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How About a Bill of Rights?

It is an honour to deliver the first Tony Fitzgerald lecture and do so in Queensland in the presence of Tony Fitzgerald and his wife Kate. Griffith University must be congratulated for institutionalizing this lecture and the scholarships attached to it. The bi-annual lecture will remind Queenslanders of the corruption and lawlessness which was once at the heart of their police force, and of the closed and secretive political order that made this possible. That is important, for we so easily forget our past and fail to heed its lessons. The scholarships are also important. Not only will they offer opportunities for aspirant law students, but because they are named for Tony Fitzgerald, they will encourage the recipients to follow his example of seeking the truth, and to have the courage and determination to follow the truth wherever it may take them.

The Fitzgerald Commission, which we mark and celebrate tonight, has been described by one observer as:

> **A watershed inquiry for not only Queensland, but across all jurisdictions in Australia and internationally . . .it triggered wide-ranging reform within the public service, placed a new emphasis on ministerial accountability, highlighted the importance of ethics, updated parliament, improved police and the administration of criminal law . . . it caused the first major reforms in local government in more**

than forty years. . . no other inquiry before or since in Australia or overseas, has had such impact.[1]

What led Tony Fitzgerald along this path twenty years ago was an Order in Council published in the Queensland Government Gazette on 26 May 1987 appointing him to make "full and careful enquiry" into the correctness of certain allegations concerning the Queensland police that had been aired in the media. There had been previous allegations of corruption against the Queensland police which had come to nothing, and at the time, as the report records, many thought that the pattern would be repeated, and that the investigation would prove to be ineffectual. [2] **But this is not what happened.**

Tony Fitzgerald took seriously the instruction to him to conduct a 'full and careful enquiry". Before accepting the appointment he obtained assurances from the acting Premier, that he would be able to conduct an honest and comprehensive inquiry. The Commission's report records that as soon as it was established, moves were made to consolidate the commitment made by the acting Premier, and to establish the public credibility of the Commission. One of the early steps was to prevent the Commission being hamstrung by the narrowness of the terms of reference. Approximately a month after his

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[1] Dr Scott Prasser, Director of the University's Sunshine Coast Research Institute for Business Enterprise (SCRIBE)

[2] This is referred to in the Commission's report, which says that "The general expectation was that the inquiry would be brief and ineffectual, and was primarily a device to ease the political pressure on the Government". It goes on later to say "Previous inquiries on law enforcement in Queensland in the last quarter of a century had failed despite skill and endeavour. Their terms of reference were limited and their recommendations largely ignored or lost in political posturing and bureaucratic obfuscation". Commission Report at page 10

appointment the terms of reference were amended at Fitzgerald's request to extend the scope of the enquiry. He also asked for access to all police and Government documents. This was no formality. The inquiry report records that the Justice Department and the Police Department tried to prevent this, raising issues of privilege, confidentiality and sensitivity, and warnings of the "dire consequences" of providing unvetted Police Department and other Government material to the Commission. With the support of the acting Premier, the Commission was able to obtain all the records without exception. Even Cabinet minutes and associated documentation were made available. This, and a further amendment of the terms of reference granted about a year after the Commission had started its work, set the stage for a wide-ranging enquiry into corruption. The bare statistics show the depth of the enquiry that was undertaken. 238 sitting days, 339 witnesses, 21.504 pages of transcript, and 2304 exhibits.[3]

The result has been described by other speakers this evening. What needs to be acknowledged, however, as we recall the events of that time, is the courage of Tony Fitzgerald, the enormous personal stress to which he, his team and their families were subjected over the two years of intense work involved in confronting a corrupt police force, and politicians who supported them, and in exposing the deceit and dishonesty that existed. It is also important to acknowledge the role of the media in exposing the corrupt conduct that led to the enquiry, in being willing to confront the hazard of laws suits likely to follow

[3] Fitzgerald Commission Report, page 4

the expose, and the personal and financial risks involved in the investigation and publication of the information that led to the appointment of the commission.

What lessons can we learn from these events? We know from bitter experience that power can be abused. I have seen that in my own country which was subjected to more than three centuries of colonialism, white supremacy, and apartheid. Colonialism, and postcolonial South African constitutions prior to 1994, excluded blacks from any effective say in the government of the country. Apartheid laws denied blacks, who were the overwhelming majority of South Africans, access to proper education, to work opportunities other than in menial occupations, to the ownership and occupation of most of the land, and to fundamental rights and freedoms essential to self esteem and self development. This led to vast social and economic disparities between we who were white, and privileged by apartheid, and those who were oppressed by it; it caused poverty, degradation and suffering on a massive scale within the black community.[4]

The type of society that we have depends to a large extent on the laws of our country. I say to a large extent because even good laws are not in themselves sufficient to prevent the abuse of power. That depends in addition on the institutions of government and their integrity, political will, resources, development, and a host of other factors - social, economic, educational and cultural. But law and government have a central role, either

[4] Arthur Chaskalson, *Dignity and Justice for All,* (2009) 24 Maryland Law Journal, 24 at 28

actively in promoting and seeking to legitimize particular ends, or passively, by failing to prevent abuses.

Addressing the issue of good government, the Fitzgerald report states that this is more likely to result if opposition, criticism and rational debate are allowed to take place, appropriate checks and balances are placed on the use of power and the administration is open to open to new ideas, opposing points of view and public scrutiny. [5] **But what checks and balances are appropriate to achieve these ends?**

In common law countries a constitutional principle designed to prevent the abuse of public power is the rule of law. What do we mean when we talk about the rule of law?[6] **In a lecture on that topic, Lord Bingham, then the senior judge of the House of Lords in the United Kingdom, describes the core of the rule of law as being**

> **That all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts**[7]

But is that enough, and is it all that is embraced by this principle? For some, the answer would be yes. For instance, one highly respected scholar once observed that,

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[5] Fitzgerald Commission Report, page 358
[6] I addressed this topic in an unpublished paper at the World Justice Forum held in Vienna in July 2008, and have drawn on what I said there.
[7] Thomas Bingham, *The Rule of Law*, The Sixth Sir David Williams Lecture delivered at Cambridge on 16 November 2006

> **"a non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and racial persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies . . It will be an immeasurably worse legal system, but it will excel in one respect: in its conformity to the rule of law.** [8]

For Lord Bingham, there is more to the rule of law than the bald description of its core. There must, he says, also be a substantive content to the law itself, requiring "legal protection of such human rights as, within that society, are seen as fundamental."[9] Otherwise,

> **A state which savagely repressed or persecuted sections of its people could not . . . be regarded as observing the rule of law, even if the transport of the persecuted minority to the concentration camp or the compulsory exposure of female children on the mountainside were the subject of detailed laws duly enacted and scrupulously observed.**

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[8] J. Raz, "*The Authority of Law: Essays on Law and Morality* (Clarendon Press, Oxford 1979) as cited by Lord Bingham in his Sixth Sir David Williams Lecture. Lord Bingham also refers to the argument that Dicey, whose rule of law theory is foundational in English law, did not give a substantive content to the rule of law.

[9] Raz seems to acknowledge this in *Politics of the Rule of Law,* in *Ethics in the Public Domain:Essays in the Morality of law and Politics* (Clarendon Press, Oxford, 1994)

This may sound over the top to tonight's audience. But it has a resonance for people like me who lived through apartheid, and possibly for the Australian families of the "stolen generations". Even before apartheid was institutionalised, South African law was corrupted by racial discrimination. The attitude of the courts to discriminatory legislation, and denial of fundamental rights, appears from a 1934 judgment of the Appellate Division, then our highest court, where it was said that:

> **Parliament may make any encroachment it chooses upon the life, liberty, or property of any individual subject to its sway. . . and it is the function of the courts of law to enforce its will.**[10]

Paying lip service to the rule of law, courts followed the laws and held government officials to account when they failed to comply with them. Apartheid laws, upheld by the judiciary, were clear, publicized and stable. The apartheid government, its officers and agents were accountable in accordance with the laws. But the laws were unjust. They failed to protect fundamental rights such as freedom of assembly, and freedom of speech; instead, they denied the franchise to blacks institutionalized discrimination, denied equal education and job opportunities to black persons, made provision for forced removal of black communities from land which they owned and occupied, sharply curtailed freedom of political activity, and vested broad discretionary powers in the executive to enforce these policies. What kept apartheid in place in these circumstances, was an ideology rooted in

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[10] Stratford JA in *Sachs v Minister of Justice* 1934 AD 11 at 37, referred to by Cora Hoexter in *Administrative Law in South Africa (Juta & Co, 2007)* at 12, and Kate O'Regan, *Breaking Ground: Some Thoughts on the Seismic Shift in our Administrative Law,* (2004) 121 SALJ 424

the history of colonialism and white supremacy, the self-interest of the dominant white community, a government determined to have its way irrespective of the suffering caused by its policies, draconian security laws,[11] and a constitutional order based on the supremacy of parliament. In this setting the law served to reinforce the belief of whites in their racial superiority, and to that extent legitimated it within the white community.

In a different context we can see a similar phenomenon by looking at the laws of most Southern States in the United States of America prior to the changes wrought by the civil rights movement in the second half of the last century. The law sanctioned policies, of segregation and discrimination and legitimated them in the states where they were practiced. And it was laws that sanctioned the mistreatment of the stolen generations of Aboriginals here in Australia.[12]

Without a substantive content there would be no answer to the criticism, sometimes voiced, that the rule of law is "an empty vessel into which any law could be poured".[13] However, most democracies now accept that there are certain fundamental rights and freedoms to which all people are entitled. This is consistent with the international legal order established by the United Nations in the aftermath of the Second World War. The Charter

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[11] I spoke about these laws in more detail in the Seventh Sir David Williams Lecture: See: Arthur Chaskalson, *The Widening Gyre: Counter-terrorism, Human Rights and the Rule of Law,* (67) 2008 Cambridge Law Journal, 69 at 72 – 74.

[12] Apology to Australia's Indigenous Peoples by the Prime Minister of Australia in Canberra on 13 February 2008

[13] The need for the rule of law to have a substantive content is demonstrated in an extensive study undertaken by the International Commission of Jurists: see *The Rule of Law and Human Rights: Principles and Definitions:* International Commission of Jurists, Geneva, 1996; and by the contemporary study of the World Justice Project of the American Bar Association details of which are available at www.worldjusticeproject.org/forum, last visited on 2 July 2009.

of the United Nations reaffirms "faith in fundamental rights, in the dignity and worth of the human person, [and] in equal rights of men and women",[14] and member states pledge themselves to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[15]

The Universal Declaration of Human Rights, adopted without dissent by the United Nations in 1949, records the pledge made in the Charter to promote "universal respect for the observance of human rights and fundamental freedoms" and goes on to proclaim the detailed rights set out in the Universal Declaration "as a common standard for all peoples and all nations". The International Covenant on Civil and Political Rights and the International Covenant on Social, Economic and Cultural Rights were adopted as treaties to give effect to these commitments, and other treaties such as the Convention on the Elimination of All Forms of Discrimination Against Women, and the International Convention on the Elimination of All forms of Racial Discrimination, and many more adopted during the second half of the last century, fleshed out the commitments made in the Universal Declaration.

At the beginning of the present century heads of state, meeting at the United Nations in New York, adopted the Millenium Declaration as a resolution of the United Nations in

[14] Preamble to the Charter
[15] Articles 55 and 56 of the Charter

which they resolved to respect fully and uphold the Universal Declaration of Human Rights, and to spare no efforts to strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms, and to strengthen the capacity of all their countries to implement the principles and practices of democracy and respect for human rights.

If this commitment to human rights and fundamental freedoms is an essential component of a democratic society, how should it be expressed in the country's legal system? We had to confront this question when apartheid collapsed, and a new democratic legal order was established in South Africa. We had seen how the doctrine of the supremacy of parliament had operated to immunize apartheid laws and practices from judicial review.[16] We wanted to ensure that the commitment to a new political order based on respect for fundamental rights, and the founding values of our Constitution, would be respected in substance as well as in form. And to this end, we entrenched fundamental rights, the rule of law, and judicial review in our Constitution.[17]

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[16] I have discussed the role of the South African judiciary under apartheid on other occasions, drawing attention to the fact that judges enforced unjust laws – almost invariably without protest - and in so doing helped to legitimate them within the white community. But that was not the entire story, and it would be an oversimplification to see them as being no more than instruments of a repressive state. At times there were spaces in apartheid laws that could be exploited to challenge the abuse of authority, and courts became one of the sites of the struggle against apartheid. See for instance Chaskalson, *From Wickedness to Equality: The Moral Transformation of South African Law* (2003) International Journal For Constitutional Law (Oxford) Vol.1, No 4, 590.

[17] Section 1 of the Constitution provides: "The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms. (b) Non-racialism and non-sexism. (c) Supremacy of the constitution and the rule of law. (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government , to ensure accountability, responsiveness and openness".

I have lived through apartheid and have seen what can happen when there are no constraints upon the exercise of power. If we look at the world during the last century, we see examples of this in every continent, by people of all ethnicities, of all religions, and of no religion. Nazism in Germany and Austria, fascism in Spain and Portugal, segregation and racial discrimination in the United States of America and more recently rendition, torture and Guantanamo Bay, the military dictatorships in South America, the communist regimes in eastern Europe and Russia, the cultural revolution in China, autocratic regimes in the Middle East and Mynmar, the colonial occupancies of Africa and Asia, post-colonial regimes in those continents, conflict in Israel, Palestine and Sri Lanka, and the treatment of aboriginal communities here in Australia. The list is endless.

These examples concern the exercise of state power. But the abuse of power in the private sphere can also have devastating consequences. Illustrations of this would include the history of discrimination against women in almost all parts of the world, racial discrimination in countries where the majority of the people are white, and discrimination in Europe and elsewhere against marginalized groups such as the Roma. Here too the list is endless. In almost all countries there are marginalized people who are seen by those who wield power, as being "not like us".

How then should the law of a democratic country guard against the abuse of power and corruption, hold government accountable for its actions or lack of action, protect those who are vulnerable, and ensure that everyone's fundamental rights are respected and upheld? For a long time, common law courts depended on the doctrine of legality, an

incident of the rule of law, to hold governments to account. Public authorities were obliged to perform their functions in accordance with the law, and could be held to account by the courts if they failed to do so. Holding public authorities to account through the courts was, however, constrained by various factors. By the content of laws they were bound to enforce, by the absence of any requirement that reasons be given by the public authorities for their decisions, by the inability of the public to gain access to information in the possession of the government, by strict rules of standing and by the deference shown by courts to the executive. This is alluded to in the Fitzgerald report, which called for statutory provision to be made for access to information, for "existing complicated judicial remedies" to be simplified, for the broadening of the rights of individuals to bring applications for administrative review, for interested parties to be given the right to obtain reasons for the decisions affecting them, and for a system of review of the merits of the decision by an independent review body.[18] In the twenty years since then many of these recommendations have been implemented, though only recently have steps been taken to introduce a comprehensive Civil and Administrative Tribunal for Queensland.[19]

These measures have broadened the ways in which the executive can be held to account, but they are directed to the executive and not the legislature. In Australia certain implied freedoms are apparently, protected by limiting the power of legislatures to curtail them.[20] Though important, these implied freedoms have to be harmonized with the supremacy of

[18] Fitzgerald Commission Report, page 128
[19] Queensland Civil and Administrative Tribunal Bill, introduced into the Queensland Parliament by the Attorney-General on 19 May 2009
[20] Lange v Australian Broadcasting Corporation (1997) 189 CLR 520

parliament, and have a comparatively narrow application. Federalism disperses power and to that extent provides a check and balance against the concentration of power in one centre, but it does not address the principle of legislative supremacy, which sees the political process as the only means of control over federal and state legislatures within their fields of competence.

In South Africa we took a different path when we entrenched fundamental rights in our Constitution. In doing so we followed the same path as other countries have done when they emerged from the yoke of repressive regimes. This happened in Germany after the defeat of the Nazis in the Second World War. In Spain and Portugal after the end of fascism, in countries in the southern cone of South America after the eclipse of the military dictatorships, in Eastern Europe and Russia after the collapse of communism, in India and other countries in South Asia after colonial rule. Influenced by the UN Charter and the Universal Declaration of Human Rights, fundamental rights have also been entrenched in other countries, such as Canada and the states of the Council of Europe, whose recent histories have not been so stark.

In a constitutional democracy the effect of the doctrine of legality is that the legislature, and not only the executive, may exercise no power and perform no function beyond that conferred upon them by law.[21] Our Constitution makes this clear, stipulating that the

[21] In South Africa this principle is recognized by the Courts and is enforced against all organs of state including the President and the various legislatures. *Pharmaceutical Manufacturers Association of South Africa and Another: In Re: Ex Parte President of the Republic of South Africa and Another* 200 (2) SA 674 (CC); *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) Para 49*; Masethla v President of the*

Constitution is the supreme law, and that law or conduct inconsistent with its provisions is invalid and of no force and effect.[22] A Bill of Rights binds all organs of state including parliament. The judicial authority is vested in independent courts[23] which are required by the Constitution to "declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency".[24]

Should legislatures be constrained in this way? There has been debate and disagreement, particularly in the USA, but not only there, about the legitimacy of judicial review of legislation, and that is also an issue in Australia.[25] Strong arguments can be marshaled for the competing views.

Each country has its own history and own culture, and what is appropriate for one is not necessarily appropriate for another. Let me talk about South Africa. Our Constitutional Court has said,

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Republic of South Africa and Another 2008 (1) SA 566 (CC), Para [80]. So too in Canada, *Reference by the Government in Council Concerning the Secession of Quebec 1998 (2) S.C.R. 217, paras 70-78* and Germany; See Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany,* 2nd ed (Duke University Press, London, 1997) at 36 – 37; Currie, *The Constitution of the Federal Republic of Germany* (University of Chicago press, Chicago,1994) at 18 -20.

[22] Section 2 of the Constitution

[23] Section 165(1)

[24] Section 172(1)

[25] See for instance Ronald Dworkin (for judicial review) in *Laws Empire* (Harvard University Press, 1986), *A Matter of Principle,* (Harvard University Press, 1985) and Jeremy Waldron (against judicial review) in Waldron, *Law and Disagreement* (Oxford University Press, 1999), *The Core of the Case Against Judicial Review,* 115 Yale Law Journal, 1346 (2006) and *Judges as Moral Reasoners*, 7 International Journal of Constitutional Law, (Oxford 2009) 1. This is the subject of many books and articles, too many to note, or to attempt to discuss in a short lecture like this.

> **Our history is one of repression not freedom, oligarchy not democracy, apartheid and prejudice not equality, clandestine not open government.**[26]

You may think that in such circumstances it is not surprising that we chose constitutionalism over the supremacy of Parliament.

Some might argue that this is not consistent with democracy. But that begs the question. Democracy is government by the people. If the people vest the power to govern in elected representatives, they are entitled to prescribe how that power should be exercised. If they say that power must be exercised in a certain way and within prescribed limits, for instance within the framework prescribed by a bill of rights, or within a federal structure, democracy and legality require that those procedures and limits must be observed. Constitutionalism is not inconsistent with democracy; it is a form of democracy and one adopted today by most developed democratic countries.

Is is sometimes argued that what is inconsistent with democracy, is not so much a commitment by the legislature to uphold and respect fundamental rights enshrined in a Bill of Rights, as the vesting in the judiciary of the authority to determine whether the legislature has complied with that commitment. But, if not the judiciary, then who should make this decision? Some would say: the legislatures themselves, or the people at the next election. Leaving such matters to the legislature, however, is saying in effect that there is no control other than through electoral politics over how the legislature exercises its power.

[26] O'Regan J in S v Makwanyane and Another 1995 (3) SA 391 (CC), para 322.

But as Justice Jackson said in the decision of he United States Supreme Court in West Virginia State Board of Education v Barnette:

> **The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.** [27]

There are powerful arguments that go the other way. Landmark cases dealing with issues of great importance to society may ultimately be decided by a majority of a divided apex court, showing that people of good faith could reasonably hold different views on whether or not the legislature had exceeded its power. If that be the case, some ask why the views of a majority of unelected judges should prevail over those of a majority of the elected representatives of the people? The answer is that there must be a way of determining disputes as to legality, and in a democracy this is the role of the judiciary.

Judges are not self-appointed; they are appointed and derive their power from the same source as parliament does, from the Constitution itself. Constitutions constrain the power

[27] 319 US 624, 638 (1943)

of the legislature in various ways, both procedural and substantive. For instance, most constitutions prescribe special procedures and special majorities for amendments to the Constitution. Federal constitutions, assign certain powers to the federal government and others to state governments. Disputes in regard to such matters are not determined by a parliamentary majority. They are determined by judges. The constitutional principle of the separation of powers requires this to be done.

Disputes concerning the powers of the various legislatures in a federal state may be complex and raise issues of great importance about which people of good faith could reasonably hold different views. Yet they are determined by unelected judges, and far reaching decisions may depend on a majority of a divided apex court.

The argument that bill of rights issues should not be decided by unelected judges, also fails to give sufficient weight to the contrast between court proceedings and the way modern legislatures function in most countries. Issues that come before the courts are dealt with in the atmosphere of the courtroom, where competing arguments are debated. Courts give reasons for their judgments, and the appeal process allows those reasons to be examined and ultimately decided by the judges of the apex court, who because of their experience and training, are able to decide issues with due regard to relevant legal principles, and the evidence placed before them.

Modern bills of rights, unlike the United States model which has been the focus of much of the debate, have limitations clauses which are of general application, and allow a margin of

appreciation for the views of the legislature. For instance, the Canadian Charter provides that the rights are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".[28] Similar provisions are contained in the South African Bill of Rights[29] and in the New Zealand Bill of Rights.[30] The South African Constitutional Court has explained the practical implications of this:

> **[Section 36] of the Bill of Rights requires that where an entrenched right is limited, that limitation may be constitutionally permissible if it is "reasonable and justifiable in an open and democratic society based upon human dignity, equality and freedom". [This provision] requires the state, or any person asserting that a limitation of a right falls within the provisions of section 36 to show that the limitation is reasonable and justifiable. It is one of the objects of the Bill of Rights to require those limiting rights to account for the limitations. The process of justifying limitations, therefore, serves the value of accountability in a direct way by requiring those who defend limitations to explain why they are defensible.[31]**

The South African Constitution empowers courts deciding constitutional matters to make any order that is just and equitable, including the power to limit the retrospective effect of a declaration of invalidity, and to suspend a declaration of invalidity for any period and on any conditions to allow the competent authority to correct the defect. Through these

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[28] Section 1 of the *Canadian Charter of Rights and Freedoms.*
[29] Section 36:
[30] Section 5
[31] Rail Commuters Action Group & Ors v Transnet Ltd. t/a Metrorail & Ors 2005 (2) SA (CC), Para [75]

powers, and techniques such as reading down, reading in and severance, courts can tailor their judgments to address the particular flaw identified through litigation.

Contrast this with the role of the legislator as an adjudicator. Legislation is usually enacted on the initiative of the executive, and debates tend to be influenced by the powerful role of the executive in party politics. The debate takes place within the charged atmosphere of a political chamber, which may be influenced by populist rhetoric and pressing political considerations, rather than a commitment to uphold and respect human rights. Deferring accountability until the next election offers little consolation to those adversely affected by discriminatory or otherwise invasive legislation. Elections are seldom determined by single issues, particularly if they affect a minority. Dominant issues are likely to concern matters such as the economy and security, and not how laws impact on people "not like us".

Some 150 years ago John Stuart Mill, himself a utilitarian, was constrained to say:

> **The will of the people... practically means the will of the most numerous or the most active part of the people...; the people, consequently, may desire to oppress a part of their number and precautions are as much needed against this as it is any other abuse of power...** [32]

[32] JS Mill, *On Liberty*, Harmondsworth, Penguin, 1974: at 62.

In a different context the Fitzgerald Report made the point that self-regulation "is the antithesis of accountability".[33]

Minorities shift depending on the issues at stake, and electoral politics, although a check on the way power is used, do not ensure that the "right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly and other fundamental rights " will not be infringed by the legislature. This has been emphasized by the South African Constitutional Court, which has said:

> **The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected.[34]**

The legislature debates laws in the abstract, and not, as in court proceedings, in the light of the facts of particular cases. If, through lack of foresight of the impact the law will possibly prove to have, or the failure to fully appreciate its implications, prejudice is caused to particular sections of the community, or to persons engaged in particular occupations,

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[33] Fitzgerald Commission Report, page 357

[34] S v Makwanyane 1995 (3) SA 391 (CC), Para 88

those affected have no remedy. Where a bill of rights is supreme, individuals have the opportunity to claim in a domestic court that on the facts of a particular case there is a gap in the law, and that their fundamental rights have been infringed. That is an important check on the exercise of public power.

Whether Australia should have a bill of rights is an issue presently being debated here. The mandate of the Committee appointed by the Australian government to enquire into this question is limited by the requirement that any options for change 'should preserve the sovereignty of the parliament and not include a constitutionally entrenched bill of rights'.

A concern for the sovereignty of parliament was also an issue in Canada, the United Kingdom and New Zealand when bills of rights became part of the domestic law of those countries. Canada addressed this issue by allowing Parliament or a provincial legislature to enact legislation declaring that an Act or provision thereof shall operate "notwithstanding" particular provisions of the Charter" of rights.[35] In effect this allows the legislatures to immunize laws against Charter review, or override a court decision with

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[35] Section 33of the Charter which provides: (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15. (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration. (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration (4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1). (5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

which it disagrees. This is permissible in respect of some but not all of the Charter rights; in particular language rights and rights pertaining to the equality of men and women, are not subject to an override. Overriding legislation has a limited life of not more than five years, unless the legislature reenacts the override before the expiry of the prescribed period.

An override power can be used to undermine a bill of rights. This was done in Quebec where for a period of three years between 1982 and 1985, a notwithstanding clause was inserted into in every piece of legislation, and into all Quebec legislation exiting when the Charter came into force. In effect this immunized Quebec legislation against Charter review. This is not likely to happen, however, if there is a genuine commitment to uphold and respect fundamental rights. This later proved to be the case in Quebec, and the overrides were allowed to lapse. Since then the override has been used only on isolated occasions.

In the United Kingdom the Human Rights Act[36] has a different way of dealing with this issue. The Act in effect incorporates the European Convention on Human Rights into the domestic law of the United Kingdom. Public authorities must comply with the Convention, and Courts are required, where possible, to interpret legislation so as to be consistent with the Convention. If that is not possible, courts may declare the legislation to be

[36] Human Rights Act, 1998

incompatible with the Convention. In that event a Minister of the Crown may amend the legislation, subject to the approval of a resolution of parliament, to remove the incompatibility.[37] The somewhat complex provisions of this Act are designed to accommodate the United Kingdom's treaty obligation to honour the Convention, allowing its own courts and not only the court at Strassbourg to rule on such issues, whilst in substance preserving the principle of parliamentary sovereignty.

In New Zealand the Bill of Rights applies to all legislative and executive acts, and to the exercise of all public power .[38] Although the legislature is required to comply with the bill of rights, courts cannot decline to enforce legislation because of an inconsistency with the bill of rights;[39]wherever possible, however, courts must interpret legislation so as to be consistent with the bill of rights.[40]

The Human Rights Act in the United Kingdom and the New Zealand Bill of Rights are ordinary statutes and theoretically are subject to revision or repeal by ordinary statutes. They have, however, had a deep impact on the making of laws, on executive action and the exercise of public power, and on the jurisprudence of these countries.[41]

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[37] For A discussion on the practical implementation of the HRA, see: Janet L. Hiebert, *Parliament and the Human Rights Act: Can the JCHR help facilitate a culture of rights,* International Journal of Constitutional Law, (2006, Vol 4, Number 1).
[38] Section 3 of the New Zealand Bill of Rights; Rishworth et al, *The New Zealand Bill of Rights*, (Oxford University Press, 2003) 72
[39] Section 4 of the New Zealand Bill of Rights
[40] Section 6 of the New Zealand Bill of Rights
[41] As to the UK, see Janet E Hiebert, n.37 above; as to New Zealand, see Rishworth et al, note 38 above, 22-24.

If Australia were to adopt a bill of rights, this would give effect to its international obligations under the UN Charter, and human rights treaties to which it is party, such as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, the Convention Against Torture, and the Convention on the Rights of Persons with Disabilities. It would also gives substance to the pledge made by Australia and other countries in the Millenium Declaration to spare no effort to strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms, by ensuring that these rights and obligations are enforceable not only through international structures, but in and by its own courts.

Of course these obligations can be met by ensuring that Australian domestic law complies with these standards. But a Bill of Rights goes beyond this. It is a declaration to all in the country of the values with which the law must comply. It is a commitment by the government and parliament to uphold those values and to ensure that the fundamental rights of everyone will be respected and upheld. It impacts on the legal culture of the country, influencing not only the way courts interpret and develop the law,[42] but also

[42] The South African common law must now be developed within the matrix of the objective normative value system contained in the Bill of Rights: Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC); K v Minister of Safety and Security 2005 (6) SA 419 (CC)

parliamentary debates, and focuses the attention of drafters of legislation on the importance of ensuring that the law complies with the provisions of the Bill of Rights.

The protection of the rights of people within society depends ultimately not upon the provisions of a bill of rights, but upon community attitudes and political will. A government determined to exercise power without any concern for human rights and the rule of law, is unlikely to be deterred by a Bill of Rights and judges who say that they are acting unlawfully. It is more likely to tear up the Bill of Rights, or get rid of troublesome judges and find others, more compliant, to take their place. But in a functioning democracy, where there is respect for the rule of law, the symbolic importance of a bill of rights, and a legal order in which independent courts are empowered and required to protect such rights, can have a profound influence on the culture of society, reinforce an existing culture of rights, and provide a powerful antidote to the pursuit of policies which could lead to the erosion of such rights. This has been accepted by almost all developed democracies in the world.

Because of where I come from, and no doubt because of my own professional and life experience, I have come to believe that a legally enforceable bill of rights is one of the

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checks and balances that enhance democracy, and ensures that those who exercise public power are accountable for the way that they do so. Tonight, on the 20th anniversary of the Fitzgerald Report, I invite you to ask yourselves whether this is not indeed an essential check and balance, one that is needed in a democratic legal order to protect the rights of everyone and to guard against the possibility of power being abused, as it was in Queensland before Fitzgerald more than 20 years ago.

Arthur Chaskalson

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