Towards a Meaningful Discourse on Rights in Australia

Dr Imtiaz Omar*

Abstract

This paper has three objects: first, to question whether existing legal doctrine and judicial techniques can offer a coherent and realistic conception of rights; second, to suggest a plausible philosophical basis of individual rights; and third, to canvass the need for a justiciable statutory bill of rights. The proposition for a theoretical basis for individual rights is done by critiquing conventional approaches to issues of rights. Existing constitutional doctrine, like responsible and representative government, judicial implications drawn from these, or separation of judicial power, is described as inadequate for meaningful protection of individual rights. The concluding part suggests that a bill of rights is crucial for the theoretical and practical reasons analysed in the paper.

Introduction

The debate in Australia on a bill of rights is as old as federation. The idea of a bill of rights in the Commonwealth Constitution[1] was mooted by the Constitution-makers, but rejected.[2] Since the 1970s, there have been intermittent efforts to adopt a bill of rights either in statutory or constitutional

* LLM *Saskatchewan*, PhD *ANU*, Lecturer, Department of Law, University of New England. I am grateful to Dr James Thomson and Professor George Winterton for comments on an earlier version of this paper. Matthew Cowman and Lewis Grimm provided research support in the preparation of the article. I appreciate their help very much.

1 *Commonwealth of Australia Constitution Act* 1900.

2 See, for example, J La Nauze, *The Making of the Australian Constitution*, Melbourne: Melbourne University Press, 1972, 227–232.

form. The *Human Rights Bill* of 1973,[3] the Bill for an *Australian Bill of Rights Act* 1985,[4] and the *Constitution Alteration (Rights and Freedoms) Bill* 1988[5] testify to these efforts. More recently, the bill of rights debate has been regenerated. There has been Commonwealth legislation on sexual privacy,[6] and racial vilification[7] in the past couple of years. Issues relating to individual freedom of contract in the workplace are being debated. The High Court has generated a new body of jurisprudence on implied rights. Some, if not all, of these new developments have been controversial, and there are entrenched positions on both sides of the bill of rights debate.

The first part of this paper examines whether existing constitutional doctrines such as responsible and representative government, or judicial implications of rights drawn from these concepts, or separation of judicial power, or common law theory can offer a realistic framework for the articulation and operation of individual rights. The adequacy of constitutional provisions on, for example, jury trial, and statutory guarantees of non-discrimination are also explored in this part. The second part of this paper discusses the writings of two contemporary moral and legal philosophers, John Rawls and Ronald Dworkin, in relation to the context and justification of individual rights. This part of the paper highlights that the Rawlsian 'principles of justice', and Dworkin's formulations of 'positive' individual rights[8] based on political morality are fundamentally antithetical to the utilitarian position. It is argued that the conception of rights, proposed by John Rawls and Ronald Dworkin, may be adopted as a basis on which to explicate the nature of individual rights against the state in modern society.

The concluding section suggests that a bill of rights in Australia is crucial for a number of reasons including the inadequate protection of individual rights by existing constitutional, statutory and common law mechanisms; the undesirability of controversy generated by the implied rights jurisprudence of the High Court; affording litigants, courts and society prior information of the broad parameters of articulated rights and exceptions; and avoiding controversies on Commonwealth-State

---

3 For an account of the origin of the *Human Rights Bill* and the eventual failure in having it passed by the Commonwealth Parliament see, for example, P Bailey, *Human Rights*, Sydney: Butterworths, 1990, 52–54.

4 For a brief discussion on the origin and fate of this Bill see, for example, P Bailey, above n 3, at 54–56.

5 For a critical review of this effort to entrench bill of rights in the Commonwealth Constitution see B Galligan, "Australia's Rejection of a Bill of Rights", (1991) *Journal of Commonwealth and Comparative Policy* 344.

6 *Human Rights (Sexual Conduct) Act* 1994 (Cth).

7 *Racial Hatred Act* 1995 (Cth).

8 Throughout this paper, the characterisation of individual rights as 'positive' refers not to a 'positivist' conception, but rather in the sense of those rights not being 'negative' in character. A 'negative' conception of rights implies that individual rights operate only where there is no law to the contrary. This position is exemplified by the common law conception of rights/liberties discussed below.

division of powers entailed by opportunistic legislation such as the *Human Rights (Sexual Conduct) Act* 1994 (Cth). It is suggested that it may be practical to adopt a statutory, rather than a constitutional bill of rights, which would bind both the Commonwealth and the States. The concluding section also briefly discusses concerns about the expansion of the courts' power in enforcing a bill of rights.

Conventional Rights Discourse in Australia: Rhetoric and Reality

The 'Common Law' as Guarantor of Rights

The common law conception of 'liberty' is based on negative considerations. The subject matter of a citizen's right is defined by what is left unregulated by the law. Common law protection of rights can, therefore, be abrogated by legislation to the contrary. The nature of the common law and its capacity to protect individual rights are highlighted in the following comments.

> "The common law does not say we have freedom of speech; it says we may speak as we wish, so long as what we say is not lawful. The common law does not say we have the right to freedom of assembly; it says that people may not be prevented from meeting together unless the law forbids that meeting.
>
> The common law says a person may not be unlawfully arrested or kept in custody; it does not put any limits on the kind of laws that may be made to authorise arrest or detention ... The common law prohibition on police or other officials searching a man's house without warrant was not intended to protect his privacy; its purpose was to protect his property. The common law gives a man who can afford the fees the right to be represented by a lawyer in court; it does not guarantee the same privilege to a poor man."[9]

The common law's inability to safeguard individual rights has also been noted by the Constitutional Commission.

> "Inevitably the common law is made up of a wilderness of single instances from which general principles are extracted. The common law has thus not developed and enforced a set of protections of the individual against governments."[10]

---

[9] Lionel Murphy's reply as Attorney-General to a series of articles by Sir Robert Menzies on the Human Rights Bill, Canberra, Australian Government Publishing Service, 1974, quoted in Marcus Einfeld,"Murphy and Human Rights", in J Scutt (ed), *Lionel Murphy: A Radical Judge*, Melbourne: McCulloch Publishing Ltd, 1987, 187–210, at 189.

[10] Constitutional Commission, *Report of the Advisory Committee on Individual and Democratic Rights under the Constitution*, Canberra: Australian Government Publishing Service, 1987, 15.

Despite these portrayals of the common law's incapacity to safeguard individual rights, there is still in Australian society and politics, a complacency in varying degrees that the common law operates as an effective guarantor of rights.[11] This argument is sometimes used to deny the need for alternative mechanisms for protecting rights. It has, for example, been asserted that:

> "in the area of human rights the common law will remain a very significant contributor to that protection which all of us desire. Even if the change remains evolutionary rather than revolutionary, quite significant protection of human rights is being provided and ... will be provided by the common law."[12]

The concept and content of individual rights advocated in this paper is predicated on the principles of public law. A public law inquiry into individual rights is concerned with questions of the extent of governmental powers and the legal, moral and ethical questions of individual liberties in the context of a constitution. These dimensions of the public law transcend the issues, controversies and resolution of disputes of such branches of the law as, for example, contracts, torts, and property, where the focus is on competing entitlements of private parties. These areas have historically been the pre-dominant concern of the common law. In the public law arena, and more specifically on questions of protection the 'positive' conception of rights, which is the basis of this paper, the common law is fundamentally inadequate.[13]

In highlighting the inadequacy of the common law as guarantor of rights, it is not suggested that the common law is wrong. Neither is it the intention here to dispute that the judiciary does not play any role in safeguarding individual rights. In the sense that common law refers to judge-made, and judge-developed, law in the broadest sense, it cannot, of course, be denied that the court would be involved in interpreting and enforcing rights articulated in a bill or charter of rights. The reasons for this assertion lies, as noted here, in the nature and character of the common law and its underlying assumptions as a system of law.

---

[11] Professor Zines, however, has noted that this trend has been eroded. See L Zines, *Constitutional Change in the Commonwealth*, Cambridge: Cambridge University Press, 1991, 73.

[12] J Doyle and B Wells, "How Far Can the Common Law Go Towards Protecting Human Rights", in P Alston (ed), *Towards an Australian Bill of Rights*, Canberra: Centre for International and Public Law, Faculty of Law, ANU, and HREOC, 1994, 107–121, at 121. The authors recognise the limitations of the common law to protect a full range of rights while making this observation.

[13] See, for example, C Howard, "Public Law and Common Law", in D Galligan (ed), *Essays in Legal Theory*, Melbourne: Melbourne University Press, 1984, 1–28. Compare the concept of a 'common law bill of rights' in M Detmold, "The New Constitutional Law", (1994) 16 *Sydney Law Review* 228, at 248–249.

Responsible and Representative Government as Facilitator of Individual Rights[14]

The framers of the Commonwealth Constitution were not unaware of the arguments for inclusion of entrenched rights in the Constitution. They were, however, convinced that the combined processes of parliamentary representative democracy and responsible government constituted adequate protection of individual rights.[15] In large measure, this logic has permeated political thinking in Australia since then, and at times been justified in rhetorical terms.[16] The original acceptance, by the Constitution-makers, and its later justification, that individual rights can be adequately safeguarded by this scheme of government, appears to be grounded on the putative link between utilitarian ethics and democracy.[17]

Generally, in utilitarian terms, democratic government is truly representative of citizens, and because democratic laws emanate from the majority of citizens, they are directed to promote the well-being of the greatest number of them. But in reality, the link between representative government and popular sentiments of individuals' rights and entitlements, in democracies like Australia, is tenuous. Whatever may have been the position in the early days of the federation, the inefficacy of representative government in modern times to adequately protect individual rights cannot be denied. This is realised by citizen-voters, and expressed in their dissatisfaction towards the institutions of representative government.

Despite dissatisfaction and apathy, in varying degrees, by individual citizens in Australia, the processes of representative government continue

---

[14] In this section, only the general arguments concerning representative and responsible government being a facilitator of individual rights are discussed. Recent case-law on implied rights grounded on notions of representative government are critically discussed below.

[15] In addition, there were concerns about the invalidation, in the States, of racially discriminatory employment legislation if individual rights were entrenched in the Constitution. On the deliberations on the Constitutional Conventions on a bill of rights see, generally, J La Nauze, *The Making of the Australian Constitution*, Melbourne: Melbourne University Press, 1972, 227–232.

[16] For a brief discussion on this point see, for example, B Galligan, "Political Culture and Institutional Design", in P Alston, *Towards an Australian Bill of Rights*, Canberra: Centre for International and Public Law, Faculty of Law, ANU, and HREOC, 1994, 55–72, at 65–68.

[17] According to classical utilitarian philosophy "society is rightly ordered, and therefore just, when its major institutions are arranged so as to achieve the greatest net balance of satisfaction summed over all the individuals belonging to it ..." J Rawls, *A Theory of Justice*, Cambridge, Mass: Belknap Press of Harvard University Press, 1971, 22. The classical utilitarian tradition established by Jeremy Bentham and John Stuart Mill is still influential in legal and political theory, although many of the original premises have been revised and new perspectives are offered within the basic framework. For statements on Bentham's and Mill's position on the link between utilitarianism and representative democracy see, for example, H L A Hart, *Essays in Jurisprudence and Philosophy*, Oxford: Clarendon Press, 1983, 192–193; H L A Hart, *Essays on Bentham*, Oxford: Clarendon Press, 1982, 69–71.

to flourish.[18] In the context of the USA and Canada, the following remarks highlight the perpetuation of representative government irrespective of the disaffection on the part of voting citizens.

> "The link between government policy and popular sentiment is, at best, obscure, with electoral apathy and disaffection the norm ...
>
> Representative democracy has flourished in the face of widespread citizen ennui precisely because public participation and interest are dispensable to its survival and performance. Limited public participation and apathy are even regarded in a positive light, since they minimise conflict and promote stability. Democratic politics is seen as the legitimate preserve of specialists ..."[19]

If representative government cannot ensure individual rights, does the principle of responsible government overcome the problem? The fundamental principle of responsible government dictates that the executive branch of government is responsible or accountable to Parliament. In theory, there is a complex and sophisticated collection of principles to ensure accountability. But, in reality, with the emergence of elitist party machinery and the influence of professional bureaucrats, it is the executive government that now controls Parliament.[20]

In dispensing with the need for including guarantees of individual rights in the Commonwealth Constitution, the constitution-makers also accepted another basic principle of utilitarian ethics — majoritarianism. Majoritarianism implies that all policies affecting rights and entitlements of citizens should be made by accountable elected representatives and not by other institutions such as courts.[21] It must be remembered, how-

---

[18] The following comment highlights the situation:

> "It is sometimes said that the Australian people are politically apathetic and ignorant. On particular issues, people may well be ill-informed, and many are certainly apathetic. But this is itself a result of the present system."
>
> G de Q Walker, "Direct Democracy and Citizen Law-Making" in Samuel Griffith Society, *Upholding the Australian Constitution*, (1994) 4 *Proceedings of the Samuel Griffith Society*, 281–304, at 289.

[19] A Hutchinson and P Monahan, "Democracy and the Rule of Law", in A Hutchinson and P Monahan (eds), *The Rule of Law: Ideal or Ideology*, Toronto: Carswell, 1987, 97–123, at 97–98. See also P Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada*, Toronto, Carswell, 1987, 120–126.

[20] See, for example, B Galligan, above n 16, at 65–68.

[21] This is important to note in the context of anti-majoritarian arguments against a bill of rights. Those arguments are based on the ground that non-elected judges would be responsible for enforcing individual rights. A recent reiteration of this trend of reasoning centres on the idea of 'equality in the exercise of political power'.

> "Any viable justificatory theory of democracy centres on the idea of equality in the exercise of political power. Scarcely any aspect of political power is more important than the determination of what is to count as those priority interests which are to overrule and out-prioritize all other considerations. To hand this role over to a non-representative body is to hand over such a major aspect of political authority as to undermine the initial basis which is used to justify that move."
>
> (T Campbell, "Democracy, Human Rights, and Positive Law" (1994) 16 *Sydney Law Review* 195, 205.)

ever, that the primary function of a 'written' constitution is not to entrench majoritarianism. In conceptual terms there is a difference between 'majoritarian democracy' and 'constitutional democracy'.

> "The Constitution is based neither on a concept of democratic rule that is purely majoritarian nor on an assumption that all policies must be chosen by electorally accountable officials."[22]

If the assumptions of the Australian constitution-makers were that constitutional government would be premised solely on majoritarianism, and that majoritarianism alone would guarantee individual rights, those assumptions were erroneous. The practical working of the Commonwealth Constitution has reinforced this conclusion.

Extrapolating Individual Rights from Specific Constitutional Clauses

There appears to be broad agreement that several provisions of the Commonwealth Constitution guarantee certain aspects of individual rights. The reason for such an assertion is that, although those provisions are not articulated as individual rights, principles relating to rights can be extrapolated from them. The provisions commonly referred to are[23] s 80 *Commonwealth Constitution* (trial by jury); s 116 (freedom of religion); s 117 (prohibition of interstate discrimination); and s 51(xxxi) (acquisition of property on just terms).

In approaching these provisions of the Constitution, it must be remembered that, rather than being expressions of individual rights, these constitutional provisions were conceived as restrictions on legislative power. Further, except for s 117, the other provisions are applicable only to the Commonwealth, and not to any State legislature. Even in that respect, most of the provisions are not effective checks on government from transgressing on those specific individual rights. Thus, the guarantee of jury trial in indictable offences, prescribed by s 80, may be overridden by Commonwealth legislation reclassifying the offences.

---

[22] E Chemerinsky, "The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review", (1984) 62 *Texas Law Review* 1207, at 1232–33.

[23] Several writers have suggested additional provisions of the Commonwealth Constitution from which to extrapolate other individual rights. See, for example, P Bailey, *Human Rights*, Sydney: Butterworths, 1990, 84–105, where a extensive list of constitutional provisions are cited in this regard. Recent writings have suggested that s 41 of the Constitution can be interpreted as a right to vote. See, for example, A R Blackshield, G Williams and B Fitzgerald, *Australian Constitutional Law and Theory: Commentary and Materials*, Sydney: Federation Press, 1996, 707–710.

> "Section 80 says nothing as to the manner in which an offence is to be defined. Since an offence against the law of the Commonwealth is a creature of that law, it is the law alone which defines the elements of the offence. The fact that s 80 has been given an interpretation which deprives it of much substantial effect provides a reason for refusing to import into the section restrictions on the legislative power which it does not express."[24]

Acquisition of property on just terms in s 51(xxxi) is included in the list of Commonwealth legislative powers. For the purposes of this paper, two things are to be noted. First, the 'just terms' expectation does not confer an individual right, but is a consequence of Parliament's legislative power to appropriate property. Secondly, s 51(xxxi) is not directed to an individuated entitlement because the beneficiaries of 'just terms' are not only individuals, but also corporate bodies, and the States. In this respect, it is conceptually difficult to insist that this provision constitutes an individual right against unjust deprivation of property such as is provided, for example, by the Fifth Amendment to the Constitution of the United States.[25]

In respect of the religion clause in s 116 of the Constitution, judicial interpretation has centred on highlighting differences between it and freedom of religion guaranteed by the First Amendment to the United States Constitution.[26] This approach to interpretation entailed a narrow reading of s 116.[27] This restricted approach is exemplified, for example, by *Krygger v Williams*,[28] and *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth*.[29] The High Court's predilections in these decisions, in not laying down any meaningful parameters for the operation of s 116, was continued in *Attorney-General (Vic) (ex rel Black) v Commonwealth*.[30] More recently, however, the High Court appears to have signalled a move away from its traditional interpretation of s 116. In *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)*,[31] Mason ACJ and Brennan J identified freedom of religion and conscience as 'the essence of a free society'.[32] Strictly speaking, this observation is *obiter*. It remains to be seen how the High Court will utilise this interpretation in the future.

---

[24] *Kingswell v R* (1985) 159 CLR 264, at 276, per Gibbs CJ, Wilson and Dawson JJ.

[25] *Constitution of the United States*, Amendment V:
"No person shall be ... deprived of life, liberty, or property, nor shall private property be taken for public use, without just compensation."

[26] *Constitution of the United States*, Amendment I:
"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ..."

[27] For a critical overview of decisions on s 116 see, for example, L Zines, *The High Court and the Constitution*, 3rd ed, Sydney: Butterworths, 1992, 326; P Hanks, "Constitutional Guarantees", in H P Lee and G Winterton, *Australian Constitutional Perspectives*, Sydney: Butterworths, 1992, 92–128, at 100–105.

[28] (1912) 15 CLR 366.

[29] (1943) 67 CLR 116.

[30] (1981) 146 CLR 559. Compare the dissenting opinion of Murphy J in this case.

[31] (1983) 154 CLR 120.

[32] Above, n 31, at 130.

This discussion shows that none of the provisions in ss 51(xxxi), 80, and 116 of the Commonwealth Constitution can be explained as guarantees of individual rights by adopting the standards of the conceptual basis of rights suggested in this paper. Individual rights are individuated entitlements expressed in positive, not negative terms. The relevant provisions of the Commonwealth Constitution cannot, therefore, be claimed to be either statements of individual rights, or to be meaningfully used to extrapolate rights relating to the subject-matter of those specific clauses. For the same reasons, it cannot also be argued that these sections, linked with other provisions like s 117 or s 41 of the Constitution, can be identified as a 'mini' bill of rights.

Statutory Guarantees of Procedural Rights

In considering the need for documented individual rights, the content, scope and efficacy of Commonwealth anti-discrimination laws arises for consideration. Legislation like the *Racial Discrimination Act* 1975 (Cth), the *Sex Discrimination Act* 1984 (Cth), and the *Human Rights (Sexual Conduct) Act* 1994 (Cth) provide some guarantees to individuals against discrimination. This legislation makes unlawful certain kinds of behaviour or practices which detract from general notions of fair play, and provide redress for unjustified discrimination. But these guarantees and entitlements are given in the context of the existing framework of legislation relating to employment and other laws. Allegations of discrimination are to be made within this existing legislative framework, on the footing that those laws are valid. The anti-discrimination guarantees are, therefore, 'procedural', and cannot be identified as substantive guarantees like the rights to 'liberty' or 'equality'.

In addition to the 'procedural' nature of statutory anti-discrimination guarantees, the operation of those guarantees is further complicated by the federal constitutional structure of government in Australia. One of the ways in which complications have arisen in the past, is the operation of the doctrine of inconsistency of laws under s 109 of the Commonwealth Constitution.[33] In *University of Wollongong v Metwally*,[34] for example, the majority of the High Court held that, in the absence of express disclaimer in the Commonwealth *Racial Discrimination Act* to the contrary, the operation of s 109 made the New South Wales *Anti-Discrimination Act* 1977 inconsistent and inoperative. This conclusion ensued even though both laws were directed to guaranteeing the individual right to non-

[33] Commonwealth Constitution, s 109:
"When a law of the State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

[34] (1984) 158 CLR 447.

discrimination. The majority decision in *Metwally* was characterised by a formalist technique of interpretation without sufficient regard to individual rights concerns.[35]

The consequences have been similar when the administrative process, for ensuring compliance with statutory guarantees of non-discrimination, is explained by a formalist technique. In *Brandy v Human Rights and Equal Opportunity Commission*,[36] for example, the legality of amendments to the *Racial Discrimination Act* 1975 (Cth) brought about by the *Sex Discrimination and other Legislation Amendment Act* 1992 (Cth) and the *Law and Justice Amendment Act* 1993 (Cth) was in question. The amendments related to the process of determining allegations of racial and other discrimination by the Human Rights and Equal Opportunity Commission (HREOC), and the enforcement of the findings of the Commission. Under these amendments, a 'determination' by the HREOC was to be registered at the Federal Court Registry, and after the expiration of a fixed period during which a *review* of the HREOC 'determination' might or might not be taken up before the Federal Court, the 'determination' took effect "as if it were an order of the Federal Court".

In *Brandy*, the High Court found this enforcement mechanism of an HREOC 'determination' invalid as being contrary to the principle of the separation of judicial power. In holding the relevant provisions of the amended *Racial Discrimination Act* invalid, the High Court expressed its awareness of the ineffectiveness of the earlier process of enforcing an HREOC 'determination' through independent proceedings in the Federal Court, and the policy considerations for the change to the new procedure. The High Court, however, chose to insist on the technical grounds for the separation of administrative and judicial powers, without due consideration to the issues of individual rights to non-discrimination that were involved in the process.[37]

Considering the decisions in *Metwally* and *Brandy*, can it be seriously argued that the administrative process for enforcing statutory guarantees of non-discrimination is efficacious? Generally, the capacity of administrative law to address individual rights issues is not fully realised because of the absence of a bill of rights. The adoption of a bill of rights

---

[35] See, for example, the observations of Deane J quoted in M Coper, *Encounters with the Australian Constitution*, Sydney: CCH Australia, 1987, 24, acknowledging the need for compensation for racial victimisation despite the outcome of the case. As a technique of interpretation, formalism focuses close attention on the words of the relevant statute read in the light of maxims of statutory interpretation which emphasise semantic and syntactical considerations. At a more conceptual level, formalism has been identified with a *rule*-based approach to interpretation, with little or no regard to social, political or economic considerations. See generally, for example, F Schauer, "Formalism", (1988) 97 *Yale Law Journal* 509.

[36] (1995) 127 ALR 1.

[37] For critical discussion of the High Court's decision in *Brandy v Human Rights Commission* see, for example, Imtiaz Omar, "Darkness on the Edge of Town: The High Court and Human Rights in the Brandy Case", (1995) 2,1 *Australian Journal of Human Rights* 115.

would provide extrinsic standards for 'better decision-making', and overcome resistance of administrative officials to new administrative law measures designed to protect individual rights.

> "Much of ... [the inefficacy of administrative law measures] is because of the lack of fundamental source to the values that administrative law reflects. The principles of the rights of the individual in relation to society — fundamental civil liberties — have not had a central platform in the political context and this lack of centrality is arguably part of the reason for the lack of improvement of governance. The introduction of a Bill of Rights has the potential to change all that."[38]

Implied Rights[39]

In the last few years the High Court has built up a remarkable jurisprudence of 'implied' rights. Arguments for implied rights were first suggested by Murphy J in his opinions in a number of High Court decisions.[40] Some of the recent High Court decisions on implied rights are based on arguments similar to those of Murphy J; namely, that, considerations of democracy and representative government require the recognition of certain implied rights and freedoms. Among those decisions are *Polyukhovich v Commonwealth*,[41] *Nationwide News Pty Ltd v Wills*,[42] *Australian Capital Television v Commonwealth*,[43] *Leeth v Commonwealth*,[44] *Dietrich v R*,[45]

---

[38] K Rubenstein, "Towards 2001: An Assessment of the Possible Impact of a Bill of Rights on Administrative Law in Australia", (1994) 1 *Australian Journal of Administrative Law* 13, at 78.

[39] The discussion in this section is not directed to conventional critiques of implied rights based on arguments of parliamentary supremacy, or judicial usurpation, or of creating legal indeterminacy. Rather, the objective is to question the basis for the implication of rights, and to refute the contention such rights may be a substitute to an articulated bill of rights. For conventional critiques of implied rights see, for example, L Zines, *Constitutional Change in the Commonwealth*, Cambridge: Cambridge University Press, 1991, Lecture 2; T Campbell, "Democracy, Human Rights and Positive Law", (1994) 16 *Sydney Law Review* 195; M Coper, "The High Court and Free Speech: Visions of Democracy or Delusions of Grandeur", (1994) 16 *Sydney Law Review* 184; J Goldsworthy, "Implications in Language, Law and the Constitution", in G Lindell (ed), *Future Directions in Australian Constitutional Law*, Sydney: Federation Press, 1994, 150–208; A Glass, "Freedom of Speech and the Constitution", (1995) 17 *Sydney Law Review* 29; D Rose, "Judicial Reasonings and Responsibilities in Constitutional Cases", (1994) 20 *Monash University Law Review* 195.

[40] Among those opinions are *R v Director-General of Social Welfare (Vic); Ex parte Henry* (1975) 133 CLR 369; *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54; *Seamen's Union of Australia v Utah Development Co* (1978) 144 CLR 120; *McGraw-Hinds (Aust) Pty Ltd v Smith* (1978) 144 CLR 633; *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237; and *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556.

[41] (1991) 172 CLR 501.

[42] (1992) 177 CLR 1.

[43] (1992) 177 CLR 106.

[44] (1992) 174 CLR 455.

[45] (1992) 109 ALR 385.

Theophanous v Herald and Weekly Times Ltd,[46] and *Cunliffe v Commonwealth*.[47] The High Court's jurisprudence on implied rights in these cases is diverse, and sometimes subtle and sophisticated. It is, however, beyond the scope of this paper to analyse these decisions in any detail. Only the decision in *Australian Capital Television v Commonwealth* is discussed to illustrate that the basis of implied rights is inconsistent with the conception of individual rights suggested in this essay.

In *Australian Capital Television*, several commercial television companies challenged the amended provisions of the *Political Broadcasts and Political Disclosures Act* 1991 (Cth), which imposed a ban on political advertising on radio and TV, for a specified 'election period' immediately preceding federal, State, Territory, and local government elections. These amendments also provided 'free time' during an 'election period' to political parties to present their policies. By majority, the High Court found the new provisions of the Act to violate the implied freedom of political communication, and communication generally. Justification for this implied freedom of communication was grounded in representative democracy and responsible government. Mason CJ explained:

> "Indispensable to ... [representative government and political accountability] is freedom of communication, at least in relation to public affairs and political discussion. Only by exercising that freedom can the citizen communicate his or her views on the wide range of matters that call for, or are relevant to, political action and decision. Only by exercising that freedom can the citizen criticise government decisions and actions, seek to bring about change, call for action where none has been taken and in this way influence the elected representatives. By these means the elected representatives are equipped to discharge their role so that they may take account of and respond to the will of the people."[48]

In examining the impact and consequences of Chief Justice Mason's observations it should be remembered that the proceedings in the *Australian Capital Television* case were brought by television companies. These companies stood to lose millions of dollars in revenue because of the prohibition on political advertising by political parties. In so far as political information to members of the public was concerned, means other than political advertisements were available. In his dissenting opinion, Dawson J pointed out:

> "[U]pon the assumption that political advertising imparts information which is capable of assisting in the making of informed choice in an election, the prohibition clearly denies some information to electors. But the provision of

[46] (1994) 182 CLR 104.
[47] (1994) 182 CLR 272.
[48] (1992) 177 CLR 106, at 138.

> information in the press and by other means is unimpeded. Even the electronic media have an undiminished capacity to present news reports, current affairs programs, editorial comment and talkback radio programs all relating to political issues."[49]

It could, of course, be argued that the subject matter of the political advertisements was a source of political information, however minor the impact of that information may be. This explanation is similar to the utilitarian justification of free speech proposed by John Stuart Mill. According to Mill:

> "if everyone is free to advance any theory of private or public morality, no matter how absurd or unpopular, truth is more likely to emerge from the marketplace of ideas, and the community will be better off than it would be in if unpopular ideas were censored ... [O]n this account, particular individuals are allowed to speak in order that the community they address may benefit in the long run."[50]

Regardless of its utilitarian justification, the implication of rights from other premises, such as representative democracy or responsible government, detracts from the 'positive' conception of rights based on political morality. Also, while the High Court's majority decision in the *Australian Capital Television* case was unequivocal about the implied right to communication, other decisions on implied rights were not so. "*Polyukhovich v Commonwealth* ... may or may not have established an implied guarantee against retrospective criminal legislation; *Leeth v Commonwealth* ... may or may not have established an implied guarantee of equality."[51] There is, therefore, no prospect that a catalogue of judicially crafted implied rights can be a substitute for a bill of rights in Australia.[52] The limited impact of implied rights was recognised by Mason CJ in his judgment in the *Australian Capital Television* case. Referring to the disinclination of the framers of the Commonwealth Constitution to include a bill of rights in the Constitution, Mason CJ observed:

> "In the light of this well recognised background, it is difficult, if not impossible, to establish a foundation for the implication of general guarantees of fundamental rights and freedoms. To make such an implication would run counter to the prevailing sentiment of the framers that there was no need to

---

[49] Above, n 48, at 189.

[50] R Dworkin, *A Matter of Principle*, Cambridge, Mass: Harvard University Press, 1985, 385–86.

[51] A R Blackshield, "The Implied Freedom of Communication", in G Lindell (ed), *Future Directions in Australian Constitutional Law*, Sydney: Federation Press, 1994, 232–268, at 235–236.

[52] Cf, M Detmold, "The New Constitutional Law", (1994) 16 *Sydney Law Review* 228.

incorporate a comprehensive Bill of Rights in order to protect the rights and freedoms of citizens."[53]

Separation of Judicial Power as Implied Bill of Rights

The Commonwealth Constitution did not import the doctrine of separation of powers from the United States Constitution. Judicial power has, however, been explained by the High Court, since its earliest days, with very few exceptions, as being rigidly separate from the executive and legislative branches of government. In upholding and reiterating the strict separation of judicial power, the High Court has sometimes tended to use the separation rule as an end in itself. This trend finds expression, for example, in *R v Kirby; Ex parte Boilermakers' Society of Australia*,[54] and the more recent decision in *Brandy v Human Rights and Equal Opportunity Commission*.[55] On the other hand, at times when issues of individual rights are concerned, the High Court has relied upon arguments of separation of judicial power in arriving at conclusions, rather than articulating principles relating to those rights as justifying those decisions. The decision of the Court in *Lim v Minister for Immigration*,[56] for example, attests to this latter trend.

The *Boilermakers'* and *BLF* cases

In the *Boilermakers'* case,[57] the parties to an industrial award were the Metal Trades Employers' Association and the Boilermakers' Society. The award incorporated a no-strike clause. During the pendency of the award, however, the Boilermakers' Society, out of solidarity with striking iron-workers, infringed the no-strike clause. For this infringement, the Arbitration Court fined the Boilermakers' Society for contempt. The Boilermakers' Society applied to the High Court for a writ of prohibition against the Arbitration Court from enforcing its judgment. In the absence of a bill of rights in Australia, which arguably would have supported the Boilermakers' Society's case, the ground for seeking the writ was the separation of judicial power principle. It was argued that, the relevant

---

53 (1992) 177 CLR 106, at 136. Prospects for the implications of general guarantees of individual rights from the Commonwealth Constitution have been approached with scepticism by commentators as well. See for example, L Zines, *Constitutional Change in the Commonwealth*, Cambridge: Cambridge University Press, at 51–52; G Winterton, "Separation of Judicial Power as Implied Bill of Rights", in G Lindell (ed), *Future Directions in Australian Constitutional Law*, Sydney: Federation Press, 1994, 185–208, at 206–207.

54 (1957) 94 CLR 254.

55 (1995) 127 ALR 1.

56 (1992) 176 CLR 1.

57 (1957) 94 CLR 254.

legislation reposing both arbitral and judicial powers in a single body (the Arbitration Court), was impermissible under the separation of judicial power principle. The High Court agreed with this contention, and laid the foundations of a rigid separation of judicial power.

In the *Boilermakers'* case, High Court's interpretation of the separation of judicial power principle, entailed a victory for trade union rights. In *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* ("the *BLF* case"),[58] however, the consequences were very different. In this case, the Conciliation and Arbitration Commission (CAC), at the initiative of the Minister, made a declaration, under the *Building Industry Act* 1985 (Cth), that the Builders Labourers' Federation (BLF) had engaged in certain conduct. According to the provisions of this Act, a declaration of this nature enabled the Minister to direct the cancellation of the trade union's registration. The BLF challenged, before the High Court, the legality of the declaration by the CAC. While the proceedings were pending, the Commonwealth Parliament hurriedly passed a new law, the *Builders Labourers' Federation (Cancellation of Registration) Act* 1986 (Cth), which deregistered the BLF.

In the *BLF* case, a major issue of challenge was that the 1986 Act interfered with the judicial power of the Commonwealth. The High Court, however, rejected the challenge by the BLF on the ground that Parliament may legislate to alter or affect rights in pending litigation, without infringing the separation of judicial power rule. Comparing the *Boilermakers'* and the *BLF* cases, it can be seen that, on a macro-level, the invocation of the separation of judicial power principle entailed different consequences. These divergent consequences supervened because principles relating to industrial rights, and the balancing of these rights with other considerations were not the primary focus of decision-making. Rather, the cases were decided primarily by relying, in many respects in an instrumental way, on the principle of the separation of judicial power.

The *Lim* and *Brandy* cases

In *Chu Kheng Lim v Minister for Immigration*,[59] amendments to the *Migration Act* 1958 (Cth) created a category of 'designated person'. This was meant to apply to Cambodian 'boat people' who were detained in custody, pending decision on their applications for refugee status in Australia. The amended Act included a rule (section 54R) to the effect that a court was not to order release of a 'designated person'. The provisions of section 54R were challenged as constituting an interference, by the Commonwealth Parliament, with the judicial process. In deciding this

[58] (1986) 161 CLR 88.
[59] (1992) 176 CLR 1.

challenge, the majority of the High Court held that in enacting s 54R, Parliament attempted to direct the courts as to the manner and outcome of the exercise of their jurisdiction. For the High Court, this constituted an impermissible intrusion into the domain of judicial power. In deciding *Lim*, some of the justices appeared to uphold a broad *ratio* by suggesting that deprivation of individual liberty can come about *only* by judicial sanction.[60]

Non-interference with the judicial process, and the separation of the judicial power upheld by the High Court in *Lim*, served the cause of individual liberty. In *Brandy v Human Right and Equal Opportunity Commission*,[61] however, the individual right to non-discrimination under Commonwealth law was negated as a result of the affirmation of quite a mechanical view of the separation of judicial power. The High Court's approach in *Brandy* was characterised by a formalist technique of inquiry.[62] It did not concern itself with the nature and enforcement of rights to non-discrimination which concerned the subject-matter of the contentious issues in *Brandy* .

Can judicial power by itself be a guarantor of individual rights?

Despite the diverse consequences of the application of the separation of judicial power principle highlighted in this paper, some commentators have suggested that the requirement of due process implicit in the separation of judicial power can guarantee individual rights.[63] Professor Winterton, for example, makes the following observations.

> "Procedural due process is extremely important and constitutional entrenchment of its essential features against the Commonwealth ... by implication in the concept of federal judicial power is a valuable contribution to the protection of civil liberty in Australia."[64]

---

[60] For instance Brennan, Deane and Dawson JJ proposed that:
"the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt."
((1992) 176 CLR 1, at 27.)

[61] (1995) 127 ALR 1.

[62] See above for comments concerning this technique of interpretation.

[63] G Winterton, above n 53, at 185–208; L Zines, "A Judicially Created Bill of Rights?" (1994) 16 *Sydney Law Review* 166; G Kennett, "Individual Rights, the High Court and the Constitution" (1994) 19 *Melbourne University Law Review* 581. Cf C Parker, "Protection of Judicial Process as an Implied Constitutional Principle" (1994) 16 *Adelaide Law Review* 341.

[64] G Winterton, above n 53, at 200. However he points out that "if the separation of federal judicial power is to be a thoroughgoing implied Bill of Rights, substantive rights will also need to be entrenched".

In the context of the United States Constitution, a similar theme, directed to ensure the operation of procedural rights, has been advocated by John Ely. In *Democracy and Distrust*, Ely conceives of the judicial function as directed solely to procedural matters, leaving the determination of decisions of substantive rights to the political process. According to him, judicial review is directed at "policing the process of representation". For Ely, a participation-oriented form of judicial review concerns itself with *how* decisions affecting value choices are made. By engaging in this review, the Court will uphold what Ely terms "participational values". The Court should pursue such values because they are those with which:

> "(1) ... [the] Constitution has ... concerned itself, (2) whose 'imposition' is not incompatible with, but on the contrary supports, the ... system of representative democracy, and (3) that courts set apart from the political process are uniquely situated to 'impose'."[65]

It has been pointed out, however, that the process-based explanation of the judicial function is unconvincing.

> "The process theme by itself determines nothing unless its presuppositions are specified, and its content supplemented, by a full theory of substantive rights and values."[66]

Separation of judicial power and the attendant due process can safeguard liberties not just by "protecting whatever 'entitlements' happen to be conferred by legislation or administrative regulation". To protect individual rights, the separation rule must "posit a right to individual dignity, or some similarly substantive norm, as the base on which conceptions of procedural fairness are constructed".[67]

It is not the separation of judicial power that can guarantee individual rights. Rather, it is individual rights that the separation of judicial power is supposed to subserve. Had this been the premise, the High Court, in the *Boilermakers'* case may have considered the question whether liberties flowing from trade union solidarity justified a departure from an enforceable award condition which it was the judicial function to determine. Similarly, in the *BLF* case, consideration of trade union rights against unjust deprivation of registration would not have been swept aside by the semantic distinctions between judicial power, judicial process and jurisdiction. On the same token, the ratio in *Lim* would have been more specific. And there would be no recourse to formalism in *Brandy* .

---

[65] *Democracy and Distrust*, Cambridge, Mass: Harvard University Press, 1983, 75. See too at 117, "unblocking stoppages in the democratic process is what judicial review ought preeminently to be about ...".

[66] L Tribe, "The Puzzling Persistence of Process-Based Constitutional Theories" (1980) 89 *Yale Law Journal* 1063, at 1064.

[67] Above, n 66, at 1070.

The Parameters for a Substantive Theory of Rights

The state of rights-discourse in Australia makes it essential that an alternative theoretical basis for individual rights be explored. We have to adopt an approach that recognises, for example; that the concept of individual rights is 'positive', not 'negative' in character; it is mistaken to explain individual rights through utilitarian arguments; individual rights are not gifts of the law or of the Constitution; they "pre-exist" law; conceptions of individual rights are primarily based on moral values like 'liberty', 'dignity', 'equality', 'fairness'; and individual rights cannot just be explained in instrumental terms (like liberty of contract), but must be explained in the context of other concerns such as equality.

In this regard, the writings of John Rawls and Ronald Dworkin can be useful. The broad outlines of their theories are briefly highlighted here.

John Rawls

In *A Theory of Justice*,[68] Rawls offers a powerful critique of utilitarianism, and sets out two fundamental principles of justice, their analysis, content, and their priority of application. The starting point of Rawls' theory of justice is a hypothetical social contract where the contractual parties know only the general facts about human society but not certain kinds of particular facts. Rawls tries to show that if these individuals are to enter into a social contract, while temporarily ignorant of their individual qualities and attributes, they would choose two principles of justice. Roughly, these principles provide:

> "that every person must have the largest political liberty compatible with a like liberty for all, and that inequalities in power, wealth, income and other resources must not exist except in so far as they work to the absolute benefit of the worst-off members of society".[69]

Rawls' contract is not utilitarian because the parties' consent to the principles of justice are made without knowledge of their advantageous or disadvantageous qualities. Also, the principles of justice are not the product of the contract but a presupposition of Rawls' use of the contract.

Ronald Dworkin has suggested that only right-based theories are compatible with Rawls' contract model.[70] Dworkin has also suggested that the particular right which lies at the heart of Rawls' theory is the right of

---

[68] Cambridge, Mass: Belknap Press of Harvard University Press, 1971.

[69] R Dworkin, "The Original Position", in N Daniels (ed), *Reading Rawls*, Oxford: Basil Blackwell, 1975, 16–53, at 17.

[70] Above, n 69, at 45.

each individual to equal concern and respect.[71] This individual right to equal concern and respect is also fundamental to Dworkin's theory of rights. In Dworkin's view:

> "a man has a moral right against the state if for some reason the state would do wrong to treat him in a certain way, even though it would be in the general interest to do so."[72]

Conceived in this way, a theory of rights "simply shows a claim of right to be a special, in the sense of a restricted, sort of judgement about what is right or wrong for governments to do".[73]

According to Dworkin, when rights characterised by these moral dimensions are 'fused' with the 'legal' rights enumerated in the Constitution, the validity of a sub-constitutional law is made dependent on answers to complex *moral* problems like *liberty* or *equality*.[74] Since rights against the government, as Dworkin conceptualises them, are rights which are available even though the majority in society considers them wrong, 'utilitarian' arguments have no place in Dworkin's jurisprudence. The accommodation of utilitarian considerations in an explanation of rights would mean the 'annihilation' of rights.[75]

Rights for Dworkin are crucial because the institution of rights "represents the majority's promise to the minorities that their dignity and equality will be respected."[76]

Dworkin rejects conventional ideas of the right to liberty because those ideas create "a false sense of a necessary conflict between liberty and other values [of society]".[77] Rights to certain liberties, according to Dworkin, must be based "on grounds of political morality".[78] In this regard the fundamental principle is not 'liberty' but 'equality'. Dworkin articulates the

---

71 Above, n 69, at 50.

72 *Taking Rights Seriously*, London: Duckworth, 1978 (new impression) 1st published 1977, at 139.

73 Above, at n 72.

74 Above, n 72, at 186.

75 Above, n 72, at 194. For accounts of the utilitarian approaches of Bentham and Mill on questions of individual rights see generally, H L A Hart, *Essays on Bentham*, Oxford: Clarendon Press, 1982, 79–104, 162–193; H L A Hart, *Essays in Jurisprudence and Philosophy*, Oxford: Clarendon Press, 1982, 181–222. Contemporary writers on utilitarianism and individual rights include, D Lyons, "Rights, Claimants, and Beneficiaries", and "Human Rights and General Welfare" in D Lyons (ed), *Rights*, Belmont, Calif: Wadsworth Publishing Co, 58–77 and 174–86 respectively, plus his other works; and R Hare, *Moral Thinking: Its Levels, Method and Point*, Oxford: Clarendon Press, 1981, plus his other works. An influential American writer of the 'law and economics movement', R Posner, has attempted to explain rights on the dual premises of wealth maximisation and utility maximisation. Among Posner's works are, *The Economic Analysis of Law*, 3rd ed, Boston: Little Brown & Co, 1986, and *The Problems of Jurisprudence*, Cambridge, Mass: Harvard University Press, 1990.

76 Above, n 72, at 205.

77 Above, n 72, at 271.

78 Above, n 72, at 272.

right to equality as the 'right to equal concern and respect'. For Dworkin, this right to equal concern and respect is the criterion by which other rights are identified.[79] Of the two grounds of political morality that are comprehended by the 'abstract' right to 'equal concern and respect', Dworkin proposes that the 'right to treatment as an equal', rather than the 'right of equal treatment', be taken as fundamental.[80]

Dworkin's theory of rights is broadly based on philosophical, moral and political considerations. Some of his assumptions find support, as has been pointed out, in Rawls' principles of justice. His formulations of the rights to liberty and equality are also similar to the idea of human dignity affirmed by Kant.[81] That idea accords priority to the individual right to human dignity, and accepts the primacy of justice. It is suggested that the broad outlines of Dworkin's jurisprudence, and the underlying principles of Rawls' theory of justice can inform a meaningful discourse of rights in Australia. This approach to rights will overcome the problems encountered in conventional rights discourse in Australia, and provide an impetus to arguments for adopting a bill of rights.

Conclusion: The Imperatives of a Bill of Rights in Australia

It cannot be seriously denied that, in Australia, the protection of individual rights is inadequate. The debate on rights is dominated by variants of an utilitarian approach. To a large extent, it can also be identified as Benthamite. These premises are old-fashioned. On the other hand, as has been pointed out, a communitarian approach to issues of individual rights entails foregone opportunities for individual rights' enforcement. There is, therefore, the need for a realistic conception of rights, a concept that recognises positive rights of individuals against the state. Equally, it is essential that the subject matter of those rights, like the right to life, and the rights to liberty, equality, speech and expression, be documented.

Without such an approach, fundamental concerns of contemporary society and politics cannot be meaningfully addressed. Issues like strip search,[82] or the application of facial or neck pressure by police to remove

---

[79] Above, n 72, at 273.

[80] Above, n 72, at 273.

[81] For a concise critical commentary on the broad outlines of Kant's moral philosophy see, for example, A Teale, *Kantian Ethics*, Oxford: Oxford University Press, 1951.

[82] There has been a number of newspaper reports lately that customs and police personnel are resorting to strip-searching individuals as part of the enforcement of anti-drug legislation. In a number of instances, young females, arriving from destinations in Asia, were victims of strip-searches by custom officials. See, *The Age*, 20 October 1994, at 2. In another publicised incident, 463 patrons of a gay and lesbian nightclub in Melbourne were strip-searched by police for drugs. See, *The Age*, 11 and 13 August 1994, at 1 and 17 respectively.

protesters,[83] would continue to be dominated by a utilitarian discourse. Attempts at resolving such issues through the medium of the common law,[84] or via a framework of implied rights can only meet with limited success. A manacled prisoner's plight,[85] or the quest for equality by gay and lesbian persons, would end up in an international forum (UN Human Rights Committee)[86] because utilitarian considerations, or common law, or an implied rights approach, or anti-discrimination legislation have failed to address their individual rights.

A meaningful discourse on rights can take the writings of Ronald Dworkin and John Rawls as helpful starting points. Dworkin has been criticised for advocating a very expansive approach to individual rights.[87] It is not suggested that all aspects of Dworkin's theory of rights be accepted, but the broad outlines of his theory can still be the basis for a new approach to individual rights.

The approach to individual rights advocated here makes it essential to adopt a bill of rights. The unsuccessful referendum in 1988 to entrench a bill of rights in the Commonwealth Constitution,[88] suggests that it may be practical to opt for a statutory bill of rights, as a first step towards ultimately having a constitutional one.[89] Further, in order to address the

---

[83] For accounts of the use of pressure point tactics by the police to remove protesters see, *The Australian*, 14 December 1993, at 5; *The Age*, 12 February 1994, at 1. For a critical review of these police tactics see the Report by the Victorian Ombudsman, *Richmond Secondary College — Allegations of Excessive Force*, Melbourne: Government Printer, 1994.

[84] For example, by remedies for assault, battery or false imprisonment.

[85] Christopher Dean Binse, a high security prisoner in Barwon Prison near Geelong was shackled, under prison regulations, for repeated attempts to escape. A petition to the Victorian Supreme Court by Binse to declare his bodily restraints unlawful was unsuccessful. See *The Age*, 25 and 26 July 1995, at 1. See also, K Derkley, "Leg Irons: Return to the 19th Century?" (1995) 69 *Law Institute Journal* 751.

[86] The *First Optional Protocol to the International Covenant to Civil and Political Rights* permits individuals from member state-parties to petition the UN Human Rights Committee (UNHRC) with allegations of violations of rights recognised by the *International Covenant to Civil and Political Rights* (ICCPR). In December 1991, a gay activist from Tasmania petitioned the UNHRC alleging that Tasmania's *Criminal Code* violated rights to equality and privacy of gay persons. The UNHRC found that the Tasmanian legislation violated the relevant provisions of the ICCPR. For an account of these developments see, for example, R Croome, "Australian Gay Rights Case goes to the United Nations" (1992) 2 *Australian Gay and Lesbian Law Journal* 55. Subsequent to the UNCHR's finding, the Commonwealth Parliament has passed the *Human Rights (Sexual Conduct) Act* (Cth) 1994.

[87] There has been a host of critiques of Dworkin's theory of rights, legal interpretation and adjudication. See, for example, M Cohen (ed), *Ronald Dworkin and Contemporary Jurisprudence*, New Jersey: Rowman and Allanheld, 1984.

[88] See generally, B Galligan, "Australia's Rejection of a Bill of Rights" (1990) *Journal of Commonwealth and Comparative Politics* 344.

[89] In this regard, the Canadian experience can be noted. The *Canadian Bill of Rights* 1960, applicable only to federal laws, was adopted as a statute to overcome the inefficacious constitutional amending procedure, and the anticipated opposition of the provinces. See generally, W Tarnopolsky, *The Canadian Bill of Rights*, 2nd ed, Toronto: McClelland & Stewart, 1975. Most of the rights and freedoms guaranteed by the *Canadian Bill of Rights* are now entrenched in the Canadian Constitution as the *Charter of Rights and Freedoms*. The *Charter* is applicable to both the federal and provincial levels of government in Canada.

fundamental concerns of individual rights arising from both and Commonwealth and State governmental action, as well as to avoid the duplication of bills of rights at Commonwealth and State levels, an Australian bill of rights should be applicable at both Commonwealth and State levels.[90] The currently recognised boundaries of the Commonwealth Parliament's 'external affairs' power would facilitate the adoption of a statutory bill of rights.[91] It is upon reliance of its 'external affairs' power that the Commonwealth Parliament passed legislation like the *Racial Discrimination Act* 1975 (Cth), the *Sex Discrimination Act* 1984 (Cth) and the *Human Rights (Sexual Conduct) Act* 1994 (Cth). As discussed earlier, these statutes incorporate the procedural dimensions of selected individual rights. The same head of legislative power might enable the Commonwealth Parliament to adopt a fully-fledged bill of rights, encompassing substantive individual rights standards.

Such a course would also ensure that the Commonwealth government of the day is precluded from adopting opportunistic legislation, such as the recent *Human Rights (Sexual Conduct) Act* 1994 (Cth) which would have the effect of invalidating provisions of, for example, State criminal law. The invalidation of State law is effected by invoking the constitutional doctrine of 'inconsistency'.[92] A Commonwealth bill of rights applying to the States would have a broader scope for invalidating State legislation inconsistent with the human rights standards and principles articulated in the bill of rights. Some opposition from the States can be anticipated in this regard. It would, however, be in the interests of the States to reconcile themselves to the comparatively predictable consequences of the operation of a bill of rights, than to subject themselves to opportunistic Commonwealth legislation, and the unpredictable consequences of constitutional litigation.

Concerns are sometimes expressed about the role of the court in enforcing guaranteed individual rights through the medium of judicial review. The basis of most, if not all, of these contentions is the doctrine of parliamentary sovereignty or variations of it, which in turn is grounded on arguments of majoritarian democracy. As pointed out earlier in this paper, such contentions are misconceived; the Australian constitutional system does not, either expressly or by implication, provide for a

---

[90] The *Human Rights Bill* of 1973 sought to apply to both Commonwealth and State levels. The *Bill for an Australian Human Rights Act* of 1985 was to be applicable only to the Commonwealth level.

[91] The external affairs power of the federal Parliament is found in s 51(xxix) of the Commonwealth Constitution. The scope of this power extends to passing of legislation to translate international obligations undertaken by Australia in pursuance of treaties and other international agreements to which it is a party. The High Court has recognised wide parameters of the external affairs power in a number of landmark cases including, *New South Wales v Commonwealth* ("*Seas and Submerged Lands* case") (1975) 135 CLR 337; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Commonwealth v Tasmania* ("*Tasmanian Dam* case") (1983) 158 CLR 1.

[92] See above, at n 33.

majoritarian democracy, or for parliamentary sovereignty. Rather, Australia operates as a 'constitutional democracy' where the powers of the organs of the state, the legislature included, are circumscribed by the terms of the Commonwealth Constitution. Adoption of a bill of rights would add a further limitation to the exercise of state powers by requiring executive and administrative action, and legislation, to conform to the guaranteed rights and freedoms of individuals.

In practical terms, part of the premonitions regarding the court's role in enforcing rights appear to be grounded on the vigorously 'activist' role taken by the United States Supreme Court at times.[93] This has been one reason why the constitutional legitimacy of judicial review in the United States has, at times, generated such acrimonious debate. In Australia, by contrast, the constitutionality of judicial review has not been seriously impugned.[94] It is true, however, that with the adoption of a bill of rights, there would be a new dimension to judicial review in Australia, and there may be reservations in this regard. But the comparison with the United States' context may be misplaced because in the United States, debate on judicial review is heavily weighed down by historical considerations, a factor which is absent in Australia.

In considering the role of judicial review in enforcing a proposed bill of rights in Australia, it is also important to note that the qualifying clauses in the document will offer explicit points of reference. Those qualifying clauses would be similar to the standards of 'proportionality', 'reasonableness', and 'balancing' suggested by the High Court in its implied rights jurisprudence, for example.[95] The difference between the two situations would be that, while in the current jurisprudence, the limitations are judicially crafted, those in the proposed bill of rights would be express and predictable, and engender less controversy.

---

[93] It has been pointed out, for example, that during the first ten years of Chief Justice Warren Burger, the Supreme Court of the USA "struck down 230 pieces of legislation, 34 federal laws, 182 state statutes and 13 local ordinances ..." T Eastland, "Are We All Activists Now?" (1984) *Policy Review* 14, at 15. The description 'activist court' may be misleading. In those years referred to here, the US Supreme Court was engaged in continuing the jurisprudence of desegregation and affirmative action initiated under the chief justiceship of Earl Warren. In that sense, the Court was 'activist'. However, the invalidation of social welfare legislation by the Supreme Court in the 1930s could also be called an 'activist' role.

[94] For a succinct essay on the legitimacy of judicial review in Australia based, in part, on historical arguments, see B Galligan, "Judicial Review in the Australian Federal System: Its Origin and Function", (1979) 10 *Federal Law Review* 367. See also G Lindell, "Duty to Exercise Judicial Review", in L Zines (ed), *Commentaries on the Australian Constitution*, Sydney: Butterworths, 1977, 150–190. For a contrary view see, for example, P H Lane, "Judicial Review or Government by the High Court", (1966) 5 *Sydney Law Review* 203.

[95] For a discussion on 'proportionality' and similar qualifying factors in the implied rights cases see, for example, H P Lee, "Proportionality in Australian Constitutional Adjudication", in G Lindell (ed), *Future Directions in Australian Constitutional Law*, Sydney: Federation Press, 1994, 128–149, at 140–149.

It is sometimes argued, that a conservative court, or a pliant or passive judiciary, may work against the spirit of the proposed bill of rights. That has certainly happened in the USA at several phases in the past,[96] and it may be a possibility in Australia as well. To oppose a bill of rights on these grounds, however, would be like throwing out the baby with the bath water.

Speaking in the context of a constitutional bill of rights, it has been suggested that:

> "Constitutional rights engender endless debate. Recognising questions and postulating answers represents an initial foray into this morass. Flux, not repose, predominates. Unrelenting struggles, between legislatures, executives, courts and the people, to determine the basis and shape the contours of rights will not abate. Bills of rights, as American and Canadian experience continue to demonstrate, stimulates, not dampens, this phenomenon."[97]

Yet, it is this disputatious interaction that is the strength of a democracy. It cannot be seriously suggested that Australian democracy is in peril of too much democratic freedom.

[96] See, for example, the decisions of the United States Supreme Court in *Plessy v Ferguson* 163 US 537 (1896), *Lochner v New York* 198 US 45 (1905), *Dennis v United States* 341 US 494 (1951).

[97] J Thomson, "An Australian Bill of Rights: Glorious Promises, Concealed Dangers" (Book Review, *An Australian Charter of Rights?*) (1994) 19 *Melbourne University Law Review* 1020, at 1062–63.