RIGHTS PROTECTED BY STATUTE AND BY THE COURTS

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This piece focuses upon legal rights and duties, particularly the similarities and dissimilarities between parliamentary and judicial 'protection' of rights. Many rights stem from moral or religious duties which may not be co-extensive with legal duties.

Morality underpins the law and is, in turn, reinforced by law. Most people refrain from murder because they believe it to be seriously wrong and/or a sin against God. In some areas, morality alone rules, though things can change over time and space. In Australia, adultery is not a crime and no longer even an actionable civil wrong or a ground for dissolution of marriage. A generation or two ago, it was considered discourteous to refuse a cigarette; nowadays, it is morally wrong to smoke in some places and legally wrong to smoke in others.

Lawyers fool themselves if they think that law is the sole protector of rights or if they are blind to the role of religion, morality, education, family nurture, financial incentives, general customs and simple good manners in protecting and reinforcing legal and other rights. Conversely, moral or religious pressures may undermine the legitimacy and effective enjoyment of legal rights. In some areas the law is a dead letter. In others, would-be martyrs queue up for the opportunity to shame those involved in the enforcement of outdated and morally questionable laws.

Respect for the rule of law and enjoyment of rights of security, freedom, property and personal safety would break down without military, police and law enforcement personnel acting efficiently and fairly. The rich and powerful may fare better than others in anarchy, but this would stem from their access to naked power, it would not be the consequence of legal rights. The protection stemming from a Bill of Rights in a corrupt dictatorship is paper thin.

Some legal rights are poorly protected because insufficient funding is devoted to investigation and enforcement and because they do not lend themselves to self-help. Some duties may only be enforced by public officials, and public officials have the capacity to discontinue private prosecutions.

Day to day protection of rights is the function of the executive arm. Courts nevertheless play a vital role in declaring the legal rights which the executive branch seeks to enforce and applying them in particular contexts. The threat of litigation or prosecution also deters would-be wrongdoers. In this sense, courts

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enforce rights stemming from legislation, delegated legislation and the common law. Their role is vital, but different to that of the executive, albeit that the judicial and executive arms are dependent on each other in various ways.

Legal rights are important, but not the whole picture. And legal rights are to be enjoyed and not just viewed on paper.

Each arm of government makes law that is the source of rights. Parliament enacts statutes; the executive makes delegated legislation; courts maintain and develop the common law. But each law-maker has a different source of constitutional authority, uses different methods and has different competencies. These differentials bear upon the types of laws emanating from each arm and the rights they protect.

The *grundnorms* of law-making authority may be lost in the mists of time and jurisprudential wondering. Chicken vies with egg in ascertaining the contributions of the naked power of 'the Crown', custom, the common law, 'the people', formal constitutions and mere statutes. These matters apart, we know that a (valid) statute trumps common law and sets the bounds of executive power. We also know that courts in a democracy hold the ring, both in principle and reality. Judges resolve conflicts of authority among all would-be lawmakers (international, national, state, local, executive and judicial). And judges make definitive interpretations of existing laws as they are applied in particular contexts. Court orders are enforced unless it is impracticable to do so.

The judicial method is explored in other articles in this Issue. For my purposes, it is sufficient to observe that courts are dependent on the vagaries of litigation for their opportunities to 'make' law. But when opportunity knocks, courts cannot pass or defer the chalice of decision-making. If a litigant with standing tenders a justiciable dispute to a court with jurisdiction to determine it, then the court must pronounce judgment, although in some areas relief may be refused on principled discretionary grounds. Hard issues necessarily arising for decision cannot be shelved or ignored.

On the other hand, courts cannot initiate law-making opportunities in the way the Parliament and the executive can. They are dependent upon litigants to launch or prosecute claims and to press those claims in the appellate courts whose rulings make the precedents that confirm or establish 'the law' and the rights dependent upon law.

These constraints are significant. So too are constraints upon innovation stemming from the 'common law method', including doctrines of precedent and the capacity of higher courts to overrule the decisions of judges lower in the judicial hierarchy.

Statute may trump common law, but the judges have a lot going for them. Common law rights are not easy to displace. Why is this so? The corpus of the common law is vast, complex and relatively inaccessible. Its guardians are the judges, the very referees who interpret the precedents and construe the statutes that impinge on the common law. Those with the role of drawing lines tend to favour their own perception of 'the good' when there is a close call to be made. Judges are past masters, all the more so because the interpretive rules are themselves part of a judicial armoury. These interpretive rules are the judges'

own handiwork and they include a plethora of presumptions, maxims and 'fundamental' doctrines that are difficult to displace when courts are faced with encroaching legislation. With these tools, courts jealously guard important common law rights.

Statutes may be 'read down' (ie narrowly construed or just ignored) if they threaten significant and dearly-loved common law principles such as fairness of trial and administrative procedures, property rights, non-displacement of vested rights, non-encroachment upon the judicial function, 'privileges' against self-incrimination and breach of lawyer-client confidentiality. To meet this, Parliament may have to go to extreme lengths to express clearly its intent to supplant the status quo, especially in core areas such as those mentioned above. If it does, the courts will bow – provided the statute is held to be within Parliament's constitutional competence.

It would, however, be quite wrong to infer that a state of war exists between Parliament and the judiciary. Individual players might grumble quietly and, occasionally, openly. An unwanted burst of judicial 'activism' may draw a hostile public response from legislators, especially ministers. ('Wanted activism' seldom draws public praise.) Courts may respond with threats of contempt. Things usually settle down quickly.

Of enduring significance is the open and reasoned dialogue between Parliament and the courts. Parliament enacts statutes designed to modify existing rules. Courts construe and apply them or borrow from them in developing common law principles. Judicial decisions demonstrating gaps may encourage an advance by Parliament; those that manifest hard and unintended outcomes may encourage a partial legislative retreat. *Obiter dicta* from judges may give advance warnings that can be heeded before damage is done. Sometimes, the executive will respond to an unwanted ruling by appealing to a higher court seeking the overruling of a decision that goes too far in promoting particular rights. If all else fails, legislation can be introduced. Chief Justices are sometimes consulted before this is done, particularly in areas touching court procedures and access to justice.

Historically, courts have developed and protected particular types of rights. In these areas Parliament has tended to keep its interference to a minimum. And it is within these areas that courts have demanded clear signals before acknowledging the displacement of common law by statute. The main categories have already been mentioned.

Statute is the primary mechanism for addressing equality rights and rights stemming from international law or dependent upon the expenditure of public money. These include anti-discrimination and affirmative action rights, rights to minimum standards of living and refugee rights. Tribunals are often used rather than courts in these areas. The right to a welfare payment may ultimately be litigable in the courts, but this is merely a reflection of its statutory derivation. Courts interpret legislation expansively in these areas.

One reason why statute is the vehicle for advancing these 'newer' rights is that, by definition, they are not aspects of 'the good' which judges have traditionally addressed. There is, therefore, no corpus of common law in these fields. Widespread public acceptance and reinforcement by way of moral

sanctions may also be lacking. Judicial reluctance to recognise a right of privacy is a good example of this phenomenon. Statute is the primary vehicle for changing public attitudes and advancing into controversial areas. Courts cannot create new criminal offences.

Is it possible to detect broad patterns about the respective law-making role of Parliament and the courts? Do the traditional areas of law-making reflect the different methodologies and competencies of the law-makers? Are there patterns which help explain why the two arms tend to respect and defer to the other in core areas? I believe that such patterns can be detected. They emerge from an examination of the strengths and weaknesses of judicial law-making and the processes of the common law method.

The Courts' strengths include:

- Courts tend to know more than Parliament and its advisers about the law in traditional common law fields. The arcane complexity of, say, contract or restitution law, is not easy to grasp and legislators are rightly cautious about dominating such fields. 'If it ain't broke, don't fix it' generally prevails. Statutes tend to tinker at the edges.
- Courts have more time to reflect upon difficult issues in context and with the benefits of the adversary system. Deciding liability in a tort case or the sentence for a crime requires close attention to particular facts. This is usually seen as a strength, although recent signs of parliamentary concern about the outcome of individual cases has led to some strangling of judicial discretion.
- Judicial independence protects judges from some public criticism and, possibly, from short-term swings in popular opinion. 'Hard' decisions are easier to make in such a context. Parliament and the executive may be happy to pass the making of hard decisions to the courts in some areas, enjoining judges to do their best in deciding what is 'just and equitable' in the particular case.
- The judiciary's law-making agenda is not set exclusively by the executive arm. Private litigants with 'causes' may bring up controversial issues that the politicians would prefer to keep off the agenda. A sharp judicial shift in response to litigation initiated by non-governmental interests (eg the recent recognition of native title) may force legislative intervention to tidy up rough edges and control the risk of future disturbance in that area.

The weaknesses of judicial law-making include:

- Courts have limited time and resources for prolonged investigation of complex social issues. Despite research assistance, interveners and access to a world wide web of decisions from courts overseas, judges are not law reform commissioners.
- The ad hoc nature of litigation often presents a blinkered view of issues and their wider impacts.
- Judges may be slow to perceive the economic or social impact of their decisions. They may do so in the long term, but this may be too late if, say,

a pattern of decisions provokes an insurance crisis or a huge drain upon public money.

- Judges must apply 'the law'. This severely limits their capacity for principled innovation. Faced with an unpalatable but legal outcome a judge must apply the law. This is simply part of the job. It is also a strength, because of the legitimacy it confers upon individual decisions, however unpopular or counter-cultural they may appear. The most that a judge can do is to draw attention to problems with the existing law and perhaps suggest a legislative solution.
- The corollary of the previous point is that 'bad' judicial outcomes are not easily put aside through the common law method. Appeals to higher courts may adjust problems or create new ones. But once a particular rule is stated authoritatively it cannot easily be dismantled. Awkward precedents cannot always be ignored or 'distinguished'. The comparative immovability of the common law is not always a strength.
- The common law lacks appropriate transitional tools. It can change, but not prospectively. A shift in legal principle (including constitutional or statutory interpretation) operates retroactively. It cannot be phased in gradually.

I have not addressed the comparisons between a Bill of Rights and mere legislation. An entrenched Bill of Rights will prevail over both legislation and the common law. This brings its own set of opportunities and problems, many stemming from the fact that courts will be involved in the adjudication of disputes. Most of the strengths and weaknesses of judicial decision-making that I have highlighted will apply. The opportunities for judicial 'law-making' in the area of constitutionally entrenched legal rights is a major reason why many are cautious going down this path.[1]

1 I have endeavoured to wrestle with matters of general principle without the distraction of footnotes. To those who may be concerned about a law review article without footnotes, I refer to the body of writing on that topic. See Charles R Maher, 'The ¹*Infernal Footnote²' (1984) 70 *American Bar Association Journal* 92; Abner J Mikva, 'Goodbye to Footnotes' (1985) 56 *University of Colorado Law Review* 647; Herma Hill Kay, 'In Defence of Footnotes' (1990) 32 *Arizona Law Review* 419; Lindsay T Thompson, 'Homage to Robert Benchley – A Short History of the Footnote' (1991) 1 *Bar News Law Review*; Edward R Becker, 'In Praise of Footnotes' (1996) 74 *Washington University Law Review* 1; Liz Fisher, 'Some Notes on Footnotes' (1997) 71 *Australian Law Journal* 245.