

**LAW COUNCIL OF AUSTRALIA**

**INTERNATIONAL LAW SECTION**

**HONG KONG CHAPTER**

**HONG KONG 16 JUNE 2016**

**HUMAN RIGHTS: THE BASIC LAW AND THE AUSTRALIAN  
CONSTITUTION**

**MURRAY GLEESON**

1. It is a pleasure to take part in this activity of the Law Council of Australia; an institution that has grown enormously during my time in the law.
2. Fifty years ago, as a young barrister, I was the Honorary Assistant Secretary of the Law Council. In those days it had a very modest establishment. The Executive consisted of the Honorary Secretary (who was the in-house counsel of a large tobacco company), myself, and a stenographer who worked two days a week. Years later I represented the New South Wales Bar on the Council, and later still was made an Honorary Life Member.
3. Fifty years ago China was a closed society. In 1966, the Cultural Revolution was launched.
4. Fifty years ago, I made my first visit to Hong Kong, on the way to London for my first appearance in the Privy Council. Hong Kong was a British Crown colony, with a rapidly expanding population. In 1945 the population was 600,000. Then followed a civil war. In 1960, the population of Hong Kong was 3 million. In 1966 it was still growing.

- 
5. Historical context is important for my topic: a comparison of two different approaches to a subject that has become of major interest to lawyers. Since the 1980s, the matter of human rights has overtaken subjects such as property, contracts, torts, and criminal law as the principal theme of jurisprudence in many common law jurisdictions. To test that proposition, select a volume of the Appeal Cases from, say, the 1920s, then select another from the last ten years, and look at the index of each.
  6. Human rights are not newly discovered. The French Declaration of the Rights of Man covers many of the topics that are found in modern rights instruments. When Americans talk of their “constitutional rights” they are usually referring to a series of Amendments introduced over an extended period. However, following the upheavals in Europe earlier in the twentieth century, during the 1980s and 1990s there was a wave of human rights declarations and legislation, international and national. The Hong Kong Bill of Rights Ordinance in 1991 gave the provisions of the International Covenant on Civil and Political Rights (ICCPR) effect as part of Hong Kong’s domestic law, just as the Human Rights Act 1998 of the United Kingdom gave domestic effect to the European Convention on Human Rights.
  7. This pattern of international instruments, and domestic legislation, also became influential, directly and indirectly, in judge-made law.
  8. Legislation is one thing; constitutional entrenchment of rights is another. Constitutions typically limit the law-making power of legislatures, and enable (and oblige) judges to rule upon the validity of legislation and upon the lawfulness of executive action. When a right, or a freedom, is created or protected by an Act of Parliament, or by judge-made law, then Parliament may, if it sees fit, alter, qualify, or

---

even remove the right or freedom. When the right or freedom is constitutionally entrenched, Parliament is bound by what is in the Constitution, and judges (in Australia, the adjective “unelected” is often added at this point) have the power and responsibility of ruling upon whether legislation conforms to the requirements of the Constitution. Furthermore, constitutions are difficult to amend.

9. The Basic Law is the Constitution of the Hong Kong Special Administrative Region. It was brought into effect on 1 July 1997 by virtue of its adoption by the National People’s Congress of the People’s Republic of China. In 2010, then Chief Justice Li, in a Foreword to Ramsden & Jones, Hong Kong Basic Law, Annotations and Commentary (Sweet and Maxwell, 2010) wrote:

“As from reunification on 1 July 1997, Hong Kong entered a new constitutional order as a Special Administrative Region of the People’s Republic of China under the principle of ‘one country, two systems’ governed by the Basic Law.”

10. The Basic Law came into being in a very special politico-legal context, but also in the wider context referred to above. Chapter III deals with Fundamental Rights and Duties of the Residents [of the Hong Kong Special Administrative Region]. Its articles deal, for example, with equality before the law, freedom of speech, freedom of the press and of assembly, privacy, freedom of movement, freedom of commerce and freedom of religious belief, and they prohibit arbitrary arrest, detention and torture. Article 39 imports the ICCPR and certain other international instruments, and the Hong Kong Bill of Rights.
11. Judicial review of legislation when it is challenged as infringing the Basic Law is commonplace, and is undertaken by the courts, and especially the Hong Kong Court of Final Appeal, in a manner familiar

---

in human rights jurisprudence. The following extract from the judgment of Ribeiro PJ in *Kong Yunming v Director of Social Welfare* (2013) 16 HKCFAR 950 illustrates the process:

“[S]ome rights are non-derogable and absolute, in which case, no infringement is permitted and no question of proportionality arises. But in other cases ... the law may validly create restrictions on a constitutionally protected right provided that such restriction can be justified on a proportionality basis.

The starting point is the identification of the constitutional right engaged ... The next step is to identify the legal or administrative measure said to infringe or restrict that right. ... The Court then asks whether that restriction pursues a legitimate societal aim, and, having identified that aim, it asks whether the impugned restriction is rationally connected with the accomplishment of that end. If such rational connection is established, the next question is whether the means employed are proportionate or whether, on the contrary, they make excessive inroads into the protected rights.”

12. That kind of judicial review of legislative action in order to uphold constitutionally entrenched standards is not the way Australia deals with human rights issues generally.
13. Judicial scrutiny of legislation where its constitutional validity is challenged is also commonplace in Australia. There has never been, in Australia, a sovereign Parliament with unlimited law-making power. Prior to Federation, the colonial legislatures all had limitations to their powers. Colonial courts, and ultimately the Judicial Committee of the Privy Council in London, enforced those limitations; where necessary declaring legislation invalid. The grounds of invalidity, however, were unrelated to human rights considerations. Normally they arose

- 
- out of restrictions imposed by the United Kingdom Parliament on the authority of colonial governments or of colonial administrations.
14. The Australian Constitution came into force on 1 January 1901, as an enactment of the United Kingdom Parliament. It was not the outcome of a war, or a revolution, or a struggle against oppression. It came into being in order to give effect to the agreement of the people and governments of a number of British colonies to unite in a federal union. Those colonies enjoyed varying degrees of self-government, and none was sovereign. There was no written constitution in the United Kingdom. On the other hand, a federal system of government requires a written constitution in order to define the relationship between the constituent parts of the Federation and, in particular, to allocate legislative power as between the central authority and the authorities of the States or their counterparts (in the case of Canada, the Provinces).
  15. The Australian Constitution was largely (although not completely) drafted in Australia, and approved by the colonial parliaments and by a referendum process. Australia was part of the British Empire; a matter of vital importance to its defence and foreign relations. The framers of the Constitution regarded themselves as British. They admired British institutions. In the United Kingdom, and in Australia, at the beginning of the twentieth century people looked to Parliament and to the common law to protect their rights and freedoms; not to broadly stated declarations of human rights. The framers did not set out to make the Constitution a charter of rights and freedoms. To have done that would have been inconsistent with the politico-legal context in which the instrument was prepared, and contrary to the legal culture which the colonies inherited. The Constitution was essentially a structural plan for a federal system of government.

- 
16. In 2001, in a speech to the Australian Association of Constitutional Law, Sir Anthony Mason said:

“The Australian Constitution is a prosaic document expressed in lawyer’s language which ... would have done credit to a memorandum and articles of association drawn for a nineteenth century corporation ... In essence it defines and delimits the powers of government. It distributes the powers of government vertically between the Commonwealth and the States, making provision also for the Territories, and it distributes the powers horizontally between the three branches of government [legislative, executive and judicial].”

17. Naturally, an instrument which defines and delimits governmental power may in the course of so doing include provisions that create or protect rights and freedoms. An example is the conferral of power on the Federal Parliament to make laws with respect to the acquisition of property “on just terms”. Another is the power (introduced by amendment) to make laws with respect to the provision of certain health services “but not so as to authorize any form of civil conscription”.
18. In keeping with the rights-conscious spirit of the modern age, the provisions of the Constitution in relation an elected Parliament were found, later in the twentieth century, to imply a constitutional guarantee of freedom of political expression. The provisions in relation to the Judicature have been seen as a source of certain rights of due process. On the other hand, a provision that looks like a guarantee of trial by jury has been given a much more limited effect.
19. Much of the litigation involving judicial review of legislative action has arisen out of exactly what would have been expected of an instrument of this nature, such as disputes, often between the States

- 
- and the Commonwealth, about the meaning of the provisions conferring and limiting the power of the Parliament of the Commonwealth to make laws.
20. One important conclusion that has been drawn from the structure of the Constitution itself is that it mandates a high degree of separation of powers between the three branches of government at the Commonwealth level. This has had far-reaching consequences for the Australian apparatus of government.
  21. One express provision of particular significance is section 75, which confers on the High Court of Australia original jurisdiction (which, because it is in the Constitution and not legislation, cannot be withdrawn or modified) to make certain kinds of order against “an officer of the Commonwealth” to enforce compliance with the law or to restrain breaches of the law. This provision ensures that the Executive government is subject to the law. It enshrines the rule of law. Subjection of the Executive government to the law as declared and enforced by the courts is the crucial difference between the rule of law and what is sometimes called rule by law.
  22. Extensive constitutional entrenchment of broadly stated human rights, of the kind found in the Basic Law, is not the way the Australian body politic has dealt with the issue. Substantially, although not entirely, protection of rights and freedoms has been left in the hands of democratically elected parliaments, and the common law which, of course, can be (and often is) altered by Parliament. Placing rights beyond the reach of Parliament creates what is sometimes described as a democratic deficit. It is something with which many legal and political commentators are, to say the least, uncomfortable.
  23. Australians often are taken aback by the kind of decision-making that, in the United States, is accepted as the responsibility of the Supreme

- 
- Courts. There are issues which are presented in public debate as issues of human rights (the word “right” is sometimes used to describe what are, in truth, contestable claims) that, on the Australian approach, are better resolved by the political process than by judicial decision. The outcome of the political process may not be to everyone’s liking, but people generally accept it as part of what is involved in living in a liberal democracy. They may be less accepting of judicial resolution of such issues. The rule of law does not imply rule by lawyers.
24. The Parliament of one Australian State, Victoria, in 2006 enacted a Charter of Human Rights and Responsibilities Act (which, of course, it can amend), which requires Acts of the Victorian Parliament, so far as possible consistently with their purpose, to be interpreted in a way that is compatible with the human rights declared in the Act. Generally, however, the political class is wary of limiting legislative power by appeals to broadly stated rights.
  25. There is, in Australia, a Human Rights and Equal Opportunity Commission which is funded by, but is independent of, the Federal Government. It investigates, and reports to the Federal Parliament on, issues or complaints concerning human rights compliance and discrimination. Australia is a signatory to the ICCPR, and its legislative and administrative performance can be, and often is, measured against its international obligations.
  26. The Australian Constitution can be amended only through a process of referendum which attracts a majority of voters in a majority of States. A referendum proposal must be initiated formally by the Federal Parliament. The Federal Parliament does not have a record of enthusiasm for proposals aimed at restricting the powers of the Federal Parliaments.



- 
27. A curiosity of history worth noting in conclusion is that one of the few provisions of the Australian Constitution that looks like a broad statement of rights, and that for a period during the middle of the twentieth century was so treated by the High Court, is no longer viewed in that way. Section 92 of the Constitution declares that “trade, commerce, and intercourse among the States ... shall be absolutely free”. Of course that was intended to prohibit customs barriers between the States after Federation, but no one considered it was limited to that. How much further did its meaning extend? This was a famous source of legal uncertainty. One view that prevailed for a time was that the section was a source of individual rights to trade and, of course, to move within the Commonwealth. What does “absolutely free” connote? Much legal ingenuity went into that question. Some of the answers that were given, and were later modified, would resonate with human rights jurisprudence. The rights approach to section 92 was modified (apparently with general approval) at about the same time as human rights jurisprudence began to flourish. Freedom of movement within a union of political entities is, at present, a sensitive topic for human rights in Europe. Freedom of trade and commerce is a sensitive topic worldwide. One general declaration of such a right and freedom that found its way into the Australian Constitution caused a great deal of legal and political uncertainty.