COMPARATIVE CONSTITUTIONALISM - AN AUSTRALIAN PERSPECTIVE

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CONSTITUTIONALISM IN THE MIDDLE EAST
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THE CENTRALITY OF INDEPENDENT JUDGES

When compared with the nations of the Middle East, Australia's constitutional history has been so different that it seems doubtful, at first, that we have anything to say that is useful to the development of constitutionalism and the rule of law in that part of the world. We have had no revolution; no civil war; no external invasion since the establishment of European settlement; and no major external terrorist attacks on our home soil. We have had continuity of government and of independent courts, virtually since the earliest colonial times. We grew naturally into a federal democracy. In many ways, we were the beneficiaries of the United States Revolution. The British colonial authorities learned lessons. They did not make the same mistakes in settler societies after 1776. What then does such a placid national experience have to contribute to reflections upon constitutionalism in the Middle East?

In 1951, the High Court of Australia was called upon to decide the constitutional validity of the *Communist Party Dissolution Act* 1950. That Act was passed by the Australian Parliament soon after the election of the Menzies Government in 1949. The Government had an electoral mandate to proceed against communists. There was much support in the community for doing so. The world had just witnessed the Berlin blockade. There was great fear of the commmunist peril. Shortly, Australian forces were to serve with United Nations in Korea. In such circumstances, the Act was favoured by about 80% of the population.

However it was challenged in the High Court of Australia as going beyond the legislative powers of the Federal Parliament which had enacted it. The Australian Constitution includes no general Bill of Rights. One cannot find there an express guarantee, such as exists in the United States Constitution, of freedom of expression and freedom of association[1]. In the United States, in *Dennis v United States* [2], the Supreme Court had upheld as valid the *Smith Act* which was in some ways similar to the Australian anti-communist legislation. It, in turn, had borrowed elements from a South African law which subsequently became the model for "suppression of terrorism" laws in a number of

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[1] United States Constitution, Amendment I.

[2] 341 US 494 (1951).

British colonies[3]. The challenge in the High Court of Australia did not, therefore, look particularly promising.

Nevertheless, by six Justices to one, with Chief Justice Latham dissenting, the High Court struck down the legislation. It found that it travelled beyond the constitutional grant of power to the Federal Parliament. Moreover, it conflicted with implications which the majority Justices found in the Constitution. These were implications defensive of the role of the separate judicial branch of government and defensive of the rule of law[4].

The lesson of the *Communist Party* case in Australia is that, whilst constitutional texts are very important, just as important as written words is the commitment of the judiciary to liberty and to its own neutrality and independence. Even without a Bill of Rights, it is sometimes possible to protect fundamental rights if the judges have a clear idea of the essentials of human rights and human dignity. Text is vital. But it is not everything. Sometimes it is not enough.

THE JUDICIAL DEFENCE OF BASIC RIGHTS

In all common law countries it is a fundamental principle of interpretation that judges will presume that the legislature ordinarily intends to respect and uphold fundamental human rights and human dignity. In the event of ambiguity, courts will give meaning to the law in a way that respects civil rights, unless the law as made validly derogates from such rights and makes the legislative purpose absolutely clear[5].

In Australia, from early times, the High Court has also followed the principle that local legislation will be construed, so far as possible, to conform with international law, including the international law of human rights[6]. These are basic tools for performing the judicial craft. They can often assist judges to avoid manifestly unjust and objectionable outcomes.

In 1988, in Bangalore, India, I attended a conference on the domestic application of international human rights norms. Most of the judges were from the Commonwealth of Nations. One United States federal judge attending was Judge Ruth Bader Ginsburg. This was before her appointment to the Supreme Court of the United States and mine to the High Court of Australia.

The propositions considered, which were later endorsed, became known as the *Bangalore Principles*. According to these *Principles*[7], where a statute is ambiguous or the common law is unclear, a judge may construe the statute or develop the common law using the international law of human rights as a guide. This was a particularly important proposition for a country like Australia where there is no elaborated Bill of Rights. Looking to the growing field of international law to help express the principles inhering in local law

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[3] *Suppression of Communism Act* 1950 (SAf).

[4] *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.

[5] *Plaintiff S 157/2002 v The Commonwealth* (2003) 211 CLR 492 [29]-[31]; *Daniels Corporation International v ACCC* (2002) 77 ALJR 40 at 59-61 [101]-[160]; 59 ALR 561 at 587-590; *Attorney-General (WA) v Marquet* (2003) 78 ALJR 105 at 138 [184]-[186]; 202 ALR 233 at 278-279.

[6] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38.

[7] M D Kirby, "The Australian Use of International Human Rights Norms: From Bangalore to Balliol" (1993) 16 *University of New South Wales Law Journal* 363.

was a new idea. It gave the international law of human rights a new and affirmative role to play, not simply a negative or restrictive role.

In the important decision of *Mabo v Queenland [No 2]*[8], the High Court of Australia was faced with a challenge to hitherto established rules of land law. These had traditionally maintained that, upon British acquisition of sovereignty over the Australian continent, the rights of the indigenous peoples to land were extinguished. That proposition had been accepted because of a belief that the indigenous peoples of Australia were purely nomadic, with no real interest in land or established legal or social systems. As factual propositions, it came to be understood that nothing could have been further from the truth.

In the course of reasoning, the majority of the High Court of Australia adopted a principle similar to that expressed in the *Bangalore Principles*. Thus, Justice F G Brennan put it this way[9]:

> "The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organisation of the indigenous inhabitants of a settlement of a colony, denies them a right to occupy their traditional lands".

The influence of the *Bangalore Principles* has expanded in many countries of the Commonwealth of Nations since 1988. In more recent times, it is interesting to observe the extent to which international expositions of human rights law have been invoked by majorities of the Supreme Court of the United States in explaining the meaning of provisions of the United States Constitution[10]. Justice Ruth Ginsburg was a party to these decisions. This is a clear indication, if ever there should be doubt, that it is important and useful for judges of final courts (or those who may end up there or serve elsewhere in the judiciary) to attend international legal meetings and to engage in dialogue with judicial colleagues and scholars. Conferences like this stimulate new thoughts and help share important experiences.

HUMAN RIGHTS AND ECONOMIC COSTS

During the course of this conference concern has been expressed about the implications for costs to the community of particular decisions taken by judges. These are legitimate concerns. Judges themselves are very conscious of the economic implications

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[8] (1992) 175 CLR 1.

[9] (1992) 175 CLR 1 at 42.

[10] See eg *Atkins v Virginia* 70 USLW 4585 at 4589 fn 21 (2002) per Stevens J, with whom O'Connor, Kennedy, Souter, Ginsburg and Breyer JJ joined. That approach produced a strong dissent from Rehnquist CJ at 4591 and from Scalia J at 4598 (with whom Thomas J joined). See also *Lawrence v Texas* 539 US 1 at 16 (2003) per Kennedy J for the Court, referring to decisions of the European Court of Human Rights on the rights of homosexuals as "values shared with a wider civilisation".

of their decisions. However, sometimes the expression of fundamental rights is so important that it must be accepted that a civilised community will bear the costs necessarily inherent in a judicial ruling. Self-evidently, the rule of law comes with a price tag.

This issue arose directly in the High Court of Australia in cases concerned with the right of indigent persons, charged with serious criminal offences, to have access to publicly funded legal aid. There had been no such right in the Australian common law. That system improvised with various forms of legal assistance, including the dock brief, by which young and often inexperienced lawyers would offer their services at no, or little, fee to an otherwise unrepresented accused.

Against that background, in a first appeal to a broader principle, the High Court rejected the contention that the common law, or some constitutional norm, demanded that a person without legal assistance should have a stay of proceedings until the State provided a lawyer to represent that person at the trial[11]. There was a strong dissent by one of the judges against that holding. A little more than a decade later it was revisited.

In *Dietrich v The Queen*[12], the majority of the High Court of Australia held that a stay of proceedings could be granted where an accused person faced a serious charge in a criminal trial and, without fault on his or her part, was unable to secure legal representation. In such a case, the Court held, the stay might be provided until legal representation was afforded at public cost. The minority judges, whilst sympathetic to the plight of the accused, felt that the Court should not uphold the principle urged upon it *inter alia* because of the large costs implications that it had for the budget - a matter for the Executive Government and the legislature not the courts[13]. However, the majority concluded that the settled principles governing stay of proceedings, illuminated by international human rights law and decisions in other countries (including *Gideon v Wainwright*[14] in the United States) justified the expression of a new general principle of the common law.

Although this step on the part of the High Court of Australia has been criticised by commentators[15], it is unremarkable. By the language of the Constitution, the work of the courts is committed to independent judges. For them to go through their paces and give the appearance of a judicial proceeding, which amounts only to a charade, with no true substance, is to impose an intolerable burden on the courts. Throughout Australia, the principle in *Dietrich* has been observed. In effect, it has meant that no person now faces trial on a serious criminal accusation, without the availability of publicly funded legal representation. The outcome has been an enhancement of the quality of justice and of the integrity of the judicial branch of government. And it was all done by the techniques of judicial exposition - without a written Bill of Rights.

DERIVING CONSTITUTIONAL IMPLICATIONS

Whilst it is vitally important to ensure that a written constitution contains all of the provisions that are deemed necessary for the polity concerned, it should not be forgotten

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[11] *McInnis v The Queen* (1979) 143 CLR 575.

[12] (1992) 177 CLR 292.

[13] See eg (1992) 177 CLR 292 at 321 per Brennan J.

[14] 372 US 335 (1963).

[15] "J D Heydon, "Judicial Activism and the Death of the Rule of Law", *Quadrant*, Jan 2003, 9 at 18.

that every text, of whatever document, contains implications. Nowhere is this more true than in a written constitution. Of necessity, it cannot cover every eventuality. It is therefore basic to judicial reasoning that courts will derive from the constitutional text implications that help to resolve later cases concerned with matters which are not expressly dealt with in the text.

One such instance was that already mentioned, concerning the *Communist Party* case. There, implications concerned with the respective functions of the legislature and the judiciary were invoked to result in striking down the law. Similarly, the broad implication of the rule of law was invoked in the reasoning of the majority to the effect that the federal law against communists was invalid. In the age of terrorism, it will be essential that the courts of all nations stand vigilant guardians of constitutionalism and the rule of law[16]

In more recent years, the Australian High Court has upheld implications derived from the democratic character of the Australian Constitution and to provisions of that document for elected parliaments and executive governments accountable to them. From these starting points, the High Court has derived an irreducible freedom of communication about political and economic matters[17]. The "discovery" of this implication proved controversial in Australia, given that there was no Bill of Rights in the Constitution, as appears in most others, expressly guaranteeing freedom of speech and freedom of the press[18]. Nevertheless, the principle that a constitutional implication forbade the enactment of legislation that unduly burdened political and economic expression was later unanimously upheld by the High Court[19] and now expresses the established law of Australia[20].

JUDICIAL UNANIMITY IN ESSENTIALS

In every court, including my own, there are differences between the judges, sometimes significant differences, over important issues. They have to be resolved. However, on matters of the greatest importance, it is not uncommon for judges to reach unanimity.

The decisions of the High Court in the *Mabo* case, in *Dietrich* and in the *Free Speech* cases angered some politicians. A senior Australian political figure promised that future judges would be appointed to the court who were "capital C conservatives". The Justices appointed to the Court since that statement have inevitably been measured against that standard.

Nevertheless, it cannot be assumed that judges, appointed by whatever government and of whatever philosophical disposition, will meekly accept attempts to reduce the operation of the rule of law and the vital role of the courts in assuring it. Experience teaches that, in fundamentals, judges of final courts often see eye to eye.

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[16] cf M D Kirby, "Australian Law - After 11 September 2001" (2001) 21 *Australian Bar Review* 253 at 263.

[17] H P Lee, "The Implied Freedom of Political Communication" in H P Lee and G Winterton (eds) *Australian Constitutional Landmarks* 383.

[18] G E Barwick, "Democracy Too Precious for Political Tinkering", *The Australian*, 3 April 1995, 11.

[19] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

[20] *Roberts v Bass* (2002) 212 CLR 1.

Although that was not true in the United States Supreme Court in *Bush v Gore*[21], it was true in *United States v Nixon*[22] and other cases. Similarly, in Australia, when the Federal Parliament enacted a so-called "privative clause" to reduce the scope of judicial review of decisions concerning applicants for refugee status, the High Court unanimously concluded that the propounded law did not prevent constitutional review of decisions involving jurisdictional error[23]. Such execution actions were not "decisions" at all. At the conclusion of the joint reasons in that case, reference was made to the cardinal operation of s 75(v) of the Australian Constitution. That provision affords direct access to the High Court of Australia where it is alleged that a federal office-holder has acted in breach, or neglect, of a legal obligation. The joint reasons in that case said of s 75 of the Constitution[24]:

> "That section, and specifically s 74(v), introduces into the Constitution of the Commonwealth an entrenched minimum provision of judicial review. There was no precise equivalent to s 75(v) in either of the constitutions of the United States of America or Canada. The provision of the constitutional writs and the conferral upon this Court of an irremovable jurisdiction to issue them to an officer of the Commonwealth constitutes a textual reinforcement of what Dixon J said about the significance of the rule of law for the Constitution in *Australian Communist Party v The Commonwealth*[25]. In that case, his Honour stated that the Constitution:
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> > 'Is an instrument framed in accordance with many traditional conceptions to some of which it gives effect as, for example, in separating the judicial power from the functions of government, others of which are simply assumed. Amongst these I think that it may fairly be said that the rule of law forms an assumption'[26].
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> > 'The reservation to this Court by the Constitution of the jurisdiction in all matters in which the named constitutional writs or an injunction are sought against an officer of the Commonwealth is a means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them. The centrality, and protective purpose, of the jurisdiction of this Court in that regard places significant barriers in the way of legislative attempts (by privative clauses or otherwise) to impair judicial review of administrative actions. Such jurisdiction exists to maintain the federal compact by ensuring that propounded laws are within jurisdiction. In any written constitution where there

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[21] 531 US 1046.

[22] 418 US 683 (1974) (there were eight participating Justices; Rehnquist J did not participate).

[23] *Plaintiff S 157/2002 v The Commonwealth* (2003) 211 CLR 476.

[24] *Ibid,* at 513 [103], reasons of Gaudron, McHugh, Gummow, Kirby and Hayne JJ.

[25] (1951) 83 CLR 1 at 193.

[26] *Australian Communist Party Case* (1951) 83 CLR 1 at 193.

> are disputes over such matters there must be an authoritative decision-maker. Under the Constitution of the Commonwealth the ultimate decision-maker in all matters where there is a contest, is this Court'.

CONCLUSION

The lesson of the Australian constitutional experience is therefore that, whilst the text of the Constitution is obviously central to the work of the courts, there are other features of national and legal life that can sometimes be just as important. These include the existence of strong democratic and judicial institutions which work in general harmony with each other, respecting each other's functions. They include the existence of independent judges who strive to apply the law neutrally and within a culture that seeks to do justice according to law. They also include a recognition of the implications that may be derived from the text and structure of the written Constitution. It is impossible for constitution writers, however gifted, to anticipate every issue that will be addressed in the life of a national constitution. Courts perform a vital role when they ensure that the constitution continues to have relevance to society. The constitution is a living document. Courts must often breathe life into the text and render it relevant to contemporary circumstances. Judges play an essential role in upholding the rule of law - not just for the popular and dominant majority. As important are minorities, including unpopular minorities, who have special need for the law's protection[27].

The centenary of the establishment of the High Court of Australia in 2003 coincided with the centenary of the decision of the Supreme Court of the United States in *Marbury v Madison*[28]. The bold assertion in that case of the power of judicial review, copied by so many other final courts, including my own, was a defining moment for modern constitutionalism. It is now difficult to imagine a world without such judicial superintendence. It represents a vital contribution of lawyers of the United States to the rule of law everywhere.

Texts and institutions are important. But so are people. And so is the spirit of the community that embraces acceptance of diversity, respect for difference and a commitment to living together under the rule of law.

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[27] *Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth* (1943) 67 CLR 116 at 123.

[28] 1 Cranch (5 US) 137 (1803).