

THE PRINCIPLE OF LEGALITY AND THE PROTECTION OF HUMAN RIGHTS IN AUSTRALIA

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Introduction

- 1 It is an honour to present the 2017 Barry O'Keefe Memorial Lecture. Barry O'Keefe was an esteemed lawyer, judge and civil servant, with a deeply committed social conscience based in his faith. His extraordinary achievements were equalled only by his extraordinary energy.

- 2 It is an occasional feature of the legal community in New South Wales to have famous siblings. Hugh Jackman's brother, Ian Jackman, is an esteemed silk at the New South Wales Bar. Barry O'Keefe's little brother was, of course, Johnny O'Keefe, the rock star of "Shout" fame. Hugh and Ian are still alive, and their respective legacies are still works in progress. Johnny O'Keefe left us some great music, itself of lasting cultural importance. Barry O'Keefe has left us a legacy of aspiration. Aspiration as lawyers to serve the community.

- 3 With that in mind, it is important to ask what it is that we want for this community. The topic of human rights is one that should excite each and every one of us. However, it is not particularly useful to speak of rights in the abstract. Rather, it is important that we identify those rights that should be

protected in our society, ask whether those rights are presently protected, and if they are not, ask whether such rights are best placed in a Bill or Charter of Rights or whether there are other measures that serve the same protective purpose. I should warn you that having posed these questions I do not promise to answer them or even to posit that there are any definitive answers. Often, the importance of an issue is in the questions it raises.

- 4 Underpinning what I am going to say this evening is the concept of the rule of law – something that we should see as sacrosanct in our democracy. All the rights legislation in the world is rendered nought without a firm commitment, as a society, to the rule of law, of which the principle of legality is but one of a number of very important components.
- 5 I must also stress at the outset that the concern of this lecture is legal rights. There are other notions, including the notion of moral rights and values more broadly, that are also important in any democracy in which we would wish to live.¹ However, discussion of those matters inevitably moves towards the philosophical and is a topic best left for another day.
- 6 Rights discourse in Australia is not new. In the drafting of the Australian Constitution, Andrew Inglis Clark, Attorney-General of Tasmania, was a vocal advocate for the inclusion of strong rights protections in our Constitution. Arguing against inclusion of a constitutional stipulation that no person be deprived of life, liberty, or property without due process of law, in the model of the 14th Amendment to the Constitution of the United States, Dr Cockburn, Delegate from South Australia expressed the view that such a provision:

...would be a reflection on our civilization...People would say-"Pretty things these states of Australia; they have to be prevented by a provision in the Constitution from doing the grossest injustice."²

¹ Chief Justice Robert French AC, "Law Making in a Representative Democracy: The Durability of Enduring Values" (delivered 14 October 2016, Adelaide).

² *Record of the Debates of the Australasian Federal Conference*, Third Session, Melbourne, 8 February 1898.

- 7 In the end the framers of our Constitution decided, by and large, against the express constitutional statement of rights and freedoms. The framers instead placed their faith in responsible government, representative democracy and the common law tradition,³ these sentiments being the “*unexpressed assumptions on which the Constitution was drafted*”.⁴
- 8 That rights discourse is not a new phenomenon in Australia is by no means cause for complacency. The existence of a vigorous discussion about the protection of rights in Australia is, I suggest, as important as ever. In embarking upon an examination of the protection of rights in Australia, I propose to reflect on two questions which are fundamental in any healthy discourse about rights protection. Namely, the question of “rights-form” and the question of “rights-content”. In so doing, I propose to bring into the discussion a little Yalean jurisprudence.⁵

The protection of rights at common law

- 9 The enactment of a statutory rights charter is not a necessary prerequisite to securing the legal protection of basic rights. The judge-made common law is imbued with protection mechanisms which operate by affording an aggrieved party the right to bring a claim and seek a remedy for breach of what, at its heart, is a basic societal norm – or, to adopt the language of rights, for breach of a fundamental right.
- 10 To take but one example, the common law has traditionally protected the individual right to liberty and freedom of movement by recognising a personal claim in tort in cases of wrongful arrest. In *Christie v Leachinsky* [1947] AC 573, Lord du Parc observed:

³ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 136 (Mason CJ).

⁴ *Ibid.*

⁵ See especially Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Yale University Press, 1919).

... **the governing rule of the common law [is] that a man is entitled to his liberty, and may, if necessary, defend his own freedom by force. If another person has a lawful reason for seeking to deprive him of that liberty, that person must as a general rule tell him what the reason is, for, unless he is told, he cannot be expected to submit to arrest, or blamed for resistance. The right to arrest and the duty to submit are correlative.**⁶ (emphasis added)

- 11 What does it mean to say that “the right to arrest and the duty to submit are correlative”? This idea of a relationship between rights and duties was a central preoccupation of Wesley Newcomb Hohfeld, Professor of Jurisprudence at Yale Law School.
- 12 Hohfeld sought to promote precision in legal discourse by breaking down legal concepts into their most basic constituent parts. Having identified what he considered were the lowest common denominators of legal thought, Hohfeld went on to explain how those basic building blocks related to each other. He identified that each of these building blocks has an opposite and a correlative.⁷
- 13 The basic idea can be demonstrated in terms of a common law claim in tort. Person A has a right not to be assaulted by person B. Person B has a duty not to assault person A. In Hohfeldian terminology, these rights and duties are correlative – wherever there is a right in one person, there is a correlative duty in another person.
- 14 To come back to the common law concerning unlawful arrest, as the New South Wales Court of Appeal has emphasised on a number of occasions, the common law’s insistence that people are entitled to know why they are being arrested is a reflection of the fundamental right of individuals not to be

⁶ *Christie v Leachinsky* [1947] AC 573, 598.

⁷ Hohfeld’s basic schema of legal relations is as follows:

Correlatives	Opposites
If A has a <i>right</i> , then B has a <i>duty</i> .	If A has a <i>right</i> , then A lacks a <i>no-right</i> .
If A has a <i>liberty</i> , then B has a <i>no-right</i> .	If A has a <i>liberty</i> , then A lacks a <i>duty</i> .
If A has a <i>power</i> , then B has a <i>liability</i> .	If A has a <i>power</i> , then A lacks a <i>disability</i> .
If A has an <i>immunity</i> , then B has a <i>disability</i> .	If A has an <i>immunity</i> , then A lacks a <i>liability</i> .

deprived of their liberty without lawful cause.⁸ The entitlement of a person unlawfully arrested to bring a claim for damages in tort is a vindication of that right and the enforcement of the correlative duty.

- 15 In this way, the protection of a fundamental right is embedded in the common law. The substantive rights and interests sought to be protected by these common law claim-rights reflect fundamental rights and interests long recognised as meriting protection. The modern tendency is to refer to “common law rights” and “fundamental rights at common law”. For example, the individual right to liberty and bodily integrity can be seen as the rights-content protected by the tort of trespass to the person. The right to quiet enjoyment of one’s home and property is protected by the torts of trespass to land and private nuisance.

The constitutional protection of rights

- 16 Another common subject for discussion in rights discourse is that of freedom of religion. In Australia, it is generally accepted that s 116 of the Constitution enshrines freedom of religion.⁹ However, it is important to appreciate the particular manner in which s 116 operates.
- 17 As Stephen J recognised in *Attorney-General (Vic); Ex rel Black v Commonwealth* (1981) 146 CLR 559,¹⁰ s 116 operates not by providing any personal right of legal action but rather by acting as a constitutional fetter on Commonwealth power.¹¹ For example, as one of its four limbs, section 116

⁸ eg, *Johnstone v State of New South Wales* [2010] NSWCA 70 at [41]-[44] (Beazley JA); *State of New South Wales v Abed* [2014] NSWCA 419 at [88]-[92] (Gleeson JA).

⁹ “**116 Commonwealth not to legislate in respect of religion**
The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.”

¹⁰ Otherwise known as the Defence of Government Schools or “DOGS” Case. The case involved a challenge to the provision of financial aid to non-Government schools.

¹¹ *Attorney-General (Vic); Ex rel Black v Commonwealth* [1981] HCA 2; 146 CLR 559, 605.

provides that the Commonwealth Parliament may not make any law for establishing any religion. Rights protections in the Constitution of the United States, such as the First Amendment, operate in a similar manner.¹²

18 There are other limited constitutional protections in the Australian Constitution. French CJ, speaking extra-judicially, has identified these rights as broadly “*falling within the categories of civil and legal process rights and economic and equality rights*”.¹³ It has been suggested, and you might think it obvious, that these rights in the Australian Constitution bear “*similarity to, if not identity with, many of the human rights and freedoms guaranteed under the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights*”.¹⁴

19 A survey of the relevant constitutional provisions illustrates the rights French CJ had in mind:

- the prohibition against civil conscription (s 51(xxiiiA));
- the requirement of just terms in respect of any compulsory acquisition of property (s 51(xxxi));
- the limited guarantee of trial by jury (s 80);

¹² See, eg, John Harrison, “Power, Duty, and Facial Invalidity” (2013) 16 *Journal of Constitutional Law* 501 where it is observed:

“The Constitution is primarily about power, the capacity of government actors to change legal rules and legal relations. It is also to some extent about the duties of government actors and institutions, and imposes on them obligations that it is wrong not to fulfill. These two functions of constitutional rules, setting out powers and imposing duties, are distinct from one another, and it is important not to confuse them. **The provisions of the Constitution that grant and limit the power of Congress are concerned exclusively with power and do not create duties.**” (emphasis added)

¹³ Chief Justice Robert French, “Protecting Rights without a Bill of Rights” (delivered 26 January 2010 at John Marshall Law School, Chicago) at 15.

¹⁴ *Ibid.*

- the freedom of trade and commerce and freedom of intercourse among the states (s 92);
- the protections against religious establishment, imposed religious observance or prohibition on free exercise of religion (s 116);
- the prohibition on discrimination against out of state residents (s 117);
- The implied freedom of political and governmental communication.

20 If we consider these constitutional protections in Hohfeldian terms, they can be said to operate as constitutional “immunities” rather than as “rights” in the strict sense. By operating as fetters on legislative power, these constitutional protections impose a “disability” on the legislature or the executive – the correlative of which is an immunity.

21 In the context of the Australian Constitution, these constitutional protections give rise to immunities against governmental interference of the relevant type. However categorised, they provide powerful protections against Commonwealth governmental interference with identifiable rights and interests: freedom of religion, freedom of trade, freedom of movement, non-discrimination between citizens of different states and the like.

22 Perhaps even more fundamentally, s 75(v) of the Constitution embodies the core principle that no member of the Commonwealth Executive, no Commonwealth officer and no Commonwealth authority is immune from judicial review for excess of power. This reflects the fundamental notion of the rule of law as articulated by Dicey that “*no man is above the law ... whatever be his rank or condition*”.¹⁵

¹⁵ A V Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan and Co, 4th ed, 1893) 183.

The principle of legality

23 I mention the principle of legality in the title to this lecture. The principle of legality is a common law principle of statutory construction. In *Al-Kateb v Godwin* (2004) 219 CLR 562, Gleeson CJ described the principle of legality in the following terms:

[19] In exercising their judicial function, courts seek to give effect to the will of Parliament by declaring the meaning of what Parliament has enacted. **Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment ...**

24 The principle of legality was the basis upon which Gleeson CJ found that Mr Al-Kateb could not be kept in detention against his will. Gleeson CJ was in the minority.

25 McHugh J, as part of the majority, took a strictly literal approach to statutory interpretation and held that the Commonwealth is entitled to protect the nation against unwanted entrants by detaining them in custody for the purpose of their deportation.¹⁶ His Honour has stated extra-judicially that it was the absence of a bill of rights that required him to construe the legislation in question as permitting the government to keep Mr Al-Kateb in continuing detention.¹⁷

26 The rights identified as so fundamental as to warrant protection by the principle of legality are generally rights which have a long history of recognition under the common law. Spigelman CJ has identified in this regard the long held common law presumptions that Parliament does not intend, absent indication to the contrary:

¹⁶ See, eg, *Al-Kateb v Godwin* (2004) 219 CLR 562 at [74].

¹⁷ The Hon Justice M H McHugh AC, "The Need for Agitators – the Risk of Stagnation" (delivered at the Sydney University Law Society Public Forum, 12 October 2005).

- to invade fundamental rights, freedoms and immunities, of which I have already spoken – the right to liberty, bodily integrity, the enjoyment of our home and the like;
- to restrict access to the courts;
- to exclude the rights to claims of self-incrimination;
- to deny procedural fairness to persons affected by an exercise of public power;
- to interfere with vested property rights; and
- to interfere with equality of religion.¹⁸

State and territory human rights enactments

27 Australia is not entirely bereft of charters of human rights. Victoria and the ACT have enacted rights legislation. The substantive content of the rights protected by the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Human Rights Act 2004* (ACT) has been described by Carolyn Evans and Simon Evans in their text *Australian Bills of Rights* in the following terms:

Both Acts protect civil and political rights and make brief reference to cultural rights. They do not refer to economic and social rights, environmental rights or rights to self-determination.¹⁹

28 The same commentators acknowledge the considerable overlap with the rights enshrined in the International Covenant on Civil and Political

¹⁸ See, eg, Hon J J Spigelman AC, “Principle of legality and the clear statement principle” (2005) 79 *Australian Law Journal* 769 at 775.

¹⁹ Carolyn Evans and Simon Evans, *Australian Bills of Rights* (LexisNexis Butterworths, 2008) 33 [1.95].

Relations,²⁰ and go on to group the statutorily enumerated rights under the following headings:

- Equality rights;
- Physical integrity rights;
- Liberty and security of person and property;
- Liberties of privacy, religion, expression and association;
- Public participation and democratic rights;
- Rights relating to families and children;
- Rule of law and legal process rights;
- Cultural and minority rights.²¹

29 Both Australian enactments adopt the so-called “dialogue” model in that where a particular statute or statutory provision cannot be interpreted consistently with human rights, the courts can make a declaration to that effect.²²

30 This declaratory mechanism notwithstanding, the core legal protection afforded by these statutes operates, as with the principle of legality, as a rule or principle of statutory construction. Under the Charter, the courts are directed that “[s]o far as it is possible to do so consistently with their purpose,

²⁰ Ibid 33 [1.96]; see also *Human Rights Act 2005* (ACT) Sch 1 “ICCPR source of human rights”.

²¹ Ibid 34-44 [1.98]-[1.1137].

²² In Victoria, the courts make a “declaration of inconsistent interpretation”: *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 36. In the ACT the courts make a “declaration of incompatibility”: *Human Rights Act 2004* (ACT), s 32.

all statutory provisions must be interpreted in a way that is compatible with human rights”: s 32(1). The relevant provision of the *Human Rights Act 2004* (ACT), s 30, is in like terms. There is no right to claim damages for breach of a human right in these two pieces of legislation, but an executive act can be challenged as unlawful for breaching a charter right – in administrative law terms a decision can be challenged for jurisdictional error.

Summary of position

- 31 In the international human rights literature, it is common to refer to “generations” of human rights.²³ Broadly stated, the “first generation” rights constitute civil and political rights of the kinds typically associated with, *inter alia*, the Magna Carta, the United States Bill of Rights, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. The “second generation” of rights are said to relate to equality and to comprise rights that are more economic, social and cultural in nature. There is now an emerging discussion of “third generation” rights. These rights have been described as “rights of solidarity” and include, for example, the right to development, the right to peace, the right to a healthy environment and the right to intergenerational sustainability.
- 32 What one discerns from this brief survey of the rights protected by the common law, the principle of legality, the Victorian and ACT enactments and the protections of the Australian Constitution is that, by and large, the focus in each respect is on first, and perhaps second, generation rights. Although “rights” to which every civil society should aspire, the third generation rights, of their very nature, are less well suited to protection by legal means.
- 33 Now what is the point of all this? It is not my intention to express, or impress upon you, any particular view as to the most efficacious model for the *legal* protection of rights in Australia or as to whether Australia should enact its own

²³ See, eg, Karel Vasak, “Human Rights: A Thirty-Year Struggle. The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights” (1977) 30 *UNESCO COURIER* 11.

Charter or Bill of Rights. This paper is intended to be entirely agnostic in that regard.

34 The point I wish to make is this. When discussing the protection of rights in a modern democratic society such as ours, it is imperative that we know what we are arguing about, or may I venture, what we are fighting for. It is also imperative that we value and understand what we already have and act in a way that ensures that what we have is not undervalued or undermined. If that is understood, if the rule of law is valued and respected and if the principle of legality is appropriately applied, there will be a solid platform upon which and from which rights discourse, important in itself, can proceed.

35 As we have seen in other countries, bills and charters of rights do not, of themselves, safeguard rights and liberties. The respect we have, as a society, for rights and liberties as between ourselves as individuals and in the community more generally is a matter of fundamental importance and which we must jealously protect.

36 I wish to conclude by quoting to you the eloquent insight of a great American judge at the height of World War II and in an environment of great public fear of enemy subversion. Judge Learned Hand observed:

Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it...And what is this liberty which must lie in the hearts of men and women?

...I cannot define it; I can only tell you my own faith. The spirit of liberty is the spirit which is not too sure that it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interest alongside its own without bias...²⁴

²⁴ Billings Learned Hand, "The Spirit of Liberty" (delivered 21 May 1944, Central Park, New York City).