

Public Ethics Radio

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Transcript of Episode 10, Hilary Charlesworth on Bills of Rights

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MATT PETERSON: You're listening to Public Ethics Radio. I'm Matt Peterson.

That human rights should be protected is almost universally agreed upon in liberal democracies. But just how these rights should be institutionalized in governments' founding documents is hotly debated.

The United States, for example, has a bill of rights entrenched in its constitution, and its judiciary has long been empowered to review the consistency of legislation with these rights. Australia, on the other hand, lacks such a formal mechanism of rights protection. These legal differences expose profound disagreements about the nature and distribution of political power.

Recall that a number of the American Founding Fathers were strongly opposed to including a bill of rights in the U.S. Constitution. Alexander Hamilton believed that the government, properly constituted as a democracy, would regulate itself justly, and that those attempting to introduce a bill of rights misunderstood the new government's relation to its people. In creating a Constitution, he wrote, "the people surrender nothing; and as they retain every thing they have no need of particular reservations."

In other words, the people need not be protected from themselves by bills of rights. Hamilton mocked that these bills "would sound much better in a treatise of ethics than in a constitution of government." Hamilton's sentiments are shared by many contemporary critics of bills of rights, who view them as corrosive of democracy, and as vesting too much power in unaccountable judges and other officials.

Today on Public Ethics Radio, we talk through these controversies on rights protection with Professor Hilary Charlesworth of the Australian National University. Professor Charlesworth is an international and human rights lawyer and an expert on bills of rights. She has, for many years, been at the center of a debate over whether Australia should institute of a bill of rights or some other form of formal human rights protection.

Professor Charlesworth sat down with Christian Barry in Canberra.

CHRISTIAN BARRY: Today we are joined by Professor Hilary Charlesworth of the Australian National University, and we're going to be talking about human rights, bills of rights and some other related topics. Professor Charlesworth, welcome to Public Ethics Radio.

HILARY CHARLESWORTH: Thanks, Christian.

CHRISTIAN BARRY: I wonder if you might first start just by describing some of the work that you've done recently that related to bills of rights and talk about some of the political debate in Australia and more generally surrounding bills of rights.

HILARY CHARLESWORTH: Well this issue, the issue of bills of rights, has sort of come on and off the Australian political agenda. But it's now very much on the agenda because the government on December 10 of last year announced a national human rights consultation. It's of particular relevance in Australia at the moment because I think we are the only Western democracy that has no formal method of rights protection, either in our constitution or in other statutes.

And I did my thesis in the mid-eighties, and when I was studying in the U.S., I became quite interested in what was going on in Canada and the whole movement around the adoption and what was happening in the courts after that. So I was very interested in looking at the U.S. Bill of Rights which of course had been adopted 200 years earlier, in the Canadian Charter, which had just been adopted, and in those days in Australia it looked as though we were going to have some form of bill of rights adopted in the early eighties.

In the end the Australian moves came to nothing, but that interest stayed with me. But it never seemed to have much political purchase in Australia. But, I finally got the chance to work on it a slightly more practical way when in the early 2000s—so this is now almost 20 years after I'd done my work on it—the Labor government here in our tiny jurisdiction of the Australian Capital Territory—John Stanhope was elected as chief minister, and he, for quite interesting but unique biographical reasons, had an interest in seeing whether or not the ACT should adopt some form of rights protection.

I chaired his committee to consult with the community on that, which was a fantastic experience because I think as an academic you don't often get the chance to—we always talk about the community, but the community you deal with as an academic is often quite a small one. And on this committee we had to go out to all parts of the ACT and meet with groups I'd never met with before to think about whether we should introduce something like this in the ACT. So I spent a year doing that and really enjoyed that, and it changed my ideas a lot about what were the best ways to protect human rights.

We came out with a report and the government of course didn't necessarily like all aspects of our report, and they picked up some aspects of it. And in 2004 the ACT adopted an ACT Human Rights Act, which was fairly closely modelled on the British Human Rights Act. And since then at the ANU we've had a research project just following up; well how that has actually worked in practice—

CHRISTIAN BARRY: Mm hm.

HILARY CHARLESWORTH: —and whether, has actually changed anything in the ACT.

CHRISTIAN BARRY: What has been the experience both, in your view, post-Trudeau Canada and also perhaps with the much more recent experience that you've had with respect to implementing a bill in the ACT?

HILARY CHARLESWORTH: There's been a lot of debate in Canada. One Canadian academic, or, a group of academics, came up with the idea that the Canadian Charter was all about dialogue, that really what you wanted—its genius, if you like—was creating not a bunch of powerful judges stomping on political decisions, but rather the idea was—this was Peter Hog and Alison Bushell who wrote quite a famous article about how the Charter promoted dialogue. In other words, the judges were in dialogue with the executive branch of government and the legislature. There was this dialogue going on that in the end ratcheted up human rights protection. There are quite a number of scholars who point to the fact now that this has meant that a lot of issues that previously just got submerged in political decision-making have come on to the agenda again. There's been quite a lot of study of the way, some would say, this has improved the quality of Canadian political decisions.

One major difference with what's happened in Australia and the Australian debate is that of course that the Canadian Charter is a constitutional document, so it actually gives—because it's entrenched in the constitution—there are a couple of possibilities of opting out of it. So the Canadian—unlike the U.S. Bill of Rights—under the Canadian Charter, at Section 33, there is a possibility of any of the Canadian provincial legislatures or the national legislature actually enacting legislation that violates human rights, but doing so explicitly. So, to invoke what's called the “notwithstanding” clause.

So if you actually say “notwithstanding the Canadian Charter of Rights, we will imprison all redheaded people,” that actually still is constitutional. You can get away with that sort of law, but you have to be explicit about the fact that you're bypassing the Charter. Nevertheless, it is a constitutional document and it is possible for the Canadian Supreme Court to actually invalidate laws. They can simply say, “This law is invalid because it's inconsistent with the Charter.” In Australia, there was early talk about having a constitutional bill of rights, but it's quite striking that for the past 30 years nobody has really seriously spoken about constitutionalising rights.

CHRISTIAN BARRY: And why is that?

HILARY CHARLESWORTH: Well, I think it's because there is a thought that it would be impossible to amend the constitution in that way. To amend the Australian constitution we have a requirement that you have to have the majority of voters in the majority of states. So that's four out of six of the Australian States, and I think out of the last—I think I've got the figures right—out of the last thirty proposals to amend the constitution only eight have been successful. Very, very difficult to amend the constitution.

And the thought is, on issues like rights, you are going to have so much political division that it would be impossible to get it up. There was in 1988 actually an attempt to amend the constitution in a very modest way to increase rights protections, not really to get a bill of rights, but just in quite a narrow way to... There are three or four so-called rights provisions currently in the constitution and the proposal in 1988 was simply to—they now only apply to the Commonwealth Government—and the proposal in 1988 was to extend those to the State Governments as well. That proposal lost by the greatest number of votes ever, for any constitutional amendment. So I think the idea that this could get up as a constitutional amendment has just been put aside. And most—

CHRISTIAN BARRY: How would it have traction without having that status? Certainly, without constitutionalization, many people will say, “Oh, what is that really adding?” How is that given a real status, as opposed to the ordinary—the ordinary law that legislatures make all the time?

HILARY CHARLESWORTH: That’s a very good point, and that’s exactly an issue that has come up in the current national debate. There are number of people who say, “Look, if you’re not putting constitutional change on the agenda, this is not worth talking about.” And a number of colleagues of mine, a number of legal academics, would make that point and just say really to speak about anything less than constitutional amendment is preposterous, because it can always be overridden.

But the great counterargument to that cynicism about leaving aside constitutionalisation I guess comes from the U.K. experience. And in 1998 the United Kingdom government adopted the Human Rights Act, which is a piece of legislation which could be, in theory, altered tomorrow, by the British parliament. So it has no greater status than any other piece of legislation.

But essentially what it does is—the U.K. model of a bill of rights—is to say, “Okay you have a statute, and the first thing you need in the statute is a set of rights.” So, in New Zealand, what they did was to list a whole set of rights out of the International Covenant on Civil and Political Rights. They changed a few, but essentially it was a list taken from the international treaty. In the U.K., what they did was to effectively take the rights out of the European Convention on Human Rights of 1950, to which the U.K. is of course a party, and say, “OK when we talk about human rights in this legislation, that’s what we’re referring to.” So you have a cross-reference in the U.K. legislation to an international treaty. So that’s one important part—defining your rights.

The second thing that the U.K. Human Rights Act does is to say, “OK, whenever a piece of legislation is interpreted in the U.K., it must be consistent”—and the critical words are—“as far as possible with the rights set out”—not all rights—“but with these particular rights set out in the European Convention.” So the first engine, if you like, of making these human rights bite, is to say all legislation must be interpreted, as far as possible, with these designated human rights.

So that’s straightaway—that might not sound like a lot, but the U.K. experience shows that where you have legislation that’s genuinely capable of two meanings, the judges are told “you must prefer the meaning that’s consistent with human rights.” And there’s been a whole series of cases in the U.K. where that’s really made a difference.

So just to give one example, this was a relatively early case under the U.K. Human Rights Act, and this was where there was some legislation that dealt with people with a mental illness. This particular piece of law said, “OK, once you are put into an institution that deals with mental illness, you, as the person so confined, must then establish to the satisfaction of the doctors and a number of other decision-making people, that you’re perfectly sane and then you can be left, you can be let out.”

CHRISTIAN BARRY: Mm hm.

HILARY CHARLESWORTH: And if you think about it that’s quite hard, because not many of us can actively prove that we’re sane. In fact, I feel regularly that I’m probably not sane. [Laughter.]

So the person, or the people acting for a person who was being held in a mental institution in Scotland, said, “Hang on: this is reversal of the onus of proof for detention. Really, it should be up to the medical authorities to prove that this person continues to suffer from mental illness—the person suffering from a mental illness shouldn’t have to show affirmatively that they’re not suffering from it any more.” The onus must be, in other words, on the detainer and not on the detainee. And this case wended its way up through the British court system and they said, “Yes, this legislation is clearly a violation of a human right, the human right that you should not be subject to detention, unless there is a positive reason why you should be.” So that’s just one example where a human-rights friendly interpretation—

CHRISTIAN BARRY: Mm hm.

HILARY CHARLESWORTH: —actually changed the interpretation of legislation.

But what to do if you’re stuck with legislation that cannot be interpreted in a way that is consistent with human rights? What about a piece of legislation that on its face is inconsistent with human rights? So the next step in the U.K. armoury of human rights protection is, OK, if the courts are confronted with a piece of legislation that is on its face inconsistent with human rights, they can issue a declaration of inconsistency—

CHRISTIAN BARRY: Mm hm.

HILARY CHARLESWORTH: —which is a formal statement to the legislature that the legislation is inconsistent. And then under the British Human Rights Act that triggers a whole range of possibilities for amendment of the relevant legislation. In the case I’ve just mentioned about the provision about onus of proof, the court decided that it couldn’t interpret the legislation to be consistent with human rights because it was manifestly inconsistent. So they issued a statement of inconsistency that then was like a flag to the legislature, and the British Parliament then passed amending legislation very fast to alter that.

The third engine, if you like, in the U.K. Human Rights Act is the possibility of people actually bringing an action against a public authority that has acted inconsistently with human rights. So

if you find that a government authority you are dealing with has acted in a way that violates your human rights, you can actually bring an action against them.

CHRISTIAN BARRY: Oh, OK.

HILARY CHARLESWORTH: So there are those methods if you like, of bringing human rights home. So they're theoretically just like any other statute, but in practice, of course, there'd be quite a few questions asked. "Well, why are you amending this human rights legislation?" It develops, if you like, a status which goes beyond its strictly legal status, whereby I think governments would be quite loathe to amend that legislation.

CHRISTIAN BARRY: One thing we've been mentioning throughout, we've been referring to the judiciary. But of course, especially if it's not something that's constitutional, but even if it were, there's no a priori reason why it should have to be open to judicial review. Why give the judiciary such a central role in the review of legislation?

HILARY CHARLESWORTH: Well, I think that why I particularly am drawn to these other models, to the nonconstitutional models, is precisely because they don't overload the judiciary. Now, I think the judiciary—if we just look at our judiciary here in Australia, and I think this is true generally—are drawn from a very narrow cadre of society. They tend to be men, they tend to be white men, they tend to come from very middle class backgrounds, they have very, very limited life experience. And one only has to look at—it's very easy in any country to find a whole suite of judicial decisions that reflect very, very narrow perspectives. Feminists have been saying this for many, many years and many other groups have pointed this out.

Why I think the statutory model of bills of rights, to me is the preferred way to go, and I'm certainly a supporter of these, is precisely because they don't—they give the judiciary a limited function. So there is no judicial review as such, in the sense that there is no way that a judge can invalidate legislation by measuring it up to human rights. What they do is—and what our research here just in the Australian Capital Territory has shown this to be the result of our Human Rights Act here—is, they actually allow much greater scrutiny of the legislature and executive action in the light of human rights. And I actually think, here in the ACT we have a fairly low-key judiciary, and it's fair to say that in the five years that our Human Rights Act has been in operation, the judiciary has hardly touched it.

CHRISTIAN BARRY: Mm hm.

HILARY CHARLESWORTH: And certainly there is no case yet in our jurisdiction where you could say the Human Rights Act has made any difference to the decision. Where the real bite has been, has been both in the legislature, with giving a scrutiny committee a much greater definition of what they need to measure proposed legislation against. And we've seen some very interesting commentary by the scrutiny committee, critical of government actions in this way, and then the government responding. And also, the major effect has actually been inside the executive arm of government, where the fact that there is now a statement of particular rights that need to be used in terms of measuring policy proposals and draft legislation has, I think, meant for much better quality legislation.

I'm quite wary of criticising the judiciary too much. I mean, why I find this a curious area in that, if you think about what we ask the judiciary to do—let's leave aside bills of rights completely. You and I have a fencing dispute, we're neighbours, and you don't like the fence that I've built and I've painted iridescent colours. This offends you. So you might then—a well-educated person will say, let me look at my statutory rights—and you might go and look up the fencing act in the ACT. And you might say, "Okay it says here that fences must be painted an appropriate colour for residential use." You don't like my iridescent whales that I've painted on the boundary fence, so you and I, we can't resolve it. You bring a case against me under the fencing act and say, "Look here court, Hilary's fence has got iridescent whales. Surely that is not appropriate for a residential area."

These sort of disputes—"appropriate for a residential area," "reasonable," "in the best interests of the child"—terms like this are used in everyday legislation, and we hand that over to judges to make a decision. Now we mightn't like the decision they make, but judges every single day are involved in making decisions like that. Nobody has yet worked out a better way of resolving them.

So given that most, almost all, of our system of governance—at the end of the day, a dispute about a statutes meaning will go to the judiciary. And we're quite happy to leave, in fact what can be huge decisions to the judiciary. What is wrongful life? That decision is left to the judiciary. And I actually don't see any decisions about human rights as in any way easier, or tougher, than the decisions that are given to judges in deciding on the meaning of any piece of legislation. So, for those reasons, I don't get too worried about a statutory bills of rights giving the judges too much power or politicising, or politicising the judiciary.

CHRISTIAN BARRY: Maybe I could relate a couple of these issues that we've been discussing. One very much open issue is what the content of a bill of rights should be, however it is to be enacted, whether to be given constitutional entrenchment, or a statutory interpretation. That is, what belongs on it? And it seems the justification for having one will determine very much what the content of it is.

So for example, some people, they'll say, "So much the worse for democracy," in the sense that what we need is protection of human rights—that's a liberal egalitarian commitment that most societies have. It's certainly true that democratic decision making is a pretty good way of aggregating preferences, and it gets the right answer a lot of the time, but it can't be trusted to get this right answer about a whole range of issues and for that reason we need to have some way to protect individual rights. So particularly in cases where we have persistent minorities and so on, that's simply what we need.

Another type of approach is slightly different in that it takes seriously the idea of democracy as the supreme value of a society like ours, but recognizes the difficulties of democracy self-undermining itself. So just to take a very crude example, if a majority makes it impossible for a minority to voice its opinion, for example, which could in a strict majoritarian system work, that would be a way of undermining democracy. So even if you care about democracy, this is a concern you would have.

And so these different types of justification do seem to give rise to these different sets of rights that one might want protected. On the first model, it could be as broad a range of rights as would be better protected having a bill of rights protection for them. Under the second model it would be much more restricted. And you mentioned—it's certainly often the case that bills of rights focus very much on civil rights and certain political rights, certain procedural rights as opposed to—well, I don't want to overstate it—substantive rights. How do you view the underlying justification of bills of rights and how does that influence what you think ought to be made part of their content?

HILARY CHARLESWORTH: I would be a critic of just sticking to civil and political rights. I think if one has rights protection, I am in favor of including economic social and cultural rights as well as civil and political rights. Because it seems to me, if we look at... The democracy argument as it is often used in Australia. In fact, the strongest and perhaps most effective critics of the idea of bills of rights in Australia have tended to be, well, they're often politicians, and they've often tended to say, "Look, you know, the genius of Australian democracy is that all these things are slugged out in parliament and you can basically rely on robust parliamentary debate to sort these things out." And when you actually look, on any issue, at what happens in any parliamentary debate, you see that, first of all in our Australian democracy, party allegiance is exceptionally strong.

CHRISTIAN BARRY: Mm hm.

HILARY CHARLESWORTH: Very rarely is there any crossing of the floor. It was very interesting just last week here in Canberra to watch, on a particular piece of legislation, the issue of whether we should charge asylum seekers for their detention costs, which has been the case in Australia. A couple of members of the conservative party, the Liberals, actually crossed the floor—exceptionally rare for that to happen. So generally these issues are not decided through robust parliamentary debate, and as soon as you have something like anti-terrorism laws within view, you find both major parties closing ranks behind it because both are too terrified to be seen, or want—they're fearful of being accused of being, sort of, soft on terrorism.

So in fact, when you look at almost any human rights issue that comes before parliament (and of course there are human rights issues in almost every piece of legislation) those aspects of them are almost never debated, or they're not debated seriously or adequately. So for that reason, I am a believer majoritarian democracy being a very flawed form of delivering a proper substantive justice. I don't know how you'd characterise it. I'm a "the imperfections of majoritarian democracy" person—

CHRISTIAN BARRY: Mm hm.

HILARY CHARLESWORTH: —and see statements of rights enshrined in some way in the equation are very important. By the same token, they're obviously not—I don't see bills of rights as in any way—they're not guarantees of protection of human rights, not at all.

CHRISTIAN BARRY: Do you see ways in which a bill of rights could actually promote more profound deliberative democratic decision-making within a society?

HILARY CHARLESWORTH: Mm hm.

CHRISTIAN BARRY: And do you have examples where you feel that the fact of having protection of certain rights, with judicial review, and so on and so forth, has actually promoted a more thoughtful public debate than would have happened otherwise?

HILARY CHARLESWORTH: Well I guess the best example I'd give of that, where it happening is here in the ACT in the context of anti-terror laws. The ACT was required under a compact to adopt anti-terror laws, but the government said, "OK we have to do this, we've agreed to adopt anti-terror laws, but we are going to do so using the prism of human rights to measure the sorts of laws that we should have." And there was a quite an interesting community consultation about the sort of laws that the ACT should adopt, which avoided some of the human rights violations that came up in the national laws and the laws adopted by other states.

I should emphasize that I don't... I guess us human rights lawyers—and I'm sure I'm guilty of this, have a tendency to think you know—human rights are the statement of every worthwhile value, and I just don't think that's the case. I would, in my own work have often criticised human rights law for being—it's very limited. It's blind to a number of perspectives. But I do think that it's a useful starting point for some of these conversations, and I think that you certainly see, in the United Kingdom now, the way that debate of issues that actually won't ever get to courts are affected by the U.K. Human Rights Act and the rights that are set out there. So, I see it as a very valuable way to bring a number of issues that we don't think about usually into the discussion.

CHRISTIAN BARRY: We're discussing human rights, bills of rights, and democracy with Professor Hilary Charlesworth. We're going to take a brief break, and we'll be back.

CHRISTIAN BARRY: You're listening to Public Ethics Radio. Today we're joined by Hilary Charlesworth, and we're discussing bills of rights, human rights, and democracy.

I wanted to just come back to something you said earlier, when you were referring to the fact that we already look to the judiciary to make determinations about a broad range of issues about which reasonable people might disagree, about which there might be different interpretations and so on. One example you gave was certain things related to public nuisance and your fantastic spread of whales dancing. One thing that I know some critics of bills of rights often press is they say, "Well, certainly when we think of a judge as a kind of an umpire, there is some value. Especially when, you know that at the end of the day there may not be a deep moral truth about whether or not it really is a public nuisance or an eyesore that you have dancing whales on your fence or not. That ultimately we have different conflicting preferences about what we most want." Similarly, when it comes to issues about whether we should allow trading on Sundays or not. Right, there are certain issues where we just have different preferences, and under such circumstances, either we take a vote, or if we can't take a vote, then we simply go to a neutral party who can legislate it.

Whereas there might be other types of issues where we think that there really are much more fundamental things at stake. So whether or not some practice of treatment of asylum seekers, for example, constitutes punishment or is unduly cruel and so on and so forth. These are issues about which reasonable people could certainly disagree, but it doesn't seem to be merely a matter of preferences.

HILARY CHARLESWORTH: Mm.

CHRISTIAN BARRY: And since it's not just a mere matter of preferences, a lot of people are uncomfortable. And it seems to be a quite different type of thing to be asking of a judge to be making decisions about that type of fundamental political principle, and as a corollary, that this is the type of decision that really belongs with the people, through some legislative process.

HILARY CHARLESWORTH: Hm. I understand that objection, however, I think I would say, I could think of—and of course my example about the fence was, sort of, quite a frivolous one. But I think that it's not hard to point to, even in a rights-deaf society such as Australia, decisions that we ask judges to do that involve quite large issues of political principle.

So I'm thinking of, when we—there's been a series of cases in the High Court in Australia, which have involved interpretation, say, particularly the cases I'm thinking of are under the Migration Act. And what you do is... To give one example in a famous case, in the Al-Kateb case, where you had a provision of the migration legislation that was—could be interpreted in a whole range of ways.

The critical issue at stake in that case was, whether a person who had been refused refugee status, and who could not be returned to the land of their formal nationality. This was a Palestinian born in Kuwait, it's a very complicated case about nationality. But the long and short of his case was that he hadn't been able to gain refugee status here, he would not be accepted back by... well, Palestine doesn't exist in international law terms. And Kuwait wasn't going to accept him back. So he effectively had no country to go back to and it looked as though he was going to be kept in indefinite detention for the whole of his life in Australia. So the question was for the High Court, was a particular provision of the legislation that said a person, could you interpret the provision in the migration act to contemplate allowing somebody to be held in indefinite detention for the whole of their life? A fairly huge issue of political principle.

Three members of the High Court said, "We're going to read this legislation in a way that this couldn't possibly be what the legislature meant and we think that he can't be held in indefinite detention." Four members, the majority, said "this is how we read this legislation." Now, and so, that case decided, under this provision of the legislation, that under Australian law it is possible to hold a person for the whole of their life in detention. They're not guilty of a crime, but it is possible to do so under our law. So that's quite a big issue of principle, to decide that, in a democracy, it's possible to hold a person who's never done anything wrong, in that way—

CHRISTIAN BARRY: Right. So much the worse for entrusting the judges to make such a decision, especially if they make that decision!

HILARY CHARLESWORTH: Exactly! But what was interesting is that the decision is four–three, so it obviously could be decided in a range of ways. I should just actually say, I think the government almost, the government were so surprised by the High Court’s decision, they weren’t expecting it I understand, and they actually released this man. So he now lives in Sydney, I think. But there you had a case where you actually had a judiciary already deciding that it was possible to hold a person not guilty of any crime indefinitely under Australian law: a pretty big political principle to decide, almost by default.

CHRISTIAN BARRY: Without a bill of rights as well.

HILARY CHARLESWORTH: Without a bill of rights, exactly! Exactly! And in fact one of the judges—it’s quite an interesting case because one of the judges who was part of the majority writes this, I think quite disingenuous, decision where they say, “This just shows you, where we get to in Australia without a bill of rights.” Now, which I thought was completely bizarre because you might have said to him “Well, couldn’t you have just decided with the other group of people who decided that this was impossible under Australian law?”

But, the point is that silence on rights doesn’t improve the situation, it just leaves you with these extraordinary, and quite unsatisfactory decisions, and yet we’ve left—

CHRISTIAN BARRY: With less resources on which to...

HILARY CHARLESWORTH: Exactly, and we left them without any arguments on rights, about detention. And even the three judges who found for Mr. Al-Kateb—well, one of the judges, Michael Kirby, did go into a whole lot of rights jurisprudence. But the chief justice at the time, Murray Gleeson and the judge who agreed with him Justice Gummow, if you read their decisions, you would have no idea that they were dealing with rights. They decided on almost abstruse points of, of statutory interpretation, although it’s very clear, I think that they were moved by the human situation. So it’s a completely bizarre decision, completely unsatisfactory, and about fundamental rights, but done in a vacuum almost without reference to rights.

CHRISTIAN BARRY: Do you see a danger with respect to difficult cases of principle of this type that might come—one of the things that’s sort of interesting in looking at many Supreme Court decisions in the United States is the extent to which they end up being decided—the opinions refer to small technicalities, that, almost evading at all costs some of the questions of principle. Do you see that as a danger, and what institutionally can be done to guard against that type of risk?

HILARY CHARLESWORTH: Yeah, I think, the U.S. Supreme Court, to a respectful observer, a sort of outsider, is not really a model on rights jurisprudence. And I would actually say that the American Supreme Court has now for a long time... its decisions are extraordinarily narrow. They very rarely refer to jurisprudence beyond the bounds of the United States. I think they—it’s considered highly controversial to refer to international decisions.

I think they have got themselves into a great big backwater of rights jurisprudence where it’s just constantly self-referential, and they haven’t opened themselves up to the much broader and more

interesting principled jurisprudence that's coming out of the European system for example, or even Canada to their north. So I think it's, it's not an exemplar of rights jurisprudence.

I completely concede that rights jurisprudence means that judges will need different training. I always—I'm struck by the fact that a lot of critics in Australia of judges deciding human rights issues sort of say, "Well, you know, they have these very narrow educations" and yet they're very, very suspicious—and it's true, they're very very suspicious, like the American ones, of referring to international cases. But as a human rights lawyer, I'm conscious of, you know there's a huge range of very interesting thought out there that's being used by judges in very, very sophisticated ways.

Perhaps the most sophisticated case of this, tends to be the European Court of Human Rights, which over 50 years and a great swag of cases has come up with very, very interesting and quite, at times, deep philosophical discussions of major issues. So, I'm cautious here because I don't think that they should necessarily be—I think we want legislatures to have these big decisions on principle too, but I think that should be mirrored by a much better trained judiciary. So I'd like to send the judiciary back to school to do basic courses in understanding what rights are.

They're not just a question of personal preferences, which I think is somehow the way that it's depicted in the media. That you'll think cruel and inhuman and degrading treatment is that, and, I'll think something different, and so it's just a matter of you and me disagreeing, it's a matter of opinion. One only just has to look at some of the big decisions on these topics, or some the philosophical or legal writings on them to know there's been a huge amount of thought and analysis given to this and a lot of really, very deep thinking that I think should be taken into account in making these decisions. It's just not a matter of "I think this and you think that, and that's the end of it." People should be drawing on this very deep well of thinking and discussion about this and coming to their decisions. That's not to say that at the end of the day we might disagree, but at least we should be disagreeing in a very informed and sophisticated way, not just on knee-jerk, sort of reactions to things.

CHRISTIAN BARRY: Professor Charlesworth, thank you for joining us on Public Ethics Radio.

HILARY CHARLESWORTH: It's a pleasure, thank you.

MATT PETERSON: Public Ethics Radio is a podcast featuring conversations between our host, Christian Barry, and scholars and thinkers who engage with ethical issues that arise in public life. The show is an independent production, supported by Yale University, the Australian National University, and the Centre for Applied Philosophy and Public Ethics, in association with the Carnegie Ethics Studio at the Carnegie Council for Ethics in International Affairs. We'll be back soon with another conversation about public ethics. In the meantime, you can find out more about us and our guests on the web at www.publicethicsradio.org.