Human Rights in Australia

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Court of Conscience

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A love for freedom has to live in the political culture of Australians, not the courts.

We support freedom because it drives human progress. Freedom empowers individual autonomy and responsibility. It encourages respect for the individual and dignity of treatment for all, and fosters innovation and creativity through the expression of individual choice and freely determined participation in economic, social and cultural affairs.

Freedom is underpinned by a respect for human rights — the still radical notion that individuals are born with equal dignity and should be free to exercise their faculties to pursue their lives, their opportunities and their enterprise.

Understanding why human rights are radical requires an appreciation of their origins. They are not lofty aspirations of social justice. Rather, they are bedrock principles about the preservation of the rights of individuals against government power.

There was no one moment that brought about the ideals of human rights. They evolved out of learning and reflections from compounding events over centuries. But of significance is the signing 800 years ago of the Magna Carta, or Great Charter of 1215 by King John, which first saw significant developments in human rights concepts by placing constraints on the power of the monarchy.

Magna Carta is romanticised — but that does not diminish its importance. Political ideas are not permanent. They only live in the hearts and minds of free people. The Great Charter, however, established in law many principles including freedom of the Church, respect for property rights, no taxation without representation, and a fair system of justice.

But more importantly it helped further entrench the modern understanding of the separation of powers doctrine. The Barons who forced the Magna Carta on the King experienced the threat of centralised authority to ancient-understood liberties. Power in the hands of the few was a threat to the liberties of all, even if at the time

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‘all’ meant the privileged classes and the ‘free men’ who survived in the cities.

Magna Carta also recognised some of the early structures of government: the role of the Monarch was to design law; the courts were responsible for its interpretation; and the common counsel was formed to approve tax revenue to finance the decisions of the King.

These principles were transposed and built upon in the early American colonies and formalised in the United States Constitution. The Americans further recognised that a singular dominant level of government was also a threat to liberty and so fostered competitive governance between states. These structures were designed to preserve and protect peoples’ rights against government.

In England during the 17th Century, great philosophers such as John Locke intellectualised an understanding of the natural rights of the individual from the preserve of the ruling class to include all people. These rights were legally formalised in the English Bill of Rights in 1689.

However, it wasn’t until the 1948 *Universal Declaration of Human Rights* that these principles went beyond the reach of the legacy of the British Empire to the world.

Despite its wide reach, the Universal Declaration has had a limited impact on Australia’s political structures. Australia was an active participant in drafting the Declaration but the ideas were not novel.

Rather, human rights in Australia are owed to our inherited political culture from Britain and the United States.

With our British foundation, Australia inherited the common law and the principles of justice that flow from it. At Federation, modern Australia acquired a hybrid of democratic structures from the learned experience of Britain and the United States. Our so-called Wash-Minister system of government seemingly adopts the best practices of both:

Like the United States, Australia has a constitution to limit the power of the federal government, and states to reduce the potential monopoly of federal government. Furthermore, both houses of Parliament are elected to make us democratic and accountable. Mirroring the British system, executive government is drawn from the Parliament to ensure it is answerable to the people’s representatives.

Freedom in Australia is not preserved through strong legal protections. Built on the common law, freedom is instead based on government proscribing unlawful conduct rather than making conduct lawful.

In particular, the structures of our democracy divide power deliberately to ensure it is left squarely in the hands of the people and not the ruling elite.

In his 1985 essay ‘Political ideology in Australia: The distinctiveness of a Benthamite Society’,[1] Hugh Collins argued that the structure of Australia’s democracy leads it to value ‘utilitarianism’, ‘legalism’ and ‘positivism’, and that ‘natural rights will be an alien tradition’.[2]

Collins’ analysis recognises that while people may philosophically have ‘natural rights’ or ‘human rights’, it is through the structures of government that we seek to preserve them, tempered by our other ambitions for society.

It is these other ambitions that often create conflict. The free exercise of many rights often comes into conflict with social justice or aspirations of social cohesion. Preserving human rights and freedom is therefore largely dependent on political culture: the extent that we can protect human rights is the extent to which they are valued by the Australian people.

Understandably, many human rights activists can find this a frustrating solution. Advocating for rights requires convincing Australians of the importance of their cause, and urging the political class to take action on their behalf. That can be particularly problematic when rights rarely need to be defended for the most loved individuals or justified behaviour. As such,

for many people the logical conclusion is to advocate for a 'bill' or 'charter' of rights.

Securing the electoral passage of a constitutional bill of rights in Australia would be extremely difficult. Constitutional bills of rights are achievable at the foundation of a country because they put firm parameters on the development of laws; constitutionally protected rights are like stakes in a garden. As a country develops, it creates laws which grow around these stakes.

But Australia's body of law has developed on the basis of its current constitutional constraints — introducing a bill of rights would drive stakes into the body of our law that grew without them.

For example, no credible bill of rights could be introduced without a strong protection of free speech. Yet Australia's law has been developed with little protection for free speech beyond courts reading down excessive restrictions using the precedent of the common law. Introducing a strong protection of free speech through a bill of rights would mean many laws that enjoy widespread support — which range from plain packaging of tobacco products,[3] to section 18C of the *Racial Discrimination Act* 1975 (Cth) — would require amendments or repeal.

The other reason a bill of rights would be difficult to secure in Australia is because of its impact on our political culture. Political cultures develop out of the institutional structures that surround our democracy: for example, America's political culture is heavily built around its Bill of Rights, and England's is built around its own structures without formal constitutional protection. So too, our political culture is built on an understanding and respect for rights, but not in isolation.

As a result, appealing to rights rarely wins you an argument in Australian political discourse. Rights are only valued as part of a matrix of competing values including fairness, justice and responsibility. Inserting a strong protection of rights amongst this political culture will do little to engender support for rights, and would likely bring them into ridicule as they almost always only ever need to be defended for the less desirable and their conduct.

Legislative charters of rights have their own significant issues. They have the same problems as a bill of rights absent teeth, but they also place courts in an impossible position.

Courts already factor rights into their legislative interpretations, but the rights they factor in come from the common law and focus on the 'negative' rights of the individual. Negative rights are protections of the individual's liberty against the excesses of government, such as freedom of speech, freedom of association and religious freedoms. Other rights, such as the right to a fair trial, are embodied in the institutions of our democracy.

Depending on their design, charters of rights often include both negative and positive rights; advocates for charters of rights tend to want to go beyond 'negative' rights, and instead focus on 'positive' rights about expectations of the individual from government. Positive rights are rarely human rights; rather they are civil and political rights that include issues such as whether and the extent to which citizens can access publicly funded health and education services.

Irrespective of the merit of each civil right, it is deeply undesirable to use courts to advance them.

When positive rights are included in legal proceedings judges cease to be interpreters of law and instead become arbiters over decisions on public policy.

Charters that include positive rights afford the courts the power to make decisions on issues without the comparable knowledge or responsibility for their decisions. For example, a court may make a decision about what constitutes 'equal' access to a civil right that could lead to significantly higher costs for government, without an understanding of the precedent they are setting or the cost consequences it will impose on the taxpayer.

Hence courts are not the place to fight out issues of legitimate public policy. That rightly sits with Parliament. When Parliament develops charters and handballs decisions to courts they are undermining the very institution they serve.

Handing this power to the courts is also deeply undemocratic as it empowers non-elected judges to decide public policy. That doesn't mean just taking away power from the Parliament, it also amounts to taking power away from the people.

The consequence is a corrosion of respect for rights as they are seen to take precedence over the rich mixture of other policy aspirations we have for our society.

REFERENCES

1. Hugh Collins, 'Political ideology in Australia: the distinctiveness of a Benthamite Society' in Stephen R Graubard (ed) *Australia: the Daedalus Symposium* (Angus and Robertson, 1985) vol 114, 147–169.
2. Ibid.
3. *Tobacco Plain Packaging Act* 2011 (Cth).