

A CHARTER OF RIGHTS AND RESPONSIBILITIES: Who decides?

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The debate surrounding whether or not to enact statutory protection of human rights is often dominated by the criticism that a Charter that empowers the judiciary with the responsibility of interpreting and giving practical effect to human rights would derogate from democracy. According to critics, the judiciary is not the appropriate body to make such decisions because judges are not democratically elected and are not therefore responsible to the people for their decisions.¹

My contribution to this discussion will be to address that issue. There is an argument, and in my view a compelling argument, that the statutory protection of human rights capable of being enforced in the courts is not only consistent with the democratic society we value, but should in fact strengthen democracy through the different and complimentary roles played by the different arms of government.

First, it is important to consider how democratic values are served by the different arms of government. In a lecture at the Faculty of Law at Queen's University, Justice Rosalie Abella, then of the Court of Appeal for Ontario and now of the Supreme Court of Canada, said 'What democratic societies promote - and repressive ones do

¹ See discussion in Justice Rosalie Abella, 'The Judicial Role in a Democratic State' paper presented to the *1999 Constitutional Cases Conference*, Osgoode Hall Law School York University, 7 April 2000
<http://www.ontariocourts.on.ca/coa/en/ps/speeches/judicialrole.htm> (10 February 2009); Allen J and Cullen R " *A Bill of Rights Odyssey for Australia: The Sirens are Calling*" (1997) 19 UQLJ 171.

not - are the rights of its citizens and their participation in decision-making about the rules they will be governed by. Democracy promotes choice, voice and access to rights.’²

What is important therefore is that any statutory protection of human rights is passed by our democratically elected parliament after full consultation with the public. There should be a full and open debate about what should and should not be in the Charter. A Charter of human rights would represent the legislative expression of the State’s core values and those which underpin its continued existence. The courts would then, by enforcing those laws, give effect to the will of the people and the parliament expressed through that legislation. Applying Justice Abella’s analysis, the public make the choice as to what rights to protect, that is given voice by the parliament and access to those rights is enforced in the courts.

One may ask rhetorically, if it is not the courts who are to be bestowed with the responsibility to make decisions regarding the protection of human rights and the validity of individual and state action, what body or group of people is better suited to this role? In a democracy, the authority of the judges comes from the rule of law and the judge’s oath or affirmation to do equal justice to all persons at all times and in all things.

It has been suggested that critics believe it is the role of the legislature to make decisions about ‘rights’. And so it is. However, while the legislature is

² Justice Abella *ibid.*

democratically elected, its role is not to make day to day decisions about rights and duties of individual people.

The role of judges is to give effect the rights and responsibilities enacted by Parliament. Judges are faced with difficult decisions regarding competing rights and interests every day. It is our responsibility to weigh and balance competing arguments, the outcome of which impacts heavily on the rights and responsibilities of both individuals and the State.

- For example, in criminal proceedings, Judges must decide whether an accused is fit for trial, conduct a fair trial and sentence appropriately balancing the need for punishment, deterrence, protection of the community and the need for rehabilitation.
- Judges conduct and decide commercial, administrative, constitutional, torts cases and many others which decide and balance the rights and responsibilities of citizens, corporations and governments in courts across the nation every day of the week.
- Courts are well accustomed to the role imposed on them by the Constitution of the judicial review of the distribution of powers under the Constitution and the express and implied limitations on the exercise of that power.

Another common criticism of the judiciary's role in the statutory protection of human rights is that Judges are a "privileged elite", out of touch with society and in particular

the often disadvantaged individuals who come before them in their Court.³ While in time past this may have been a valid argument, today the Queensland judiciary has become considerably more diverse. In the Supreme Court of Queensland for example there are 25 Judges, of whom about one-third are women. There is a growing diversity in the educational, ethnic, religious and class backgrounds of judges. Far from living in an ivory tower, in our work we see the best and often the very worst of human behaviour.

It can be argued however that it is also important to balance the power of the courts and parliament in dealing with the protection of rights. To ensure that the protection of rights is not reposed only in the courts, there are important safeguards within the Canadian Charter model which have been adapted for use in both Victoria and the Australian Capital Territory.

The first is the general limitation clause which is in s 1 of the Canadian Charter which provides:

“1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

³ Allen J and Cullen R *ibid.*

This is similar to the provisions found in s 7 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)⁴ (the “Victorian Charter”) and s 28 of the *Human Rights Act 2004* (ACT).⁵

The second is the legislative override found in s 33 of the Canadian Charter and s 31 of the Victorian Charter which provides:

“31 (1) Parliament may expressly declare in an Act that that Act or a provision of that Act or a provision of another Act has effect despite being incompatible with one or more of the human rights or despite anything else set out in this Charter.”

The Canadian experience is that the advantage of these clauses is “they allow for constitutional conversations about what priorities should be attached to conflicting objectives and rights, which draw from the comparative strengths of both judicial and representative institutions. Arguably, this mode of resolution, which allows for opportunities for institutional disagreement, offers a more balanced system of checks

⁴ s 7 (2): A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including – (a) the nature of the right; and (b) the importance of the purpose of the limitation; and (c) the nature and extent of the limitation; and (d) the relationship between the limitation and its purpose; and (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve. (3) Nothing in this Charter gives a person, entity or public authority a right to limit (to a greater extent than is provided for in this Charter) or destroy the human rights of any person.

⁵ 28 (1) Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society. (2) In deciding whether a limit is reasonable, all relevant facts must be considered, including the following: (a) the nature of the right affected; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relationship between the limitation and its purpose; (e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

and balances than what exists in some political systems which have opted for, or have avoided, a bill of rights”.⁶

This solution may be considered particularly useful where codified rights do not necessarily provide for obvious or non-contentious resolution to rights conflicts. Furthermore it is legitimate to be concerned about the democratic implications of a small number of judges having the final word on what priorities are to be attached to social values.⁷ While the judiciary prides itself on objectiveness and impartiality, there is an equally crucial role for the exercise of political judgment by parliamentarians who are elected for that purpose. The existence of and respect for a neutral arbiter of disputes between citizen and citizen, and between citizens and the State, however, is also essential to the working of a democratic system.⁸

The two limitations introduced into the Bill of Rights in Canada ensure that the democratic ideal prevails. A significant role is preserved for the political judgment of the legislature. No single correct answer necessarily exists for the principled resolution of a rights conflict. As Canadian academic, Professor Janet Hiebert says, “Rather, it accepts the proposition that a range of acceptable and principled answers may exist and views the resolution of rights conflicts as a joint responsibility of courts and Parliament”.⁹

⁶ Hiebert J “*Why Must a Bill of Rights be a Contest of Political and Judicial Wills? The Canadian Alternative*” (1990) 10 Public Law Review 22 at 25.

⁷ See Griffith, JAG., “*The Brave New World of Sir John Laws*” (2000) 63(2) Modern Law Review 159; Gava, J., “*The rise of the hero judge*” The Australian Financial Review, 14 November 1996, p 21; Enderby, K., “*Judges right to go in where politicians fear to tread ...*” The Australian, 24 May 1993, p9.

⁸ Lord Steyn, “*The Weakest and Least Dangerous Department of Government – The Role of the Judiciary in a Democracy*” [1997] Public Law 84.

⁹ Hiebert at 127.

This gives effect to the mutual respect that Sir Gerard Brennan referred to in the speech which he gave on the occasion of his retirement in 1998 as Chief Justice as:¹⁰

“The mutual respect which the branches of Government must have and demonstrate for the powers and functions of each. Mutual respect is the necessary acknowledgment of the constitutional distribution of powers and the manifesting of mutual respect accords with the expectation of the Australian people.”

The advantage of a Charter is that it sets out the common aspirations of citizens articulated through the political process given effect to by the courts. The checks and balances in the division of powers between the courts and legislature ensures that it is the citizens who are supreme rather than the institutions which exist to serve them.

¹⁰ (1998) 193 CLR v.