



A lot of value in Bill of Rights

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A democracy needs a Bill of Rights to protect essential individual rights. These rights cannot and are not protected by democratically elected parliaments. Opposition to a Bill of Rights on the grounds that unelected judges will be reviewing acts of Parliament is misplaced and reflects a misunderstanding of the democratic process itself.

Parliament is a democratic institution and reflects the will of the majority. In a Westminster system of government, such as Australia's, the majority political party prevails – the main concern is the will of the people and not the interests of a sometimes unpopular minority or individual.

Frequently the desires and wishes of the majority are contrary to minority interests. Parliament does an excellent job of representing the people, but is simply ill-equipped to represent the interests of an individual who may be very unpopular. Only the judges who do not face constant re-election are equipped to protect the rights of an unpopular or even despised minority. Judges are independent because they do not need to cater to the whim of the majority. Popularly elected governments are vulnerable to the spirit of the time; they reflect the whims of the majority.

Of course, majorities are at best temporary and everyone is part of a minority from time to time. A constitutional Bill of Rights empowers the courts to assure that the rights of the individual are not stamped by a temporary majority. Both Canada and the United States enjoy a constitutional charter or Bill of Rights. The Supreme Court of Canada takes a somewhat more restrictive view of the charter than the Supreme Court of the US, but in both nations, laws are balanced against constitutionally guaranteed rights. Both are stable and successful democracies.

Some of the arguments raised in opposition to constitutionally guaranteed rights are red herrings at best. One of the favourites to raise the second amendment of the US Constitution which speaks of rights concerning firearms. This is a silly argument because no one has ever said that an Australian charter should have something like the second amendment.

Besides, the US Supreme Court has interpreted the second amendment to permit extremely restrictive state gun laws. On the other hand, the US first amendment guaranteeing freedom of speech, the press, religion and of assembly is something to which many nations aspire.

The US fourth, fifth and sixth amendments have protected Americans against laws that democratically elected governments have enacted in other countries post 9/11. Despite temporary enthusiasm for warrantless searches, rights to interrogate without the presence of a lawyer and the abolition of public jury trials in cases of terrorism, the US Bill of Rights, as enforced by the Supreme Court, stands as an immutable wall protecting the accused. While this may not be popular, it is what we would all want if we were charged with criminal conduct.

Recently, there has been talk of abolishing jury trials in some criminal trials in Australia. Americans do not have to worry about such an infringement of fundamental rights because the sixth amendment would block any effort to restrict jury trials.

However, we must also keep in mind that the mere existence of a Bill of Rights does not alone protect the minority. That protection requires the courts to be courageous even when their decisions are unpopular. A tragic case in point was the abject failure of the US Supreme Court to protect Japanese-Americans who were unlawfully deprived of their rights to due process of law and forcibly confined in concentration camps during World War II. More recently, the Supreme Court rejected laws promoted by the Bush Administration and passed by Congress that curtailed basic rights of Guantanamo detainees.

Australia has a unique chance to craft a Bill of Rights for the 21st century and beyond. Australia has the advantage of observing how they have performed in other countries such as Canada and the US. Constitutionally guaranteed individual rights do not detract from a democracy; rather these rights enhance the democracy by assuring that the individual is not trampled by the popular will.

Whether the role of the courts is expansive as in the US or more restrained as in Canada, a constitutional guarantee of personal freedoms is not something to fear but is to be cherished. Sometimes these rights are not very popular with the howling mob of popular opinion, and when it comes to protection of these rights and freedoms, give me the independent, "unelected" courts any time.

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