

## **Siren Songs and Myths in the Bill of Rights Debate\***

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I have resisted the temptation to entitle this talk ‘Whaling is for Scientific Purposes; Homeopathy Actually Works; and a Bill of Rights Will Enhance the Role of Parliament—These are a Few of My Favourite Myths.’ All in all it was a bit unwieldy. But it will become plain, as I proceed, why I was tempted, not least by the dripping sarcasm.

Many, if not most, of those pushing for some form or other of a bill of rights instrument like to point to the fact that Australia is one of the very few democracies—depending on how you look at the Basic Laws in Israel and the judiciary’s unwillingness to make much of what they have in Japan and a few other non-common law countries, perhaps the only one—without a national bill of rights. On its own, of course, such a ‘we differ from everyone else’ type of argument tells us nothing. After all, Australia is one of only two democracies with preferential voting; only a handful more have compulsory voting; few have a form of bicameralism with an elected, genuine house of review Upper House; and many lack federalism. Ought we to change any of these on the sole ground that we stand out from the pack? Of course not.

The real question is not whether we should emulate others but whether a bill of rights is a good idea in its own right. Would having one deliver better outcomes than we achieve without one?

My answer is an emphatic and resounding ‘no’. Here is why.<sup>1</sup> To start, notice that any sort of bill of rights enumerates a list of vague, amorphous—but emotively appealing—

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<sup>1</sup> What follows is a selective overview of my reasons for opposing bills of rights. For more detail, arguably mind-numbing detail, see eg. James Allan, ‘Bills of Rights and Judicial Power—A Liberal’s Quandary?’ (1996) 16 *Oxford Journal of Legal Studies* 337; James Allan, *Sympathy and*

moral entitlements in the language of rights. It operates at a sufficiently high level of abstraction or indeterminacy that it is able to finesse most disagreement. Ask who is in favour of 'freedom of expression' or 'freedom of religion' or a 'right to life' and virtually everyone puts up his or her hand. And of course this is where bills of rights are sold, up in the Olympian heights of disagreement-disguising moral abstractions and generalities; this is where they are being sold right now in Australia.

Nevertheless, that is not where these instruments have real effect. People do not spend hundreds of thousands of dollars going to court to oppose 'freedom of speech' in the abstract. They do not take a case all the way to the Supreme Court of Canada or the United States or to the House of Lords in the United Kingdom, with all the costs and time and worries that entails, to argue that they are opposed to 'freedom of movement' or to a 'right to life' or 'to liberty and security of the person' (or to any other of the enumerated rights in Victoria's *Charter of Human Rights*).

Bills of rights have real, actual effect down in the quagmire of social-policy decision-making where there is no consensus or agreement across society at all about what these indeterminate entitlements mean. Rather, there are smart, reasonable, well-informed, even nice people who simply disagree about where to draw the line when it comes to campaign finance rules or hate speech provisions or defamation regimes or whether Muslim girls can or cannot wear veils to school or whether to sanction gay marriage and so much more. One could sit around in groups, holding hands, singing 'Kumbaya', and chanting 'right to free speech' or 'right to freedom of religion' for as long as one wanted and it would help not at all in drawing these contentious, debatable lines.

What a bill of rights does is to take contentious political issues—and I will deliberately say this again, issues over which there is reasonable disagreement between reasonable people—and it turns them into pseudo-legal issues which have to be treated as though there were eternal, timeless right answers. Even where the top judges break 5–4 or 4–3 on these issues, the judges' majority view is treated as the view that is in accord with fundamental human rights.

The effect, as can easily be observed from glancing at the United States, Canada and now New Zealand and the United Kingdom, is to diminish politics and (over time) to politicize the judiciary. Meanwhile, the irony of the fact that judges resolve their disagreements in these cases by voting is generally missed. The decision-making rule in all top courts is simply that five votes beat four, regardless of the moral depth or reasoning of the dissenting judgments, or that they made more frequent reference to J.S.

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*Antipathy: Essays Legal and Philosophical*. Aldershot, Eng., Ashgate, 2002; James Allan, 'Rights, Paternalism, Constitutions and Judges' in Grant Huscroft and Paul Rishworth (eds), *Litigating Rights: Perspectives from Domestic and International Law*. Oxford, Eng., Hart, 2002, p. 29; James Allan, 'Oh That I Were Made Judge in the Land' (2002) 30 *Federal Law Review* 561; James Allan, 'Paying for the Comfort of Dogma' (2003) 25 *Sydney Law Review* 63; James Allan 'A Modest Proposal' (2003) 23 *Oxford Journal of Legal Studies* 197; James Allan 'An Unashamed Majoritarian' (2004) 27 *Dalhousie Law Journal* 537; James Allan, 'Portia, Bassanio or Dick the Butcher? Constraining Judges in the Twenty-First Century' (2006) 17 *King's College Law Journal* 1; James Allan, 'Thin Beats Fat Yet Again—Conceptions of Democracy' (2006) 25 *Law & Philosophy* 533; James Allan, 'The Victorian *Charter of Human Rights*: Exegesis and Criticisms' (2006) 30 *Melbourne University Law Review* 906.

Mill or Milton or the International Covenant on Civil and Political Rights. Only the size of the franchise differs.

None of this deters bill of rights proponents from talking repeatedly about how such an instrument ‘protects fundamental human rights’, as though these things were mysteriously or magically self-defining and self-enforcing. They are not. They simply transfer the power to define what counts as, say, a reasonable limit on free speech over to committees of ex-lawyers (who have no greater access to a pipeline to God on these moral and political issues than anyone else, but who are immune from being removed by the voters for the decisions they reach).

Of course in the Australian context proponents who formerly championed some sort of American or Canadian-style constitutionalised bill of rights that would allow judges to strike down legislation now tell us (after repeated failures to get Australian electors to agree) that they favour only statutory bills of rights. And they make much of how these statutory versions leave the last word with elected politicians.

By no means is this the sort of Damascene conversion some proponents pretend. Quite simply, these statutory versions are virtually as potent as their constitutionalised cousins. They too shift much power to the unelected judiciary, however much some proponents may indicate otherwise.

The proof of the pudding, of course, is in the eating. And the evidence from New Zealand and the United Kingdom (both jurisdictions having statutory bills of rights, indeed ones that were the models copied by the state of Victoria’s *Charter of Rights*) is clear and unambiguous. The top judges there have become more powerful since the arrival of the respective bills of rights.

How? One of the main (and little publicized) devices is a provision in these statutory versions that is known as a ‘reading down provision’. These end up being a license to rewrite (as opposed to strike down) legislation. What they do is direct the judges, *so far as it is possible to do so* (Victoria and the UK) or if they can (NZ), to read all other statutes as consistent with the enumerated rights. Of course what is and is not consistent with such rights is wholly up to the judges, as is the question of what is and is not possible. Even the secondary question of what limits on rights are reasonable is one that bills of rights leave wholly with the unelected judges. They decide what aspects of other statutes are or are not consistent with the vague, amorphous rights provisions; they decide what is and is not possible insofar as giving other statutes a different meaning; and they decide what is and is not reasonable.

Remember that when you hear proponents of statutory bills of rights continually talk in gaseous platitudes about protecting fundamental rights. Remember that people disagree down in the quagmire of detail about where to draw the line to do that protecting; remember that the judges have no greater moral (not legal, but moral) perspicacity in knowing what will and will not be the course of action that does that upholding of fundamental rights than you or I or plumbers or secretaries or, dare one say it, politicians; and remember that when the unelected judges disagree amongst themselves on these tough rights questions, as they inevitably do, they themselves resort to voting and letting the numbers count, the exact same decision-making procedure so many bill

of rights proponents like to belittle, at least in quiet moments of honesty over a drink or two.

Turning back to these various sorts of reading down provisions—these directions to give the words of other statutes a meaning that you, the judge, happen to think is more moral and more in keeping with your own sense of the demands of fundamental human rights—the danger is that just about any statutory language (however clear in wording and intent) might possibly be given some other meaning or reading.

Put differently, reading down provisions such as these throw open the possibility of ‘Alice in Wonderland’ judicial interpretations; they confer an ‘interpretation on steroids’ power on the unelected judges. So although there is no power to invalidate or strike down legislation, the judges can potentially accomplish just as much by re-writing it, by saying that seen through the prism (that is, their own prism) of human rights, ‘near black’ means ‘near white’. They can make bill of rights sceptics like me half long for the honesty of judges (under constitutionalised bills of rights) who strike down legislation rather than gut it of the meaning everyone knows it was intended to have (rule of law values notwithstanding—and by that I mean the value we citizens, if not judges, all otherwise put on knowing in advance what the laws are that we are required to abide by so that we can plan accordingly and have our legitimate expectations satisfied).

Now that allegation of ‘Alice in Wonderland’ interpretations can sound alarmist. So the question arises, has anything remotely like that occurred under the UK and New Zealand reading down provisions? As it happens, the answer is a definite ‘yes’.

Here I will simply quote from the leading House of Lords decision from four years ago. Read what Lord Nicholls (supported, more or less, by all the other Lordships) was prepared openly and explicitly to say:

It is now generally accepted that the application of s.3 [the reading down provision] does not depend upon the presence of ambiguity in the legislation being interpreted. Even if, construed according to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt, s.3 may none the less require the legislation to be given a different meaning ... Section 3 may require the court to ... depart from the intention of the Parliament which enacted the legislation ... It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it convention-compliant [meaning bill of rights compliant].<sup>2</sup>

The other Lords (even Lord Millett in dissent) were broadly in agreement with these revolutionary views. Lord Steyn was clear that the interpretation adopted need not even be a reasonable one. And just to give you the full potency of these reading down provisions, it is crucial to realise that in reaching this result their Lordships overruled one of their own House of Lords authorities—a case on the meaning of exactly the same statutory provision, an authority only five years old, and one that had held the meaning to be clear.<sup>3</sup>

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<sup>2</sup> *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at pp. 571–572.

<sup>3</sup> *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27.

Lest anyone be inclined to think this was some rogue case, note what was said two years later: ‘The Human Rights Act 1998 [incorporating the European Convention on Human Rights—their bill of rights] created a new legal order.’<sup>4</sup> It is a new order, of course, in which a good deal more of the moral and political line-drawing in society is being done by committees of ex-lawyers. I do not think it is in any way an unfair characterisation to say that what is happening in the United Kingdom is the diminishing of democracy (where democracy is understood in its usual sense of ‘majority rules’ or ‘letting the numbers count’). And the various people who are presently pushing for one of these statutory bills of rights here—and I am not clear whether that includes the Attorney-General or not—should at least have the good graces to come clean and tell everyone that there is the potential for this statutory bill of rights of theirs ‘to create a new legal order’, one that will enhance significantly the role of unelected judges while diminishing that of the elected representatives of the voters.

Certainly after looking at the experience of the United Kingdom one could summarize what has thus far happened there by saying that under a statutory bill of rights the most senior judges of what was once considered to be the most interpretively conservative court in the common law world now tell us they can give other statutes—statutes they concede would otherwise be clear and unambiguous—the exact opposite meaning as that intended by the elected parliament. They can read words in, read words out, and opt for clearly unwanted outcomes. Wow! As I said, that is Alice in Wonderland stuff. It certainly looks to me to amount to a power to redraft or rewrite disfavoured statutes. And it is precisely that which bill of rights advocates have shifted to promoting in Australia. It is largely that version of a statutory bill of rights, with a bit of New Zealand’s thrown in, that Victoria has enacted.

The experience in New Zealand with their reading down provision reinforces this assertion. Despite on the face of things having the most enervated bill of rights imaginable—not least because the remedies provision had to be wholly removed and a unique ‘this bill of rights loses to all other statutes’ provision (s.4) inserted to get the Bill through Parliament—the judges across the Tasman have done the following: a) in the first case<sup>5</sup> ever to reach the highest domestic court Cooke P. suggested that this new bill of rights, with its reading down provision, may require a court to depart from long established interpretations as regards the meaning to give to other statutes; b) the remedies clause was read back in, while creating a new public law remedy sounding in the bill of rights;<sup>6</sup> c) s.4 was and has been more or less completely ignored; d) exclusion of evidence rules were re-written (and re-written again), to the advantage of accused; e) the judges simply gave themselves a power to issue declarations of incompatibility (see below), with no statutory warrant whatsoever.<sup>7</sup>

And here’s what they came within a whisker of doing. They came within one judicial vote of saying that they, the judges, could use the bill of rights (with its reading down provision) to say that old statutes—when perceived to be inconsistent with one of the amorphous rights entitlements—could prevail over inconsistent statutes of more recent enactment. In other words, three of seven top Kiwi judges thought that if the judges

<sup>4</sup> *Jackson v Attorney General* [2006] 1 AC 262 at [102] per Lord Steyn.

<sup>5</sup> *Flickenger v Crown Colony of Hong Kong* [1991] 1 NZLR 439 at p. 441.

<sup>6</sup> *Simpson v Attorney-General [Baigent’s Case]* [1994] 3 NZLR 667.

<sup>7</sup> *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9.

happened to conclude that an old statute was more in keeping with rights than a new one, and the two were inconsistent, the judges could say the old one prevailed (The seventh judge decided the case on other grounds).<sup>8</sup>

Think about that. The doctrine of implied repeal, based on the notion that each generation should decide matters for itself, would go out the window. This would have been a power to choose whether newly enacted statutes can be ignored in favour of older, existing statutes the judges happen to prefer, or to think more in keeping with their notion of what is a rights-respecting outcome. And this on the basis of an enfeebled, enervated bill of rights much weaker than those of the United Kingdom or Victoria. All that Australian proponents of such instruments tend to say in response is a) that at least this worst sort of wild, unintended outcome did not, in the end, come to pass in New Zealand; and b) even the New Zealand top judges have on one occasion disapproved of the UK approach.<sup>9</sup> So even if all the other matters I enumerated above are true, and they are, at least the New Zealand top judges haven't gone as far down the 'giving statutes a meaning you think they should have, rather than the one they clearly do have' path as the UK judges have. Does that comfort any of you in the audience?

I think I have said enough to back up my earlier claim that the experiences of the United Kingdom and New Zealand throw open the possibility of Alice in Wonderland interpretations, should we opt for a statutory bill of rights. And were this to come to pass it would look to me very much like what the judges do in Canada and the US under constitutionalised bills of rights. There they strike down statutes. In the UK and New Zealand they simply re-write them (under the guise of pretending to interpret them) to say what they, the judges, think would be preferable. And in New Zealand they came one vote away from simply handing themselves the power to ignore new statutes in favour of other, older, inconsistent statutes.

No one could ever say, with a straight face, that reading down provisions do not hold out the prospect of transferring much power to the unelected judiciary.

So what do the singers of the 'bill of rights for Australia' Siren Song say in response? And here I hope you'll forgive me for descending into a technicality or two, but if you bear with me you might just think it worthwhile. In effect they point to four words that are part of the *Victorian Charter of Human Rights* but that are not part of the UK or New Zealand bills of rights. I am referring to the respective reading down provisions. The UK's (s.3(1)) states: 'So far as it is possible to do so [other legislation] must be read ... in a way which is compatible [with this bill of rights].' By contrast, Victoria's Charter (s.32) states: 'So far as it is possible to do so *consistently with their purpose*, all statutory provisions must be interpreted in a way that is compatible with human rights.'

It is those extra four words ('consistently with their purpose') that we now are being told will make all the difference. Those four words will be our bulwark against the tide of interpretation on steroids type House of Lords' results, results that are not interpretation so much as redrafting. Those four words will ensure that parliament in Australia remains supreme (within the confines of the Constitution). To paraphrase Churchill, 'never has

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<sup>8</sup> *R v Pora* [2001] 2 NZLR 37.

<sup>9</sup> *Hansen*

so much been owed by so many to ... four words', at least if we are to take this latest incarnation of the pro-bill of rights camp's assurances seriously.

Before tracing out their argument, and why it is a feeble one, notice that this bill of rights debate in Australia has taken on something of a smoke and mirrors quality to it. You can never quite pin down proponents on what they actually think or believe. To start, most proponents were all in favour of a vigorous US-style or Canadian-style entrenched, constitutionalised bill of rights. After something of an apparent Damascene conversion for some of them, not least when Australian voters continually rejected their hopes for one of these, we then learned it was only a harmless little statutory bill of rights they wanted. What harm could a mere statutory version cause? But as the evidence came in from the UK and New Zealand, that position was abandoned too in favour of this new gloss: that these four words will make all the difference in reining in the unelected judges.

Here's the gist of their argument. With these four words in place judges are directed to read down all other statutes, just as they are in the UK and New Zealand, BUT here they are being directed to do so only when that reading down outcome will be 'consistent with the purpose' of the statute being interpreted. So here's the crucial question. How constraining on the point-of-application interpreter of a statute is that extra four word injunction? You can read words in, read words out, have no need to wait for any ambiguity before doing so, indeed (given that subsection (2) of Victoria's s.32 reading down provision explicitly tells the judges to consider overseas case law, and that includes quite clearly what the House of Lords and top New Zealand courts are doing) you can even copy all these international trends, provided only that the meaning you end up attributing to the statute after this reading down exercise is one that is 'consistent with its purpose'. To repeat the key question, how constraining on a judge is that?

Not very much at all is the short answer. I would say that any half decent lawyer, told that his preferred human rights rewriting of a statute would only be allowed if he could also say that it was in keeping with the purpose of the statute, would rarely have much difficulty driving a truck through that sort of purported constraint. The fact is that most decent sized statutes have a multitude of purposes.

Here's how the famous American legal scholar Lon Fuller of Harvard made the point about the porousness of purposive limitations or constraints when it comes to interpretation (and Fuller was an advocate of such a purposive approach, he just was honest about its malleability) in his famous mock hypothetical *The Case of the Speluncean Explorers*:

We are all familiar with the process by which the judicial reform of disfavored legislative enactments is accomplished. Anyone who has followed the written opinions of Mr. Justice Foster [who is the fictional judge Fuller created to put forward the purposive case] will have had an opportunity to see it at work ... I am personally so familiar with the process that in the event of my brother's incapacity I am sure I could write a satisfactory opinion for him without any prompting whatever, beyond being informed whether he liked the effect of the terms of the statute [or not].

The process of judicial reform requires three steps. The first of these is to divine some single ‘purpose’ which the statute serves. This is done although not one statute in a hundred has any such single purpose, and although the objectives of nearly every statute are differently interpreted by the classes of its sponsors. The second step is to discover that a mythical being called ‘the legislator’, in the pursuit of this imagined ‘purpose’, overlooked something or left some gap or imperfection in his work. Then comes the final and most refreshing part of the task, which is, of course, to fill in the blank thus created. *Quod erat faciendum.*<sup>10</sup>

Here is the truth of the matter. Any judge inclined to fancy himself or herself a latter day philosopher king—an arbiter for the rest of us of what is and is not in keeping with the amorphous notion of fundamental human rights—will not in the least be prevented from doing so by these four extra words. Those who balk at what the House of Lords has done would balk without these four extra words. And those who would not balk, who think they have some sort of pipeline to God when it comes to all these incredibly contentious and debatable line-drawing exercises connected to rights-based disputes that always and everywhere lead to disagreement and dissensus amongst smart, reasonable, well-informed and even nice people, well those sort of judges are simply not going to be deterred by these four words. Does anyone really think, hand to heart, that these four words would have made the crucial difference to a Steyn or Hoffmann or Cooke? (Discretion being the better part of valour I refrain from mentioning any Australian judges here, but I’m quite sure those in the audience would not find it an overly taxing job to list a few for themselves.)

If the assurances against runaway judicial conceit and over-powerful judges and juristocracy and kritarchy now rest on the four words ‘consistently with their purpose’, then I am afraid they don’t rest on much at all.

So reading down provisions can turn, and in the UK and New Zealand to a significant extent they have turned, a statutory bill of rights into something that gives the unelected judges almost as much power as they are afforded under an entrenched, constitutionalised bill of rights. You might like that, or—like me—you might not. But pretending it is not a possibility is at odds with what is happening in jurisdictions that have already gone down the statutory bill of rights path. It is simple prevarication or naivety, you pick. And in those other jurisdictions, as with here, we were heartily assured before the enactment of the bill of rights that ‘the judges here are so interpretively conservative you have nothing to worry about.’ Elsewhere those assurances have proven to be hollow to the core.

Given my time constraints I will say no more about reading down provisions. Let me instead say a few brief words about the other main provision in a statutory bill of rights that transfers power to the unelected judges—yes, there is more than one—though I will have to be brief. Then I want to move back to some more general concluding remarks.

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<sup>10</sup> (1949) 62 *Harvard Law Review* 616 at p. 634.



Section 36(2) of the *Victorian Charter of Rights* has a provision that gives that state's Supreme Court the power to declare that in its opinion a statutory provision cannot be interpreted consistently with one of the enumerated rights. I do not have time to go through all the problems with this provision. But notice that s.36 furthers the tendency—one indulged in almost always by bill of rights proponents—to conflate 'what the judges think about rights' and 'what is actually the case about rights'. It is as though a committee of ex-lawyers had some authoritative, definitive (and to me, mysterious) ability to know and to declare precisely where to draw all the highly contestable and disputed lines that comes from turning political disputes into pseudo-legal ones.

Yet put that to one side, along with the potential chapter III and s.73 issues related to advisory opinions.

Instead, let's take this declaration of inconsistent interpretation provision on its own terms. In the absence of any power to strike down legislation (as per constitutionalised bills of rights as in the US and Canada), and assuming (wildly optimistically in my view) that the judges will not go too far down the Alice in Wonderland path of how to use the reading down provision, it is precisely these judicial declarations that are supposed to give rise to all the benefits proponents of statutory bills of rights predict. The claim is that there will be some sort of dialogue<sup>11</sup> and that the legislature—on learning that one of its statutes has attracted one of these judicial declarations—will ponder it and reflect on how best to accomplish its aims while at the same time attempting to uphold the various enunciated human rights, or at least limit them only to an extent that is reasonable and justifiable.

That is the claim. However, that claim is only remotely plausible where the elected legislature is left in a position in which it feels it can, on occasion at least, disagree with and overrule the unelected judges. Remember, judges are not gods and so there is no reason at all to think their view on some moral or political issue is by definition the correct one. So if the *Victorian Charter of Rights* is really to result in a dialogue, a scenario in which the judges' views do not routinely prevail, then it must be the case that sometimes—in fact—the elected legislators stand up to the unelected judges and say, in effect: 'We've heard your view and we've considered it but after more reflection we disagree.' If the judges always prevail that in no way resembles a dialogue.

The signs on this front are bleak indeed. In Canada, with its constitutionalised *Charter of Rights* that nevertheless contains an override that in theory allows the elected parliament to trump the judges, the elected federal parliament has not used that override—not one single time—in the 26 years of the Canadian *Charter's* existence.

Perhaps, though, that can be ignored as what flows from a constitutionalised model (or so, at least, we regularly are reassured). What then of the UK? It has a statutory bill of rights. It has a provision allowing the judges to make declarations of incompatibility. What, in fact, happens over there after the judges issue them? Does the elected legislature ever dispute what almost always amounts to a highly debateable line-drawing

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<sup>11</sup> Personally, I think such claims highly implausible. For an attack on the very plausibility, coherence and likelihood of any judicial-legislative dialogue, see Jeremy Waldron, 'Some Models of Dialogue Between Judges and Legislators' in G. Huscroft and I. Brodie, eds, *Constitutionalism in the Charter Era*. Markham, Ontario, Lexis Nexis Butterworths, 2004.

call, one over which sincere, reasonable, well-informed, even nice people can and do disagree?

The answer is ‘no’. According to Klug and Starmer, writing in 2005, ‘[i]n every case where remedial action had not been taken before the [judicial] declaration was made, the government responded by repealing, amending or committing to repeal or amend, the relevant provision.’<sup>12</sup> In other words, after every single judicial declaration of incompatibility in the UK, *every single one of them*, the elected legislature deferred to the unelected judges.

Dialogue should be made of sterner stuff. And so, too, should be claims that this declaration power will not make it impossible for the elected parliament to disagree with the judges, will not have the de facto effect of making the judges’ views the ones that end up prevailing.

My allotted time is virtually up. Let me turn, therefore, to a few concluding remarks. As a native born Canadian I had thought about recounting to you what the judges have done in Canada with their bill of rights. Yes, I know theirs is a constitutionalised one, but the way things are going with statutory versions there won’t be much, if any, difference between what the UK and Canadian judges can do. Of course when I point to Canada I’m often told I’m scaremongering. In this instance, however, a little scaremongering might go a long way.

So let us recall some of the decisions of the Supreme Court of Canada. The judges there have decided that free speech concerns trump health and safety concerns in the context of tobacco and commercial advertising;<sup>13</sup> they have decided what campaign finance rules are acceptable,<sup>14</sup> that each and every refugee claimant to Canada must be given an oral hearing (at a cost of billions of dollars, and massive ongoing delays),<sup>15</sup> and that the legislature’s ban on private health insurance was unconstitutional,<sup>16</sup> as was its confining of marriage to opposite sex couples.<sup>17</sup> They have twice over-ruled the federal Parliament on whether convicted and incarcerated prisoners must in all cases be allowed to vote,<sup>18</sup>

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<sup>12</sup> Klug and Starmer, [2005] *Public Law* 716 at p. 721 (emphasis mine—and note that the authors see this as a *good* thing).

<sup>13</sup> See *RJR MacDonald Inc v Canada* (1995) 127 DLR (4<sup>th</sup>) 1.

<sup>14</sup> See *Harper v Canada (Attorney General)* [2004] 1 SCR 827 or *Libman and Equality Party v Attorney General of Quebec* [1997] 3 SCR 569.

<sup>15</sup> See *Singh v Canada (Minister of Employment and Immigration)* [1985] 1 SCR 177.

<sup>16</sup> See *Chaoulli v Quebec (Attorney General)* 2005 SCC 35. Strictly speaking this was a 7 member court splitting 3–3 on whether s. 7 of the *Charter* was violated. The casting vote held that the Quebec Charter was violated, so there were 4 votes for striking down the legislation.

<sup>17</sup> See *Halpern v Canada (AG)* [2003] OJ No. 2268. After this Ontario Court of Appeal decision the court was awarded the title of ‘nation builder of the year’ by the *Globe and Mail* newspaper and the judges posed for a portrait.

<sup>18</sup> See *Sauve v Canada (Attorney General)* [1993] 2 SCR 438 and *Sauve v Canada (Chief Electoral Officer)* [2002] 3 SCR 519. And as for any vapour and vacuous notions of a dialogue between elected and unelected branches of government, the Chief Justice’s core view is made clear in the latter case: ‘Finally, the fact that the challenged denial of the right to vote followed judicial rejection of an even more comprehensive denial, does not mean that the Court should defer to Parliament as part of a dialogue. Parliament must ensure that whatever law it passes, at whatever stage of the process, conforms to the Constitution. The healthy and important promotion of a

indeed in the latter of those cases the Chief Justice of Canada has referred obliquely to countries that disagree with her court's 5-4 ruling, including Australia, the UK, the US and New Zealand, as 'self-proclaimed democracies'.<sup>19</sup> (Perhaps I should pause for a moment and allow fully to sink in the staggering self-assuredness—no, the out and out moral sanctimoniousness and self-righteousness—of a top Canadian judge calling New Zealand, Australia, the US and the UK 'self-proclaimed democracies'? What would have been the reaction had George Bush said that? )

I could go on and mention other Canadian cases, say the one striking down the compromise abortion legislation<sup>20</sup> or others. However, let it suffice simply to recall the case of *Reference Re Remuneration of Provincial Court Judges*,<sup>21</sup> a scandalous decision in which the Canadian Supreme Court struck down legislation reducing the salaries of provincial judges as part of a general province wide reduction of public servants' pay. As Jeff Goldsworthy describes it:

[F]irst year law students [are] taught to clear their heads of 'mush' and think like lawyers. In [this] case, the Supreme Court seems to have undergone something like the same process in reverse. But there is a difference: the Supreme Court's mush is calculated—it is mush in the service of an agenda ... [it is] a disingenuous rationalization of a result strongly desired by the judges on policy grounds.<sup>22</sup>

So I finish with this thought. Democracy is the best form of government for people who aren't sure they're right. Bills of rights, by contrast, are for people who think their moral antennae are better than everyone else's, who are sure they're right. Actually, that's not quite correct, is it? Because bills of rights—in turning debatable and contentious political and moral line-drawing exercises into pseudo-legal exercises where one side or the other has to be proclaimed to be the one on the side of fundamental human rights—actually empower a small group of unelected judges. The bet that proponents are making isn't that they have a pipeline to God, but that the judiciary does. They're betting that judges have greater moral and political perspicacity than do the elected representatives of the people. It's an unattractive bet, in my view, when it's presented openly and honestly, rather than when it's disguised in moral abstractions and grand proclamations about 'protecting rights' (as though Australia were some North Korea whose citizens lacked rights; as though at present, without a bill of rights, we didn't outscore Canada in terms of the scope citizens are afforded to express themselves without constraints and didn't outscore the UK in terms of having the less harsh anti-terrorism provisions).

At core, if we're at all honest, any sort of bill of rights is about imposing an aristocratic or anti-democratic element into government. It's about handing an awful lot of line-drawing powers as regards an awful lot of highly contentious moral and political issues

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dialogue between legislature and the courts should not be debased to a rule of "if at first you don't succeed, try, try, again." ' (at paragraph 17, per the Chief Justice)

<sup>19</sup> Ibid. para [41]. The reference is to countries discussed in Justice Gonthier's dissent. See paragraphs [125], [130] and [131].

<sup>20</sup> See *R v Morgentaler* [1988] 1 SCR 30.

<sup>21</sup> [1997] 3 SCR 3. For a similar view see Jeffrey Goldsworthy, 'The Preamble, Judicial Independence and Judicial Integrity' (2000) 11(2) *Constitutional Forum* 60.

<sup>22</sup> Ibid. p. 64.

to committees of ex-lawyers, who will resolve their disagreements on these issues by themselves voting, the only difference being the size of the franchise. Those of us who think democratic decision-making—for all its many and obvious faults—is nevertheless the least bad form of government going (and certainly better than what you'd get if you added an element of judicial oversight) had better start voicing their opposition to a Commonwealth bill of rights now, before it's too late.

This won't be easy. Emotively-laden appeals up in the Olympian heights of amorphous moral abstractions have a certain attraction in some quarters. It's time to start explaining why that attraction is superficial, vacuous and, down in the quagmire of day-to-day detail, at odds with giving each Australian a more-or-less equal say in how we are all governed.



**Question** — I was fascinated by so many aspects of your address but let me try and focus on three. First, I was intrigued by your somewhat sarcastic criticism of courts making decisions by majority. Now we live in a constitutional democracy and the courts regularly adjudicate on challenges to the validity of legislation, and they make their decisions by majority. How else? Would you suggest that parliament should be the final arbiter of its own constitutional powers? No, that's the role of the courts. If it's the courts that make the decision, how else would they adjudicate otherwise than by majority, when you have an appellate court?

**James Allan** — My point is that people who propose bills of rights by and large either explicitly or implicitly bring into their argument something about the tyranny of the majority and the fundamental problem with deciding on a majority rules basis. My point is that that is how judges decide. Judges don't decide based on who writes the most moral judgement.

In most pieces of legislation I don't have any problem with judges voting because how else are they going to decide, you are perfectly right. But normally when the judges interpret the Tax Act or the Companies Act and the legislature doesn't like the outcome of that interpretation, they bring in an amendment. You can't do that with a bill of rights. The fundamental difference even with a statutory bill of rights is that the judges get the last word. It's not the same as common law decision-making where the judges create a long set of rules about personal negligence, say, and the New Zealand Parliament comes along and passes a no fault tort system where they say: 'We've heard what you judges say, and we're changing it.'

Every single time the judges make a declaration in the UK, there's no response. Every single time the judges make a decision in Canada on the bill of rights, even though in theory formally the Parliament could respond, they can't respond because these things are sold at such a high level of moral abstraction where there is a mantra for protecting peoples' rights, as though that is some sort of uncontentious, obvious thing. In fact the legislature cannot respond, that's the difference, and what you are stuck with is that

seven judges will decide by voting what we end up with, with no response for us. At heart I am a democrat, and that really bothers me.

**Question** — You made no mention of the fact that the Human Rights Bill/Act provides a yard-stick for measuring future legislation. We've seen the difference between the Commonwealth and the ACT in relation to the anti-terrorism legislation and we all know the outcome. Do you not agree that that was a very important outcome in the ACT and a much better one than the Commonwealth one?

On the reading-down provisions, can I give you an example where a reading-down provision would have introduced a much more beneficial result and ask you to comment on it? You'll be familiar with the Al-Kateb decision where Mr Al-Kateb was a failed refugee applicant who was stateless. He couldn't be deported anywhere because no state would take him. The legislation provided that someone in his position had to be held in detention until either a visa was granted or he was deported. But he wasn't going to get a visa and they couldn't find anywhere to deport him. The Court held by four to three that that meant that he was to be held in detention indefinitely. We now know that one of the members of the majority, Justice McHugh has said since his retirement that had there been a bill of rights he could have interpreted that legislation as against human rights standards and found another way. Wouldn't that have been a preferable outcome? Does that not illustrate the benefit of a reading-down provision?

**James Allan** — On the first point, it is true that I haven't mentioned all of the many parts of a bill of rights; there are lots of other bad parts to them. There's one in the Victorian one, section 28, which is a statement of compatibility, where the Minister or the Attorney-General gets up in the House and says yes or no, this bill being introduced is or is not in my view compatible with the bill of rights. Sounds great, but the idea was supposed to be that the parliamentarians would start thinking twice about whether their bills infringe rights. What ends up happening is that you hire a bunch of lawyers in the Attorney-General's chambers or somewhere and the lawyers decide whether the bill is compatible with bills of rights. How do they do that? They look and see what the judges have done, and if they haven't done anything here they look and see what the judges have done in Canada; so in other words even at the statement of compatibility stage it becomes legalised and lawyer-driven.

About the terrorism legislation. The UK has a very strong bill of rights and that has done nothing to make their terrorism legislation less harsh than Australia's. Australia's is less harsh than the UK's. You can be held in detention in the UK for 28 days. What is it here? Two? Four? Now, it's true that the ACT has incredibly liberal laws but I don't think it's the bill of rights myself, I think it's the kind of people who live in the ACT.

What about Al-Kateb? Well you know my answer to that because I've written about it. I think that the four majority judges on Al-Kateb got it right. The best judge in the US last century was Oliver Wendell Holmes, and he said: 'My job is this as a judge: if the people through their elected representatives want to go to Hell then my job is to help them, that's what I am paid for.' The problem with the minority judges in Al-Kateb is what I call 'do the right thing judging'. They are just rewriting the legislation. Now if the question is, wouldn't it be nice if a bill of rights allowed judges to just rewrite legislation, then my answer is no, and in fact after Al-Kateb I don't know exactly what the legislature did but they actually softened it.

That's what you should do. If you don't like Al-Kateb, get out there, spend a few Saturdays working for a party that's going to change the rules on stateless refugees. The worst thing you can do is rely on a few judges to fix the system for you. If that's what you want then you and I fundamentally disagree on what the best way to live in a democracy is. You can't always win in a democracy. I mean in my university I never win, but leave that aside. You can't expect to win every issue. You can't expect to win every issue even if it's a moral and political issue that you feel very strongly about. The fact is if your decision-making rule is to let the numbers count, you're going to lose some. Work for a political party.

**Question** — As one of these enlightened citizens of the ACT we're already being freaked out here. I'm very morally opposed to cloning. We are debating it right now in the ACT Legislature. But of course the bill to permit it has that little moral cache saying it has been found compatible with the ACT Human Rights Act, as if that's meant to impress me. When you lobby you are told it is compatible; what if it's incompatible in my view? I'm still entitled to argue it. And then we have a very interesting gloss: Mr Stanhope's Human Rights Act said it was based upon the ICCPR provisions. Article 6 says everyone has a right to life. In the preparatory works to that Convention it was quite clear that there were very strong differences about the abortion issue as to whether that applied, and countries have gone their own different ways, but our Human Rights Act here actually adds a paragraph in Section 9 that says these rights do not apply before birth. I think that's rich. In a lecture I attended at the ANU about two years ago, a Human Rights Commissioner, on being asked why this clause was added, said it was obvious that they shouldn't apply before birth. I said, well, some of us would like to argue about that, and she said: 'The Chief Minister doesn't want it introduced.' But what do you think about legislatures themselves that seem intent on glossing human rights statements. Will it will come back and affect them when they do something that the lawyers don't want them to do?

**James Allan** — Well you and I can probably sit around and debate what the situation would be if the legislature actually sat down and debated whether a particular bill was compatible with human rights. And you might not like that or you might, but that's not what happens, it is way worse than that. Bills are declared to be compatible with bills of rights or not compatible on the basis of a few students just out of law school having sat down and read what the judges are saying. They don't look and see, what does a legislature think, what do the legislators think? The Minister gets opinions based on what the lawyers are deciding based on what the judges are deciding. That has been so in New Zealand, when they look and decide if a bill is compatible or not. The people in the Crown Law office, the twelve or thirteen full-time lawyers who are working on the bill of rights, they look and see what their top judges have said about this sort of thing, and if they can't find anything in New Zealand they then look at the Canadian Supreme Court and the American Supreme Court. Your statement of compatibility is a statement of what judges think: that's the irony of it.

Yes, you are right, there are other knock-on negative effects of a bill of rights that I haven't got to because I had fairly short period of time, but there's no doubt that if you are, say, a legislator in Congress in the US and you know that sitting behind you are some philosopher king judges, you can abdicate your responsibility. You could pass a piece of legislation that outlaws flag burning, not because you support that ridiculous piece of legislation but because you're very confident that the judges behind you are

going to strike it down so you comply. You don't have to take any moral responsibility for your legislation. Absolutely that's a knock-on negative affect and that will certainly happen although it happens more in the US because they have such a long history.

**Question** — You have mentioned the impact that a bill of rights can have on campaign finance law reform. I'm really curious as to whether it's statutory or constitutionally entrenched, and exactly how that line is drawn and what cases we've seen in other countries.

**James Allan** — The cases in Canada have come out of Alberta. Basically the question is this: you have campaign finance questions, how are you going to stretch your electoral campaign? Australia has some public money go in, and the US tends to be more wide-open, so what happens is you trigger the question of the right to free speech. If you are a multi-gabillionaire you can spend all your money to buy lots of television time to support one political party over another. Obviously you have to make a compromise between some sort of view that you don't want money, wealth, having too big a role in election campaigns and on the other hand not wanting to stifle people's views when they go to speak, express themselves in terms of the party they prefer to win.

There is a long line of cases in the US and Canada, where if you try to bring in any legislative constraints on money the American judges consistently tend to say that's a breach of the first amendment, free speech. Now John McCain and McCain-Feingold I think it was, they have compromised but it hasn't worked very well. The Americans tend to be really pro free speech which puts very few limits on campaign finance. In Canada the legislature tries to take some of the money out of campaign financials. The Canadian Supreme Court has upheld that because the judges like it. We've had 40 years of Liberal Party government in Canada so every single judge in Canada pretty much has been appointed by the Liberal Party which is another way to get around a bill of rights, if you can stay in power that long.

So the question is, what about Australia? Ironically, of course, as you probably know, in Australian there is so-called implied rights jurisprudence, where the High Court might just make up some rights because they weren't there and they wanted to put some in. The first one was the ACTV (Australian Capital Television v Commonwealth of Australia) case, and that's ironic because the judges decided that in the fabric and inner workings of the Constitution somehow there is this freedom of political communication during campaigns. It sounds great when you read it, but the practical effect was that legislation I think brought in by a Labor government to try to take some of the money out of campaign financing got struck down as unconstitutional. Now I don't know where I stand on my first order preferences of those sort of things; probably, here's the irony, I'm with the judges. My own nice middle-class sensibilities probably get more of my first order preferences satisfied by the judges, but ACTV and all of those implied rights cases really offend me just as much as a bill of rights, because the judges are making highly debatable calls. It's a highly debatable call. Where are you going to draw the line in terms of how much money you're going to let people spend of their own to try to influence local campaigns? There's no right answer in the sense of an obvious morally correct answer.

Bills of rights never trigger the sort of cases people like to talk about: when some little blue-eyed baby boy is about to get murdered and the bill of rights steps in to save him:

that's never what the case is. It's always highly debatable; such as how you're going to structure your campaign finance rules, your defamation regime, or wearing veils to school or something like that. There is no doubt that bills of rights have had a huge effect on campaign finance, but is it the case that different judges and different jurisdictions draw different lines? Absolutely. The Canadians draw a line that really favours limits. The Americans draw lines that put hardly any limits. In fact that's another irony, when the judges under a bill of rights say they're going to look overseas for guidance, they can get any answer they want. You tell me the answer you want, I'll tell you the jurisdiction to look at.

**Question** — Bills of rights are often criticised because you're freezing in time a particular moral or political environment and views about rights, and it's interesting to hear argument on the other side which is that a statutory bill will give judges open slather to interpret. I am wondering about your views on entrenching bills of rights.

**James Allen** — The sort of people who say: 'Oh, a bill of rights is going to lock us in' are the kind of people who want a bill of rights. The judges are so unconstrained that outside of Justice Scalia in the US there is almost no-one who says the way to interpret a bill of rights is to give it the meaning that the people at the time originally understood it to have. It is a version of originalism. If you flesh Scalia's argument out it is a persuasive one. He says that, in other words, a bill of rights is providing a floor, below which government cannot go. But if you want more than that, if you want legislation that allows same-sex marriage, or other things, then you've got parliamentary sovereignty. There is nothing in the bill of rights that stops you from having more liberal outcomes. Scalia's argument is: we have to interpret bills of rights as setting a floor, and they don't move. You want to change the bill of rights then you need a constitutional amendment.

And people say: 'That's awful, how do we keep pace with civilization, its 200 years old, what do we do, 250 years down the road?' and Scalia says: 'You pass an statute, that's what you do, nobody is stopping you, its called voting.'

That's an attractive position in my view. If you are going to have a bill of rights, give me bunch of Scalias who are going to lock things in. I don't want people keeping pace with civilisation, treating bills of rights as a living tree.

But the fact of the matter is there is one Scalia and thousands of non-Scalias. And as a practical matter judges don't actually lock things in. It doesn't happen outside of Scalia and Thomas in the US. What judges do is they say: 'This is part of our Constitution, it's a living thing, it needs to branch out, blah blah blah, we need to keep pace with civilisation.' What they mean is, we judges can amend the Constitution, everyone else has to use Section 128. So it will not be locked in, what will happen is that it will be amended from time to time as the various justices of the High Court feel that in their view it needs updating. Everyone else will have to use Section 128 and it will be impossible.

I don't think that the threat of locking things in is as much of a threat as people pretend it is, because you can still pass a statute, there is always a floor, but you are never stopped from going higher.