Civil Rights and Other Impediments to Democracy

Hon Justice Roderick Meagher

We hear much nowadays about "civil rights". To magnify their importance, they are often designated "fundamental". What, if anything, are they in law?

They are not immediately recognisable, as having defined features. In this, they do not resemble ordinary proprietary rights, like rights to possess, to enjoy the benefit of an easement over another's property, a right of support. They seem to be of a different quality from, say, a parent's right to inflict condign chastisement on his child. They have nothing to do with rights arising out of contract or tort. They seem to be unlinked to obligations or responsibilities. They mean whatever each proponent wants them to mean.

They include things like: the right to life, the right to death, or more accurately the brief life of the right to death in Darwin, the right to strike, the right to work, the right to demonstrate, the right to own one's own body, the right to subsidised tertiary education, the right to bear arms. Various political philosophers and institutions, and right-thinking persons like Kirby J, make lists of them. No two lists coincide.

In Jacques Maritain's list, for example, we find: "The right of the church and other religious families to the free exercise of their spiritual activity".[1] Nobody else's list has that. As times change, new civil rights get born: in the United Kingdom some are asserting "the right to a tobacco-free job", the "right to sunshine", and the "right to a sex-break".[2] As new "rights" appear, old "rights" disappear from the lists. "The right to property" was on everyone's list until 1966, when it vanished from the *International Covenant on Economic, Social and Cultural Rights.* Nowdays it is not even on Kirby J's list, despite his Honour's extensive holdings of real estate. However, the "rights" which allegedly exist are often said to be "inviolable" or "inalienable" while they exist.

The concept has even infected dress. Thus, apparently I can assert that I have a civil right to wear the clothes I am now wearing. A decade or two ago it became briefly fashionable in London for women to wear earrings made of shrivelled human foetuses. Mrs Thatcher, who did not know overmuch about philosophical concepts, but did have a clear idea of what she approved of, passed laws to make the practice illegal. Thereupon, there was formed a committee of concerned persons, who were for the most part harpies, and included Miss Margaret Drabble, which accused Mrs Thatcher of infringing their civil rights.

Professor AJM Milne says: "Human rights are universal *moral* rights",[3] (emphasis his). Mr John Kleinig asks the question:

"Nevertheless, the fact that human-rights talk has been cut free from its moorings in natural law vocabulary leads us to pose the serious question whether it is now a ship adrift on the sea of political rhetoric, at the mercy of this or that 'ideological wind' ".[4]

It is not difficult to agree with writers such as these who see civil (or human) rights as moral ideals or as political slogans, but are they legally meaningful concepts?

In the face of the advancing flood of assertions of civil rights it behoves us to ask ourselves what it all means. What is a "right"? When does a normal right become "civil" or "fundamental"? Those who are most vociferous in their assertion of rights at least imply, if they do not express, that it is something with which no law-making body, not even Parliament itself, may tamper, hence "inviolable" and "inalienable". Thus, the unspeakable

Drabble sought to assert that Mrs Thatcher was legally unable to pass a law to curtail or extinguish the sale of foetus-earrings.

But the first, and most remarkable, fact about a right in our system of law is that it can never be an absolute; it can never be the entitlement, come what may, to do something; it must always yield to the principle of Parliamentary Sovereignty. In this respect, rights can never be regarded as inviolable or inalienable. Thus, in a very real sense, a "right" is no more than an entitlement to do something which neither Parliament nor the common law has forbidden. I can only wear what clothes I am wearing because Parliament has chosen not to pass a Sumptuary Act preventing me. And a "civil right" is only such an entitlement with a flattering adjective: whilst a "fundamental right" is such an entitlement with an even more flattering adjective.

A supposed "right" may, and very often will, have a strong political or moral basis, or both. Yet other supposed rights, like the right asserted in the American Constitution to "the pursuit of happiness", have no meaning at all.

I should like to examine a little more closely two of these alleged rights: the so-called "right to strike", and the "civil rights" allegedly involved in the abortion debate.

First, the right to strike. That such a right exists at all used to be constantly asserted. Today, less so. It is a particularly interesting example of "civil rights" because, it seems to me, it could not possibly exist; indeed, its very assertion is a contradiction of the law. When an employee takes employment with an employer, he undertakes a contract. The terms of that contract can be ascertained by the normal rules of contract, together with any industrial awards which might be applicable; but that it is a contract can hardly be gainsaid. A contract to do what? Surely, a contract to work. A strike is a refusal to work. A refusal to work cannot be other than the commission of a breach of that contract. That has been held to be the position by the House of Lords, but it hardly needs strong authority to reach this conclusion.[5] There is a maverick decision in New South Wales of Macken J to the contrary;[6] and there may be some very exceptional cases where the withholding of labour may not amount to a breach of contract, e.g., when the work is illegal, or possibly highly dangerous for the employee. But I do not know of any lawyer, however progressive, who would deny that a strike necessarily involves a breach of contract.

That, of course, is not the end of it. It will usually involve a tort as well: for example, an incitement to commit a breach of contract, or a conspiracy, or intimidation. How, then, can one in any meaningful legal sense, have a "civil right" to commit a legal wrong? It would be more accurate if those who supported the concept adopted the language of one of their brethren, Mr K D Ewing, who described it as "what would be regarded on the streets as a basic human right",[7] thus adopting the language of politics rather than law. (There would be some streets, needless to say, whose pedestrians might be disposed to take a less indulgent view). Nor, I think, need it be stressed that the same would be true of lock-outs, although I have never heard anyone, on the streets or off them, advocate a civil right of lock-out.

Now, for the "rights" involved in abortion issues. The opponents of abortion are often given to the proposition that all abortions are an infringement of the "right to life", a civil right of fundamental importance. Whilst it is not difficult to see the moral strength of such a view, it is not one which commands any legal strength.

In the first place, so long as the common law maintains its traditional view that human life commences at birth, a mere embryo , or a mere foetus, can have no legal "right to life", nor any other right. This consideration is supported by the fact that at common law an abortion

was not murder, although it may have been a common law misdemeanour.

Those in the opposite camp assert equally indefensible positions: insofar as one can understand what they are saying, they are asserting a civil right to control their own bodies. Abortion has been a criminal offence for many decades, and a woman can no more as of right have an abortion outside the common law exceptions to the crime, than she can as of right commit any other crime. If it is any consolation for her, no person, male or female, has complete control of his body: it used to be a criminal offence to commit suicide, the ultimate act of control over one's body, and traces of that law still survive.[8] Indeed, if *R v. Brown*[9] be correct, none of us has even the right to commit a serious act of self-mutilation; if public policy prevents one from consenting to another mutilating one, must not the same public policy prevent one from doing it to oneself?

One remarkable feature of those who insist on the civil right to own their own bodies is that they seem largely to consist of a herd of bearded lesbians, for whom presumably the problem of an abortion will never arise. Another remarkable feature of the pro-abortion lobby is that they clothe their arguments in language of impenetrable obscurity. Consider, for examples, the following:

"On its most viable reading, the Australian law, in requiring women to defend themselves against foetuses, is requiring women to justify their choices by reference to an individualising rights based model. As such, the legal rulings to date have merely been, at best, attempts to favourably accommodate women within this (male) theoretical practice. But this is already to be prejudiced! And at worst, we are handed a decision, such as Newman J's in *Superclinics*, which effectively relegates a woman's autonomy, to freely determine the course of her own life, to the dictatorial whim of the medical profession".

These musings come from the pen of a Mr Christopher M Tricker.[10] They underline the ease with which post-modernistic feminist legal thought slides into incomprehensibility – and split infinitives.

"Civil rights", on this analysis, can have little or no meaning in ordinary law. However, there is one context in which it may be capable of legal significance, and that is in constitutional law. The factor which prevents civil rights being inviolable is parliamentary sovereignty: if parliament can amend or abolish a so-called "civil right", it can hardly masquerade as inviolable. But if it be enshrined in a Constitution, so that it can only be altered within certain stringent conditions, there is some point in calling it an inviolable "civil right". The Constitution of the United States, adopting a Bill of Rights, contains many examples, the Australian Constitution very few. One example in Australia is afforded by s.92 of the Constitution, which affords freedom to all acts of interstate trade, commerce and intercourse. That can be altered, but only by such referenda as are needed to alter the Constitution.

There are two major disadvantages in such constitutionally entrenched civil rights. First, they are productive of seemingly endless litigation. The Constitution of India, where litigation is taken seriously, bristles with constitutionally entrenched rights, and in 1971 the average waiting time for a case involving "civil rights" to be heard was 20 years. It is now probably worse still. This is excessive, even by the standards currently obtaining in New South Wales.

Secondly, civil rights are exquisitely difficult to define with any precision. The Constitution of the United States has an entrenched Bill of Rights, and if one takes any of those rights as an example one will see what I mean.

In *Braunfield v. Brown,*[11] it was held that the First Amendment did not permit an Orthodox Jewish merchant, who recognized Saturday as his Sabbath, to disregard the Sunday closing laws. In *United States v. Lee,*[12] it was held that to require involuntary Amish participation in the social security system did not violate the First Amendment. In *Wisconsin v. Yoder,*[13] it was held that a law requiring compulsory school attendance for Amish – which was in contravention of Amish beliefs – violated the First Amendment. As a distinguished ex-Judge said, speaking extra-curricularly:

"Such judicial work not only strikes me as ignoble. It also bogs the Court down in endless permutations of factual situations each requiring separate adjudication by reference to the assumed meaning of a slogan devoid of real content. I once took the trouble to peruse the U.S. law reports in search of a sample of rulings on the First Amendment guarantee of the right of free speech. The line between behaviour which may be prohibited by law without offending the guaranteed right on the one hand and behaviour which is immune from interference because the First Amendment protects it has been solemnly drawn as follows. The right of free speech protects utterances of a coarse nature but not speech likely to provoke fisticuffs. It protects the man who limited his picketing, no matter how offensive, to the footpath, but not if he takes one step onto private property. The possession of obscene materials in the home is protected but not the carriage of the same materials in a closed bag on a public aircraft. It is legitimate to insert advertisements for abortion services in the press, but the display of political advertisements on public transport is not protected and can be validly prohibited. You may wear the U.S. flag on the seat of your pants with impunity, but burning it can be made an offence".[14]

In Australia, there are to be found in the Constitution very few express, or necessarily implied, civil rights in this sense. One is the right which I have already mentioned to freedom of trade, commerce and intercourse between the States guaranteed by s.92. After nearly 100 years of federalism, nobody yet knows what this means. This is not because opportunities have not existed for the High Court to tell us. Nor is it because they have not tried to.

That is as far as things go, if one extends one's labours to the text of the Constitution. What has now happened is that the High Court has begun reading into the Constitution civil rights which are certainly not overtly mentioned there, nor which are necessarily implied there on any ordinary rules of construction, but which are "implied" because the current judges of the High Court regard them as indispensable democratic rights. In *Nationwide News v. Wills,*[15] and *Australian Capital Television Pty Limited v. Commonwealth,*[16] the High Court, in various ways, has discovered that the Constitution guaranteed "a right to freedom of communication on matters relevant to political discussion". In *Leeth v. Commonwealth,*[17] there has emerged a new right to equality of legislative and executive treatment, although the judges could not agree what it meant in *Deitrich v. R,*[18] an implied right to a "fair trial" (meaning several adjournments until one can secure counsel of one's choice). And in *Theophanous v. Herald & Weekly Times*[19] and *Stephens v. Western Australian Newspapers,*[20] the High Court has invented a right to be free from the laws of defamation. In these two cases the majority disregarded what McHugh J said:

"It is not legitimate to construe the Constitution by reference to political principles or theories that find no support in the text of the Constitution. A constitutional doctrine is unacceptable unless it is based on some premise or premises that is or are contained in the Constitution itself".

What the High Court has done is enact a new s.92A.

These cases seem to me difficult to defend. First, they defy all the known rules (connected with *The Moorcock*[21])for detecting implications in a document. Any person who read the Constitution and asked himself the traditional question: "Does it guarantee a right to freedom of communication?", would have some difficulty in answering, "Of course". Secondly, every newly-discovered implied right is *pro tanto* a derogation from the sovereignty of Parliament, which is not only the recognized source of legal power but also expressly recognized as such in the Constitution itself. Thirdly, and as a converse of the above, the new doctrines are undemocratic.

In the *Australian Capital Television Case*[22] the Court seemed to recognize some implication of free speech to the regular transmission of information, so that to curtail political advertising prior to an election would be a breach of the implication, but the point of view that last-minute political advertisements trivialise political debate, distort the truth and misinform the electorate was barely considered. So we have an entrenched civil right to listen to rubbish. Whether such a point of view is valid is surely a question to be decided by an elected Parliament rather than by an unelected judiciary.

This point has been made by Sir Garfield Barwick, who said:

"It would be quite fair to say that those liberties which were spoken of earlier – freedom of speech, of association, of movement, etcetera – are far more secure under a Westminster system of parliamentary democracy than they are in the United States of America where they are in the hands of and subject to the vagaries of the judiciary. This until recently could also have been said of the position of those liberties in Australia. Our liberties could be protected by ourselves. But recent decisions of the High Court have implied a constitutional individual right of free speech and by doing so have reduced the sovereignty of the Parliament, withdrawn from the community its heretofore democratic control of its liberties and vested it in an unelected and unrepresentative judiciary. The Parliament cannot overturn such decisions even though in truth they may be unwarranted in law. It is exclusively a judicial function to construe the words of the Constitution. Like the entrenchment in the American Bill of Rights, this is an undemocratic step".[23]

One could go further, I think, than even Sir Garfield Barwick did. The basis asserted by the High Court for manufacturing novel civil rights is that they are necessary for the maintenance of a normal democratic society. That is what they assert. But do they really, the civil rights which I have listed, do they really help the average citizen? Do they help a democratic society? If you take the *Australian Capital Television Case,* for example, which said that there is a right of political discussion which can't be curtailed by the Parliament, who is going to be the beneficiary of that? It's not you or me. It is the press.

Likewise, if you look at the defamation cases, like the *Theophanous Case,*[24] which say that there is a freedom from the rules of defamation, who is going to be the beneficiary of that? Again, it is not you or me. It is the press. It is surely the position that the media moguls in Australia, as elsewhere, are sufficiently powerful not to need further protection by judges. They were said by Baldwin to be "the whores of society, who exercised power without responsibility". Why should the judges give them more power and less responsibility?

Although the Court has subsequently revisited *Theophanus* and *Stevens* in *Lange v. Australian Broadcasting Corporation*[25] and retreated from its hoisted petard of the constitutional defence, to put in its place the notion that qualified privilege extends to publication of matters to the world at large of or about public office and its officials, is,

would have thought, of cold comfort in a democracy. Further, to broaden the common law defence of qualified privilege, thereby extending a constitutional right to freedom of communication over defamation, can only afford greater protection to the press and her masters. Is this really a reasonable and appropriate exercise of judicial power?

Fourthly, it seems odd that the newly-discovered implied rights should have gone undetected for the almost 100 years during which the Constitution has existed without any observer having suspected their existence; suspiciously odd.

Fifthly, the new doctrine has an irrational basis. The framers of the Constitution had before them various formulations of the rights of man. They knew that a Bill of Rights was incorporated into the Constitution of the United States. They decided they did not want to follow that path. They opted for the alternative, government by an elected Parliament. By what means can one re-imply that which has been consciously rejected? As Mason CJ said in the *Australian Capital Television Case*:

"It is difficult, if not impossible, to establish a foundation for the implication of general guarantees of fundamental rights and freedoms. To make such an implication would run counter to the prevailing sentiment of the framers that there was no need to incorporate a comprehensive Bill of Rights in order to protect the rights and freedoms of citizens. That sentiment was one of the unexpressed assumptions on which the Constitution was drafted".[26]

Exactly. His younger colleagues have, however, achieved the impossible.

Sixthly, the new implications are unpredictable. How does one know what will be next conjured up out of the constitutional void? Will it be a civil right to social security payments? Or a right to the pursuit of happiness? And, in the peculiar reasoning involved, is one to disregard the values which the framers actually had while concentrating on those which modern "progressive" judges wished they had? Our founding fathers were monarchist to a man; theists as well; and they certainly thought the States of greater importance than the Commonwealth. Are these facts to be considered in formulating newly-emerging civil rights? If not, why not? And if so, how?

Finally, the process of discovering the new rights is idiosyncratic. It seems to go something like this: a judge says to himself that the right in question is essential to the ideal working of a representative democratic state, therefore the founding fathers must have been of a like mind, therefore (whether they wanted to or not) they injected it (all unseen) into the Constitution. Really!

We are thus moving to the position where we have more "civil rights" than countries which have an express Bill of Rights, and where the only legal content of a "civil right" depends on the imagination of the High Court.

"Civil rights" do not exist, except to the extent that they are manufactured out of thin air by the High Court, which acts like a sort of legal Doctor Coppelius, fashioning delicate and novel toys – and, one hopes, ephemeral toys at that.

Endnotes:

1. Maritain, J, *The Rights of Man: a Scheme* (1944), cited in Dowrick, FE (ed.), *Human Rights: Problems, Perspectives and Texts* (Durham, 1978), pp.148-9.
2. Kleinig, J, *Human Rights, Legal Rights and Social Change*, in Kamenka, E & Tay, AES (eds), *Human Rights* (Port Melbourne, 1978), p.40.
3. Milne, AJM, *The Idea of Human Rights: a Critical Inquiry*, in Dowrick, FE (ed.), *op. cit.*, p.24.

4. Kleinig, J, *op. cit*., p.38.
5. *Miles v. Wakefield MDC* [1987] 1 All ER 89 at p.97 *per* Templeman LJ.
6. *Re Federated Storemen and Packers Union of Australia, NSW Branch* (1987) 22 IR 198.
7. Ewing, KD, *The Right to Strike in Australia*, in *Australian Journal of Labour Law*, Volume 2 (1989), 18 at p.30.
8. See s.31C, *Crimes Act, 1900* (NSW).
9. [1993] 2 All ER 75, [1993] 2 WLR 556, [1994] AC 212.
10. (1995) 17 *Sydney Law Review*, 446 at 457.
11. (1961) 366 US 599.
12. (1982) 455 US 252.
13. (1972) 406 US 205.
14. Glass JA, and pseudonymously in Benjamin, S, *Discord Within the Bar and Sherman for the Plaintiff* (Sydney, 1981), pp.150-1.
15. (1992-3) 177 CLR 1.
16. (1992-3) 177 CLR 106.
17. (1992) 174 CLR 455.
18. (1992) 109 ALR 385.
19. (1994) 124 ALR 1.
20. (1994) 124 ALR 80.
21. (1889) 14 PD 64, [1886-90] All ER Rep 530.
22. (1992-3) 177 CLR 106.
23. Barwick, Sir Garfield, *Parliamentary Democracy in Australia*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 5 (1995), pp.13-14.
24. (1994) 124 ALR 1.
25. (1997) 145 ALR 96.
26. (1992-3) 177 CLR 106 at 136.