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ABC BLOG ON
CONSTITUTIONAL
AND CIVIL RIGHTS

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The Australian Constitution is one of the very few in the world that does not contain a substantive charter of fundamental human rights. This defect came about, by decision of the founding fathers (no mothers) in the 19th century. They rejected a bill of rights as an American intrusion into notions of parliamentary sovereignty. That decision was taken at a time of Aboriginal disempowerment, the White Australia policy, Imperial rule and a largely monochrome population of British settlers.

Australia is now a very different place: cosmopolitan, multi-cultural, multi-religious, with assertive Aboriginal, ethnic, gay and other minorities playing their part in the nation's society and culture. Unlike most countries, these minorities do not have a constitutional principle of equality or basic guaranteed rights to appeal to when (as sometimes happens) the majority in Parliament ignore, or override, their dignity and rights.

In most other countries, there is an ongoing conversation between the courts (which protect basic civic rights) and the legislature and executive government (which tends to reflect majoritarian opinions and wishes). A contemporary democracy is not a place of brute majoritarianism. This we have learned from the errors of Nazi Germany where the Nazis came to power and wielded their tyranny with apparently strong majoritarian support. But they ignored basic rights and trampled on minorities. If this could happen in civilized Germany, we cannot pretend that Australia is immune.

Australia's Constitution contains a lot of provisions about elected democracy. And in many (perhaps most), disputes over civil rights, parliamentary democracy does ultimately address the rights of minorities. Sometimes, by reference to particular provisions in the Constitution, the High Court and other courts have upheld basic constitutional rights in Australia. A few examples include:

- * The right to hold property free from governmental seizure without just compensation, as in the *Banking Case* of 1948;
- * The right to hold and express unpopular political views, as in the *Communist Party Case* of 1951;
- * The right of Aboriginal Australians to enjoy native title to their land, upheld in the *Mabo* decision of 1992; and the *Wik* decision of 1996;
- * The right to free expression on matters of political and economic concern so as to sharpen political debates, upheld in the *Lange Case* of 1997;
- * The notion of Australian nationality, in the face of constitutional provisions referring to the status of 'British subjects', as in *Sue v Hill* in 1999; and
- * The right of prisoners not to suffer a blanket disenfranchisement from voting, upheld in the *Roach Case* of 2007.

Despite these important decisions of Australia's highest court, sustaining significant values against attitudes of discrimination, inequality and prejudice, there are many other cases that show the present incapacity of Australia's courts when faced with important constitutional challenges:

- * The unavailability of a remedy for an Aboriginal prisoner, sentenced to death, despite serious disquiet about the safety of his conviction for murder, as in the *Stuart* case of 1959;
- * The preservation of the antique notion that prisoners, convicted of felonies, suffered “corruption of the blood” and lost the protection by the courts for their civil rights, as in the *Darcy Dugan Case* of 1978;
- * The suggested inability of the courts to remedy the permanent detention of a refugee applicant, based on parliamentary law rather than judicial orders, as in *Al-Kateb v Godwin* (2004);
- * The failure of the democratic principle in upholding effective parliamentary scrutiny of governmental spending on political advertising, despite the important appropriation power, decided in the *Combet Case* of 2005;
- * The failure of the Constitution to provide remedies against detention orders under anti-terrorism legislation despite the vagueness and over-breadth of such orders, as in the *Jack Thomas Case* of 2007;
- * The failure of the constitution to provide effective remedies to Aboriginal Australians against the legislative deprivation of basic rights in the Northern Territory Intervention in the *Wurridjal Case* of 2009.

This review of some of the key decisions of the High Court of Australia in recent times, concerned with the basic rights of Australians, will disclose admirable occasions where the judges have found enough in the constitutional text and doctrine to protect the basic rights of the individual. But other cases where (sometimes by majority) the court has

felt unable to respond to complaints about serious departures from universal principles of human rights.

The rejection in April 2010 of a federal statutory *Charter of Rights* for Australia and the bipartisan concordat opposing national remedies for that purpose, suggests that effective constitutional protections for fundamental rights are still a long way off. In part, this conclusion rests on a naive and romantic view of the capacity and interest of elected parliaments to respond to all of the legitimate needs for law reform of the people. Drawing on long service in institutional law reform and the judiciary, it can be said without serious contradiction, that notions that parliament ‘fixes everything up’ are false and misleading. Parliament did not ‘fix up’ the basic deprivation of title to Aboriginal land during 150 years of representative legislatures. This was eventually done by the High Court in *Mabo*, which then properly stimulated the democratic parliamentary system. In 1979, Amartya Sen advocated the “capability approach” to human rights: to allow people ‘to do and to be’ what they aspire to. The Australian Constitution safeguards some rights. But it falls short in protecting minorities, and especially misunderstood and unpopular minorities. We are a long way from Amartya Sen’s ideal.

One day, Australia, like virtually all other countries, will have a constitutional charter of basic rights. But it will require political champions who understand the complexity of governance and the weaknesses of the parliamentary system as it operates in an age of media infotainment; party control of members’ voting; and indifference or hostility to minority rights.

Whilst Australians can be proud of the independence of the courts and many of their important decisions under their Constitution, they lose out on the full attainment and protection of their basic rights. Not only does this mean that individual injustice goes unrepaired. It also means that the education of coming generations about their civil rights and the protection of such rights in administrative practice fall short of what citizens enjoy in other lands. The price of these realities is a diminution of the potential of the Australian Commonwealth to be a true example to the world of a vibrant modern democracy where the majority is encouraged to respect and protect minorities, stimulated to do so by legal provisions speaking of the universal values of rights belonging to all people that are put beyond electoral deprivation or neglect.

The great Australian philosopher, Peter Singer, in *Practical Ethics* (1993) at p10 suggests that 'ethics carries with it the idea of something bigger than the individual'. It requires the adoption of a "universal point of view", by which selfish perspectives are tamed by the obligation to respect the interests of everyone else. This is what a charter of rights would afford. A review of Australia's past suggests that our legislators and citizens are occasionally in need of the stimulus of such perspectives.
