"A Bill of Rights for Australia?"

Attorney General's Department-Constitutional and Law Reform Branch

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Living In A Time of Global Human Rights

Mr Attorney General, my fellow citizens and distinguished guests from overseas. I am naturally very pleased to be here and especially to talk about the subject of this excellent discussion paper, which has been prepared to enliven our debate and to give it focus. It is an outstanding document. It sums up where we have been and perhaps where we are going. It will allow us to cut a lot of the preliminaries and get straight to the importance of this debate this morning.

As I was coming down in the plane with Adama Dieng, my dear colleague in the International Commission of Jurists (ICJ), we were talking about two matters.

First, how one or other of us can get to the Union Buildings in Pretoria next Tuesday for the swearing in of the new President of the Republic of South Africa to which the International Commission of Jurists has been invited. The International Commission of Jurists played a very important role in the early days of the South African freedom struggle. From the beginning, it put anti-apartheid and non-discrimination in its charter. In those times we would scarcely have thought, as the Attorney General said, that we would live to see the day of freedom for all South Africans. We are blessed that we have lived to see this day. But the ICJ wasn't just blessed. It contributed to the process. I think that is something which will propel either Mr Dieng or me to the Union Building next Tuesday, probably myself.

Australia's Hesitation - and its historical explanation

Secondly, I tried to explain to Adama Dieng why it was that Australians, until now, have reacted with a degree of caution about the notion of a Bill of Rights. It is something which is truly astonishing to people from other countries who (whether their countries have been democracies or autocracies) really find it difficult to understand how such a beautiful country, with such fine people, which has followed so faithfully the tradition of the Rule of Law, could be so resistant to the notion of adopting a Bill of Rights. Why they resist in principle

the statement of the fundamental bases upon which people live together in freedom.

So I went back into my own memory (which would be the memory of most of us and certainly of all lawyers) as to why it is that we have been resistant to the Bill of Rights notion. We have resisted it, I suppose, basically because we had a very deep faith in democracy and in the trust which we could accord to our democratically elected representatives to do the right thing and the fair thing and to encapsulate the ideas of freedom, civil and political, and social and economic and cultural, in legislation sensitively drawn and carefully prepared to deal with particular problems. It has not been the way of our people to put faith in great broad principles. Perhaps this was because of a certain scepticism about generalities; a certain inherited English tradition of dealing only with that which has to be dealt with, and not reaching for the great idea but merely solving the current problem. This is, certainly, the intellectual baggage with which I have travelled. I received it at my law school. All of you who were lawyers trained at about the same time (or even long after the time I was trained) received the same intellectual training. Yet it was never the complete story. The notion that the people had rights was actually quite deeply entrenched in our legal thinking, as history shows.

The Inheritance of Conditional Monarchy

The rights of individuals was not a notion comfortable with absolute monarchy. But you will remember how King Charles I lost his head in the assertion of the power of the English Parliament - representing the people, such as the people who elected the Parliament. The people asserted their claim to ultimate sovereignty over the King.

Perhaps even more important is the tale of the way King James II was ousted from the throne. It is an interesting tale of James, who came back with his wiser brother King Charles II and found in place the Catholic limitation legislation which had been enacted by Parliament during the reign of Queen Elizabeth I. James - under the urging of his Catholic Queen - was minded to get rid of it. So he instructed the Archbishop of Canterbury and the six bishops of England to read, on two consecutive Sundays in every pulpit throughout the kingdom, a statement concerning the removal of all discrimination against Roman Catholics.

In the atmosphere of that time and the fear which the bishops had of the Papal power in Europe, the Archbishop of Canterbury and the bishops refused. They asserted, accurately enough, that the King alone could not repeal the legislation of Parliament. The King thereupon had them all arrested and thrown into prison. King James II's action in doing so was challenged in the courts. The Court of King's Bench had to face the challenge of the bishops to the power of the King to amend or suspend the Acts of Parliament made by the people's representatives in Parliament and to arrest the bishops. The Court of King's Bench held that it could not interfere. That court recognised that the King did have the ultimate power to have a subject arrested and thrown into prison. And so the matter went on to trial before a jury. You will know this story. The six bishops and the Archbishop of Canterbury were acquitted by the jury. The jury perhaps did not pay close heed to the instructions of the judge on the Acts or the law. Doing what they, as the commons of England have often done and the "commons" of Australia have been known to do too. They applied common sense and their sense of the limitation of the King's power.

An interesting tale that, is it not? Because it represents the clash between what James was trying to do (to remove the discrimination on religious grounds which we would regard as completely unacceptable in relation to Roman Catholics) and his power or lack of power to do it. The last lingering piece of the discriminatory legislation is the Act of Settlement which has still relevance to the royal succession in Australia as Mr Lavarch pointed out the other day. But it was the assertion of a King, and the way he went to enforce it (the fact that he sought to use his sovereign power) that was then challenged in the courts of law. A challenges which failed before the judges. But before the jury it succeeded.

When it succeeded there was such a commotion in the streets of London that a revolution broke out, the so-called Glorious Revolution. The invitation was then sent to the Prince and Princess of Orange. William and Mary were invited to assume the sovereignty of England. But they were invited to do so on condition. The condition was that they would accept certain limitations on the royal power. Never again would the commons be subject to the assertion of the royal power over the people's will. The Bill of Rights of 1688 (actually it was 1689 but the calendar changed and we will not worry about that too much) was adopted. King James II was ousted, throwing the great seal of England into the Thames on his way. The commons were triumphant. The tale is important, not least to our inherited liberties in Australia. It shows the clash between the

desire of King James II to assert, in a sense, his subjects' rights to freedom of religion, and the fear of the commons of England that might lead to a revival of the religious wars and religious intolerance that had caused so much division in the past. It was also an obstruction to their assertion of the ~~King~~ Commons's power. After a revolution, a true revolution, new sovereigns were invited but on condition. Ever since then, and indeed ever since King Charles I lost his head, we have lived in and we are the successors to, a limited system of government. The ultimate power for us is the people's power, the people's rights declared in Parliament: first in Britain and later in this country.

The people's rights have, since 1688, asserted themselves in the wonderful language of the Declaration of the Rights of Man and of the Citizen in France in 1789. Earlier in 1776 there was the American statement of fundamental rights, in the Declaration of Independence. James Madison a father of the American Revolution was at first most resistant to the notion of preparing a Bill of Rights for the new republic. He carried the same intellectual baggage as I bore. "Who will be so bold", asked James Madison "...as to declare the rights of the people?". But declare them he did. The Bill of Rights of the United States of America was prepared in 1790. It has profoundly affected what has happened globally. In the League of Nations and now the United Nations, it continues to have its effect - including on our own country.

The Bill of Rights of 1688 Still Applies

The Bill of Rights of 1688 contains one provision which I will mention by way of illustration. It says no-one should be subject, I paraphrase, to "excessive fines". We had a case in my court only a year ago in which a prisoner was charged with contempt of court[1] . He was undergoing a life sentence, so he could not be sentenced to any more imprisonment. The judge who had charged him with contempt in the face of the court found him guilty. For his refusal to answer questions, he fined him $60,000. He was a prisoner on a $1.20 a week sweeping allowance. His appeal came up to my court. I found that in the circumstances $60,000 was an excessive fine. My colleagues did not agree with me. So that may perhaps be an illustration of the difficulty which we face in accepting fundamental principles. But I will not digress to re-argue my dissents lest I became as tedious as a noted English dissenter sometimes was.

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[1] see Smith v The Queen (1991) 25NSWLR 1(CA),13

Three International Human Rights Developments

In the international scene I see developments which are profoundly affecting our country. We have seen, for example, our ratification of the International Covenant on Civil and Political Rights. We then saw later the signature of Australia to the First Optional Protocol to the International Covenant on Civil and Political Rights. This gives Australians the entitlement, having exhausted local remedies, if the end of the road is reached in our legal system, to take their complaints to the United Nations in New York and Geneva. Mr Nick Toonen from Tasmania, took to Geneva the complaint that the Tasmanian criminal laws on homosexual conduct were contrary to the International Covenant. The Human Rights Committee, which includes Justice Elizabeth Evatt of our country, found unanimously that the Australian laws in Tasmania did breach our obligations under the Covenant. So that is one human rights procedure that is now already in place. It is already happening.

Another procedure is the so called special reporting system. Recently, I was appointed Special Representative of the Secretary General for Human Rights in Cambodia. In that capacity I have been to Cambodia twice. I will be going again in July/August. The purpose of my activities there is to measure the actions of the Cambodian legislature and executive against the standards of the International Covenant on Civil and Political Rights and other such human rights instruments. Cambodia invites this. Their leaders seek it. They seek guidance. They seek to test their measures against these provisions. There are a number of these special rapporteurs and representatives around the world. I am just one of them. But it is an interesting new development. It is a development which, I suggest to you, is suitable for the global problems for human rights in the age of interactive telecommunication, of the human genome project, of the reaching out to the moon. We are living in a great global community. We in Australia have to find our place in that community and to be a part of it.

The third relevant human rights development is one in which I have taken a part myself. It is one which the High Court in the *Mabo* case has recently sanctioned[2]. It is the notion that, in interpreting ambiguous legislation, or on filling a gap in the common law by the processes of analogous reasoning which judges of the common law have been doing for 800 years, it is legitimate, where

[2] Mabo v The State of Queensland [No 2] (1992) 175 CLR1, 42

it is relevant, to have regard to international human rights law, to which Australia has subscribed. The same development is occurring in this Territory. I see it referred to in the discussion paper. Chief Justice Miles has referred to the international instruments for the purpose of illuminating the choices which judges have in their daily work. So also in my own court we have done so.

The Domestic Application of International Norms

I will give you a practical instance, because I think it is easier to focus on practical cases. This was the case[3]: Mr Young had a son. He and his wife fell out. His wife formed a relationship with another person who was from the Lebanon. Mr Young became terribly fearful that the new partner to the wife, was going to take his son to the Lebanon, then locked in mortal war. And so, contrary to a court order; first of the Family Court of Australia and then a restraining order of the Supreme Court of New South Wales, Mr Young seized his son. He took him to the United States. They assumed a different name. They hid away there for something like eleven years. Mrs Young, who always denied the intention to take the son to the Lebanon, chased Mr Young around the world. Ultimately she tracked him down. She secured orders. Mr Young was brought back to Australia and the son was restored to the mother. The son then much older of course; eleven years older. Mr Young was charged with contempt of court. He was tried, as the legislation of New South Wales prescribes, not by a single judge, but by the Court of Appeal. He then was convicted by a court comprising three judges. I did not sit in the case. He was found guilty. He was sentenced to six months imprisonment. By the standards of Australian punishment for such conduct (which is not unknown in this country), that was not a particularly high sentence. The Family Court standard would have been six months to a year.

Mr Young then raised a point. It was a point which he took with him to the High Court of Australia. It was an assertion that under the International Covenant on Civil and Political Rights, the Covenant provides that everyone who is convicted of a criminal offence shall have an entitlement to have that conviction reviewed by a court. Mr Young asserted that the opportunity to seek special leave to appeal to the High Court of Australia was not a "review" of the kind which the International Covenant prescribed. The High Court, with its very heavy docket, is concerned with matters which will be of national

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[3] Young v Registrar, Court of Appeal [No 3] (1993) 32 NSWLR 262 (CA)

importance and general significance. In the return of the case to the Court of Appeal, we had placed before us, on Mr Young's subsequent challenge his special leave application where such leave was refused. The transcript of the High Court of Australia was but six pages. In the nature of such things, it was all over in a quarter of an hour or twenty minutes. The judges affirming the decision of the Court of Appeal. They said that this was a matter where they would not interfere.

So Mr Young came up again. He asked to be released by the Court of Appeal on the basis that he had been denied the fundamental right to have his conviction "reviewed" as the International Covenant prescribes. This application came before a bench comprising Justice Handley, Justice Powell and myself. In the manner of lawyers, we split three different ways. Lawyers will often do that.

Justice Powell said, in effect "I don't know about this International Covenant; I am not at all convinced that it should even be considered. It is not part of our law. Therefore I will not have regard to it. But, in any case, I think that the entitlement to a review in the High Court of Australia by special leave is a "review", and therefore that's that."

Justice Handley, in the middle as it were, said, "I do not accept that the Covenant is part of our law. But it is something to which we can refer in illuminating our law as the High Court said in *Mabo*. We can therefore do that." We have, in a sense, imported it in that indirect way. And I think that Mr Young was convicted of a criminal offence. The Crown said that contempt was not a crime for the purposes of the Covenant. Justice Handley did not agree. However, he concluded that the entitlement to have an application or special leave to appeal was within the margin of appreciation of Australia to provide that sort of review. Therefore Mr Young's conviction would be confirmed. He would not be granted release.

I said, that the International Covenant was not, as such, part of the common law of Australia, unless it was incorporated by legislation or judicial decision. But, we can look at it to illuminate our decisions. It is a treaty to which our country has subscribed. As Justice Brennan said in *Mabo*, it is inevitable that its impact is going to be felt in the common law when judges have a choice in construing legislation or in devising the common law of the country. I said that the conviction of contempt was indeed a conviction of a criminal offence. The

niceties of the English law - the designation of contempt as either being civil or non-criminal - was not what the Covenant was getting at when it pronounced the requirement of a review of criminal convictions The Covenant was talking, at least, about people going to jail. Therefore, contempt was criminal. Mr Young did not get a "review". That, therefore, was a matter which should be reconsidered. However because Mr Young had not raised his point earlier when the case was first before the Court of Appeal at his trial, I held that he had waived the point. Had he raised it then, the Court might have sent the case off to be tried in whole or part by a single judge - giving Mr Young an ample "appeal" or "review" in the Court of Appeal - instead of a trial there. So, Mr Young went back to complete his sentence.

The Young case is a typical case, where you are presented with a suggestion that the law (the law which requires that contempt in New South Wales will ordinarily be dealt with not as it is in most states of Australia, by a single judge with right of appeal but by a Full Court with a further right of special leave to appeal to the High Court), does not conform to international standards. Unless we elevate the principles of the Covenant into something more than just a point of reference to which judges can have regard, then the cases will continue to come where the judges will say either, "I'm not going to have a regard to this consideration," or "well it's not really our law and therefore we don't have to worry too much about it."

The Options before Australia and the ACT

The time has come in Australia for us to consider whether or not we should take the step of providing a higher principle of law which we can use in the courts for decisions of the kind that I have just mentioned. Of course, we can continue to use the international instruments for illuminating our decisions. But the issue which is proposed by the discussion paper and by this seminar is whether we need to go further. The discussion paper gives a number of options.

One option is to do nothing and to say that the founding fathers of Australia's Constitution basically got it right. We have got a very political country. There are lots of politicians, and endless numbers of advisers and bureaucrats serving them. Therefore, we can basically leave it to them to be sensitive to our wishes. If we want particular protection of human rights, we will provide it in our own legislative way. Have faith in democracy.

The intermediate position which is proposed by the discussion paper is to do what New Zealand and Canada first did. That is to introduce a legislative Bill of Rights which is a reference point. This gives the legitimacy of the vote of the people's representatives to the international instruments. It provides judges with a non-entrenched but nevertheless legislative provision to which they can have regard in construing ambiguous legislation and in determining how to fill the gaps of the common law.

The third possibility proposed by the discussion paper is entrenchment. A higher law is established. It can strike down a provision, such as the provision that required that Mr Young's case had to go to the three judge court. It can set aside a law which deprives a person such as Mr Young of a full "review". It can require that he has more than a twenty minute operation looking at issues other than the facts and details of his case. The discussion paper suggests that the third option may be attained in two possible ways: either by enactment by the Federal Parliament or by enactment under the entrenching provisions in the government of the Australian Capital Territory.

The focus for the seminar today should be on which of those options is the better for the good government of this Territory. Last weekend this Territory received top marks for good government in Australia. In a sense therefore it is a special sort of place. Did we not always used to say that in our federation: we can have experiments. We can see what happens in one part of the country and if the heavens do not fall, then it may be that it will be copied elsewhere. That, after all, is how very important reforms of the law, including reforms in relation to crimes of homosexual conduct, spread throughout the country. It started in South Australia. It was copied elsewhere; except Tasmania. So, that is one possibility. That the Territory should go it alone - and see how a Bill of Rights works, giving an example to the rest of Australia.

Four Reasons For Adopting a Bill of Rights Now

Why do I now favour taking a step either towards an entrenched Bill of Rights or towards a Bill of Rights which is at least enacted as the first step on the path to an entrenched Bill of Rights?

The reasons are these: First it would give the provisions the legitimacy of an Australian democracy. At the moment the international instruments are

international statements of the law, of international human rights. That is very important. But how much stronger and firmer then would be in the foundations of our law if they had the vote, the imprimatur, of the people's representatives, and were given the legitimacy of the support of the people's representatives in a particular jurisdiction of our country. I think that this was the idea behind Solicitor-General Gavan Griffith's statement, as I see him reported in the press as saying, that we should have a Bill of Rights because that would, as it were, state the fundamental rights. Then it would not be left to the High Court, across the water, or to other judges to imply the fundamental rights. The people through their representatives, would have stated what they see as their fundamental rights. Better that the people do that than the judges take out their magnifying glasses and find rights interlineally in the text. So legitimacy is the first reason.

The second reason is the failure of legislatures to attend to all the issues of human rights. Forgive me for saying it again. But I was for ten years chairman of The Law Reform Commission. It is the product of my experience that often the legislators and the bureaucrats will pay attention to what law reformers propose if the time is right. Or if they are ready. But there are also many suggestions for reform of the law which are not attended to with proper speed. There are many issues which simply cannot capture political attention. Take the predicament of Mr Young, and whether he should have a right of "review" by a three judge court. This is not the sort of thing that is going to inflame the passions of elected politicians. So better that we have a provision which provides a true instrument for giving legal force to what we believe is a fundamental principle of human rights. Let us arm the judges to fill the gaps which the legislators and the bureaucrats so often leave unattended.

The third reason is education. We complain that the young people of the country do not really have a true understanding of constitutional principle and a commitment to our polity. I think that there is some truth in that assessment. The Constitutional Convention asked the people questions. Most people have never heard of the Constitution. What a difference from Lionel Murphy who told me once that he always took the Constitution to bed with him. It was, he said, always beside him in bed, because he could find in between the lines all sorts of wonderful ideas. Others have since begun to enjoy the same experience, although whether in bed or elsewhere I cannot say.

And fourthly, the understanding which we have now come to about democracy is more sophisticated than the understanding I had when I was at law school.

Democracy is not majoritarianism unbridled. That unsophisticated form of democracy will sometimes do terrible things. You therefore need the interaction between the stimulus, the vibrancy, the unpredictability sometimes, but the general good sense of the people's representatives and the abiding values which a Bill of Rights or a statement of fundamental rights can often provide. Our legal system is already a very strange one. It is a very unusual one. Civil law people think it is a rather messy system with the common law amorphously growing and the judges extending it and contracting it. Yet it works. And the interaction of democracy which is very vibrant in our country (and nowhere more so than this Territory,) and the abiding principles, is what we should aim for. Those principles should not only be found by judges. They should be found by the people. And asserted by the people. And declared by the people and put above the political contest as a stimulus to the judges constantly to remind the elected and the unelected powers of the bureaucracy and the legislature that there are abiding principles. This is democracy as I understand it now and as I think most Australians understand it in 1990's.

So they are my reasons. For moving now in Australia to a formal Bill of Rights: To secure the legitimacy of the people's representatives adopting it. To meet the failure of the legislatures to attend all the myriad of little problems that are relevant to human rights. To provide the focus for civic education which we could then provide as a charter and a statement to be used in the schools. If you speak to Americans they know their basic rights, for they learned them as children. Our people are very uncertain. People uncertain may not assert their rights. And fourthly democracy is not just majoritarianism. It is a brilliant symbiosis of majoritarian will reflected by the people's representatives, and abiding long-standing enduring principles which last from generation to generation, as stated in a Bill of Rights.

So that is where I am on this journey. I understand those who are sceptical about Bills of Rights. I understand those who are wildly enthusiastic. I am in between. I rather suspect that is where most Australians are on the great Bill of Rights debate at this time.