

Higgins CJ - Speech to the Rotary Club Breakfast

“Judicial Independence and Human Rights”

Friday 1 August 2003

Judicial Independence and Human Rights are perhaps two of the most essential ingredients necessary for a properly functioning liberal democracy. A speech on either of these concepts could take far longer than I'm prepared to make you listen to, so this morning my aim is to simply present you with a thumb-nail sketch of what these concepts are and, more importantly, what they mean to us in Australia, applied to current issues today.

The main crucial ideal underpinning the notion of Human Rights, and providing the basic rationale for many of the arguments in favour of judicial independence to ensure against legislative or other breaches of human rights, is the idea of natural law.

The notion of natural law states that there exists some legal principles, grounded largely in concepts of morality, which are so basic and fundamental to human nature that they exist independent of any specific legislative enactment. As far back as Plato and Aristotle, and continuing into present day legal theory, it has been recognised that these principles exist, and have independent existence by virtue of their being an inherent part of human nature. So inherent in our moral existence are they, that they may be readily discovered and identified by human reason. As one legal theorist (Finnis) put it, these are created from an almost intuitive knowledge of self-evident basic human 'goods'.

Although what may be required by ‘natural laws’ may be the subject of argument in particular cases, in many cases the notion of natural laws applied to Human Rights is not particularly hard to understand. Citizens have a right not to be subjected to murder, torture or oppressive and degrading treatment, for example, as this is almost universally understood as being inherently “illegal”.

Such notions of inherent rights lie at the heart of much of the development of the Common Law. To take but a few examples, the doctrine of *Habeas Corpus* ensures against imprisonment without lawful reason, equitable doctrines such as natural justice and procedural fairness exist to guard against arbitrary or unfair administrative decision-making, and fundamental freedoms such as the freedom of speech, association and movement have all been the subject of enforcement by the High Court in past years. Moreover, living under a system where the rule of law is respected means that these principles, as well as law contained in legislation, must be obeyed equally by the executive, and not breached by laws of the Parliament.

For as long as the rule of law exists, and the laws being made by Parliament are themselves just and moral laws, and show respect for Human Rights, then the democracy will be a healthy one. In this country, as in all the Western democracies, we are extremely fortunate to live under a system of democratic rule. However, just because a system is democratic certainly does NOT mean that it is above human rights abuses. History tells us that political power, even backed by the will of the majority, can and has practised tyranny upon certain of its peoples in many nations in years past.

What, then, can be done, when the laws passed by the legislature, and supported by the majority, are themselves immoral, or in flagrant breach of Human Rights? Certainly, they must not be upheld by the courts simply because they are made constitutionally, or even because the majority may wish them to be made. In such cases an independent and fundamental level of Human Rights must be upheld, according to which the validity of legislation must be assessed, and it is the courts to whom the duty falls to enforce these fundamental rights, particularly where they seem to be unpopular with the dominant political power or even popular opinion of the day.

The truth of these ideas was vividly brought to the world's attention through the experience of Apartheid in South Africa. At the time, South Africa was under a British-style constitutional system of government, and had an English common law tradition. Their parliament, in passing racially oppressive legislation now infamous in history, demanded that their judiciary uphold the legality of the legislation, as the nature of the legislation was argued to be no concern of the courts, so long as it was passed using the required political processes. If Parliament's intention was clearly stated, it was argued, the courts are duty bound to apply that law, no matter how repugnant.

To their everlasting shame, many of those laws were not struck down by the judiciary, despite their being clearly contrary to principles of decency, natural justice or indeed principles of equality fundamental to the Common Law. This is a clear case where the application of natural justice principles should have rendered those laws invalid, despite their being "legal" on paper, and provides a stark reminder of what can happen when the judiciary fails to have the courage to stand up for those rights.

A further vivid example was provided by events here in Australia during the cold war, in the *Communist Party Case*. In that case, the Government of the day passed laws effectively banning the Communist Party, and making it an offence to be a member. Thankfully, the High Court, acting with courage in defiance of the then popular (or populist) will, struck down this law as unconstitutional. To its credit, the then Government of Sir Robert Menzies accepted that decision.

In a subsequent referendum proposal, the populace, having had the consequences of such a law explained to them most forcefully by the then Opposition Leader, Dr Evatt, changed from being two thirds in favour at first impression, to narrowly rejecting such a law being unauthorised by the Constitution.

So it is evident that to halt the course of infringement upon our rights, it is essential that the judiciary take an independent stance in determining the legality of proposed laws.

This is, moreover, as necessary today in modern western nations as it ever has been anywhere. Do not ever believe that the rule of law is not under such challenge today.

The executive government of the United States now holds about 600 persons, including 2 Australian citizens, on Guantanamo Bay, Cuba – an anomalous area within the hostile state of Cuba, but apparently immune from Cuban law.

Those persons are held without charge, without trial, without access to lawyers or even family, and without even any idea as to when they might be released or charged.

There are thousands of persons held in detention here in Australia. For some of these, this is to determine their legal and health status – a legitimate enough exercise and there is a legal regime to determine their refugee status.

But for others, the situation is far from clear. The executive denies them the right to refugee status. It claims the right to detain them on the basis that no country can or will safely receive them. Moreover, it attempts to deny them the right of judicial review, and the fact they have been only partially successful in doing so is credit to the independence of our judiciary, and a perfect example of the judiciary correctly upholding natural justice principles.

The Attorney General, in the name of the War on Terror, seeks the right to personally determine which organisations should be regarded as terrorist groups, membership of which will then become a criminal offence. He rejects the notion that such identification should come from international consensus – the formation of the opinion of a Cabinet Minister should suffice.

The last time such legislation was passed, and this has not yet become law, was in the *Communist Party Case*, with the result that I have already described.

It is obvious, therefore, that only a rigorous and continuous awareness of human rights issues and protection will insure the successful working a liberal democracy such as ours. How, then, can natural principles of Human Rights best be protected and upheld in a democratic society such as ours, and what exact role is there for the judiciary?

Well, the answer to the first question is that one particularly effective way would be the creation of a bill of rights, which would explicitly codify those basic Human Rights and Freedoms to which I have referred.

Movement on this subject has occurred in several countries recently.

The Australian Capital Territory government has proposed just such a law, which has counterparts in Canada, New Zealand and the United Kingdom, to declare and provide for the enforcement of the human rights of its citizens.

Such legislation, entrenched or not, is of course, no guarantee of respect for such rights. The Constitution of Stalinist Russia contained a model code of such rights. They were regularly abrogated and abused.

However, it may well be a beacon, dare I say, a light on the hill, to illuminate the dark areas where abuses of human rights, even in the name of the “greater good” might occur.

There are, of course, some cautions that need to be addressed. There is the role of the judiciary. Should it be the sole determinant of abuse of human rights, as in the United States and Canada? Or should it merely interpret the law in conformity with the declared rights as in the United Kingdom and New Zealand.

In the United Kingdom there is a formal mechanism for dealing with judicially perceived incompatibility between human rights and legislative enactments – a “Declaration of Incompatibility”. When such a declaration is given, the Parliament then must consider whether or not to remove or confirm the incompatibility. Since October 2000 up to April 2003, only 13 Declarations were made. It has not “Opened the Floodgates” (Report 3.44 – 3.47).

Whichever precise method is deemed appropriate, and given the understanding that in general the independence of the judiciary is indispensable in either case, there is no doubt that the rationale and the necessity for judicial intervention to protect Human Rights and natural laws exists. The best way that that can be achieved is through the creation of a clear, concretely stated Bill of Rights for all Australians.

In its Report to the ACT Chief Minister, the ACT Bill of Rights Consultative Committee (May 2003) proposed a model Bill of Rights Act based on the UK Model and seeking to incorporate the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights into Territory law.

To quote simply from Clause 1.2 of the proposed Schedule of Rights:

“All individuals within the Australian Capital Territory and subject to its jurisdiction have the right to enjoy the human rights set out in this Schedule without distinction or discrimination of any kind, such as race, colour, sex, language, religion, political or other opinion, material or social origin, property, birth or other status.”

If such an objective were to be realised, it would be perhaps the ultimate tribute to the justness and equality of our democratic system of government. It is mutual respect for those values shared between the legislators, the executive government and the judiciary which, I believe, underpins the proper independence of the judiciary and honours those for whose benefit it exists – the people.