HUMAN RIGHTS: THE ROLE OF THE JUDGE

LAST WORD

POLEMIC 1991

HUMAN RIGHTS: The Role of the Judge

In this issue, the last word goes to the Hon. Justice MICHAEL KIRBY AC CMG, who argues that, in the common law, the judge has a powerful weapon with which to defend basic rights.

The Judiciary as Guardians of Basic Rights

At a recent meeting of Chief Justices from many countries held in Washington, a question was posed for the participants as to what right was the most fundamental; so that if all else were lost, that right should be insisted upon as essential to a just legal order.

Various options were offered. Unsurprisingly perhaps, the United States judge ventured the right guaranteed in the First Amendment to that country's constitution: freedom of speech and freedom of the press. Ideas, powerfully and independently communicated, will ultimately (if properly upheld and protected by courts) defend other basic rights and ensure that they are eventually observed.

The Canadian Chief Justice (Antonio Lamer) asserted that the right of access to a judicial officer, independent of the other branches of government, and to an independent legal profession was the most important right to be guaranteed. His was an assertion which reflected the traditional attitude of the common law. The symbiosis between the appointed and unelected judiciary, on the one hand, and the powerful lawmaking branches of government, on the other, is one of the brilliant features of the system of government developed by the English over the centuries. It provides an interaction between:

(i) A judiciary aspiring to learning, intellectual rigour, the pursuit of logic, fidelity to conscience and respect for minorities and for the individual (on the one hand); and

(ii) The other lawmakers in the legislature and executive, reflecting popular will, the changing and sometimes passionate aspirations of the majority, an impatience with minorities and individuals whose perceived selfishness can sometimes hold back great revolutions, including economic revolutions which benefit the mass of individuals making up the community.

> **"The old notion of absolute and complete legalism is increasingly giving way to the recognition of the necessity and obligation of judicial choice..."**

The judiciary provides an occasional break on the resolute action of the other branches of government. The agenda of the judiciary tends to be longer term. Although not entirely impervious to popular opinions, aspirations and moods (for judges are members of the community also) the judiciary is often deflected from passion by the instruction of forebears, who remind current office-holders of the need to protect the individual, defend minorities and uphold proper procedures even where doing so may frustrate the achievement of the democratic will.

In the tradition of the common law judge, this defence of basic 'rights', as defined by the common law is not a charter for a judicial veto on the determined activities of the legislature or the executive. This truism was pointed out by the United States Supreme Court, emphasising the real, but limited, function of judges in our tradition:

"Our system of government is... a tripartite one, with each branch having certain defined functions delegated to it by the Constitution.... Here we are urged to view the Endangered Species Act 'reasonably' and hence shape a remedy 'that accords with some modicum of common sense in the public weal'.... But is that our function? Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto.... [I]n our constitutional system the commitment to the separation of powers is too

mental for us to pre-empt con-
ional action by a judiciary decree-
hat accords with 'common sense
the public weal'. Our Constitution
such responsibilities in the politi-
branches."

withstanding this recognised
ordination of the judicial branch of
rnment to the political branches,
remains a great deal for judges of
common law to do in the defence
asic rights. If the judges of Hong
have independence of the
icial branches of govern-
after 1997, there will be
for them to do in defend-
asic rights, simply because
inherent in the day by
ctivity of judging. It will
whether or not the Bill of
Ordinance survives the
ition of sovereign power
Kong Kong in 1997 from the
d Kingdom to the PRC. It
be so whether the Bill of
Ordinance is
renched'. It will be so
ther or not the United Na-
Covenants are incorpo-
into the domestic law of
Kong and remain in that
unaltered, after 1997. It
be so, simply because the
ision-makers are judges op-
ing within a legal tradition
ich, for many faults, has the
ngth of upholding and de-
ing certain basic civil rights.

role of the courts in the common
tradition in upholding these rights
not been the subject of deep analy-
In large measure, it is a function
ch is taken for granted. In part, it
function which derives from the
essity (which is an aspect of the
chore of judges) to give meaning
language. That language may be the
uage of common law judgments.
frequently, nowadays, it is the
uage of legislation. The Chinese
uages may be different, although I
bt it. Certainly, the English lan-
ge is irretrievably ambiguous. In part, this is because the English language represents the marriage of two important European linguistic schools: the Germanic and the Latin. The Anglo-Saxon Celtic tongue of the original inhabitants of the British Isles has been moderated by the 'official' language of the Norman conquerors. Thus for virtually any idea - particularly in the official context of law and government - there are usually two words or phrases: the one Germanic and the other Latin. Take 'last will'

(Germanic) and 'testament' (Latin) as an illustration. The feature of the English language, which makes it so rich in literature, presents ambiguities to judges. They are ambiguities both in the text of legislation and in the principles of the common law as expounded in the words of earlier judicial decisions. Out of such ambiguities are presented choices which simply will not go away. It is doubtless so in the legal systems of every linguistic tradition. But is magnified in any system of law operating, even in part, through the medium of the English language.

There is a growing recognition amongst judges that they have such choices. The old notion of absolute and complete legalism is increasingly giving way to the recognition of the necessity and obligation of judicial choice. That obligation is enhanced when it is the function of the judge to give meaning to the necessarily sparse language of a Bill of Rights, constitutional or otherwise. Such language, expressed in terms of great generality, will impose particular obligations to which I will shortly come.

For present purposes my point is that the obligation of choice necessitates criteria for choice. It does so whether the criteria are expressly stated in the instrument or not. It does so whether they are recognised by the decision-maker or not.

Australia is a federal country. Its constitution, originally enacted as an imperial statute, but based upon a referendum of the people in the Australian colonies, contains a number of guaranteed rights. Although it is often said that there is no bill of rights in the Australian constitution, and this has a superficial accuracy, the Australian courts have increasingly spelt out of the general language of the constitution (and the assumptions which that language enshrines) guarantees of basic rights which almost certainly were not in the mind of the Founders when the words were originally written.

It is now a century since the first draft of the Australian constitution was adopted. A recent centenary conference on the constitution - to prepare a decade of discussion about its reform - resolved that priority should be given to the incorporation in it of a Bill of Rights. An attempt in 1988 to incorporate a number of additional basic rights failed at referendum, receiving the support of little more than 30% of the people. Various attempts to draft a non-constitutional Bill of Rights in

Australia have ultimately founded upon the opposition of politicians and of people deeply imbued with an inherited English suspicion about Bills of Rights. Perhaps it is the very fact that the notion is a *conceptual* and not a *practical* one is why it offends many Australian people. Perhaps it is their suspicion of governments and of change of the constitution and of the risk of remitting power over large social issues from elected and accountable parliamentarians to unelected judges. But most probably the resistance stems from a general satisfaction with the state of basic rights in the current institutional framework of Australian law, a belief that those rights are adequately safeguarded in the laws made by Parliament and interpreted and enforced by the judiciary.

"If the judge is faithful to basic principles of the common law, he or she will have legitimate and readily available legal means to protect and uphold basic rights.."

Upon one view there could be similar attitudes to the entrenchment of a bill of rights in Hong Kong, if ever the people of Hong Kong had been properly consulted about it. Already opposition to some aspects of the proposed Bill of Rights Ordinance has been reported, based upon traditional Chinese laws and customs, eg on matters such as sexual equality.

These realities may provide reasons why, for the practical enforcement of basic legal rights in Hong Kong after 1997, the role of the judge will prove to be of the greatest importance. If the judge is faithful to basic principles of the common law, he or she will have legitimate and readily available legal means to protect and uphold basic rights, to defend the individual and to safeguard minorities.

Judicial Techniques for Safeguarding Basic Rights

Two common law techniques at least compete for acceptance in Commonwealth countries to provide the common law judge today with potent means to defend basic rights - simply by performing judicial functions.

The first is the notion that there are some common law rights which lie so deep that even a legislature of full powers has no authority to change them. This is a notion, within the common law tradition, which has an ancient lineage. It is grounded in ideas of natural law. Its supporters remind opponents that even the respect for the law made by parliament is ultimately grounded in a common law principle that the courts will accord parliament's laws respect. If then the basic rule is that of the common law, the common law can add a qualification: that no legislator may validly make a law which is so fundamentally shocking that it must be declared to be not the law at all. It is not necessary to go back to Chief Justice Sir Edward Coke to find support for this notion. More recent support for it can be found in authority in the United States where, in 'rare and exceptional circumstances', a judicial 'safety valve' is provided against the enforcement of a rule which leads to an 'unjust, unfair or otherwise absurd result' so that the 'letter of the statute is not to prevail'.

In New Zealand, the notion of such 'basic rights' exist has been crafted by the Court of Appeal and asserted in a system of law which is in some ways similar to that of Hong Kong: common law, non-federal and subject to appeals to the Privy Council. The cases are subject to a great deal of judicial and academic discussion and controversy.

The other basis which authorises judges to defend fundamental rights is more modest in its assertion but (perhaps for that reason) more potent in its daily effectiveness. It achieves its goals by the simple device of statutory interpretation and common law exposition. Because the bulk of law is nowadays made by legislatures in the form of statutes, an important feature of the life of the modern judge of the common law is giving effect to the 'intention' or 'purpose' of the lawmaker. This is done by giving meaning, and then force, to the words of the law so made. That law may have had such meaning and force before it is judicially expounded. But there is no doubt that the judicial exposition adds, if not legitimacy, at least effectiveness to that law in a society such as ours.

"The feature of the English language, which makes it so rich in literature, presents ambiguities to judges. Out of such ambiguities are presented choices which simply will not go away..."

It is in this function of statutory interpretation (but equally in the exposition of the common law and in its development) that the modern judge of the common law has a vital role to play in protecting, and even advancing, fundamental rights. The issue arises all the time in the practical work of courts. Because of the ambiguity of language to which I have referred, courts are presented with choices. Take one choice, and a basic right may be lost. Take another and the basic right will be safeguarded. Generally speaking,

modern judges of the common law have asserted their function to protect fundamental rights by preferring the second choice, if it is open on the language of the law under consideration.

There is little exposition of how this function came about or how it came to be accepted by the other branches of government. Sometimes that acceptance is grudging and reluctant. But there is a kind of compact between the courts and the 'political' branches of government that the courts will declare the meaning and effect of laws made by the other branches and the others will accept that declaration. In doing so, the courts will presume that those other branches did not (unless they made their intention absolutely clear) intend to derogate from 'basic rights', as the courts in turn declare them.

In a recent case I attempted to explain the fundamental principle upon which this basic political compact rests:

> "Thus... the danger of legislative oversight [should be] mentioned. Equally dangerous is the loss of attention basic rights which may accompany the very growth in the quantity and complexity of legislation which is such a feature of our time. Legislatures, both Federal and State, have recognised this problem by the appointment of Parliamentary committees, with terms of reference designed to call to notice such problems whenever they occur. However, it is inevitable that some such problems will escape notice. This is where the assertion by the courts of the role of construction... has such a great social utility. It may delay, on occasion, the achievement of the intention which Parliament had. It may temporarily interrupt the attainment of an important legislative purpose. It may even sometimes give rise to a feeling of frustration amongst legislators and those who advise them. But the delay, interruption and frustration are strictly temporary. And they have a beneficial purpose. It is to permit Parliament, which has the last say, an opportunity to clarify its purpose where the Court is not satisfied that the purpose is sufficiently clear. And that opportunity is reserved to those cases where important interests are at stake, which might have been overlooked and which deserve specific attention.

"The judge of the common law today often does not need an entrenched and justifiable Bill of Rights to safeguard at least some basic rights..."

Considering its importance, there has been insufficient discussion in the casebooks or elsewhere of the functions served by this technique of statutory construction... But looked at in this light, the asserted role of the courts is not an undemocratic usurpation of parliament's role. Still less is it the deliberate frustration of the achievement of the purpose of Parliament, as found in the words of an enactment. Instead, it is the performance by the courts, by way of the techniques of statutory construction, of a role auxiliary to Parliament and defensive of basic rights. In the end (constitutional considerations apart) Parliament's will must be done. But before basic rights are repealed, that will should be spelt out in clear terms. Parliaments both in this country and in other countries of the common law accept this beneficial relationship with the courts. It reflects the shared assumptions of all the lawmakers in our society. On not a few occasions, it has prevented the unintended operation of words of generality in a statute to diminish basic rights as Parliament would never have enacted, had the point been properly considered."

In the foregoing decision, the question was raised whether legislation, designed to provide for a special investigation into a company's affairs, should be construed to take away the common law right to legal professional privilege. The importance of that common law right had been emphasised in a number of decisions of the High Court of Australia. Similar questions had arisen in New Zealand and in Canada. Analogous questions had arisen in respect of the common law privilege against self-incrimination. More recently, like questions had arisen concerning the powers of a local Independent Commission Against Corruption where its statutory charter appeared to infringe fundamental common law rights.

I mention these cases because they suggest that the judge of the common law today often does not need an entrenched and justifiable Bill of Rights to safeguard at least some basic rights. Those 'basic rights' will be found clearly enough in the principles of the common law. Those principles will be upheld at least by techniques of statutory construction and common law exposition to the extent that the new law on any subject is unclear. Of course, sometimes and oppressive law, or one which derogates from 'basic rights' will be only too clear. It is then ordinarily the duty of the judge to give effect to that law. If the judge cannot in conscience do that, he or she must resign. A judge has no legitimacy to deny effect to the law, if it is plain.

Michael Kirby is the President of the Court of Appeal, Supreme Court of NSW; Commissioner, Member of the Executive Committee and Chairman-elect of the International Commission of Jurists. This article is an extract from a paper delivered at the International Conference on the Bill of Rights, held at the University of Hong Kong in June, 1991.