

Does a Bill of Rights Necessitate Better Protection of the Right to Legal Representation?

Chantal Tanner*

Few countries recognise a freestanding entitlement to publicly funded legal representation.¹ Rather, in most jurisdictions this right is embedded in an individual's entitlement to a fair trial. But arguments in favour of a freestanding right to legal representation are not new concepts. In 1932, Sutherland J of the US Supreme Court stated that: '[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law.'²

What Sutherland J describes are the philosophical underpinnings for the notion of government funded legal representation. This is that an integral component of access to justice is that all potential litigants have an unfettered opportunity to bring their case before the courts.³ The doctrine of the rule of law and principles of democracy necessitate a system that can protect society's most vulnerable citizens. As such, it is the state's responsibility to facilitate access to such representation. Thus, when an individual is forced to submit to legal processes in the absence of counsel, as a result of financial circumstances, this becomes an issue of public interest.

A common sentiment that arises in Australian public interest discourse is that our lack of constitutional rights has significant bearing upon the country's legal capacity to guarantee the human rights of its citizenry. Some advocates believe that these constitutional deficits

could be rectified if Australia were to adopt a Federal Human Rights Act.⁴ But calls for either the extension of constitutional guarantees or the enactment of a national statutory charter of rights are met with a fierce rhetoric of opposition and ideological rejection.⁵

This article considers whether Bills of Rights actually work in protecting the right to legal representation. Would the enactment of a constitutional or statutory Bill of Rights ('BOR') create more fertile grounds for enabling access to justice in the courts? Or are other fundamental structural factors, such as an effective judiciary and stable democratic institutions, the determinative factors in effective protection of one's rights? In answering these questions, the case studies that will be examined are the right to legal representation in the context of South Africa, the United Kingdom ('UK') and Australia. The right to legal representation is critical to achieving full and effective access to justice.

APPROACHES TO RIGHTS PROTECTION

The constitutional domain often functions as both a creative source, as well as an ongoing check, on government power.⁶ Indeed, some argue that the doctrines and mechanisms characterised in a country's constitution are reflective of the normative values within the legal system as a whole.⁷

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Today, a large number of countries have adopted a constitutional body of rights, which can be leveraged against abuses of government authority.⁸ A constitutional BOR empowers a country's highest court to invalidate laws of parliament, which encroach upon such fundamental rights.⁹ The logic behind this model of rights protection is explained by leading juristic philosopher Professor Ronald Dworkin:

In a real democracy liberty and minorities have legal protection in the form of a written constitution that even parliament cannot change to suit its whim or policy. Under that vision of democracy, a bill of individual constitutional rights is part of fundamental law.¹⁰

A second prominent model, which offers a halfway house between constitutional rights protections and a complete omission of domestic human rights defences, is a statutory BOR. Such legislation requires courts to interpret and develop laws accordance with human rights.¹¹ Sometimes referred to as the 'Parliamentary model', a statutory BOR seeks to protect rights in a manner that is consistent with the Westminster philosophy of Parliamentary Sovereignty. In contrast to the constitutional model, a statutory BOR does not empower the judiciary to strike down legislation. This form of 'weak Judicial Review' is devised to counter the potential threats of an overtly activist judiciary, in order to maintain parliament's status as the final decision maker in conflicts of law.¹² This means that even if

legislation is in direct breach of a right, the courts do not have the power to abolish that law. The extent of the court's authority is limited to issuing a 'declaration of incompatibility'.¹³

Australia is an exception amongst democratic nations, as it is the only such country that has abstained from institutionalising any form of nationalised BOR.¹⁴ This omission does not mean that rights are entirely unprotected.¹⁵ Instead, Australia maintains an informal ad-hoc method of legal rights protections. Indeed, the country's constitutional framers did provide a handful of disparate expressed rights.¹⁶ As well as this, the High Court has inferred a set of 'silent constitutional principles'¹⁷ or implied rights¹⁸ within the text and structure of the constitutional document.¹⁹ Complementing these constitutional principles are a range of individual laws implemented to further protect human rights.²⁰

In Australia, there is strong opposition to the enactment of a nationalised BOR in any form.²¹ The crux of the argument against a BOR is that the existing constitutional system is capable of guaranteeing rights protection via the country's strong democratic institutions and a prevalent rights culture within the national psyche.²² Those who criticise the concept of enshrined rights argue that a BOR only offers illusory protections.²³

THE RIGHT TO LEGAL REPRESENTATION UNDER DIFFERING RIGHTS PROTECTION MODELS

The right to legal representation, or the entitlement to publicly funded legal counsel, is an exemplary case study against which to test these arguments. It is an issue that is particularly burdensome upon the socially and economically disadvantaged, and as such, provides fertile grounds for the advancement of public interest jurisprudence. This article will now consider particular instances of public interest litigation concerned with achieving or protecting the right to legal representation, in the context of three different constitutional rights settings.

The Constitutional Bill of Rights: South Africa

The most comprehensive constitutional BOR in the world is contained in the post-apartheid *South African Constitution*.²⁴ Unlike most countries, the South African BOR does provide a freestanding entitlement to legal representation. Section 35(2)(c) sets out that every person detained by the law has the right ‘to have a legal practitioner assigned ... by the State and at State expense, if substantial injustice would otherwise result.’²⁵

The inclusion of section 35(2)(c) was no doubt a great theoretical victory for the indigent accused. But what this right meant in substance was an issue that still had to be settled by the judiciary.²⁶ This provision²⁷ was clearly tested in the case of *S v Vermaas; S v Du Plessis*.²⁸ The question brought before the court was whether this constitutional entitlement to legal representation must be provided at state expense.²⁹ The answer provided by the Constitutional Court was a staunch affirmation that there is a positive duty placed upon the South African government to provide publicly funded legal counsel to those who could not otherwise afford such representation. The court commented that in the year since the *Constitution* had come into force³⁰ neither financial nor administrative structures had been instituted to implement this provision. The judges insisted that without mechanisms of enforcement the right provided by this provision is ‘an empty gesture and makes a mockery of the *Constitution*.’³¹

The Statutory Bill of Rights: United Kingdom

It was under the influence of the ‘parliamentary model’ of the BOR that the UK’s human rights legislation³² (‘HRA’)

was constructed.³³ Taking origins from the European Convention on Human Rights,³⁴ article 6 of the HRA is a statutory enshrinement of the right to a fair trial. In broad terms, this right entitles an accused to a hearing before an independent and impartial tribunal.³⁵ When a charge is of a criminal nature, the accused is permitted to defend oneself ‘through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.’³⁶

The validity of this criminal based limitation for accessing the right to legal representation was challenged in the European Court of Human Rights (‘ECHR’) in the case of *Steel & Morris v The United Kingdom*.³⁷ McDonalds had sued Steel and Morris for distributing leaflets containing damaging and defaming allegations against the company. The domestic trial lasted a total of 313 days. Unable to afford counsel, Steel and Morris were refused publicly funded legal representation and were forced to represent themselves throughout the proceedings. The domestic case was found in favour of McDonalds.³⁸

An appeal was brought before the ECHR, on the grounds that Steel and Morris were denied a fair trial due to the government’s failure to provide them with legal assistance. Whilst the appeal was not based on Article 6 of the HRA itself,³⁹ it did require the ECHR to interpret the question of ‘whether the provision of legal aid was necessary for a fair hearing.’⁴⁰ The Court determined that a failure to provide legal aid, even in a civil proceeding, was a deprivation of these two individuals’ right to effectively put their case before the court, and as such is a deprivation of the right to a fair trial. The ECHR stated that individual countries are at liberty to determine how they dispense this duty to their citizens; legal aid is one such means. Nonetheless, disparity in legal assistance will in certain circumstances give rise to an unfair trial.⁴¹

Piecemeal Rights Protections: Australia

In the absence of either a constitutional or a statutory BOR, it is often insisted that the Australian common law ‘plays a role as both a source and protector’ of human rights.⁴² Whilst the judiciary does not function in a lawmaking capacity, they have interpretative powers that can limit the authority of those who do.⁴³ In addition to this authority, there is a common law presumption that judges must exercise their decision-making power against the abrogation of fundamental rights.⁴⁴

As a general proposition, the Australian High Court has applied the right of an accused person to access a fair trial.⁴⁵ In the case of *Dietrich v The Queen*,⁴⁶ the Court acknowledged legal representation as an essential element in a fair trial. However, they did not recognise an absolute right for an indigent accused to be provided with publicly funded legal representation.⁴⁷ Instead, the majority determined that in charges of serious criminal offences, a court has the power to stay a legal proceeding that is likely to result in a miscarriage of justice or an unfair trial. Thus if a criminally accused defendant is unrepresented at trial, through no fault of his or her own, the trial cannot commence until legal representation is obtained. In short, the Australian court was unwilling to enliven a 'new quasi-constitutional right to state funded counsel.'⁴⁸

THE EFFECTIVENESS OF LITIGATING ON THE RIGHT TO LEGAL REPRESENTATION

With regard to discussing the right to legal representation, Melina Buckley provides a description of the ideal model that the right should be based upon. Her description provides an apt measure to contrast against in considering the realisation of this right in the context of South Africa, the UK and Australia.

Buckley states that:

*The objective of test case litigation would be to move away from a case-by-case approach and to obtain a systemic remedy. One possibility would be to seek ... a judicial statement of principle recognising the right to legal representation where individuals, unable to retain counsel without undue hardship, are faced with a legal situation that jeopardizes their or their families' liberty, livelihood, health, safety, sustenance or shelter.*⁴⁹

In short, Buckley's position is that an ideal realisation of the right to legal representation must include state funded representation for both criminal and civil matters.

Section 35(2)(c) of the *South African Constitution* has heeded this call. In practical terms, this has meant that in criminal matters all people are entitled to legal representation; and in civil matters, a person must pass a low means-test based upon income in order to qualify for legal assistance.⁵⁰ Since the case of *S v Vermaas*; *S v Du Plessis*, independent constitutional commissions and

statutory bodies⁵¹ have been established with a mandate of protecting the rule of law and ensuring the realisation of these rights.⁵² According to the country's Former Minister of Justice and Constitutional Development, the Honourable Jeff Thamsanqa Radebe, over the past decade South Africa's Legal Aid 'has been revamped and moulded to one of the best legal aid systems in the world.'⁵³ Dave Holness⁵⁴ examines the current state of South African Legal Aid with a more critical eye. He argues that there continues to be a significant and tangible gap between the constitutionally guaranteed right to legal representation – in matters of civil justice – and the existing status quo in the contemporary South African legal system.⁵⁵

Article 6 of the UK's *HRA* does not explicitly provide for this ideal realisation of the right to legal representation, as framed by Melina Buckley. The provision only affords obligatory legal representation for an indigent accused in criminal cases. Even after the ECHR's affirmative decision in the case of *Steel & Morris v United Kingdom*, the UK has not seen the need to enforce an absolute right to legal representation for civil cases. There are several reasons for this. Firstly, jurisprudence from the ECHR has not affirmed the proposition that in civil cases government funded legal assistance is an absolute and indispensable condition for the realisation of effective access to justice. Rather, the ECHR has asserted that the particular circumstances of each case must be considered in order to determine whether legal representation is required.⁵⁶ Based on the circumstances in *Steel & Morris v United Kingdom*, the ECHR found there was a need for legal representation.⁵⁷ In light of the ECHR's finding in that case, the UK's Secretary for Constitutional Affairs stated that 'there was no need for any specific legislative amendment or remedial order to implement the judgment.'⁵⁸

Under Australian jurisdiction, no enforceable right to legal representation existed prior to the High Court's decision in *Dietrich v The Queen*. In this sense, the case was a successful outcome. However, when contrasting the outcome of the case against Melina Buckley's high-watermark description of the right to legal representation, this decision falls significantly short. There was no consideration given to the right to legal representation in civil cases. In fact, the court neglected to go so far as to declare an absolute right to legal representation in criminal matters. All that the High Court was empowered to rule was that a court can permanently stay a proceeding in instances where a

criminally accused is unrepresented and this factor will lead to an unfair trial.

CONCLUSION

Applying Melinda Buckley's notion of moving away from a case-by-case approach to the right to legal representation, the ideal objective of litigation is to obtain a systemic remedy that is applicable for any indigent citizen in either criminal or civil legal proceedings. The standard applied under South Africa's Constitutional BOR and affirmed by the Constitutional Court in the case of *S v Vermaas*; *S v Du Plessis* comes closest to achieving this high-watermark vision of the right to legal representation, despite continuing gaps between powerful judicial affirmations and practical enforcement. The statutory BOR enacted in the UK, undoubtedly enlivens a right to legal representation too, however, even after the successful outcome in the EHRC in *Steel & Morris v The United Kingdom*, this right has not resulted in an absolute systemic remedy in the form that Buckley calls for. The outcome in the Australian case of *Dietrich v The Queen* gives rise to the weakest level of protection for the right to legal representation. Based upon this comparison of jurisdictional approaches, the piecemeal model of rights protection adopted by Australia, offers the least substantive and effective context for a successful protection of the right.

It must be acknowledged that arguments continue to be made that there is a substantial gap between the constitutional guarantee of the right to legal representation and the practical execution of this right in the existing South African legal system. Nonetheless, the explicit Constitutional protection of the right to legal representation has led to the most substantive legal entitlement, when comparing these three legal systems. Thus, the general principle that emerges is that the greater the strength of the legal protection (with constitutional guarantees being the strongest, followed by statutory BORs and finally the piecemeal approach) the greater potential for the successful realisation of the right to legal representation.



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Chantal Tanner* Juris Doctor candidate, UNSW

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16. These express rights include freedom of religion (s 116), free interstate Trade and Commerce (s 92), freedom from discrimination based on State of residency (s 117), a right to acquire property on just terms (s 51(xxxi)) and a right to trial by jury (s 80): *Commonwealth of Australia Constitution Act 1900* (Imp).
17. *Silery v The Queen* (1981) 180 CLR 353, 361 (Murphy J).
18. The presence of implied rights was first 'found' in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.
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21. For further discussion of this opposition, see Robertson, above n 9, 7–12.
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25. *Ibid* s 35(2)(c).
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