VIII World Congress of the International Association of Constitutional Law 2010, Mexico City

The use of constitutional supra principles by Judges

Plenary Session IV, 10 December 2010

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At the outset, may I thank the Association for the invitation to speak and the opportunity to participate in this most interesting Congress. My thanks also for the wonderful hospitality which we have enjoyed.

Preliminary

The questions posed for this plenary session require me to provide the perspective of an Australian judge to constitutional principles which are inherent or behind the Constitution, as Professor Michel Rosenfeld described them in the second Plenary Session. I prefer this description to that of "supra" principles, which might imply principles which exist above or beyond a Constitution. I shall use the term "principle" broadly.

The time for this opening statement is relatively short, but I will attempt to give an overview of the approach of justices of the High Court. Our perspective in a given case, of course, is with an eye to precedent and therefore the past, and the other to the future. In the area of constitutional law there may be many novel situations. Thus principle informs much of our approach.

Others speaking before me have spoken generally of sources and methods of principles: I will speak more particularly (taking up what was said yesterday) about how and what we identify as principles for these purposes, their sources and how we apply them. This is constitutionalism in action. I shall provide examples to better explain the framework within which Australian judges operate and the method they use. This is now necessary perhaps in common law countries.

Text and Structure

The High Court places considerable importance upon the text and structure of the Australian Constitution. This explains, in part, my preference for Professor Rosenfeld's description. It must immediately be said that this

approach, to text and structure, is not a literalist approach. Nevertheless, it may be thought that it is one which might limit the possibilities of the development of constitutional principles. But this is not the case.

Indeed, it is the constitutional framework which is provided, and the lack of express statements or principles within it, which give the judges some work to do. And this requires us to identify principles which are inherent in or inform the Constitution. Let me first refer to those which are regarded as forming the foundation of the Constitution, but which find no expression in it.

The three fundamental principles or doctrines which the Court has held form the foundation for the Constitution are:

1. federalism
2. representative government – also called representative democracy; and
3. the separation of powers.

The three may interact in a given case. These principles have been derived from the Constitution by the judges, from its text and structure, aided by an historical perspective of the Constitution.

The historical perspective principle

It is convenient at this point to pause, to observe that the Court does not regard the Constitution as having been drawn in a vacuum. An approach, which is relatively recent in origin (1999), accepts that the Constitution may be read by reference to the debates which helped to shape it. It is also accepted that the framers' experience and understanding of the common law and of representative government, and of the history which informs both of those subjects, may also be drawn upon. This interpretative approach might be regarded as one of historical principle. However, it needs to be balanced by an understanding that the Constitution speaks today. This is especially important in relation to notions such as representative government or democracy, which have a dynamic quality.

Other foundational matters / framework for the derivation of principle

The common law is regarded as foundational, indeed an assumption upon which the Constitution was based. The relationship between the Constitution and the common law is important. The common law is recognized as the source of the rule of law. The rule of law, in turn, provides the basis for interpretative principles such as legality. It also provides a basis for a number of conclusions, which I will briefly discuss later. The rule may be capable of providing more.

So this is the framework within which the judges operate and in which constitutional principles are identified and applied.

The principles for discussion

I will therefore discuss the following:

(a) representative government;
(b) separation of powers;
(c) the common law as a constitutional foundation;
(d) the rule of law; and
(e) the principle of legality.

Some of these are more clearly principles, capable of application in a constitutional setting, in reviewing legislation. Others may be seen as sources of principles, or used to reinforce principles and decisions. I shall emphasise in my discussion the principles of representative government and judicial independence, together with one further principle which I have not yet mentioned, for the reason that it is neither fully accepted nor fully explored in Australia: the principle of proportionality.

(a) The principle of representative government is regarded as a bedrock of the Australian Constitution. It is embodied in the expression that the Houses of the Parliament are chosen by the people.

The principle is regarded as both protective and dynamic. The fact that conceptions about democracy and representative government may change over time has created some difficulty in the identification of what may be regarded as essential to it, and therefore subject to the protective aspect of the principle. There has not been unanimity amongst the judges over this. In argument in the cases, it is often put that it is a question of degree. This has been noted, but not entirely taken up.

The phrase "chosen by the people", in certain provisions in the Constitution, clearly enough brings into focus the need for the people to vote. But how it is exercised, and by how many, are matters about which there has not been agreement. Further, it is accepted that Parliament was given much legislative discretion to create, change and regulate the system of voting.

There have been two cases concerning voting. Both were majority decisions. In the first, legislation which disqualified prisoners, serving a term of one year or more, from voting in federal elections was struck down, on the basis of the principle of representative government and the importance of the exercise of the franchise. The decision was 4/3. And in relation to this year's federal

election, legislative provisions which reduced the time previously allowed for enrolment of potential voters after the calling of the election was held invalid, at least by a majority. Regrettably, the judgments in that case will not be published until next week, and I am not in a position to discuss the basis for the majority decision. I can say that reliance was placed, in argument, upon the principle which I have been discussing.

I may also add that the plaintiffs' case was based upon judgments in the earlier case involving the disqualification of the prisoners. In that case, not only was the principle of representative government identified, the disqualification was described, by the majority, as arbitrary, thus inferentially at least, involving rule of law ideals. And further, the legislative provision was said to be "disproportionate", but I will come back to that topic later.

The principle of representative government has also informed the implication, by the Court, of a freedom of communication about political matters, it being reasoned that voters cannot exercise an informed choice without such communications. This is an example of a principle utilized in aid of an implication found within the Constitution.

It is necessary here to make a particular observation about the Court's reliance on the principle of representative government, and upon its approach generally to constitutionally-based challenges to the validity of legislation. It must be borne in mind that the Constitution contains no comprehensive Bill of Rights. It is generally accepted that the framers decided not to have one. It is therefore difficult to find general guarantees in the Constitution and it is difficult to speak of individual rights. Thus in each case it is not the individual's right to vote or the right to communicate about political matters which is engaged. Rather, the Court limits the operation of legislation because it has the effect of restricting the constitutionally guaranteed freedom and because it is inconsistent with the constitutional principle.

Having identified the freedom of communication, the Court then turned its attention to aspects of the common law. It has required that it be consistent with the freedom. This is an aspect of the relationship between the Constitution and the common law, to which I earlier referred. It has been held that the common law of defamation, in its defences of qualified privilege, must allow the freedom of communication full operation and effect. Since the High Court is responsible for the development of the common law, it was able to adapt it to conform with the freedom. It could be said, perhaps, that it was engaged in a type of voluntary proportionality adjustment. But that would be controversial.

(b) The separation of powers is regarded as a fundamental doctrine of the Constitution. Again, it is found in the text and structure of the Constitution,

since there is no express mention of it. Each of the legislative, executive and judicial powers are dealt with separately. Greater emphasis is given to the separation of the judicial power, because of the content and expression of the power given to the judiciary in the Constitution, and because it is considered that the extent of those powers implies the need for protection.

Judicial functions are therefore strictly held to be reserved to the courts. The High Court is vigilant about attempts to give some of those functions to the executive or administrative authorities, and thus deny citizens access to the Court. It has been pointed out that the separation of powers principle has become an important focus of the protection afforded by the Court. The rule of law is taken as underlying the principle. And the High Court is also wary of judges being given functions which are incompatible with the judicial function.

That aspect of the principle of separation of powers which is particularly jealously guarded by the courts is judicial independence. Professor Cheryl Saunders has observed that the framers of the Constitution probably did not have the separation of powers doctrine in mind in relation to the Courts, but they are likely to have assumed the need for judicial independence.

From the principle of judicial independence, the High Court has developed another principle. This principle holds that legislation which significantly impairs the institutional independence or integrity of the courts will be invalid as contravening the Constitution. It was first identified in 1990. The legislation in question in that case required the courts to make orders for the continued, indefinite, detention of a prisoner after he had served his sentence, on the grounds of public safety. The legislative power to do so was not so much in question. Rather it was the fact that the legislation was directed to that particular prisoner. This may be thought to invoke rule of law issues. But the Court also reasoned that the courts could not be seen to participate in such a process.

More recently and controversially, the principle was applied to strike down certain provisions of legislation which was directed to prevent members of bikers' clubs associating. This was one legislative attempt of the States to deal with the problem of the involvement of bikers' clubs in serious crime. No one could doubt that the problem was a real one, but again the focus was upon the use made of the Court in the legislative scheme. The scheme of the legislation was such that the Attorney-General of the State could make a declaration about a club generally, on information produced by the police, that some of its members were involved in serious criminal activity. One of the lower courts was then required to make what was called a "control order" with respect to a person, if it was proved that they were a member of the club. Membership was defined very widely. The Court was not permitted to consider the person's

involvement in crime, or the lack of any evidence of that involvement. The effect of the order once made was not only to prohibit association between members of the Club, but to severely limit the ability of other people to associate with them. The High Court held that courts having federal jurisdiction could not be effectively enlisted by the executive to do its bidding.

The case again highlights the interrelationship of the principle with the operation of the rule of law. And, in its application to all state courts having federal jurisdiction, the principle of federalism is brought into play. The principle might also be invoked, for example, if legislation affected the character or perception of the Court or intruded upon its functioning. Matters of degree may be involved.

(c) The common law, as I have earlier mentioned, is regarded as an assumption upon which the Constitution was framed. And it has an important relationship with the Constitution. The common law is required to conform to the Constitution. Less clear is the extent to which common law principles may inform constitutional questions. But it has been accepted by the Court, on a number of occasions, that this is possible. Clearly, rule of law issues may do so. Its further development lies in prospect.

In that regard, the fact that there is only one whole body of common law in Australia may facilitate such an approach. The High Court has held that there is only one common law which, being at the apex of the judicial structure, it determines. This principle might be described as one of coherence.

(d) The rule of law is regarded as underpinning the Constitution and as derived from the common law. It has been doubted that it can be described as a freestanding principle. It has been regarded, at one level, as aspirational. But as will have been observed from my discussion to this point, it is drawn upon to support other principles and to further explain them. It is clearly influential with respect to issues such as access to the courts and due process. It has been regarded as the explanation for conclusions such as: that there must be some minimum capacity for judicial review of administrative action; that the courts may not grant executive dispensation from the criminal law; that judicial standards are to be made according to legal standards rather than undirected considerations of fairness; that citizens have a right to a fair trial; that citizens have a right to privileged communications with their legal advisers; that the content of the law should be accessible to the public; that citizens are equal before the law; and that the criminal law should operate uniformly in circumstances which are not materially different. Having said all that, it is looking rather like a principle in operation.

It has also been suggested that because the rule recognizes a limit upon legislative or executive power, it arguably gives rise to another principle, that of self-restraint by the courts. There may be differing views about that.

(e) The principle of legality was first mentioned relatively recently in Australia as an interpretative principle drawn from the common law. It assumes that the basic rights of the individual; namely, those recognized by the common law, will not be interfered with by legislation, except in the most clear language. Being an assumption and framed in this way, it obviously has some limitations. But it may be further developed. A concomitant principle is taken to be that the courts will not find ambiguity where legislation is clear in its terms.

(f) The term "proportionality" is used in Australia in connection with various tests. But it is not recognized as a principle. Nor are tests, such as those developed in Germany and elsewhere, drawn upon to explain what is meant by proportionality. It is perhaps best to describe its evolution to the present point.

The term proportionality came to be used as a synonym for a test of the connection of legislation with a constitutional head of power. This required that the legislation be reasonably appropriate and adapted to purposes within that head of power. The phrase "reasonably adapted and appropriate" was taken from a United States decision in the 19th century. Later, it was said that proportionality formed part of that test. It has not been further explained what part it forms of the test mentioned, but in more recent cases the terms proportionality and reasonably appropriate and adapted have been used interchangeably.

The clearest use of proportionality, in the sense that the method used to test it is apparent, is in connection with the constitutionally guaranteed freedom of trade, commerce and intercourse between the states. Legislation is held to impermissibly cut across that guarantee if there are alternative, practicable measures available. The analogy with the second level test of the German principle of proportionality and the ECJ's approach to the same matters of guarantee is evident.

This test has also been applied in connection with the freedom of communication, when legislation is seen to restrict it. But alternative measures are not always available. Nevertheless, legislation has been held to be disproportionate to its purposes but it is not always clear how this conclusion is reached, except that the court viewed it as excessive and therefore not reasonably necessary.

The Court has generally been reluctant to further articulate tests. It has expressed concern at balancing exercises. Although we do not have the context of rights against rights, we could have important public interest legislation on the one hand, and recognized freedoms on the other, but such a case has not yet arisen.

The concerns of the Court have not been further articulated, but are likely to stem from its concern about its role and the separation of powers, that is to say, its intrusion into legislative discretion. Concepts such as margins of appreciation and deference as such are not generally regarded as operative in Australia. As in most countries, there is always some tension between legislative, executive and judicial. Some restraint is evident in concerns expressed from time to time about the maintenance of the separation of powers and the proper recognition of the legislature's role. At the same time, the Court recognizes that it is the guardian of constitutionally implied freedoms and the principle of representative government. Thus it must sometimes invalidate legislation having an unnecessarily restrictive effect.

It may therefore be said that there is still a dialogue to be had concerning proportionality. If the Court further articulates tests of it, a principle may more clearly emerge.

Conclusion

I conclude by returning to the beginning of my discussion. I had posed the question whether an approach based upon the text and structure of the Constitution might be thought to inhibit the development of constitutional principles. But as we have seen that approach is informed by history, by the viewpoint of the framers of the Constitution, and of fundamental principles which inform it. I would therefore suggest that it too is a principle which inheres in the Constitution.