The Victorian Charter: a case of inappropriate transplants?

By André Dao

Dr Ward explains the UK Human Rights Act.

Does the Victorian Charter of Human Rights and Responsibilities borrow too heavily from solutions developed in specific jurisdictions overseas? Dr Angela Ward posed this question at a Castan Centre event co-hosted with the Human Rights Law Centre in August. At the time Dr Ward was a practising member of the London Bar and Adjunct Professor in European Union and Human Rights Law at the University College Dublin. She has since taken up an appointment as a Référendaire at the Court of Justice of the European Union in Luxembourg, and is working on a commentary on the EU Charter of Fundamental Rights.

The Victorian Charter drew much of its inspiration from the UK *Human Rights Act*. The drafters of the *HRA* were motivated by the fact that too many cases were going to the European Court of Human Rights in Strasbourg because of insufficient human rights protections in the UK. It was a matter of "bringing rights home". In order to do so, the *HRA* had to capture all of the rights protected in the European Convention on Human Rights, regardless of whether or not breaches of those rights occurred through primary legislation, delegated legislation or an act of executive discretion.

What made the *HRA* unique was that it had to implement the ECHR within the established pillars of British constitutional and administrative law. Unlike in Canada, British courts cannot strike down legislation passed by parliament. However, the crucial part of the Act lies in Section 6, which states that it is unlawful for a public authority or private authorities exercising public functions "to act in a way which is incompatible with a Convention right." This meant that delegated legislation and acts of executive discretion which breached a Convention right would be invalidated, and the court could apply whatever remedy it considered "just and appropriate", provided that the human rights wrong was not compelled by primary legislation. On the other hand, it meant that primary legislation that could not be interpreted consistently with human rights was declared incompatible.

According to Dr Ward, this British model may not have been an ideal transplant for the Victorian context. Firstly, there is a lack of clarity in the Victorian Charter on whether delegated legislation falls if it cannot be interpreted compatibly with Convention rights, and the breach of human rights is compelled by a piece of primary legislation. This ambiguity is a result of the Charter's definition of "statutory provision[s]" to which a declaration of incompatibility can be attached. It includes "an Act (including this Charter) or a subordinate instrument or a provision of an Act (including this Charter) of a *subordinate instrument*" (emphasis added). In other words, under the Charter, "statutory provisions" attract a declaration of incompatibility. Under the UK *HRA*, the declaration of incompatibility is directed at primary legislation, not subordinate legislation. As mentioned, the declaration of incompatibility was designed to meet the problem, under British constitutional law, of there being no authority in the hands of courts to strike down primary legislation.

Secondly, Dr Ward observed that the Charter was a top-down instrument which borrowed heavily from Canadian, New Zealand and British human rights instruments, all of which had been crafted from the bottom-up to accommodate their local tenets of constitutional and administrative law. Dr. Ward pointed to parts of the Brennan Report as an example of bottom-up recommendations, designed to accommodate the Australian context, such as amending the *Administrative Decisions Judicial Review Act* and the *Acts Interpretation Act*. She suggested that this type of approach might be preferable, given that it attempts to bring the International Covent on Civil and Political Rights into Australian law by reference to established principles of the Australian legal system.

However, Dr Ward finished on a rather more hopeful note. Speaking about the (then) pending High Court decision in *R v Momcilovic*, she dismissed fears that it could mean the end of the Charter. On the contrary, it could be an opportunity for the Charter to accommodate the pillars of the Australian Constitution. Dr Ward suggested amending the Charter to clarify whether delegated legislation that breaches human rights falls (or does not fall) when the human rights breach is not compelled by a piece of primary legislation which could not be interpreted in conformity with human rights. This was important because most human rights breaches arise in exercise of administrative and executive discretion, rather than in primary legislation. It also affects the range of remedies available to correct the human rights wrong. She also suggested that the Charter be made more user-friendly through better drafting, for example, by moving the rights protected from the middle of the Charter to a schedule, or a section that is separate from the provisions on the "mechanics" of the Charter's application under Victorian law. At present the latter provisions are shared between the beginning and the end of the Charter, with the substantive rights splitting them.

What became clear from Dr Ward's talk was that changes to the Charter may be inevitable. However, amendment to the Charter could make it clearer and more effective. Her final words of advice were particularly pertinent for those in the audience concerned about the future of the Charter, as she reminded everyone that whenever human rights legislation is introduced in any jurisdiction, there will always be plenty of debate. The best thing human rights advocates can do is to stay calm and continue to do their good work.