

HUMAN RIGHTS

[The following is a speech made by Hon Justice Peter Young AO to the Synod of the Anglican Diocese of Sydney on Tuesday 21 October, 2008. The Report of the Standing Committee of the Diocese referred to in the first paragraph, if not on the Sydney Diocese web page, may be obtained from the diocesan office].

You will find the Report on which this motion is focussed on pp 34 and following of the supplemental papers you received in the mailout made in late September.

The subject of whether human rights should be entrenched in special legislation, sometimes referred to as a Bill of Rights or a Human Rights Charter crops up periodically. "Entrench" is a word which denotes a law which cannot just be changed by parliament whenever it feels like it. Ordinarily, parliament can make or unmake laws whenever it considers it appropriate. However, if a law is entrenched, it may only be altered by a special procedure such as a referendum or by an increased majority in the parliament.

Recently, senior ministers in the Federal government have made it clear that they intend to reactivate the matter of a possible Charter of Rights at least by holding public consultations about it. Further, our traditional opponents, have again been stirred into making another attempt to remove the protection from the operation of so called 'anti discrimination' laws from religious bodies. Their aim is to force churches to hire persons whose life style or lack of faith would make them in our eyes unsuitable as role models for the pupils in our schools or as representatives of our church members.

The Standing Committee considered that these circumstances meant that a sub-committee of clergy, social issues people and lawyers should compile a report to be presented to the synod. This has been done and the report is in your hands.

The purpose of compiling this report was not to convince members of the synod that they should favour proposals to entrench human rights or that they should oppose that course. Rather the aim was, first to provide material providing background material to enable a proper debate to be held and to focus on the issues that arise. Some of these issues are obvious: some, less so.

The motion standing in the names of myself and Mr Tong is a fairly mild one. It does not set out any definitive direction in which we should be moving: it merely asks various organs of the church to keep working on the matter. The importance of the debate on this motion will be to give members of synod information which they can use to inform others, both in their parishes and in the wider community and for the Standing Committee to listen to the opinions and points of view on the issues which synod members will raise during the debate.

Thus, although this speech will probably carry overtones of my personal feelings on the issue, its prime purpose is to treat the synod as a sort of jury and put up the factors for and against an entrenched Charter of Rights.

First of all can I say that we all fell pangs of sympathy for minority groups, particularly in Africa who are oppressed by their majority rule government. However, the irony is that many of these places in fact have entrenched human rights clauses in their constitution. Point 1 in the debate is that what appears in a country's constitution is not necessarily going to mean anything unless there is a legal system and proper access to that legal system to ensure that the constitutional rules are actually observed.

Secondly, we must realise that our conception of human rights is of comparatively recent origin. I think it was Albert Schweitzer, the German theologian and missionary who, in the 1930s coined the phrase 'reverence for life' as a basic human right. Apart from the position in the USA, which I will come to in due course, it would seem that human rights clauses were written into the constitutions of newly independent former colonies of Britain by the British government as a cheap way of endeavouring to ensure that there would be less friction in the new self governing

nations. It was political expediency, rather than any care for the people that sparked off this attitude.

However, it is true that just after the American revolution, the US government adopted a Bill of Rights, principally drafted by Thomas Jefferson and this was entrenched in the US Constitution known as Amendments 1 to 10. This seemed to ensure that there should be freedom of speech, freedom of the right to exercise religious beliefs. Much of this was sparked because of the severe limitations that had been placed on both dissenting Protestants and Catholics by the English government. It was also inspired by the spirit of the French revolution, the Americans siding with the French against their then enemy the British.

The Bill of Rights makes heartwarming reading. However, two things must be said about it. First, despite the wide wording, the rights were only in practice given to the ruling classes. Slavery and exploitation of the poor continued unabated. Secondly, the rights were illusory.

To illustrate this latter point. Suppose the Charter entrenches the right to freedom of speech. If every citizen has that right, what happens when John Smith and Mary Jones both want to exercise their right at the same time and same place? Who wins? Whose freedom is downgraded? Does the freedom mean that the government (ie the rest of the community) have to provide John and Mary with microphones or access to the print media? If John and Mary have a right to freedom of speech, have other people got an obligation to listen to what they want to say?

What if John wants to say that all religion is bunk with a loudspeaker outside a church and Mary wants to worship reverently inside the church. John has freedom of speech, Mary has the right of freedom of religion. How can they both exercise their rights? One way of doing that is to ban John from speaking within 500 metres of a place of religion. Another is to close all the churches. Thus, one at least occasionally gets the irony of rights and freedoms actually limiting freedom.

This is not just an academic point. The USA gives freedom of religious beliefs. However, saying prayers in schools is illegal because it infringes on the religious

beliefs of people who are not Christians. So we have the paradox of a guarantee of religious freedom in the constitution which works to deny expression of religion.

Again, in America, I have the right to life. However, the odd bod next door has the freedom to have a gun and may well shoot me. My constitutional guarantee is not worth much.

We see this problem in Victoria right now. The majority of the civil rights groups appear to be backing the proposed legislation to allow abortion on demand. A Catholic doctor or nurse may have religious and conscientious objections against abortion. However, the alleged right of a woman to have control over her body appears to be prevailing backed by the very people who are thereby affecting freedom of religion.

As we know anti discrimination laws also affect freedom of religion. If I truly believe that Christ is the only way of salvation and so say that religion X is evil, in Victoria the practitioners of religion X or perhaps some busy body so called civil libertarian will prosecute me for discrimination. Again my church may be forced to employ a teacher who goes out of her way to tell students of her personal view that the Bible is bunk.

The second point to be made about a Bill of Rights is that the academics who have studied the legal nature of rights say that it is nonsensical to speak of rights without realising that if A has a right which involves B, B has a correlative obligation to allow A to exercise that right. One cannot have rights just hanging in the air. Lawyers will remember from law school days the work of the distinguished jurist Wesley Hohfeld who wrote extensively on this subject. You will be pleased to know that I have not the time to expound his theories here.

Thus every time A has a right in respect of B's property, B's rights are curtailed. Thus if A has a right to walk across B's land, B's rights to develop his land are limited because of A's rights.

Until he retired in 2004, Frank Iacobucci was a judge of the Supreme Court of Canada, the Canadian equivalent of our High Court. He wrote an article in the British Columbia Law Review on why it is not meaningful to have a system of entrenched civil rights unless one has a community which has mutual respect for each other's rights. There must be a society in which each member respects each other's rights. Thus it is idle to pass a law which says that police cannot invade a thief's privacy by bugging his phone unless the thief himself is prepared to acknowledge the rights of property of others.

However, that would mean a perfect society. Indeed, if everyone accepted Christ, if everyone loved their neighbour, indeed, if every non-Christian had respect for each other person's feelings, we would not need any Bill of Rights. If we don't have that society, at least, in theory a Bill of Rights cannot work.

So far I have probably been heard to be a bit negative about civil rights. There is a positive side. First, experience shows that, unless properly restrained, people in authority will gradually encroach more and more on ordinary people's ability to live the life that they choose to live. Now, to some extent this is inevitable. Before the last War, people could use their land as they liked. The effect of this was to cause vast erosion and groundwater problems and unsightly structures being erected in inappropriate places. The answer was to pass environmental laws and to empower local councils and others to issue consents to development and building. This effected a loss of freedom, but was necessary when the population increased and resources were limited.

However, we can see activities which the authorities think are necessary to assist them governing and controlling lawbreakers, but which impinge on freedom. Some, everyone would think are reasonable such as some screening for weapons at airports and public buildings, but some are not obvious such as police bugging telephones.

Again, the point must be made that Charters of Rights tend to protect people by mandating procedural protections rather than by looking objectively at the end result. Thus a person who has bashed his wife half to death may escape punishment

because the police, when arresting him, forgot to caution him. The procedural right of the accused is protected. The substantive right of the wife to live her life without being bashed will carry no consequences except those that currently exist.

It is interesting to note that the proponents for a Charter of Rights contain a fair proportion of those people who have lived under totalitarian regimes for part of their lives. Some of these regimes have in fact Charters of Rights which they do not enforce. However, these folk see that, where there is a proper legal system as in Australia, the abuses they suffered or saw other suffering overseas, would be prevented if there was a Charter of Rights.

The main philosophical argument for a Charter of Rights is that the social make up of most countries, including Australia over the past few decades has led to communities being made up of a significant number of minority groups. The political process usually only favours the majority. Appeals to the voters at election time are usually (though not always) directed to the majority. Unless there is something in place with which the majority for the time being cannot interfere, the only assurance that minority can have is that the court system will protect their entrenched rights.

Another argument that is often put is that entrenched Charter of Rights have now been adopted in most Western democratic nations and, although there have been some problems at the interface as happens with most new laws, the fact that the legislation is working overseas shows that the fears of those who oppose are misplaced. This is of some validity. However, the real message is that it is not so much the provision of entrenched laws that gives protection, but rather the availability to minority groups of efficient remedies to protect them from the caprice of the majority and an independent reliable court system to enforce those rights.

That is the philosophical side of the debate. There is a more practical side, as to what rights should be protected. The American list in essence is to say that that constitution protects, free exercise of religion, freedom of speech, freedom of the press, right of assembly, right to petition the government, right to bear arms, right to refuse to have soldiers billeted on a citizen in times of peace, rights against search warrants, right to refuse self incrimination, right to trial by jury, protection against

excessive bail or fines or cruel and unusual punishment. There were later added protection against slavery, the right to due process and the right to vote.

A more recent list by a government committee listed, the right to a jury trial in serious cases, the presumption of innocence, the right not to incriminate oneself, protection against cruel and inhuman punishment, the right to a speedy trial, freedom of assembly, freedom of religion, the right to liberty, the right to citizenship, freedom of information and the right to property. This list is obviously too focussed on right sin criminal law. However the example is given to show that not everybody thinks of basic human rights in the same way.

On page 38 of the report you will see in footnote 3, the list of rights protected in Victoria.

The report notes in paragraph 18 on page 36 that God is a God of mercy and justice, when He sees human rights are overridden, when someone is cheated of justice, God notices. As people of God, we too must always be mindful of society's and our obligations to the poor, the weak, the fatherless. However, the question is whether these cares should be entrenched in specific constitution type law.

A summary of the arguments appears on page 39 of the report. Paragraphs 47-49. Please read those. Also read paragraph 50 carefully which is the way in which the enactment of a Charter of Rights may affect us individually as Christians or corporately as a church.

On thing is sure. If a Charter of Rights is enacted, there will be a great increase in litigation. This will be so even in matters concerning the church. In Canada, virtually every diocese has had to employ a Deputy Chancellor—Industrial matters, as rectors are regularly sued by organists, Sunday school teachers and the like for alleged failure to accord them their due rights. As a lawyer I would have liked the extra income. As a judge, I have a different view. Some opponents of Charters of Rights say that it gives unelected judges too much power to make rules for the community. There is that possibility, but, as a judge, I much prefer to have the law in such a state as I can apply it without fear or favour affection or ill will, rather than have to judge a

case on ephemeral rules such as whether the defendant's constitutional right to privacy has been violated because some newspaper photographed her wearing old clothes.

I look forward to listening to the debate.
