusses various problems to whom any such laws should apply, how they could be enforced, the extent to which those methods of enforcement should be specified in the new Constitution, and so on.

I do not propose to go through this interesting and scholarly discussion and analysis, except for one aspect. At p10 it deals with the way the Courts of the Territory have recognized the existence of Aboriginal law, for particular purposes. I want to say a few words about the Court's recognition of customary law for sentencing purposes, in the light of a recent well-publicized misconception and pending Sentencing Code.

The 1991 Census showed that in the Territory there were 39,910 Aboriginal and Torres Strait Islander, constituting 15% of Australia's indigenous population, and 22.7% of the Territory's population. Over 26% of this indigenous Territory population lived in communities of between 200 and 999 people.

No constitution or statute in Australia recognises directly in any general way the customary laws which regulate much of the daily life of many of the Aboriginal and Torres Strait Islander peoples, particularly those living in remote communities, as is commonly the case in the Territory. Of course there are many specific legislative provisions which do recognize aspects of customary life; for example, tribal marriages are recognized for the purposes of various statutes.

Despite this absence of general statutory recognition the Courts have recognised customary laws to some degree. Most dramatically, this occurred on 3 June 1992 when the High Court handed down its decision in *Mabo v Queensland [No 2]* (1991-1992) 175 CLR 1, holding that the common law now accepted that native title to land in Australia had survived the Crown's acquisition of sovereignty and the radical title which it thereby acquired, and had been extinguished only

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in certain circumstances. What the common law now recognizes is the entitlement of the Aboriginal people to their traditional lands in accordance with their law and customs, where that title has not been extinguished.

Less dramatically, the Courts in the Territory have long recognized that in sentencing for criminal offences the attitudes of remote Aboriginal ammunities whence the offender comes should be taken into account where, and to the extent that, it is proper to do so. See, for example, *Munungurr v The Queen* (unreported, Court of Criminal Appeal (NT), 11 February 1994), and *Joshua v Thomson* (unreported, Supreme Court (NT), 24 May 1994).

The Courts have also recognized customary law in the sense that traditional punishments which may be imposed are taken into account when sentencing; see, for example, *R v Minor* (1991-92) 79 NTR 1. But the Courts have always maintained a fundamental distinction in that regard. They take into account when sentencing the fact that traditional punishments have been meted out, or the possibility that they will be meted out, but they do not incorporate traditional punishments as part of the Court's sentence. That is to say, they recognize that the Aboriginal community may exact some retribution but they do not sanction that retribution. This brings me to the misconception I mentioned. In recent newspaper articles and an ABC "Four Corners" television program last month, the media proceeded on the basis that the Court had failed to draw that fundamental distinction when sentencing in the case of *R v Wilson Jagamara Walker* on 10 February 1994. The media apparently took the view that the Court had incorporated traditional punishment, by way of spearing in the thigh, as part of its sentencing order, and had required government officers to report back on the carrying out of that order, on the basis that if the spearing did not in fact take place, the sentence would reviewed.

It was suggested that the Court had come close to ordering as condition of a bond that payback be effected. Various people were interviewed on television; some expressed their opinions on the rightness or wrongness of what they believed the court had order, while others used the opportunity to press for more general recognition of Aboriginal customary law. The media suggested that the incorporating traditional punishment into its sentencing order the Court had gone about that task badly and without proper consultation, and its sentencing had gone astray in that no traditional punishment in fact had occurred.

It needs to be said quite bluntly that the media interpretation of what the Court said and did when sentencing Wilson Jagamara Walker is complete nonsense. The Court merely took the possibility that payback would be inflicted, into account as mitigating factor when sentencing. That is its standard approach. Of course, there is always a possibility that the traditional punishment which is alleged to be likely to be inflicted, will not be inflicted. It was not a condition of the bond ordered by the Court, that payback occur. The Court merely asked to be informed after some 6 months had elapsed whether payback had occurred; this was to ensure that the Court built up an information bank to enable it better to assess the reliability of information put to it from time to time that traditional punishment would be inflicted.

I mention this matter at some length to show that the Courts, in sentencing, have always taken a consistent and cautious attitude to the recognition of customary law. The recognition of Aboriginal customary law, and the extent of that recognition, is a matter for the Legislative Assembly's attention, and possible constitutional consideration, as the Select Committee well recognizes. I observe that as a Sentencing Bill is shortly to be introduced into the Legislative Assembly, and will constitute a Sentencing Code, it would appear to be necessary that the Code recognize and authorize the long-established practice of the Courts which I have mentioned, if the Courts are to continue to be able to take community views and traditional sanctions into account when sentencing.