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Stream B: Criminal Law – Human Rights and the Criminal Law

‘Human Rights, Bills Of Rights, and the Criminal Law’

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Introduction

Human rights, it has repeatedly been said, are both fundamental and inalienable. They underpin basic legal norms, particularly those specifically associated with the need to afford due process and, more generally, those encompassed within what is commonly termed the ‘rule of law’. Of course, there are those who take a broader view of human rights discourse, applying the moral principles underlying that normative field to social and economic justice.

Professor Andrew Clapham¹ has made this very point. He observes that different people see human rights in different ways. For some, invoking such rights is a ‘heartfelt, morally justified demand to rectify all sorts of injustice’.² For others, the appeal to human rights is often little more than a slogan to be treated with a degree of cynicism, and perhaps even hostility.³

Not so long ago, ‘human rights law’ did not exist in this country as a separate field of study. Today, the position is different. No university law course would be complete without offering at least some subjects either incorporating the term ‘human rights’ in their title, or devoting a considerable amount of attention to that topic. As Professor Clapham notes, the language of human rights is now often deployed to criticise, defend, and reform all sorts of behaviour.

* Victorian Court of Appeal. This is a revised version of a paper presented to the Bar Association of Queensland on 27 February 2016. The views expressed in the paper are, of course, my own. They should not be taken to reflect the views of any other member of my Court. I wish to acknowledge the assistance given to me in the preparation of this paper by my Associate, Louise Fedele.

¹ Professor of Public International Law at the Graduate Institute of International and Development Studies, Geneva.

² Andrew Clapham, *Human Rights: A Very Short Introduction* (Oxford University Press, 2015) 1.

³ Ibid. Currently, in some quarters, the term ‘human rights lobby’ is used as a term of derision.

Indeed, Professor Clapham has stated:

At times, human rights protections may indeed seem to be anti-majoritarian; why should judges or international bodies determine what is best for any society, especially when democratically elected representatives have chosen a particular path? But the point is that human rights may serve to protect people from the ‘tyranny of the majority’. Human rights law, however, should not be seen as a simple device to thwart the wishes of the majority, as, with the exception of the absolute ban on torture, it does in fact allow for security needs and the rights of others to be taken into consideration in a democratic society. There is no easy answer to this conundrum that asks why judges should be entitled to uphold human rights in the face of democratic decisions. Different societies will choose different arrangements, some will place more power in the hands of judges than others.⁴

The debate surrounding human rights, and how they should best be protected, is ongoing. In an era when terrorism is widely seen as a pervasive and on-going threat, and there is a greater willingness than in the past to sacrifice individual rights in order to meet that threat, there is good reason for lawyers in particular to reflect upon whether we have, under current laws, struck the right balance.

In that regard, it must be recognised that there are legitimate differences of opinion as to whether we should move to constitutional or statutory protection of human rights, or whether the common law, properly applied, affords adequate and perhaps even more effective protection for basic freedoms.

Surely, one of the most basic rights, that must be secured in any liberal democratic society concerned with the rule of law, is the right of an accused person to a fair trial.

In that regard, it is interesting to note that under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (‘the Charter’) that right to a fair trial is dealt with extensively, and in some detail. Curiously, as will be seen, the provisions surrounding that right have rarely been invoked. What might have been thought to be fertile ground for frequent legal challenge has instead been left largely barren. Why that is so is worth considering.

⁴ Ibid 3-4.

The Victorian Charter of Human Rights and Responsibilities Act

Victoria was the first Australian state⁵ to have enacted a Bill of Rights. It remains the only state, to this point, to have done so.⁶ The Charter was given assent on 25 July 2006 and, for the most part, came into operation on 1 January 2007.⁷

When the Charter was first proposed, some at least of those who supported its introduction must have hoped that it would have the same far-reaching effect, as had the Canadian Charter of Rights and Freedoms.⁸ Others recognised that there was a profound difference between constitutional entrenchment, and mere statutory protection of human rights as in New Zealand⁹ and the United Kingdom.¹⁰ Nonetheless, even the New Zealand and United Kingdom legislation had been frequently invoked in those countries, and had led to significant legal change. These proponents of the Charter too would have been surprised, and disappointed, at its modest impact.

Any objective assessment of the Charter would have to conclude that while it has had a significant and beneficial impact upon the protection of basic liberties in some areas, it has had almost no impact upon the central precept that any accused is entitled to a fair trial.¹¹

In part, this may be because of the Charter's inadequate remedial framework. Although modelled in some respects upon both constitutional and legislative provisions protecting human rights in other countries, the Charter is demonstrably weaker when it comes to providing legally effective sanctions for breaches of Charter rights. In particular, unlike the Canadian Charter of Rights and Freedoms, the Victorian statute does not confer upon any court the power

⁵ The Australian Capital Territory enacted its own Bill of Rights in 2004, the *Human Rights Act 2004* (ACT). Not surprisingly, in a jurisdiction as small of that of the ACT, there has been little case law arising from that Act.

Queensland is presently considering whether to introduce statutory protection for human rights and, as I understand the position, the government is receiving submissions on that matter at this very time.

⁷ The Charter s 2(2). Divisions 3 and 4 of Part 3 come into operation on 1 January 2008.

⁸ *Canada Act 1982* (UK) c 11, sch B pt I ('Canadian Charter of Rights and Freedoms').

⁹ *New Zealand Bill of Rights Act 1990* (NZ).

¹⁰ *Human Rights Act 1998* (UK) ('the UK Act').

¹¹ The statistical evidence suggests that the Charter was mentioned in nearly 70 criminal cases in the Supreme Court up until December 2014. See Law Institute of Victoria, *Charter Case Audit* (as at 31 December 2014) <<http://www.liv.asn.au/For-Lawyers/Submissions-and-LIV-projects/Charter-Case-Audit/Charter-Case-Audit-Search>>. However, that figure may be misleading in the sense that it seems to include cases where the Charter was merely adverted to, or featured only peripherally. A number of these cases involved the construction of the provisions of the *Bail Act 1977* (Vic).

to strike down, whether by way of judicial review or otherwise, any law that is Charter non-compliant but is in other respects valid.¹²

Of course, the drafters of the Charter ultimately chose to limit its scope in this way. They considered, and rejected, the approach adopted in both the United States and Canada whereby courts from time to time can, and do, strike down legislation that violates protected rights. These models were seen as too radical, and likely to ‘frighten the horses’. Opponents of the proposed Charter expressed concern that vesting in the courts the power to strike down otherwise valid laws, on the basis of Charter non-compliance, would infringe basic principles of parliamentary sovereignty, and violate the doctrine of the separation of powers.

Even in its own terms, the Charter is, in truth, a somewhat modest document. It seeks to identify certain human rights as particularly worthy of protection. It does so with emphasis upon protecting those rights in a ‘front end’ sense, rather than by providing strong remedies for their infringement. Its most potent provision in that regard is its interpretive section, which seeks to ensure that all Victorian statutes, whenever enacted, are interpreted as far as is possible in a way that is compatible with human rights. However, as will be seen, that particular provision has received a somewhat narrow interpretation from the courts, and there is a real question as to how effective it has been.

In this paper, I will basically confine myself to those provisions in the Charter that provide for the right of an accused to receive a fair hearing, synonymous with a fair trial. In that regard, the key provisions are those contained within sections 21 to 27, which can be briefly summarised as follows.

Section 21 - ‘Right to liberty and security of person’

Section 21(4) provides that a person who is arrested or detained must be informed at that time of the reason for that curtailment of liberty.

Section 21(5) provides that a person who is arrested or detained on a criminal charge, (a) must be promptly brought before a court; (b) has the right to be brought to trial

¹² Section 36 of the Charter provides that the Supreme Court can, in such a case, make what is described as a ‘declaration of inconsistent interpretation’. Such a declaration does not affect the validity of the provision in question. The Court of Appeal has thus far made only one such declaration and, as will be seen, the decision to grant that declaration was ultimately set aside by the High Court - see *Momcilovic v The Queen* (2011) 245 CLR 1 (‘*Momcilovic*’).

without unreasonable delay; and (c) must be released if either paragraph (a) or (b) is not complied with.

Section 22 – ‘Humane treatment when deprived of liberty’

Section 22(1) provides that all persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.

Section 22(2) provides that an accused person who is detained or a person detained without charge must be segregated from persons who have been convicted of offences, except where reasonably necessary.

Section 22(3) provides that an accused person who is detained or a person detained without charge must be treated in a way that is appropriate for a person who has not been convicted.

Section 24 – ‘Fair Hearing’¹³

Section 24(1) provides that a person charged with a criminal offence has the right to have the charge decided by a competent, independent and impartial court after a fair and public hearing.

Section 25 – ‘Rights in criminal proceedings’

Section 25(1) provides that a person charged with a criminal offence has to be presumed innocent until proved guilty according to law.

Section 25(2) provides that a person charged with a criminal offence is entitled to what are described as a series of ‘minimum guarantees’. These include the right to be informed promptly and in detail of the nature and reason for the charge; the right to have adequate time and facilities to prepare a defence and to communicate with a lawyer or adviser of the accused’s choice; the right to be tried without unreasonable delay; the right to be provided, if eligible, with legal aid; the right to examine, or have examined, witnesses against him or her unless otherwise provided for by law; and the right not to be compelled to testify against himself or herself, or to confess guilt.

¹³ Note that s 23, not set out in this paper, deals with the rights of children accused of criminal offences.

In addition, pursuant to s 25(4), any person convicted of a criminal offence has the right to have the conviction, and any sentence imposed in respect of it, reviewed by a higher court in accordance with law.

Section 26 – ‘Right not to be tried or punished more than once’

Section 26 provides that a person may not be subjected to double jeopardy or double punishment once convicted or acquitted according to law.

Section 27 – ‘Retrospective criminal laws’

Section 27(1) provides that a person must not be found guilty of a criminal offence because of conduct that was not criminal when it was engaged in.

Section 27(2) provides that a penalty must not be imposed on any person for a criminal offence that is greater than the penalty that applied to the offence when it was committed.

Legal Sanctions for Breaches of the Charter

As previously indicated, when the Charter was initially being planned, it was anticipated that the various rights discussed above, in connection with the conduct of criminal proceedings, would be among those most frequently invoked. After the introduction of the Canadian Charter of Rights and Freedoms, the analogous provisions were, at least for a time, regularly utilised in such proceedings. I understand that the same was true in both New Zealand and the United Kingdom.¹⁴

In fact, there have been relatively few challenges in Victoria seeking to invoke these provisions. As previously indicated, one possible explanation for this lies in the fact that the Charter is, in practical terms, devoid of any effective remedial provisions for Charter breaches. It is necessary, therefore, to say something briefly about the Charter’s remedial regime.

There are two key provisions in that regard.

Specifically, s 38 which is headed ‘Conduct of public authorities’ provides that it is unlawful for a ‘public authority’ to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right. The term ‘public authority’ is defined in the Charter, which includes a public official or ‘entity

¹⁴ The UK Act seems to be regularly invoked in criminal proceedings in the United Kingdom.

established by a statutory provision that has functions of a public nature’, and extends to police officers, local councils, and government ministers.¹⁵ It does not, however, embrace courts and tribunals except when acting in an administrative capacity.¹⁶

Section 39 is headed ‘Legal proceedings’. That section provides that where, outside the realm of the Charter, a person may seek any relief or remedy in respect of an act or decision of a ‘public authority’, that person may also seek that relief or remedy on a ground of unlawfulness arising because of the Charter. The section goes on to provide that a person is not entitled to be awarded any damages because of a breach of the Charter.¹⁷ However, nothing in s 39 affects any right a person may have to damages apart from the operation of that section.¹⁸

A moment’s reflection will reveal some of the difficulties associated with the awkward manner in which these remedial provisions are drafted. In 2015, Michael Brett Young, a former CEO of the Law Institute of Victoria, conducted a comprehensive review of the Charter’s operation.¹⁹ He noted, in particular, that ss 38 and 39 were widely perceived as having been poorly drafted, and as being ineffective.²⁰

The reasons for Mr Brett Young’s conclusion can be readily understood. In essence, s 39 operates to ensure that the Charter provides no new remedy for breach of Charter rights, beyond any remedy that would have been available had it not been enacted. In other words, it seems that the legislature intended by the enactment of s 39 to preserve ordinary remedies (including judicial review of administrative action) but not to expand those remedies at all. Accordingly, the weaknesses of judicial review as a basis for effective sanction for breach of Charter rights continue to affect the operation of the Charter itself.²¹

¹⁵ The Charter s 4(1).

¹⁶ Ibid s 4(1)(j).

¹⁷ Ibid s 39(3).

¹⁸ Ibid s 39(4).

¹⁹ Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015) (‘Charter Review’).

²⁰ Ibid 117ff.

²¹ Ibid 132-133. There has been conjecture around the scope for applying the ordinary principles of judicial review to Charter breaches. In his review of the Charter, Mr Brett Young states that ‘it is unclear whether unlawfulness under the Charter is enough [to allow for judicial review], or whether some other (at least arguable) ground of unlawfulness must exist’. He ultimately recommends, in respect of that issue, that ‘the Charter be amended to make it clear that judicial review is available on Charter grounds alone’. Also, see generally the judgment of the Victorian Court of Appeal in *Bare v Independent Broad-based Anti-Corruption Commission* (2015) 326 ALR 198, where some of the complexities associated with this issue are comprehensively explored.

Mr Brett Young has commented:

Overwhelmingly, I heard th[at] [sections 38 and 39] are unclear and complicated, and too often do not provide any remedy for a person whose human rights have been breached. Many people are concerned that this diminishes the Charter.²²

Focusing briefly on s 38, it is true that the section can be used as the basis for a finding of ‘unlawfulness’ required, for example, as an element of various tortious claims.²³ However, in relation to the conduct of criminal proceedings, there may be little utility in a finding of that kind.

The evidentiary consequences of such a finding are, of course, determined not by the Charter but rather by the provisions of the *Evidence Act 2008* (Vic) (‘Evidence Act’). Section 138 confers upon a trial judge the discretion to exclude evidence that was improperly or illegally obtained. That discretion must, of course, be exercised judicially and it is significantly circumscribed. Such evidence is not to be admitted unless the desirability of its admission outweighs the undesirability of its admission.

Section 138(3) sets out a number of matters, non-exhaustive in nature, that a court may take into account in determining whether to exercise this power. These include the probative value of the evidence and its importance in the proceeding, as well as the nature of the relevant offence charged and the gravity of the impropriety or contravention. It is also relevant to consider whether the impropriety or contravention was deliberate or reckless; whether it was contrary to or inconsistent with a right recognised by the *International Covenant on Civil and Political Rights* (‘ICCPR’); and the difficulty, if any, of obtaining the evidence without such impropriety or contravention.

It is noteworthy that s 138 does not include, within those matters that are to be taken into account, whether there has been a breach of Charter rights. Nonetheless, the reference in the section to the ICCPR effectively encompasses all of the rights contained within s 25 of the Charter.²⁴

²² Brett Young, above n 19, 117.

²³ Ibid 120. According to Mr Brett Young, no case has ever involved damages or compensation being awarded for a breach of a Charter right. He states that the position is arguably that s 39(3) precludes the awarding of damages on the ground of Charter unlawfulness, even when damages might be awarded on another ground entailing unlawful conduct.

²⁴ See ICCPR art 14.

The next point to note is that a number of the provisions in the Charter setting out various rights that are integral to the workings of the criminal justice system, and particularly those associated with the right to a fair trial, are expressed in language of a somewhat opaque nature. Terms such as ‘without unreasonable delay’, ‘humanity’, and ‘respect for the inherent dignity of the human person’, all have an open texture built into them. Moreover, building into an express right a qualification such as ‘unless otherwise provided for by law’²⁵ can effectively neuter the right in question, and render it virtually meaningless. Thus, for example, it has been held that legislative abrogation of the hearsay rule in criminal cases can be accommodated under provisions drafted in such terms.²⁶

Statutory Interpretation and the Charter

Where the Charter could potentially have a real impact in relation to the daily operation of the criminal justice system is in the field of statutory interpretation.

The key provision in this regard is s 32. That section reads as follows:

32. Interpretation

- (1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.
- (2) International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.
- (3) This section does not affect the validity of—
 - (a) an Act or provision of an Act that is incompatible with a human right; or
 - (b) a subordinate instrument or provision of a subordinate instrument that is incompatible with a human right and is empowered to be so by the Act under which it is made.

Plainly, s 32 itself admits of a number of possible interpretations. The section is closely modelled upon s 3(1) of the UK Act which reads as follows:

So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the [European] Convention rights.

²⁵ For example, see the Charter s 25(2)(g).

²⁶ See *Bray (a Pseudonym) v The Queen* [2014] VSCA 276 (*‘Bray’*) and the discussion concerning European Court of Human Rights jurisprudence on this subject. *Bray* was an interlocutory appeal. The decision in that case on the question of admissibility of what would otherwise be rank hearsay was upheld by the Court of Appeal when it delivered its judgment on the appeal against conviction – see *Omot v The Queen* [2016] VSCA 24 (*‘Omot’*).

As will be seen, s 3(1) has been the subject of conflicting interpretations, and, as currently understood in the United Kingdom, has a far-reaching effect.

The Victorian provision, though similar in terms to s 3(1), is worded somewhat differently. As previously indicated, s 32(1) of the Charter requires that, so far as it is possible to do so *consistently with their purpose*, all statutory provisions must be interpreted in a way that is compatible with human rights. The requirement that a given provision be construed consistently with its purpose is notably lacking in s 3(1) of the UK Act.

The courts in the United Kingdom have concluded that the effect of s 3(1) of the UK Act is to require legislative provisions to be construed in such a way, if possible, as to find an interpretation compatible with the *European Convention on Human Rights* ('the Convention'). The Convention is, of course, an instrument binding upon the United Kingdom. It has been held that it will sometimes be necessary to adopt an interpretation 'which linguistically may appear strained',²⁷ and which does not in fact reflect the meaning of the language as enacted by the Parliament.

Accordingly, the United Kingdom courts have adopted an approach to the interpretation of s 3(1) which can involve what some would describe as re-writing the statute. In addition, that re-writing process may have to be carried out irrespective of whether there is any ambiguity or absurdity in the text, and sometimes in the face of the language of the text.²⁸

The leading case on the construction of s 3(1) is the decision of the House of Lords in *Ghaidan v Godin-Mendoza*.²⁹ Under the *Rent Act 1977* (UK), a surviving spouse of a tenant was entitled to a statutory tenancy of the premises. By an amendment to that Act, 'a person who was living with the original tenant as his or her wife or husband' was to be treated as a spouse. Prior to the enactment of the UK Act, the House of Lords had held that the amendment did not cover a same-sex couple. In *Ghaidan*, a majority of their Lordships, in reliance upon s 3(1), rejected that view.

²⁷ *R v A (No 2)* [2002] 1 AC 45, 68 (Lord Steyn).

²⁸ This observation may be somewhat simplistic. For a more careful and nuanced analysis of the United Kingdom position, see Julie Debeljak, 'Proportionality, Rights-Consistent Interpretation and Declarations under the Victorian *Charter of Human Rights and Responsibilities*: The *Momcilovic* Litigation and Beyond' (2014) 40(2) *Monash University Law Review* 340.

²⁹ [2004] 2 AC 557 ('*Ghaidan*').

Lord Nicholls, who was in the majority,³⁰ asked two questions. First, whether the amendment had drawn a distinction on the grounds of sexual orientation so as to infringe the applicant's Convention rights. Secondly, whether, if so and pursuant to s 3(1), the amendment could be 'read and given effect to' so as to comply with the Convention.

Lord Nicholls answered both questions affirmatively. That was because, as he explained, he could find no justification for the difference in treatment, by the Parliament, of same-sex and mixed-sex couples. Regarding s 3(1), his Lordship stated that it was generally accepted that '[t]he application of section 3 does not depend upon the presence of ambiguity in the legislation being interpreted'.³¹ In his view, it followed that the Court may be required to depart from the intention of Parliament when interpreting the provision in question, irrespective of the legislative language chosen or how clearly Parliament's intent had been expressed.³²

Lord Nicholls then stated that the difficulty was how far, and in what circumstances, the Court should depart from Parliament's intention.³³ Ultimately, having regard to 'social policy', and to eliminate the discriminatory effect of the relevant provision, Lord Nicholls came to the view that '[t]he precise form of words read in for this purpose is of no significance. It is their substantive effect which matters.'³⁴ Accordingly, his Lordship considered that the appeal should be dismissed.

Lord Millett, in dissent, construed the expression 'read and given effect to' in s 3(1) of the UK Act as indicating that the Court's function always remained one of interpretation, and did not extend to re-writing the provisions under consideration in a way that was inconsistent with the legislative scheme.³⁵ In his Lordship's view, the interpretive provision in the UK Act did not permit the courts to ascribe to the legislature an 'impossible' interpretation,³⁶ irrespective of how socially desirable any such interpretation might be.

³⁰ With whom Lord Steyn, Lord Rodger and Baroness Hale agreed, in separate judgments.

³¹ *Ghaidan*, 571 [29] (Lord Nicholls).

³² *Ibid* 571 [30].

³³ *Ibid* 571– 572 [31]-[34].

³⁴ *Ibid* 572 [35].

³⁵ *Ibid* 585 [67] (Lord Millett).

³⁶ *Ibid*.

The question of how s 32(1) of the Charter should be construed arose for determination in *Momcilovic v The Queen*.³⁷ There, the High Court considered the applicability or otherwise of the reasoning in *Ghaidan* when construing the Victorian provision.

The issue arose in this way. Section 71AC of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) ('DPCS Act') created the offence of trafficking in a drug of dependence. Pursuant to s 70(1), the term 'traffick' included 'have in possession for sale'. Section 5 deemed a person to be in possession of a substance if the substance was found upon any land or premises occupied by the person, unless that person 'satisfie[d] the court to the contrary'.

The appellant Momcilovic owned and occupied an apartment in which a substantial quantity of drugs were found, although she denied any knowledge of the drugs. She was charged with trafficking, and convicted of that offence. The trial judge had directed the jury, in accordance with s 5, that the onus rested upon her to satisfy them that she was not in possession of the drugs which had been found in her apartment.

The first question to be resolved in *Momcilovic* was whether the trial judge had erred in directing the jury in that way. In particular, ought the jury have been told that it was incumbent upon the Crown to establish, beyond reasonable doubt, that Momcilovic was aware of the presence of drugs at her premises?

Five members of the High Court³⁸ held that, as a matter of ordinary construction, the extended definition of 'possession' in s 5 applied only to that offence and had no application to the phrase 'possession for sale' within the definition of 'traffick' in s 70(1). The trial judge having wrongly directed the jury that the onus rested upon the accused to establish lack of knowledge of the presence of the drug, it followed that the conviction could not stand. Justice Bell agreed, but seemingly went a step further. Her Honour held that, as a matter of ordinary construction, knowledge was a necessary component of any offence of trafficking.

In the course of the six separate judgments delivered by the High Court in *Momcilovic*, one issue addressed by all members of the Court related to the interpretation of s 32(1) of the Charter. The issue to be resolved was whether that section, on its proper interpretation, and as it applied to s 5 of the DPCS Act, had the effect of converting what was on its face a complete

³⁷ (2011) 245 CLR 1 (*Momcilovic*).

³⁸ French CJ, Gummow, Hayne, Crennan, and Kiefel JJ.

reversal of the legal onus of proof into nothing more than a placing of the evidential burden regarding the issue of knowledge onto the accused. In other words, if, contrary to the primary conclusion of the Court, s 5 was in fact applicable to the offence of trafficking, should that section be ‘read down’ (or as some would have it, be re-written) pursuant to s 32, as the appellant contended?

All members of the Court (with the solitary exception of Heydon J) rejected a submission to the effect that s 32(1) was itself unconstitutional. It seems highly likely, if not certain, that had it been thought that the section should be interpreted as *Ghaidan* had held in relation to the United Kingdom provision, it would have been struck down.

It must be said that the reasoning of the High Court regarding this and several other issues was extremely complex and, with respect, difficult to follow. Indeed, it is hard to distil a majority view in favour of any of a number of the matters considered.

The point can be briefly explained by reference to a debate that, almost from the time of the enactment of the Charter, had surrounded the interaction between s 32 as an interpretive provision, and s 7(2) which sets out ‘reasonable limits’ upon human rights.

Section 7(2) is modelled upon similar provisions contained within various statutes from other jurisdictions that are intended to protect human rights. It reads as follows:

7. Human rights—what they are and when they may be limited

...

- (2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—
- (a) the nature of the right; and
 - (b) the importance of the purpose of the limitation; and
 - (c) the nature and extent of the limitation; and
 - (d) the relationship between the limitation and its purpose; and
 - (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

Prior to the High Court’s decision in *Momcilovic*, there had been disagreement among both judges and commentators as to whether s 7(2) should be taken into account at the initial interpretation stage, or whether the limitations contained therein only became relevant once the interpretive exercise had been concluded. Broadly speaking, the decision of the Victorian

Court of Appeal in *R v Momcilovic*³⁹ had determined that the latter position was correct. In other words, the interpretive process should first be carried out, and the result thereafter assessed in the light of s 7(2).

This approach has been regarded by some as having narrowed the scope for human rights protection under s 32(1). Now, however, the High Court's decision in *Momcilovic* has left the law regarding this issue in something of a state of confusion.

Essentially, three members of the High Court endorsed the approach to s 32(1) taken by the Court of Appeal. Chief Justice French more or less said so in terms.⁴⁰ Justices Crennan and Kiefel approached the problem on a seemingly similar basis.

However, Gummow, Hayne and Bell JJ disagreed. Their Honours concluded, in effect, that the matters addressed in s 7(2) should be taken into account as part of the interpretive process under s 32(1), thereby giving that section, so it is said, greater scope for rights protection.

The seventh member of the Court, Heydon J, also endorsed what might be termed this broader view of the operation of s 7(2). Of course, his Honour was in dissent on virtually every issue that had to be resolved, as well as on the outcome of the case. His analysis of ss 7(2) and 32(1) formed the basis for his conclusion that those provisions, and ultimately the entire Charter, were unconstitutional, a finding that he alone reached.⁴¹

The High Court's decision in *Momcilovic* can be read as either an endorsement of the Victorian Court of Appeal's reasoning on the interpretive aspect of the Charter, or as a rejection of that reasoning. The question resolves itself into whether it is correct, strictly speaking, to treat the observations of Heydon J, a dissenting judge, regarding this issue as forming part of the ratio of the High Court's decision as to the section 7(2) question. I think that the better view is that it is not appropriate to do so. However, it remains the case that four members of the High Court expressed disagreement with the approach taken to this issue by the Court of Appeal.

³⁹ (2010) 25 VR 436.

⁴⁰ *Momcilovic*, 50 [51] (French CJ).

⁴¹ *Ibid* 175 [439] (Heydon J).

Certainly, the Victorian Court of Appeal has had cause to query whether it is to continue to apply its own reasoning in respect of the relationship between ss 7(2) and 32(1), in preference to the broader approach seemingly favoured by four members of the High Court in *Momcilovic*.

In *Slaveski v Smith*,⁴² Warren CJ, Nettle and Reclich JJA considered that it was ‘unnecessary to decide whether ... the Court of Appeal [was] bound to follow its own decision in *Momcilovic* unless satisfied that it is clearly wrong’.⁴³

In *Noone (Director of Consumer Affairs Victoria) v Operation Smile (Aust) Inc*,⁴⁴ Warren CJ and Cavanough AJA left open the question whether the Court of Appeal was bound to follow its previous decision in *R v Momcilovic*.⁴⁵ In their Honours’ view, there was no ratio on this point by the High Court in light of the dissent as to final orders of Hayne and Heydon JJ.⁴⁶ Justice Nettle took the view that, after *Momcilovic*, it was appropriate to adhere to what he considered to be the correct approach, namely to have regard to s 7(2) only after the s 32 interpretation exercise had been carried out, unless and until the High Court determined otherwise.⁴⁷

This question arose again in *Nigro v Secretary to the Department of Justice*,⁴⁸ where Redlich, Osborn and Priest JJA referred to both *Slaveski* and *Noone*. The Court concluded on this point that those cases had:

... left open the question whether this [C]ourt should follow its own decision in *Momcilovic* or whether ... it should follow the view expressed by four members of the High Court in *Momcilovic* that the interpretative task required by s 32 brings in ... s 7(2).⁴⁹

The position that has been reached is obviously unsatisfactory, and must await either legislative amendment or final resolution by a court.

Returning briefly to the High Court’s decision in *Momcilovic*, a majority rejected the argument that the power vested in the Supreme Court under s 36(2) of the Charter, to make what is there described as a ‘declaration of inconsistency’, was unconstitutional.

⁴² (2012) 34 VR 206 (‘*Slaveski*’).

⁴³ Ibid 215 [22] (footnotes omitted).

⁴⁴ (2012) 38 VR 569 (‘*Noone*’)

⁴⁵ (2010) 25 VR 436.

⁴⁶ *Noone*, 576-577 [28]-[31] (Warren CJ and Cavanough AJA).

⁴⁷ Ibid 609 [142] (Nettle JA).

⁴⁸ (2013) 41 VR 359.

⁴⁹ Ibid 384 [88].

Chief Justice French and Bell J concluded that no appeal lay from the exercise of that power by the Court of Appeal. That was because the power in question was not an exercise of judicial power. However, that did not, pursuant to the ‘*Kable* principle’,⁵⁰ render s 36(2) unconstitutional.

Justices Gummow and Hayne considered the existence of a power to make a declaration of inconsistency to be incompatible with the exercise of judicial power under Chapter III of the *Constitution*. Their approach involved, relevantly, an application of the *Kable* principle.

Justices Crennan and Kiefel concluded that s 36 did not confer judicial power, but was nonetheless constitutionally valid. That was because the particular exercise of power conferred by the section was relevantly incidental to the exercise of judicial power.

As I have previously indicated, Justice Heydon concluded that s 36(2) was itself invalid along with ss 32(1) and 7(2). In his Honour’s view, the entire legislative scheme was unconstitutional because it purported to confer legislative power upon the Victorian Supreme Court, itself a repository of federal jurisdiction.

It can fairly be said that the High Court’s decision in *Momcilovic* has left the law regarding the interpretive provisions of the Charter in a state of uncertainty. The judgment, bereft of any clear holding on this, and several other points of contention, demonstrates how an excessively nuanced approach to statutory interpretation (interspersed with some arcane constitutional analysis)⁵¹ can be extremely unhelpful. That is particularly so in relation to a statute such as the Charter, which is intended to set out clearly, and comprehensibly, the basic and fundamental rights afforded to all Victorians.

With the general uncertainty that now permeates key aspects of the Charter, is there any scope, in reality, for s 32(1) to play a significant role in the day to day process of interpreting criminal statutes? Given the Court of Appeal’s current view of the proper construction of that section, and its understandable unwillingness in the circumstances to embrace s 7(2) as part of

⁵⁰ *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (‘*Kable*’).

⁵¹ I refer here to the Court’s excursus into ‘diversity jurisdiction’ based upon the fact that *Momcilovic* happened to be residing in Queensland at the time her trial began. This was a matter the significance of which had escaped the attention of all parties until it was first raised by the High Court. It was said to have rendered the appellant’s trial for what was, after all, a purely state offence, a trial conducted in federal jurisdiction. Interesting as the point may have been, it is difficult, having regard to *Kable*, to see why that fact should have assumed any real constitutional significance.

the interpretive process, the Charter's utility in promoting human rights must be viewed as problematic.

In any event, given the current state of affairs, there is a real question as to whether s 32(1) has any significant role to play in the process of interpreting penal provisions. It follows that the Charter's emphasis upon the central precept of the criminal law, the right to a fair trial, may in fact be much ado about comparatively little.

Common Law Protections of the Right to a Fair Trial – Does s 32(1) Add Anything?

It has been said that, in Australia, 'the courts approach the interpretation of legislation with a number of basic assumptions or presumptions in mind'.⁵² These are said to be interchangeable terms, and to give way in the face of a sufficiently clear indication in the legislation that it is to operate contrary to them.⁵³ The various assumptions can be viewed 'as the courts' efforts to provide, in effect, a common law Bill of Rights'.⁵⁴

In *Coco v The Queen*,⁵⁵ the High Court referred to the long-established approach to the interpretation of statutes said to abrogate fundamental rights. In a joint judgment, Mason CJ, Brennan, Gaudron and McHugh JJ observed that:

curial insistence on a clear expression of an unmistakable and unambiguous intention to abrogate or curtail a fundamental freedom will enhance the parliamentary process by securing a greater measure of attention to the impact of legislative proposals on fundamental rights.⁵⁶

More recently, this principle of statutory interpretation has been re-designated by the High Court as the 'principle of legality'.⁵⁷ In *Al-Kateb v Godwin*,⁵⁸ Gleeson CJ, though dissenting in the final result, put the matter this way:

Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its

⁵² D C Pearce and R S Geddes, *Statutory Interpretation Australia* (LexisNexis Butterworths, 8th ed, 2014) 211.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ (1994) 179 CLR 427 ('*Coco*').

⁵⁶ Ibid 437-438 (Mason CJ, Brennan, Gaudron, McHugh JJ).

⁵⁷ *Al-Kateb v Godwin* (2004) 219 CLR 562, 577 [19] (Gleeson CJ).

⁵⁸ Ibid.

attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment. That principle has been reaffirmed by this Court in recent cases. It is not new ...⁵⁹

Given the ever-increasing frequency with which this principle is now invoked (and its most recent incarnation as embodying notions of proportionality),⁶⁰ it is hardly surprising that some commentators now regard s 32(1) of the Charter as having minimal real effect, and as doing little more than re-stating the principle of legality in legislative form. Certainly, French CJ in *Momcilovic* considered that '[s]ection 32(1) applies to the interpretation of statutes in the same way as the principle of legality but with a wider field of application.'⁶¹

In *Victorian Police Toll Enforcement v Taha*,⁶² Tate JA, a strong proponent of the broader view of the relationship between s 32(1) and s 7(2), analysed this question with considerable care. Her Honour referred to French CJ's judgment in *Momcilovic*, but indicated that in her view that the Chief Justice's observation, cited above, 'should not be read as implying that s 32 is no more than a 'codification' of the principle of legality'.⁶³ She concluded that s 32(1), properly understood and applied in the light of the reasons of Gummow J (with whom Hayne J relevantly agreed) in *Momcilovic*, did, in fact, add to the potency of the principle of legality. I note, however, that her Honour did not find it necessary in *Taha* to finally determine that matter since it was 'sufficient to treat s 32 ... as *at least* reflecting the common law principle of legality'.⁶⁴

It has been suggested by one commentator that such 'nuanced observations' concerning the Charter are welcome.⁶⁵ In one sense, that is of course true. Rigorous analysis, with scrupulous attention being given to subtle refinements, is almost always beneficial.

In the context of a broad-ranging statutory Bill of Rights, however, the contrary view may also be tenable. Any statute, such as the Charter, that can only be understood by engaging in a 'nuanced' reading of a case such as *Momcilovic*, as well as a series of appellate judgments

⁵⁹ Ibid (footnotes omitted). See also *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, 329 [21] (Gleeson CJ); and *Lee v NSW Crime Commission* (2013) 251 CLR 196, 309-310 [312]-[313] (Gageler and Keane JJ) ('*Lee*') where their Honours described this principle of construction as having 'deep historical roots'.

⁶⁰ *McCloy v New South Wales* (2015) 325 ALR 15. See also *PJB v Melbourne Health* (2011) 39 VR 373, where Bell J presciently observed that notions of proportionality were central to interpretation under the principle of legality.

⁶¹ *Momcilovic*, 50 [51] (French CJ).

⁶² [2013] VSCA 37 (4 March 2013) ('*Taha*').

⁶³ Ibid 79 [189] (Tate JA).

⁶⁴ Ibid 80 [191] (emphasis added).

⁶⁵ See Debeljak, above n 28, 387.

(many of which are difficult to reconcile with each other) can hardly be said to have contributed to the advancement of our understanding of basic principles.

Of course, despite the Charter's limited application in relation to the right to a fair trial, it may still have an important role in relation to ancillary rights. For example, the Charter has been recently invoked in an (unsuccessful in that case) attempt to query the liability to registration as a sex offender under legislation requiring such offenders to keep police informed of their whereabouts and personal details.⁶⁶

Justice Tate contends that the principle of legality does not go nearly as far, in protecting basic rights, as the interpretive principle in the Charter. She notes, for example that the principle of legality has its limitations. In *Lee*,⁶⁷ Gageler and Keane JJ qualified their endorsement of the principle by adding that it ought not be extended beyond its rationale. Their Honours said that the principle:

exists to protect from inadvertent and collateral alteration rights, freedoms, immunities, principles and values that are important within our system of representative and responsible government under the rule of law...⁶⁸

Their Honours went on to say that the principle does not exist to shield rights from being specifically affected in the pursuit of clearly identified legislative objects by means within the constitutional competence of the enacting legislature.⁶⁹ Thus, in their Honours' view, the legislature can, consistently with the principle of legality, enact clearly worded but thoroughly oppressive provisions, in breach of at least some human rights that are recognised, for example, in the Charter.⁷⁰ It is, of course, a matter of debate whether unelected judges, as

⁶⁶ *WBM v Chief Commissioner of Police* (2012) 43 VR 446. The appellant argued, inter alia, that the statutory definition of 'existing controlled registrable offender' was ambiguous and should be resolved using common law principles of construction including the principle of legality, and section 32(1) of the Charter. Chief Justice Warren, with whom Hansen JA agreed, considered that there was no ambiguity in the relevant provision. However, her Honour addressed the appellant's arguments about construction, considering that the question whether the right to privacy exists at common law had not been settled by the High Court, or any superior court of record. Her Honour also considered that the Charter did not apply as it was not in force at the relevant time but that, even if it had been applicable, it would have been of no assistance 'as none of the constructions urged by the parties are incompatible with the Charter right [to privacy]' (at [94]). Justice Bell disagreed in part. His Honour considered that while the Charter did apply in this case, the relevant statutory provision did not offend the appellant's right to privacy.

⁶⁷ (2013) 251 CLR 196.

⁶⁸ Ibid 310 [313] (Gageler and Keane JJ).

⁶⁹ Ibid

⁷⁰ Ibid 310-313 [313]-[317] (Gageler and Keane JJ).

Charter sceptics would describe them, should have the power to set aside what the Parliament itself has chosen to enact.

Returning to the right of an accused to a fair trial, the High Court has, through its interpretation of Chapter III of the *Constitution*, made clear that there are limits upon what a legislature (federal or state) can do to impinge upon that right. Of course, any law that interferes significantly with the actual conduct of a criminal trial is likely to be ‘read down’, at least to the extent that any constructional choice permits. Beyond that, in an appropriate case, the law itself may be struck down.

Under the ‘*Kable* principle’, no state legislature can enact valid laws which operate to impair, or detract from, the institutional independence of any court that is a repository of federal jurisdiction. In recent years, *Kable* has seen a significant revival,⁷¹ and may now be regarded as a true safeguard so far as the right to a fair trial is concerned.

Outside the ambit of the incidents of a fair trial, there are a number of issues yet to be resolved when considering whether the Charter really does add much to the protection of the rights of those accused of serious crime.

We have yet to discover the extent to which the protection afforded by the Charter operates in relation to a series of problems that arise on a regular basis in the course of the criminal justice system. In particular, what impact, if any, does the Charter have upon:

- powers of arrest, bearing in mind the prohibition against ‘arbitrary detention’;
- rights regarding bail, and the interpretation of the *Bail Act 1977* (Vic);⁷²
- the exercise by various law enforcement authorities of statutory coercive powers, including the execution of warrants of various kinds;⁷³
- the protection afforded against abuse of process in cases of ‘unreasonable delay’;

⁷¹ For example, see *Duncan v New South Wales* (2015) 318 ALR 375; *Attorney-General (NT) v Emmerson* (2014) 307 ALR 174; *Momcilovic v The Queen* (2011) 245 CLR 1; *Wainohu v New South Wales* (2011) 243 CLR 181; *South Australia v Totani* (2010) 242 CLR 1; and *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319.

⁷² For example, see *Thanh Van Dinh v DPP* [2015] VSC 318; *Woods v DPP* [2014] VSC 1; *Re Creamer* [2009] VSC 460; and *DPP (Cth) v Barbaro* (2009) 20 VR 717.

⁷³ It would be difficult to imagine the Charter having a greater effect upon ‘reading down’ a statutory power to grant warrants than the High Court’s decision in *Coco*, and its analysis of the operation of the common law principle of legality.

- the rights of accused persons as set out in s 25 including, in particular, the right to counsel,⁷⁴ and legal aid;
- the various exceptions to the hearsay rule in criminal cases which, inter alia, allow those accused of serious offences to be convicted, arguably without any effective capacity to challenge the evidence led against them;⁷⁵
- many of the highly technical, and arguably oppressive, provisions dealing with sentencing which are now to be found in Victorian sentencing law;⁷⁶
- the rights of those in custody,⁷⁷ including serving prisoners; and
- the rights of those who have been convicted, and sentenced, to challenge these outcomes on appeal.

In addition, it is by no means clear to what extent various provisions creating criminal offences will be ‘read down’ by reason of various rights contained within the Charter outside the scope of ss 21 to 27. For example, in *Magee v Delaney*,⁷⁸ Kyrou J, as his Honour then was, considered the operation of s 15(2) of the Charter, and its protection of the right to freedom of expression, as a possible answer to a charge of damaging property as an anti-advertising protest.

Surprisingly perhaps, despite the fact that almost 10 years have now elapsed since the enactment of the Charter, it is still too early to attempt answers to many of the questions posed above.

It should be noted, as previously indicated, that the Charter is presently under review. It seems almost certain that it will be amended in the near future to overcome at least some of the difficulties associated with the drafting of s 32(1), as well as the problems generated by s 39.

⁷⁴ For example, see *R v Chaouk* (2013) 40 VR 356; and *R v Williams* (2007) 16 VR 168.

⁷⁵ See *Bray* [2014] VSCA 276, as upheld in *Omot* [2016] VSCA 24.

⁷⁶ Mandatory sentences and mandatory minimum sentences spring immediately to mind, as does the poorly conceived attempt to introduce ‘baseline’ sentencing in Victoria. See *DPP (Vic) v Walters (a pseudonym)* [2015] VSCA 303. It is interesting to note that no reliance appears to have been placed upon the Charter in the challenge to baseline sentencing, and it rated only a brief mention in the judgment of the Court of Appeal.

⁷⁷ See *R v Benbrika (No 20)* (2008) 18 VR 410, 415 – 416.

⁷⁸ (2012) 39 VR 50.

Conclusion

Overall, it is fair to say that the Charter has been beneficial in a number of areas. It is generally accepted that it has had a significant impact upon the way in which decision makers who are public authorities approach their daily tasks.

However, the Charter has been less effective in facilitating legal challenges based upon breach of Charter rights.⁷⁹ Of course, that was to some extent anticipated, and perhaps even intended.

For my part, I find it surprising that the Charter has had such little impact upon the work of the courts in the day to day administration of criminal justice. Of course, that is not necessarily a bad thing. It may reflect nothing more than the failure of the defence Bar in Victoria to recognise its full potential, and to seek to make use of it. If that were the true explanation, it would be a sad state of affairs.

There is an alternative explanation. The paucity of legal challenges brought in criminal cases in reliance upon the Charter may simply reflect the fact that, by and large, trials in Victoria are conducted fairly, in substantial compliance with the rights set out in ss 21 to 27. In that sense, one should not underestimate the strength of the common law in providing for the protection of the rights of the accused.

⁷⁹ An example of where both the Charter and the *Kable* principle were sought to be invoked by the applicant is *Rich v The Queen* (2014) 43 VR 558, 623-630. The applicant was unsuccessful, but the Court of Appeal gave serious consideration to the operation of the Charter right to a fair hearing, in a case where retrospective legislation had been passed to overcome what had plainly been a defect in the manner in which warrants had been obtained without being supported by oath or affirmation.