THE WRONGS WITH A CHARTER OF RIGHTS FOR VICTORIA

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Introduction

The Victorian Government is proposing the enactment of a Charter of Rights. In doing so, it argues for a particular model similar to that used in the United Kingdom, New Zealand and most recently, the Australian Capital Territory". According to Attorney-General Rob Hulls a charter of rights for Victoria is "the best way that rights can be protected and it's also about keeping governments honest when it comes to protection of human rights".

This government also suggests that only a bill of rights could 'get the balance right' in relation to the new anti-terrorism laws. And yet, as law professor Mirko Bagaric properly suggests, measures such as the detention of terrorist suspects can be reasonably justified on the grounds of protecting the most basic of all human rights, our right to life.

. Human Rights' Protection does not require Bill of Rights

The good old vision of every government as a 'necessary evil' justified in the Western world the adoption of a constitutional system of checks and balances for the state power. More specifically, it inspired in free nations the establishment of a constitutional division of powers, between legislative, executive, and judicial branches. Such division has been historically considered an essential measure for the protection of the inalienable rights of the citizen.

The institution of checks and balances to the state power has proved to be a far better mechanism for the protection of basic freedoms than any declaration of human rights. According to Sir Harry Gibbs, formerly Chief Justice of the High Court of Australia,

"The most effective way to curb political power is to divide it. A Federal Constitution, which brings about a division of power in actual practice, is a more secure protection for basic political freedoms than a bill of rights, which means those who have power to interpret it say what it means".

In reality, effective protection of human rights has never required any bill of rights. This fact is clearly recognised by the great French philosopher Montesquieu, for whom the genius of the English constitution was that it protected rights and freedoms in practice, rather than just in theory. The 'father' of modern legal sociology did not put blind faith in abstract legal norms. We should never forget that his major work was titled The Spirit of the Laws.

. A Bill of Rights Has Never Prevented Human Rights' Violations

Today's lawyers have a certain tendency to make exaggerate claims for what a bill of rights can deliver in terms of human rights' protection. They pay a lot of attention to abstract rights-based legal postulations, but often downplay the socio-political context in which such postulations will be applied.

However, we should not ignore that some of the most oppressive political regimes in the world have enacted glossy bills of rights. The governments of China, Cuba, Rwanda, Sudan – all of them notorious violators of human rights, have enacted extensive bills of rights. Even the former Soviet Union under the tyrannical rule of Joseph Stalin, had a quite elaborate bill of rights. Sir Harry Gibbs provides telling evidence of this fact:

"Anyone who has seen the film The Killing Fields will know that the fact that the Khmer Republic [in Cambodia] had adopted a bill of rights did not assist the inhabitants of that unhappy country. We are all familiar with the abuses that have occurred in Uganda: that country had a bill of rights on the

European model, and had judges who bravely tried to enforce it, but were unable to resist the forces of lawlessness".

As can be seen, some of the worst countries in terms of human rights' violations have promulgated impressive legal documents in all they say with respect to human rights. Such countries have no lack of formal provisions in this area. The problem, however, is the huge distance that so often separates rights inscribed on paper from their effective exercise, and, above all, the guaranty of their exercise in practical life.

When a government refuses to acknowledge the most basic principles of the rule of law, power rests ultimately not so much on formal declarations of human rights, but rather on the supremacy of the state power. A government which is not effectively subject to the institutional mechanisms of checks and balances can easily place itself above the rule of law. It can exercise power per leges (by means of legislation) but never sub leges (under the rule of law). In such cases a government may even elaborate a highly sophisticated bill of rights, but this, of itself, does not ensure that such a legal document will be truly respected. In practice it may be worth no more than the paper it is written on.

Therefore, effective protection of human rights does not require a charter of rights so much as a 'good' constitutional framework (separation of powers) underpinned by certain essential extra-legal (cultural) factors. In brief, protection of human rights depends on social values which demand a government to subject itself to rule-of-law standards of truth and justice.

. A Bill of Rights can serve as tool for undemocratic social engineering

The first bills of rights in modern history were conceived to avoid governmental tyranny. They dealt mainly with Lord Acton's aphorism that power corrupts, and absolute power corrupts absolutely.

The 1776 U.S. Declaration of Independence explicitly mentions a certain "Law of Nature and of Nature's God" so as to forbid violation of "inalienable rights" by the government. This important document for modern constitutional history solemnly declares that, "whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government".

The U.S. founding fathers regarded as "inalienable rights" basically the ones associated with the protection of human life, public security, private property, freedom of speech, freedom of association, religious freedom, and a fair and public trial. A constant in such rights is a preoccupation with the preservation of personal freedoms, and, therefore ensuring the possibility of resistance against tyranny.

However, there would appear in the nineteenth century a new generation of human rights. These rights of second generation demanded more governmental intervention, so as to guarantee by means of the state machinery that everyone must be provided with basic needs for shelter, clothing, food, health, and education.

In this sense, articles 27 to 29 of the U.N. Declaration of Human Rights have enshrined several of these socio-economic rights – namely the rights to work, to rest, to leisure, to social security, and to public education. These rights are not designed to restrict the state action, but, rather, they demand more governmental intervention upon society and individuals.

Finally, a third generation of human rights has appeared in recent years, after the consolidation of the above mentioned rights. These 'new rights' follow the idea of social evolution, covering a new range of 'group rights', such as to a healthy environment, to self-determination, to preservation of cultural traditions, and so on. They also encompass supposed 'rights' to tourism, to not be killed during war, to harmonious co-existence with nature, and to the free experimentation of alternative life-styles.

‘Group rights’ are not like the ‘inalienable rights’ of the individual, as revealed by the first modern declarations of human rights. Most of the new charters of rights tend to be stronger in relation to so-called group rights and weaker in relation to basic rights and freedoms of the individual.

In reality, these new charters of rights are designed by idealists (social engineers) who desire to use them as mere tools for radical social change. For instance, the rights contained in new charters adopted in countries like Canada, United Kingdom, and New Zealand, encompass all of them several devices for altering moral and cultural values, rather than just protecting basic rights and freedoms.

They give more ‘rights’ to the state and social groups than to the individual citizen. In explaining the practical effect of the Canadian Charter of Rights and Freedoms, Garry Furgason remarked,

“Like an exploding bomb dropped in the middle of the Canadian legal system, it has destroyed a few laws, shaken up a host of other laws and generated an immense amount of activity and at least some anxiety”.

Therefore, the introduction of a charter of rights for Victoria will weaken its rule-of-law tradition of liberty, in which everything should be legal unless legally banned. A charter of rights, by contrast, replaces this liberal principle of the rule of law with a codified (collectivist) system of political values under which human rights is rather seen as a mere concession of ‘benevolent’ state authorities.

A propos, ‘group rights’ are precisely the sort of human rights now postulated in Victoria by a coalition of so-called ‘community interests’. The Victorian Ethnic Communities Council, Council of Churches, Victorian Council of Social Service, Local Governance Association, Trades Hall Council, and Federation of Community Legal Centres are all of them signatories to a document which demands from the government the inclusion of numerous ‘group rights’. In doing so, this coalition justify such inclusion by stating that thousands of Victorians would “suffer hardship, disadvantage, and discrimination because of the failure to protect and implement fundamental economic, social, and cultural human rights”.

The basic problem, however, is that individual rights and group rights are mutually exclusive. Too much emphasis on the latter will certainly provoke an excess of statism, and, as a result, the diminishing of our basic rights and freedoms. The most important bills of rights in the history of the common law – namely the Magna Carta (1215), the Bill of Rights (1689), and the American Bill of Rights (1689), know absolutely nothing of group rights, and neither does Christianity.

Some of these so-called ‘group rights’ proposed by the ‘coalition of community interests’ are nothing but legal privileges to be provided to ethnic, religious, and gender groups that are supposedly discriminated against in society. In truth, however, such ‘group rights’ on grounds of ethnicity, race, and gender, are reminiscent of totalitarian ideologies. They follow the collectivist argument of Hitler, for whom the individual is nothing and the group is everything. According to sociology professor Alvin J. Schmidt,

“Political, economic, and religious freedom can only exist where there is liberty and freedom of the individual. Group rights that determine a person rights on the basis of belonging to a given ethnic or racial group, as presently advocated by multiculturalists and by affirmative action laws, nullify the rights of the individual. Group rights greatly reduce the freedom of the individual in that this rights stem only from the group; if he does not belong to the group, his rights are greatly curtailed

When group rights get the upper hand, gone are the ‘unalienable rights’ given to the individual by his Creator so admirably expressed in the American Declaration of Independence”.

. A Bill of Rights Leads to a Lower Sense of Individual Responsibility

The idea of introducing a bill of rights in Victoria has obviously a great appeal among the state 'worshipers' who demonstrate little or no regard for the idea of individual responsibility. These state 'worshipers' do not believe in the sinful nature of human beings, including state authorities. For this reason, they tend rather to believe it is always the 'system', and not the person, who is to be held accountable for any particular situation of poverty and/or criminality.

In these days of moral and cultural relativism, the decline of Christian morality in the Western world has removed social restraints on individual behaviour. In so-called multicultural society, 'human rights' are often advocated with no consideration given to the corresponding duties and responsibilities of the individual. Yet, no right should be divorced from its corresponding duty, without having both the right and its corresponding duty utterly destroyed.

The present decay of Christian morality, not poverty, is the main reason for the dramatic increase in criminality amongst Western societies. Perhaps the toughest sell today, notes Charles Colson, "is persuading people that they ought to govern their personal behavior for the sake of the public good". In his excellent book 'The Abolition of Liberty', Peter Hitchens observes:

"The highest levels of crime in memory have occurred at a time of unheard-of prosperity, health, social welfare provision, good housing and material contentment. This destroys the idea that increased welfare leads to a reduction in crime. On the contrary, it raises the possibility that well-meaning state intervention to improve the lot of the poor can actually lead to increased crime

It is the decay and destruction of moral values and self-restraint that have led to the misery of the modern poor."

A charter of rights can thereby increase both poverty and criminality by contributing to a morally destructive culture of human rights without individual duties and responsibilities, because such a culture clearly does not offer the necessary balance between rights and responsibilities. This is particularly true if we consider the fact that outspoken supporters in Victoria for a charter of rights are basically pushing for more 'group rights', without ever mentioning the importance of duties and responsibilities. Therefore, as Bill Muehlenberg comments,

"A Bill of Rights will certainly encourage people to demand rights, but will not be likely to enjoin them to uphold obligation and responsibility. Indeed, rights claims can be used to cover almost anything, with a never-ending stream of new rights being discovered and demanded. And if the courts become inundated with rights cases, the wheels of justice may well grind to a halt. Individual responsibility, virtue and self-control are the means by which a democracy flourishes and rights are respected".

On the other hand, the Christian ethos is focused not just on rights but also on biblically derived concepts of duties and responsibilities. Inherent in the biblical worldview is the important of obeying God's higher laws of justice and right reason. According to a Christian perspective, declares Gary T. Ammos,

"Men have rights, such as the right to life. But because a man has a duty to live his life for God, the right is inalienable. He can defend his life against all others, but not destroy it himself. No man has the right to do harm to himself, to commit suicide, or to waste his life. He has a property interest – dominium – in his own life, but not total control".

. A Bill of Rights Leads to Politicisation of the Judiciary

Despite its superficial attraction, a charter of rights generates politicisation of the judiciary. When it happens, judicial 'interpretation' becomes influenced by extra-legal factors of a political nature.

Indeed, one of the main troubles with a bill of rights is that it often gives to judges the absolute power to determine the hierarchy of rights and interests. As professor Mirko Bagarik explains,

"rights documents are always vague, aspirational creatures and give no guidance on what interests rank the highest. This leaves a plenty of scope for wonky judicial interpretation".

A bill of rights can thereby result in an undemocratic usurpation of legislative functions by the non-elected judiciary. When judges pass wrong decisions, however, their rulings are very hard to be corrected because of the entrenchment of judicial precedents. It can be argued in this sense that a bill of rights can contribute for the erosion of the rule of law, with its replacement by the 'rule of judges'. As professor Jeffrey Goldsworthy explains,

"The traditional function of the judicial function does not sit altogether comfortably with the enforcement of bill of rights. In effect, they confer on judges a power to veto legislation retrospectively, on the basis of judgments of political morality. This involves adding to the judicial function a kind of power traditionally associated with the legislative function, except that the unpredictability inherent in its exercise is exacerbated by its retrospective nature. That is why, on balance, it may diminish rather than enhance the rule of law".

In fact, the partisan administration of justice can result in perversion of the legal order, and, as a result, in the denial of the rule of law. Indeed, enactment of bill of rights makes judicial decisions less predictable, a fact leading to greater uncertainty about what laws are abiding. Moreover, the judiciary become more active players in political struggles, merely stimulating the parliament and political parties. As law professor Stephen M. Griffin explains,

"Deciding to place the protection of basic rights in the hands of the judiciary is also a decision to remove such issues from the agenda of the elected branches. This restricts the basic right of citizens to participate in important political decisions respecting the content of such rights.

The decision to adopt judicial review involves restricting some basic rights in order to promote others".

The experience recommends scepticism about the wisdom of introducing a bill of rights in Victoria. Any person who is sincerely committed to values such as democracy and the rule of law has every reason to be worried about such an initiative. There are plenty of examples suggesting that any bill of rights can aggravate arbitrary attitudes on the part of the judiciary. As the legal philosopher Jeremy Waldron points out, judicial enforcement of a bill of rights is utterly inconsistent with the democratic rights of citizens to participate in the political process of decision-making. He summarises his critique in these terms:

"If we are going to defend the idea of an entrenched Bill of Rights put effectively beyond revision by anyone other than the judges, we should think [that] even if you orchestrate the support of a large number of like-minded men and women and manage to prevail in the legislative, your measure may be challenged and struck down because your view of what rights we have does not accord with the judges' views".

In the United Kingdom, for instance, the 1998 Human Rights Act has authorized judges to declare any legislation to be incompatible with rights explicitly mentioned in that act, but not to invalidate it. In such cases the parliament is forced to decide whether or not the legislation must be amended or just repealed. And yet, it is often argued that this provision is, in practice, ineffective, because it is almost impossible for legislators to ignore any judicial declaration of incompatibility.

Those who push for a bill of rights in Victoria may suggest that since this legal document is enacted by an elected legislature, with the support of the majority of citizens, then the judicial invalidation of statutes on the grounds of violating this charter of rights would be perfectly democratic. Against this simplistic argument we could properly remind that if citizens decide to establish an elected dictatorship it does not follow from this fact that dictatorship is democratic. Rather, it only indicates that democracy has been extinguished by democratic means. If so, as Jeremy Waldron says, a bill of rights might eventually amount to exactly that: "Voting democracy out of existence, at least so far as a wide range of issues of political principles in concerned".

So what will a charter of rights do once it is enacted in Victoria? It is certainly going to aggravate judicial arbitrariness, giving to each judge the undemocratic power to decide on the most important social issues, and under the guise that judges are 'neutral' entities to uphold human rights and freedoms. In practice, however, experiences in other countries with bills of rights clearly demonstrate that the supposed moderation of judges is utterly illusory. As professor Gabriël Moens explains,

"The possibility of attributing different meanings to the provisions of bill of rights creates the potential for judges to read their own biases and philosophies into such a document, especially if the relevant precedents are themselves mutually inconsistent. Indeed, in most rights issues, the relevant decisions overseas are contradictory. For example, rulings on affirmative action, pornography, 'hate speech', homosexual sodomy, abortion, and withdrawal of life support treatment vary remarkably.

These rulings indicate that judges, when interpreting a paramount bill of rights, are able to select quite arbitrarily their preferred authorities

Since a bill of rights will often consist of ambiguous provisions, judges can deliberately and cynically attribute meanings to it which are different from the intentions of those who approved the bill – in Australia1s case the electorate".

For instance, one of the charters of rights regarded as a 'model' by the government of Victoria is the Canadian Charter of Rights and Freedoms (CCRF). However, the Canadian Supreme Court has found, under the abstract provisions of this very charter of rights, 'legal' grounds to invalidate all statutory prohibitions of abortion; thereby allowing the mass destruction of pre-born babies.

In fact, the CCRF has enthroned judicial activism as a common practice in the country. Judges in Canada can now 'judicialise' all the most controversial issues of that society, and, accordingly, impose their own ideological positions on these issues. It is true, however, that the Canadian charter of rights contains a clause only allowing the judicial review of legislation if "reasonable limits can be demonstrably justified in a free and democratic society". In practice, however, as Gabriël Moens explains,

"Since the criteria mean essentially nothing in a legal sense, judges are effectively commanded by the instrument itself to give rein to their own moral sensibilities over legal criteria in deciding the validity of legislation. In such circumstances, it is not surprising that in Canada the individual political and social beliefs of the judges are considered more important than the words of the Constitution itself".

Undoubtedly, some of the most notorious examples of abuse of rights in the service of overturning clear legislative intentions are the court rulings from the United States. In 1973, for instance, U.S. Supreme Court judges argued in Roe vs. Wade (1973) that the Fourteenth Amendment to the U.S. Constitution, an amendment that guarantees individual liberty as part of due process of law, encompasses a supposed 'right to privacy' for abortion. In his dissenting vote, Justice Rehnquist was quite right to call this absurd ruling "an exercise of raw judicial power", and "extravagant exercise of the power of judicial review".

The judicial coup d'état in the United States culminated in 1992 with the ruling involving Planned Parenthood vs. Casey. After having overridden all the state laws against abortion, in 1973, the U.S. Supreme Court went at this time to declare that abortion has somehow become a 'right to liberty', and that even to challenge this 'right' is no longer constitutionally permissible. In his majority vote, Justice Kennedy defined liberty as "the right to define one's own conceptions of existence, of meaning, of the universe, and of the mystery of life". What is more, he considered "majoritarian intolerance" any attempt of elected politicians to protect mainstream social values.

The Casey decision "rejected any belief in a transcendent ethic as 'intolerance', thereby rejecting the idea of a higher law above the Court". As such, law professor Gerard Bradley commented that the court had established with this case a 'new covenant' for the American society, which goes something like this: "We will be your Court, and you will be our people". On the basis of this 'new covenant' imposed by the judiciary, citizens have acquired the right to decide for themselves what is right and wrong, and to do whatever they please, providing they accept the court's assumption to ultimate power.

Also in the United States judicial activism produced the notorious Bourne vs. Flores decision. This 1993 ruling invalidated the Religious Freedom Restoration Act (RFRA), which aimed to re-establish a strict standard for the protection of religious freedom and exercise. Significantly, the RFRA passed unanimously in the House of Representatives, received only three dissenting votes in the Senate, and was enthusiastically signed by President Bill Clinton. If ever a piece of legislation reflected the democratic will of the people, it was the RFFA. And yet, as law professor Mark Tushnet points out,

"The Court said, with no justice expressing disagreement with this analysis, that Congress cannot 'enforce' religious liberty 'by changing what the right is'. Here the Court simply denies Congress any role in offering an interpretation of the entrenched right of religious liberty that differs from the Court's interpretation".

. A Bill of Rights Leads to a More Litigious Society

As we have already observed, a charter of rights provides an undemocratic transference of legislative functions to the judicial branch. As such, it can also become a much powerful incitement to the growth of speculative litigation as well as frivolous legal actions. In Canada, for example, "litigious floodgates have been opened and courts have been strained by the overload" since the CCRF was enacted.

Because any bill of rights always involves a certain transference of legislative power to the courts, a culture of litigation is what normally follows its introduction. Charters of rights can result in less democracy, because "a bill of rights can be potentially used as an instrument for the attainment of social agendas unable to attain majority approval". According to Gabriël Moens,

"Those who favour a bill of rights may delight in the vagueness of these documents, for they sometimes assume that its very ambiguity will enable them to achieve, through judicial decision, what they have been unable to achieve through Parliament".

. From a Christian Perspective, Basic Human Rights are God-given, not Government-authorized

Although a charter of rights can allegedly educate people to recognise their most basic rights, it can also generate the false assumption that our fundamental rights are somehow government-defined and government-authorized.

Under the Christian perspective, however, God creates human beings in His image and resemblance, commanding them to fill the earth and subdue it. We find here a special meaning for the protection of human rights, as the result of the intimate relationship between the Creator and His human beings.

This relationship reflects the true meaning of our very humanness, as relationship that the Fall distorted but did not destroy.

In this sense, human beings have never 'acquired' their basic rights from ‘enlightened’ legislators. In the words of John Stott, we have had our basic rights and freedoms from the beginning. “We received them with our life from the hand of our Maker. They are inherent in our creation. They have been bestowed on us by our Creator".

The purpose of God’s laws is to establish a godly social order based on biblical principles of freedom and justice. But unless there is a God who is Himself the source of all Goodness and Justice, then there can be no ultimate basis for the protection of basic human rights against governmental tyranny. Thomas Jefferson, the author of the U.S. Declaration of Independence, recognised this great truth when he declared rhetorically: “Can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God?”

. Conclusion

The introduction of a charter of rights in Victoria will certainly provoke the interference of judges in crucial political issues of society, including abortion, euthanasia, immigration, and religious freedom. Such a charter has the potential to serve as a dangerous undemocratic tool for “censorship of ideas unpopular with current intellectual orthodoxy”.

Although a charter of rights can be justified by the fact that the Victorian Government has passed a draconian vilification law which has already restricted freedom of speech on religious grounds, the idea risks itself to be used for even more suppression of public debate on a vast range of political issues. As it will probably be endowed with highly abstract concepts, such as the prohibition of ‘religious hatred’ and ‘social discrimination’, this charter of rights, once enacted, might dramatically limit public debate, “to the expression of opinions that are deemed acceptable by a cultural elite”.

In conclusion, the government proposal of introducing a charter of rights for Victoria poses enormous disadvantages for democracy and the rule of law. It will bring about more group ‘rights’ (privileges) on the grounds of ‘positive’ cultural discrimination, and transfer legislative powers to the judiciary, not to mention the other problems equally mentioned in this article. To sum up, the disadvantages of a bill of rights by far outweigh any alleged advantage from its enactment.

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