Prospects and Problems for an Australian Bill of Rights

By Gareth Evans*

Since the end of the Second World War there has been a continuing explosion of interest in human rights, and their protection both in international and domestic law. The Universal Declaration of Human Rights was adopted by the General Assembly of the United Nations on 10 December 1948. In 1966, the General Assembly approved the text of the more precisely formulated International Covenants on Civil and Political Rights, and Economic, Social and Cultural Rights. By 1973 there were more than one hundred countries with systematic formal guarantees of fundamental rights and freedoms embodied in their domestic law,[1] a great many of them inspired by the terms of the UN Declaration and Covenants. But it was not until 1973 that Australia took its first tentative steps towards the enactment of a national bill of rights. Until then this country had been an unselfconscious outsider in the human rights league, sceptical of the necessity, desirability or possibility of introducing far-reaching formal protections of rights in domestic law, and unwilling to commit itself to any such programme by the ratification of the Covenants. The impetus for change came from the new Labor government, elected in December 1972 with a sweeping reformist programme and an ambition to cut a respectable figure in the international scene. The twenty-fifth anniversary of the Universal Declaration on 10 December 1973 became a target date for achievement.

The recent moves to introduce an Australian bill of rights have taken place at two levels, which may be described respectively as legislative and constitutional. In the first place the Australian government has prepared a Human Rights Bill which it proposes to enact as a piece of ordinary legislation.[2] It will be in the form of a legislative implementation of the International Covenant on Civil and Political Rights, to which Australia became a signatory in December 1972. It will be enacted in reliance on s 51 (xxix) of the Constitution, the external affairs power. Its provisions, far-reaching in their substantive effect, will have an overriding force so far as inconsistent state and federal law is concerned, but will not purport to bind future Commonwealth Parliaments.

Simultaneously, preliminary steps have been taken toward the enactment of a bill of rights as a permanent part of the Australian Constitution. At the Constitutional Convention held in Sydney in September 1973, attended by delegates from all Australian Parliaments, a proposal for a constitutional Bill of Rights was put by the Commonwealth Attorney-General Senator Murphy, and discussed at some length by the delegates.[3] There were in all

thirteen speakers on the subject, of whom seven were in favour and six against. The debate was conducted on basically non-partisan lines and largely without reference to the controversy between central power and states' rights which pre-occupied speakers on other subjects at the Convention. It was also conducted with less passion and more rationality than one has come to expect from public discussions of this topic. The prospects are thus by no means remote of the Convention, at its subsequent meetings, eventually reaching a consensus in favour of a constitutional bill of rights. For the moment, the question has been referred to a standing committee for report back to the next full meeting of the Convention, proposed for mid-1974. It is true that, as the Constitution now stands, it is the Commonwealth Parliament rather than the States or any *ad hoc* body like the Constitutional Convention which has the responsibility for initiating constitutional change. The Commonwealth may well choose to proceed to a referendum on the issue without awaiting the outcome of the Convention's deliberations, or in the face of a negative decision there. However in the light of a long history of rejections by the Australian electorate of proposed constitutional changes, it would no doubt be reluctant to do so without evidence of widespread community support.

Although at first sight the Australian Government's two-stage approach to the introduction of a bill of rights may seem to involve unnecessary duplication of effort, there are good reasons for proceeding this way, ie proceeding cautiously on the question of constitutional change, and yet not resting content with a bill of rights of merely legislative status. So far as the latter point is concerned, the first and most immediately pertinent reason for not resting content with a legislative bill of rights is that such a bill may well be held by the High Court (for reasons discussed below) to be beyond the Commonwealth's constitutional competence to enact. The second reason is that there is an obvious attraction, from the standpoint of both symbolic potency and legal efficacy, in giving the protections of human rights constitutional status. On the other hand, there are also good reasons for nonetheless proceeding cautiously with any such constitutional change. First, as will become apparent from the discussion which follows, there are a great many acutely difficult problems—both of principle and practice—associated with the choice of rights to be protected, their definition and their means of enforcement, and there is something to be said for working out these difficulties in the context of ordinary legislation, which can be easily amended if it proves defective or unworkable, rather than immediately committing the country to a constitutional change which is likely to prove much more difficult to amend. The second reason for delaying constitutional innovation is a practical political one: it will no doubt take some time for the Australian electorate to develop an understanding and acceptance of what bills of rights are about, and this consciousness-raising process can perhaps best take place in the context of initial experimentation with a legislative bill of rights.

Proposals for the enactment of a bill of rights, whether in legislative or constitutional form, have always in the past in Australia been met with considerable scepticism and hostility. The main criticisms are: that bills of rights are unnecessary in a society with developed democratic political processes, a general tradition of legislative and judicial restraint, and available legal remedies like habeas corpus; that rights cannot be satisfactorily defined

in a statutory instrument and the judges cannot be relied upon to interpret them wisely; and that a national bill of rights will amount to an improper interference with the freedom of action of the States. If the critics are to be mollified, and a bill of rights achieved which is both acceptable in principle and workable in practice, its proponents must systematically tackle and resolve a series of specific problems. The first problem is to clarify the nature of the fundamental rights which it is sought to protect and to establish why they are worthy of protection. The second problem is to establish that a bill of rights will in fact more effectively protect these rights than is the case at the moment: this involves showing affirmatively that difficulties in defining and enforcing fundamental rights can be satisfactorily overcome. The third problem is the difficult technical one of showing that a bill of rights in the desired form can be implemented within the constraints imposed by Australian constitutional law. In what follows these problem areas are briefly canvassed in turn, and an indication given of the solutions which seem to be emerging at the present time.[4]

The Problem of Identification

There will always be philosophical disagreements as to which are the "true" fundamental rights, and why. Those with an individualist-liberal perspective will emphasize the traditional civil and political rights to "life, liberty and property" (such as are protected, eg in the United States Constitution), those with a Rousseauian or Marxist world view, the more recently fashionable socio-economic rights to education, an adequate standard of living and so on (such as are prominent in Soviet-bloc constitutions). And endless controversies are possible as to the nature and relative importance of the rights within each of these general categories. Confronted with these difficulties, an acceptable starting point for most nations in recent years has been the UN Declaration and Covenants already referred to, embodying the consensus of a substantial majority of civilized nations. These list, with impressive blandness and without offering reasons, a sweeping array of rights extending over the whole field of civil, political, social, economic and cultural rights.

The initial problem of choice for the framer of the bill of rights is whether to include the socio-economic rights at all. Their importance in practice is obvious: freedom of conscience is almost meaningless to the starving man. But socio-economic rights will generally be incapable of immediate implementation, or at least of enforcement, in the same way as the traditional civil and political freedoms. They depend not just on a government's goodwill but on its capacity, given the community's resources. They are appropriately included in a declaratory bill of rights, setting standards of achievements in an inspirational or aspirational manner, but are somewhat out of place in a bill of rights which is meant to operate as an effective legal peg on which aggrieved citizens can hang enforceable claims of right.

The kinds of rights on which the Australian legislators may be expected to concentrate are those set out in the International Covenant on Civil and Political Rights.[5] They may be classified in general terms as follows. First, there are the *egalitarian* rights, including the right to the equal protection of the laws and the right not to be discriminated against—in the enjoyment of any other right—on the basis of race, colour, sex, language, religion,

political or other opinion, national or social origin, property, birth or other status; second, *political* rights, including freedom of conscience and religion, speech and press, assembly and association, and participation in politics and government; and third, *legal-process* rights, including freedom from arbitrary deprivation of life or liberty, from arbitrary arrest and from unreasonable search and seizure, the privilege against self-incrimination, the presumption of innocence, the rights to a speedy, public and fair trial, to jury trial, to representation by counsel, and the right not to be subjected to cruel, inhuman or degrading punishment.

All of these rights are in the mainstream liberal tradition and have long been paid lipservice by Australian courts and legislators. Their acceptance in principle should not be in doubt. Certain *economic* rights can probably be added to this list, eg those kinds of "property" rights, capable of relatively precise formulation and enforcement, which are in the Lockean liberal (Marxists would say "bourgeois") tradition, most obviously the right, recognized by the UN Declaration, to personally own property and not be arbitrarily deprived of it.[6] For all these classes of right, however, there may be difficult problems of choice at the margin: one continuing controversy, eg, that must be resolved is that in relation to the worth in principle of the criminal suspect's right to silence, at least at the stage of pre-trial investigation. The framers of an Australian bill of rights would do well to resolve all such controversies at the outset of their task, rather than have questions of principle continually obscuring subsequent detailed debate about forms and methods of implementing rights.

The Problem of Utility

Unless a bill of rights is likely in some way to improve the civil liberties climate it is scarcely worth the trouble of enacting. Australian proponents of a bill of rights must satisfy the sceptics both that the climate of liberty here is in need of improvement, and that a bill of rights will make a difference.

The protection of civil liberties in Australia at present depends almost entirely upon the self-restraint of legislators and judges, and hardly at all upon the existence of overriding guarantees: the handful of constitutional guarantees that we do have in the federal Constitution have been, by a combination of narrow drafting and narrow judicial interpretation, emasculated and trivialised.[7] One should not exaggerate the deficiencies of the Australian situation, which is in fact quite respectable by relative international standards, but even the most impressionistic survey of current law and practice indicates a number of areas of concern. So far as egalitarian rights are concerned, there is practically no limitation on the ability of any Australian legislature to discriminate for or against whomsoever it pleases. The right to privacy is meaningless in the absence of systematic controls over unauthorized surveillance, data-gathering and disclosure by governments, the media and other commercial organizations. The Australian's home, as is the Englishman's, is in theory his castle, but there are innumerable statutory provisions providing for searches without warrant, or—what amounts to the same thing—searches under a general warrant, where there is no judicial check on each particular search or seizure undertaken by the authorized officer. The classic political rights to free speech and assembly amount to no more than what is left over when one takes out the innumerable

laws, many of them unreasonably far-reaching, relating to censorship, defamation, blasphemy, sedition, contempt, official secrecy, unlawful assembly, permits, obstruction, trespass, binding-over, nuisance, offensive behaviour and so on. The one-vote one-value principle is a bad joke in the electoral arrangements of nearly every Australian state, no more so than in Western Australia, where the variation in seat sizes is such that rural voters have four times the voting power of city voters in lower house elections, and fifteen times the power for upper house elections. Even the legal-process rights, supposedly those best protected by the British system of justice which Australia inherited, are for the most part illusory in practice. Criminal suspects are not supposed to be, but very often are, detained on suspicion, interrogated against their will, denied access to legal advice, arbitrarily searched, photographed, fingerprinted or lined up, kept incommunicado, or after arrest held in police custody for an excessive period. Evidence unlawfully obtained is still admissible in court, and the threat of a civil action for damages by an aggrieved citizen is rarely in practice substantial enough to dissuade police officers from behaving in the ways just enumerated. Accused persons are supposed to be, but very often are not, informed of their rights, given a speedy trial and proper legal representation, and if convicted and sentenced, punished in a humane and non-degrading manner.

If the protection of civil liberties is not all it could be in Australia, and this is the assumption on which the Australian Government seems to be basing its present moves, what real difference would a bill of rights make? Much clearly depends upon the kind of bill in issue—whom it binds, how it is enforced, and how the rights it contains are defined. It would of course be possible to enact an unenforceable, purely declaratory bill of rights (such as are characteristic of the constitutions of Soviet-bloc countries and former French dependencies), in which case its effect would depend solely on its role as an educative and moral pace-setter for the community, but the Australian Government seems to be proceeding on the not unreasonable assumption that what is required is something more than this, namely a set of solid legal pegs on which to hang what have hitherto been largely theoretical claims of right.

The problem of enforcement has a number of facets. In the first place there is the question of *against whom* the bill is to be enforced. Traditionally the main thrust of bills of rights has been in the public sector, against government: they have been designed and enacted as a means of limiting and checking the exercise of legislative and executive power. It may be assumed that any Australian bill of rights will have this primary rationale. But a question arises, in a federation, as to whether a national bill of rights should operate only as against the central government (as is the case in Canada) or whether it should prevail against State governments as well (as is the case in the United States, by virtue of the 14th Amendment, and in India and West Germany): in Australia the federal Labor Government seems clearly committed to the view that any bill of rights would be relatively worthless unless it did bind the States, since under the present constitutional division of responsibilities the States are the main actors in those areas—eg the administration of the criminal law—which most often raise civil liberties questions. The States have to date shown no enthusiasm for enacting bills of rights of their own. A further question arises as to what

extent, if at all, the bill of rights should operate in the private sector, conferring rights and remedies on persons as against each other. Privacy and racial or sexual discrimination are two obvious areas where the behaviour of private individuals, businesses and organizations can be at least as destructive of liberties as the worst any government can do. It is likely, however, that any proposed bill of rights will be expressed in such a way as to have only a marginal impact in the private sector, and that these problems will be dealt with by other more detailed enactments.

Probably the most important enforcement question is that of *how* the bill is to be enforced. The basic options are executive review and judicial review. The former usually involves the creation of some agency—which might be a Parliamentary Committee—whose job it is to scrutinize legislation for its conformity to the terms of the bill of rights, and to recommend changes where it does not. Examples of countries where this has been either the sole or a supplementary method of enforcing bills of rights are Sri Lanka, France, Italy and Canada. The agency may be given teeth, in the form of an absolute or suspensory veto, or it may simply have a reporting power. Its activities may be supplemented by an Ombudsman-type figure with powers of investigation, persuasion and perhaps (if the bill of rights is justiciable) litigation: the appointment of a "Human Rights Commissioner" with these functions is in fact being contemplated for Australia.

The more obvious and immediately effective solution to the problem of enforcement, and that which is likely to commend itself to Australian legislators, is judicial review. There are degrees of judicial review. Just how much power courts would have with respect to the application of a bill of rights, if a system of judicial review were adopted, would depend upon the terms of the bill, and in particular whether it was entrenched (ie made difficult to amend), by insertion in the Australian Constitution or otherwise. At a minimum, the justiciability of the bill of rights would be likely to mean that the courts had power to pass judgment upon the legality or illegality of executive behaviour in terms of its conformity with the bill of rights guarantees, and to take action accordingly: for example, to issue injunctions, award damages, or quash convictions obtained in breach of a defendant's procedural rights. It would also no doubt involve the power to strike down prior legislation regarded as repealed by, because inconsistent with, the terms of the bill of rights. A valid legislative bill of rights enacted by the national Australian Parliament would also no doubt (unless expressed to operate otherwise) enable the courts to override inconsistent legislation passed by State Parliaments not only before but after the bill of rights, by virtue of the operation of s 109 of the Constitution. A more difficult question is whether a national legislative bill of rights could be enacted in such a way as to bind future Australian (ie Commonwealth) Parliaments. In the absence of any express provision in the bill, the courts could be expected to take the view that the doctrine of parliamentary sovereignty, as traditionally interpreted, would apply to enable any subsequent Parliament to repeal or amend the work of its predecessors. What if there were express provision made? At the State level, it is possible in practice for one parliament to inhibit the work of its successors by enacting a requirement that certain legislation require a specially increased majority for its passage,[8] but this form of entrenchment would seem to be denied the Australian Parliament

by ss 23 and 40 of the Constitution, which on their face make it mandatory for all votes in that Parliament to be taken on a simple majority basis. It is even doubtful whether an Australian Parliament can guard against *implied* repeal by its successors: the authorities suggest that the insertion of a clause in a legislative bill of rights providing that no future Act is to have effect in derogation of the bill of rights, unless that later act contains a declaration expressly purporting to do so, would nonetheless not prevent any future Act which omits such an express declaration from operating according to its tenor.[9] The result of all this is that in enacting a justiciable legislative bill of rights, however hard it sought to abdicate the responsibility in favour of the courts, the Australian Parliament would retain the last word: it could always, that is, reimpose its will if dissatisfied with the interpretation given to any particular guarantee by the courts. It would seem that the only way in which the entrenchment of a national bill of rights could be achieved (and the courts thus be guaranteed the effective last word) would be for it to be enacted as part of the Australian Constitution, whence only another referendum could dislodge it: not for nothing has Geoffrey Sawer said that "Constitutionally speaking, Australia is the frozen continent".[10] This is not to say, however, that a constitutional bill need necessarily be quite so firmly entrenched as are the existing provisions of the Australian Constitution. It would be possible for such a bill to contain its own special amendment procedure, not necessarily applicable to the rest of the Constitution. It could provide, for example, for amendment of the bill by a two-thirds majority of both houses or some similar procedure less destined to failure than are referenda.

The preceding discussion, though in some respects a digression, is very relevant to the question of whether or not there should be enforcement by judicial review. There has been much criticism of judicial review in relation to bills of rights, and some of it has merit, but the force of that criticism depends very much on how much real power the judges exercise and whether or not they have the last word. If the bill of rights is easily amendable, so that unsatisfactory interpretations are in no real danger of becoming permanent, judicial review is to that extent less "dangerous". The kinds of dangers one sees in judicial review tend to vary with one's basic outlook. Conservatives deplore any tendency of the courts to become, in effect, third chambers of the legislature, and criticize in this respect the rather fast and loose quasi-legislative style of the US Supreme Court in recent years. On the other hand, those with a more radical perspective point to the dangers of emasculation of any Bill of rights by legalistically minded judges of conservative background and instincts who will tend to construe it neither liberally nor flexibly but rather as they would a Tax Act or Dog Act: the general record of Canadian courts with respect to the legislative Bill of Rights introduced there in 1960 gives credence to this expectation.[11] What both conservatives and radicals tend to overlook is the extent to which judges at present adjudicate on civil liberties matters, both in interpreting and applying statutes and in developing and applying common law rules, but with few directives other than their own instincts to guide them. Judges do make policy; a bill of rights would just give them quantitively more opportunity to do so.

How judicial review is likely to work—and how useful a bill of rights is likely to be—depends, finally, on how the guarantees contained in the bill

are defined. If the rights are expressed loosely and broadly, as they are for example in the United States Constitution, a great deal will be left within the discretion of the courts: the ambit of rights, and the scope of the corresponding limitations on government, will be to that extent uncertain. If the rights, on the other hand, are defined with precision and the qualifications and limitations upon them clearly expressed (as is the case, for example, in the extremely lengthy and detailed bills of rights in most of the new Commonwealth countries), then there will be that much less room for manoeuvre at the expense of the legislative will. The danger with the latter approach is that so many qualifications will be expressed that the core rights will be emptied of meaning.

The drafting approach which the Australian Government at present seems likely to adopt is something of a compromise between these two extremes. It involves specifying each right in fairly general terms, but then stating that it may be subject to certain restrictions—provided in turn that those restrictions are themselves "reasonable". An example would be a provision that "Everyone shall have the right to peaceful assembly, subject only to such limitations as are prescribed by law and are reasonably necessary in the interests of national security, public safety or public health or constitute reasonable regulations as to time place and manner, the proof of unreasonableness to lie upon the person or authority asserting it". The advantage of this approach is that it tightly sets the definitional framework within which the courts must operate—but nonetheless leaves them substantial freedom of action within that framework. The criterion of "reasonableness" is admittedly extremely flexible, but it is not one that is in any sense foreign to our common law courts. Formulae of this kind seem to be workable.[12] Australian courts, confronted with them, are unlikely either to be excessively venturesome or to run for cover.

The Problem of Implementation

Some of the constraints imposed by the Australian constitutional system in implementing particular kinds of bills of rights have already been mentioned. A constitutional bill of rights can only be implemented by following the thorny path of the s 128 amendment procedure, requiring a majority of voters overall and a majority in a majority of states: the support of the voters for a proposal of any complexity or obscurity, whatever the advantages it in fact confers, cannot be assumed. Again there are difficulties, which have been adverted to, in successfully entrenching a legislative bill of rights: even if the Australian Parliament could be persuaded to "withdraw certain subjects from the vicissitudes of political controversy"[13] by providing that a human rights act could not simply be amended at the whim of an ordinary majority in parliament, it is very doubtful whether in law it could do so.

The most obvious problem with respect to a legislative bill of rights, however, is whether it can be enacted at all by the Australian Parliament, in the absence of any head of power in the Constitution expressly giving the Commonwealth jurisdiction over civil rights matters. It may be that the States can some day be persuaded to refer the necessary power to the Commonwealth by utilizing the s 51 (xxxvii) referral power, but for the moment, if the Australian Government wishes to press ahead with a legislative bill of rights, it must put all its eggs in the basket of the s 51 (xxix) external affairs

power. The one thing that is completely clear about this little-used provision is that it may support legislation which is otherwise outside the Commonwealth's competence but is aimed at domestically implementing an international agreement to which Australia is a party. Thus it is that the Australian Government proposes, as stated above, to enact a legislative bill of rights—the Human Rights Act—based on the terms of the International Covenant on Civil and Political Rights.[14] In doing so it must surmount several constitutional hurdles, at least one of which may prove fatal when the Act is challenged—as it is bound to be—in the High Court.

There are only two authorities of any consequence on the External Affairs power, *R v Burgess*; *Ex Parte Henry*[15] in 1936 and *Airlines of New South Wales v New South Wales (No. 2)*[16] in 1965, and the latter adds very little to the former. In the course of the judgments in those cases five possible limits on the scope of the power were canvassed. The first, which no judge doubted but nor did any elaborate, is that the international agreement must not be a mere "device" to attract domestic jurisdiction.[17] Whatever this means, it is extremely unlikely that the High Court would call into question the bona fides of the executive government in ratifying a treaty of the nature and stature of the Civil and Political Rights Covenant. The second limit which has been expressed, again without dissent, is that the legislation must adhere to the terms of the treaty. What is unclear here is just how close that adherence must be. In *Burgess*, four judges took a somewhat narrow and literal view of this requirement,[18] with only Starke J suggesting that "all means which are appropriate, and are adopted to the enforcement of the convention and are not prohibited, or are not repugnant to or inconsistent with it, are within the power".[19] In the *Airlines* case, on the other hand, though this question occasioned little direct comment, a more relaxed Starke-type view seemed to prevail with those four judges who decided the case in reliance on the external affairs power.[20] The proposed Australian Human Rights Act is expected to conform closely with the spirit, but by no means completely with the letter, of the Civil and Political Rights Covenant. Problems may arise where the Act provides for less extensive derogations from basic rights than are permitted by the Covenant: eg, the Covenant permits restrictions on the freedom of assembly in the interests, inter alia, of public order and public morals.[21] Both of these may be unacceptably wide for the Australian draftsmen, who may prefer to use the American style formula noted above, viz "reasonable regulations as to time, place and manner". Problems may also arise where the legislation goes into greater detail than the Covenant, eg, by guaranteeing protection against arbitrary searches and seizures (which are not specifically dealt with in the Covenant) rather than merely providing generally, as does the Covenant, for the protection of "privacy".[22] So long as the divergences from the substantive terms of the Covenant are no more substantial than these, however, it seems unlikely that the legislation will be struck down on the ground of non-conformity: the trend of judicial opinion is toward giving a relatively wide scope to the incidental power.

The third possible limitation on the scope of the external affairs power, and the most dangerous for the proposed legislation, is the suggested requirement that the subject matter of the international agreement be somehow "external" in character. The strongest expression of this view is by

Dixon J in the *Burgess* case, when he says, in the course of rejecting the view that any international agreement at all might sustain an expansion of Commonwealth power, that the matter must be "indisputably international in character".[23] Barwick CJ seems to take a similar line, though less explicitly, in the *Airlines* case.[24] But the judges have by no means been unanimous. Evatt and McTiernan JJ refuse to contemplate any such limitation, insisting that "the fact of an international convention having been duly made about a subject brings that subject within the field of international relations so far as such subject is dealt with by the agreement."[25] Latham CJ, similarly, said that it was "impossible to say *a priori* that any subject is necessarily such that it could never properly be dealt with by international agreement".[26] Latham does however refer to the proper subjects of the external affairs power being those of "international interest and concern", and those having to do with "neighbours . . . living together":[27] to some commentators this has suggested that Latham would concede the appropriateness of the external affairs power as a support for legislation only when the subject matter was one of mutual practical (and not just theoretical) concern for international parties.[28] The comment of Starke J nicely points up the ambiguities inherent in this whole question. Quoting an American source, he says that "it may be . . . that the laws will be within power only if the matter is 'of sufficient international significance to make it a legitimate subject for international cooperation and agreement' ".[29] When *is* a matter one of international significance? Is it enough that there be a general humanitarian interest shared by the international community, such as there unquestionably is with respect to human rights, as manifested by the very existence of the UN Declaration and Covenants? Or does the interest have to be of a more immediate and prosaic kind? It is impossible to express a confident view as to how the present High Court will tackle these issues, but it does seem very likely that at least some requirement of "externality" will be demanded, and it is certainly possible that a legislative bill of rights having only a domestic operation will be regarded as not satisfying that criterion.

The fourth limitation on the scope of the external affairs power is the obvious one that the exercise of this power is subject to express prohibitions contained elsewhere in the constitution:[30] none of these would seem to throw any of the likely provisions of a legislative bill of rights into doubt. The final possible limitation, mentioned in passing by Starke J in *Burgess*[31] and Barwick CJ in *Airlines*,[32] is in terms of the doctrine of implied prohibitions, the notion that the Commonwealth cannot act so as to unwarrantably interfere with the functioning of or threaten the independence of the States. The argument here would be that any Commonwealth legislation which circumscribed State freedom of action to the extent of the proposed Human Rights Act, even though circumscribing the Commonwealth equally, would to the extent of that interference offend against the implied constitutional prohibition. This doctrine was thought to be dead and buried with the *Engineers* case[33] in 1920, but it enjoyed something of a recrudescence in the late 1940s,[34] was again paid lip-service in the *Pay-roll Tax* case[35] in 1971, and could conceivably again flower in a Court anxious to keep the external affairs power within manageable bounds. Having for years in fact taken the centralist line (that in adjudicating upon the constitutionality of Commonwealth legislation the question for the Court is whether the par-

ticular enactment is within Commonwealth power, and not its effect upon the States), it may be thought unlikely that the Court would actually unleash this weapon. Certainly an easier way of controlling the external affairs power would be to take the "externality" point outlined above. But the possibility of the re-emergence of the implied prohibitions doctrine cannot be altogether ignored.

Perhaps the only conclusion to emerge with unequivocal clarity from this survey is that there are still innumerable problems confronting the framers of an Australian bill of rights. Though the task of resolving them has begun, and begun well, it may be some time yet before this country has a viable system of legal protections for fundamental rights and liberties.

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1 See the accompanying *Comparative Survey of Rights* for details

2 At the time of writing, October 1973, this Bill had not yet been introduced into Parliament, let alone enacted, so discussion of its provisions must necessarily be speculative

3 See *Official Record of Debates*, 7 September 1973 (NSW Govt Printer), 294-349

4 For a more detailed account of the arguments for and against an Australian bill of rights, see Evans, "An Australian Bill of Rights?", *The Australian Quarterly*, Vol 45 No 1 (March 1973) 4-34

5 See the speech of Senator Murphy to the Constitutional Convention, *Official Record of Debates*, op cit above n 3 at 329-31

6 The Constitution s 51 (xxxi) already guarantees "just terms" so far as acquisitions by the Commonwealth are concerned

7 The relevant sections are ss 51 (xxxi), s 80 (jury trial), s 116 (religion), s 117 (discrimination on the basis of state residence) and s 92 (interstate movement). For a brief account of their fate, see Evans, op cit above n 4, at 9-15.

8 *A-G for NSW v Trethowan* (1931) 44 CLR 394; see also *Harris v Minister of the Interior* [1952] (2) SA 428

9 *South-Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603; but cf *Curr v R* (1972) 26 DLR (3d) 603 at 609

10 *Australian Federalism in the Courts* (1967) p 208

11 See, eg, Peter Brett, "Reflections on the Canadian Bill of Rights" (1969) 7 *Alberta Law Review* 294; the decision in *R v Drybones* (1970) 9 DLR (3d) 473, though hailed as a breakthrough, has not led to any marked improvement.

12 See, eg, the experience of the Indian courts with Article 19 of the Indian Constitution, discussed in H M Seervai, *Constitutional Law of India* (1968) pp 282-412

13 *West Virginia State Board of Education v Barnette* 319 US 624 (1943), per Jackson J

14 The Government proposes to ratify that Covenant formally on or before the twenty fifth anniversary of the UN Declaration on 10 December 1973

15 (1936) 55 CLR 608

16 (1965) 113 CLR 54

17 *Burgess* (1936) 55 CLR 608, per Evatt and McTiernan JJ at 687; Latham CJ at 642, Starke J at 643, Dixon J at 669, and Barwick CJ in *Airlines* (1969) 113 CLR 54 at 85, are less explicit but *semble* to the same effect.

18 Latham CJ at 646, Dixon J at 674, Evatt and McTiernan JJ at 688 and 692-3

19 (1936) 55 CLR 608, at 659-60

20 Viz Barwick CJ, McTiernan, Menzies and Owen JJ; the three remaining judges took the narrower view: Kitto and Windeyer still upheld the regulations on the basis of s 51 (i), but Taylor J, dissenting, held that neither power was applicable.

21 See Covenant Art 21; the French phrase *ordre public*, which appears together with *public order* in this and other articles, has wider connotations still.

22 Covenant Art 17

23 (1936) 55 CLR 608, at 669

24 (1965) 113 CLR 54, at 85

25 (1936) 55 CLR 608, at 681

26 Ibid at 641
27 Ibid at 640
28 See, eg, P H Lane, *The Australian Federal System* (1972) pp 145-7
29 (1936) 55 CLR 608, at 658
30 See *Burgess* (1936) 55 CLR 608, per Evatt and McTiernan JJ at 687 (where they instance ss 6, 28, 41, 80, 92, 99, 100, 116 and 117), Latham CJ at 642, and Starke J at 658; *Airlines* (1965) 113 CLR 54, per Barwick CJ at 85
31 (1936) 55 CLR 608, at 658
32 (1965) 113 CLR 54, at 85
33 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129
34 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31
35 *Victoria v Commonwealth* (1971) 45 ALJR 251

Comparative Survey of Rights*
As at 1 January, 1973

Nation	Current Constitution	Bill of Rights	UN Covenants		Status of Rights		
			Economic, Social and Cultural Rights	Civil and Political Rights	Not Respected (NR)	Precarious (PR)	Substantially Respected (R)
Afghanistan	1964	Yes				PR	
Albania	1946	Yes			NR		
Algeria	1963	Yes	S	S	NR		
Argentina	1853-1957	Yes	S	S		PR	
Australia	1901	No	S	S			R
Austria	1955	Yes					R
Bahrain	Nil	No			NR		
Bangladesh	1972	Yes				PR	
Barbados	1966	Yes					R
Belgium	1831-1970	Yes	S	S			R
Bhutan	Nil	No				PR	
Bolivia	1967	Yes			NR		
Botswana	1966	Yes					R
Brazil	1967-1969	Yes			NR		
Bulgaria	1971	Yes	X	X	NR		
Burma	Suspended	No				PR	
Burundi	Suspended	No			NR		
Cameroon	1961	Yes			NR		
Canada	1867	Yes (1960)					R
Central African Republic	Suspended	No			NR		
Chad	1962-1964	Yes			NR		
Chile	1925-1971	Yes	X	X			R
China, People's Republic of	1954	Yes	S	S	NR		
China, Republic of (Taiwan)	1946	Yes			NR		
Colombia	1886-1960	Yes	X	X			R
Congo, People's Republic of	1970	Yes			NR		
Costa Rica	1949-1963	Yes	X	X			R
Cuba	1959	Yes			NR		
Cyprus	1960	Yes	X	X			R

Nation	Current Constitution	Bill of Rights	UN Covenants		Status of Rights		
			Economic, Social and Cultural Rights	Civil and Political Rights	Not Respected (NR)	Precarious (PR)	Substantially Respected (R)
Czechoslovakia	1968	Yes	S	S	NR		
Dahomey	Suspended	No			NR		
Denmark	1953	Yes	X	X			R
Dominican Republic	1966	Yes				PR	
Ecuador	1972	Yes	X	X		PR	
Egypt, Arab Republic of	1971	Yes	S	S		PR	
El Salvador	1962	Yes	S	S		PR	
Equatorial Guinea	Suspended	No			NR		
Ethiopia	1955	Yes			NR		
Fiji	1970	Yes					R
Finland	1919	Yes	S	S			R
France	1958	Yes					R
Gabon	1961	Yes			NR		
Gambia	1965-1970	Yes					R
Germany, Dem. Republic of (East)	1968	Yes			NR		
Germany, Fed. Republic of	1949	Yes	S	S			R
Ghana	Suspended	No			NR		
Greece	1968	Yes			NR		
Guatemala	1965	Yes				PR	
Guinea	1958	Yes	S	S	NR		
Guyana	1966-1970	Yes	S	S			R
Haiti	1961	Yes			NR		
Honduras	Suspended	No	S	S	NR		
Hungary	1949	Yes	S	S	NR		
Iceland	1959	Yes	S	S			R
India	1950	Yes					R
Indonesia	1950	No				PR	
Iran	1906	Yes	S	S	NR		
Iraq	1970	No	X	X	NR		
Ireland	1937	Yes					R
Israel	Nil	No	S	S		PR	
Italy	1947	Yes	S	S			R
Ivory Coast	1960	Yes			NR		
Jamaica	1962	Yes	S	S			R
Japan	1946	Yes					R
Jordan	1951	Yes	S	S	NR		
Kenya	1963-1964	Yes	X	X		PR	
Khmer Republic (Cambodia)	1972	Yes			NR		
Korea, Dem. People's Republic (North)	1972	Yes			NR		
Korea, Republic of (South)	1972	Yes			NR		
Kuwait	1962	Yes				PR	
Laos	1947	No				PR	
Lebanon	1926	Yes	X	X			R
Lesotho	Suspended	No			NR		
Liberia	1847	Yes	S	S	NR		

Nation	Current Constitution	Bill of Rights	UN Covenants		Status of Rights		
			Economic, Social and Cultural Rights	Civil and Political Rights	Not Respected (NR)	Precarious (PR)	Substantially Respected (R)
Libya	1969	Yes	X	X	NR		
Liechtenstein	1921	Yes				PR	
Luxembourg	1868	Yes					R
Malagasy Republic	Suspended	No	X	X	NR		
Malawi	1966	Yes			NR		
Malaysia	1957-1971	Yes				PR	
Maldive Republic	1968	Yes				PR	
Mali	Suspended	No			NR		
Malta	1964	Yes	S				R
Mauritania	1961	Yes			NR		
Mauritius	1968	Yes				PR	
Mexico	1917	Yes				PR	
Monaco	1962	Yes				PR	
Mongolian People's Republic	1960	Yes	S	S	NR		
Morocco	1972	Yes				PR	
Nauru	1968	Yes					R
Nepal	1962	Yes			NR		
Netherlands	1815-1963	Yes	S	S			R
New Zealand	1852	No	S	S			R
Nicaragua	1972	No				PR	
Niger	1960	Yes			NR		
Nigeria	1963 (Part suspended)	Yes				PR	
Norway	1814	Yes	X	X			R
Oman	Nil	No			NR		
Pakistan	1972	Yes				PR	
Panama	1972	No			NR		
Paraguay	1967	Yes				PR	
Peru	1933	Yes			NR		
Philippines	1935	Yes	S	S	NR		
Poland	1952	Yes	S	S	NR		
Portugal	1933-1971	Yes			NR		
Qatar	Nil	No			NR		
Rhodesia	1970	Yes			NR		
Romania	1965	Yes	S	S	NR		
Rwanda	1962	Yes			NR		
San Marino	1600	No					R
Saudi Arabia	Nil	No			NR		
Senegal	1963	Yes	S	S	NR		
Sierra Leone	1961-1971	Yes				PR	
Singapore	1963-1965	No			NR		
Somali Dem. Republic	Suspended	No			NR		
South Africa	1961	No			NR		
Spain	1938-1967	Yes			NR		
Sri Lanka (Ceylon)	1972	Yes				PR	
Sudan	1971	No			NR		

Nation	Current Constitution	Bill of Rights		UN Covenants		Status of Rights		
				Economic, Social and Cultural Rights	Civil and Political Rights	Not Respected (NR)	Precarious (PR)	Substantially Respected (R)
Swaziland	1968	Yes						R
Sweden	1809	Yes		X	X			R
Switzerland	1874	Yes						R
Syria	1971		No	X	X	NR		
Tanzania	1964-1965		No			NR		
Thailand	1972		No			NR		
Togo	Suspended		No			NR		
Tonga	1875-1967	Yes						R
Trinidad and Tobago	1962	Yes					PR	
Tunisia	1959	Yes		X	X	NR		
Turkey	1961-1971	Yes				NR		
Uganda	Suspended		No			NR		
USSR	1936	Yes		S	S	NR		
United Arab Emirates	1971		No			NR		
United Kingdom	Nil		No	S	S			R
United States	1787	Yes						R
Upper Volta	1970		No				PR	
Uruguay	1967	Yes		X	X		PR	
Vatican City State	1929		No				PR	
Venezuela	1961	Yes		S	S			R
Vietnam, Dem Republic of (North)	1960	Yes				NR		
Vietnam, Republic of (South)	1967	Yes				NR		
Western Samoa	1960	Yes						R
Yemen Arab Republic	1970	Yes					PR	
Yemen, People's Dem Republic of	1970		No			NR		
Yugoslavia	1963-1971	Yes		X	X	NR		
Zaire	1967-1970		No			NR		
Zambia	1964-1972	Yes					PR	
147 Countries		Yes 108	No 39	S 32 X 18	S 31 X 18	74	35	38

* I am indebted to Tony Duggan for his assistance in the preparation of this Table. The column headings are explained in the accompanying *Notes on the Table.*

Notes on the Table

Dates

The object of the table is to provide, for purposes of comparison, as complete a picture as possible at a single point of time. This date was chosen for convenience as 1 January 1973. In a number of respects the table and these accompanying notes are already out of date at the time of writing (October 1973). For example, the Bahamas have achieved independence and joined both the Commonwealth and the United Nations; Bangladesh

and the two Germanys have also been admitted to the United Nations; there have been revolutions in Chile and Thailand, and a number of other constitutions have been suspended, or amended for better or worse. Another two nations (including the Soviet Union) have ratified the Covenants on Civil and Political, and Economic, Social and Cultural Rights.

It is not claimed that the table is completely accurate even as at the chosen cut-off date. The constitutions of some countries change with bewildering rapidity (eg Ecuador, where there have been 16 constitutions in the 115 years since the country became independent, not to mention 22 different presidents, dictators or ruling juntas in the last 23 years), and detailed information is often very slow to filter through.

Nations

The table lists all the one hundred and forty-seven countries having the status of independent nations on 1 January, 1973. It excludes all dependencies. Borderline cases excluded are the protected States of Andorra, Brunei and Sikkim, and the State of Namibia, still de facto a South African territory. A borderline inclusion is Rhodesia. All members of the United Nations are included, with the exception of Byelorussia and the Ukraine, treated here as parts of the USSR. Nations which are included, though not at the relevant date members of the UN, are Bangladesh, the Republic of China (Taiwan), East and West Germany, North and South Korea, Liechtenstein, Monaco, Nauru, Rhodesia, San Marino, Switzerland, Tonga, the Vatican City State, North and South Vietnam, and Western Samoa.

All thirty-two current member nations of the Commonwealth are included, *viz* Australia, Bangladesh, Barbados, Botswana, Canada, Cyprus, Fiji, Gambia, Ghana, Guyana, India, Jamaica, Kenya, Lesotho, Malawi, Malaysia, Malta, Mauritius, Nauru, New Zealand, Nigeria, Sierra Leone, Singapore, Sri Lanka, Swaziland, Tanzania, Tonga, Trinidad and Tobago, Uganda, United Kingdom, Western Samoa and Zambia.

Current Constitution

The dates given in this column are of the constitutional instruments understood to be in force on 1 January 1973. Two dates are given where substantial amendments have been made to a constitution subsequent to its initial enactment.

The expression "suspended" is used where the nation's constitution has been effectively abrogated, usually as a consequence of a coup d'etat, and not yet replaced with a new one. (Where a constitution has been 'lawfully' suspended in accordance with its own provisions, say by the proclamation of martial law or a state of emergency, the constitution is treated as being still in force: some cases were borderline, eg the Philippines.)

"Nil" means only that the country has no formal written constitution. The description is extended here to subtle and elaborate constitutional systems, like that of the United Kingdom, as well as to traditional sheikdoms and monarchies like Bahrain and Bhutan. In some borderline cases, eg Spain, the country is represented as having a written constitution even though its constitutional rules are enshrined in a series of related instruments rather than a single document.

Sources: Peaslee, *Constitutions of Nations* (3rd ed, 1965-70); Stebbins and Amoia, *The Political Handbook and Atlas of the World* (1970, and 1972 Supplement); *Keesing's Contemporary Archives; Bulletin of Legal Developments;* newspaper reports; correspondence with governments.

Bill of Rights

Bills of rights are taken to be enactments which systematically declare certain fundamental rights and freedoms and require that they be respected. Most such national bills of rights are contained in countries' written constitutions; the most notable exception is the Canadian Bill of Rights of 1960, contained in an ordinary statute.

Most bills of rights are immediately recognizable as such, but there are some borderline definition problems. The English Bill of Rights of 1688, for example, could be regarded as satisfying the above stipulated description, but it is here excluded for the reason that it is narrow in scope and, perhaps more importantly, because the UK is not usually thought of as possessing, in this Act, a bill of rights in the contemporary sense. Another problem arises where a country's constitutional instruments contain several scattered guarantees, but no systematic statement. An arbitrary solution has here been adopted: six or more substantial guarantees, however expressed, count as a bill of rights, and less than that do not. This excludes Australia, with its handful of insubstantial provisions in the Commonwealth Constitution (which no-one, again, thinks of as amounting to a bill of rights), but

allows countries like the Netherlands, Norway, Switzerland and, more arguably, Sweden, to be described as having bills of rights. Some difficulty is posed, again, by those nations which have bills of rights but which have them 'temporarily' suspended or in abeyance, either wholly or in part. Greece is an example. For present purposes these countries are, for better or worse, treated affirmatively as having bills of rights.

A further classification problem is posed by those nations which have followed the French example in their constitution making. The French Constitution does not spell out guarantees in any detail, but rather, in general terms, 'proclaims attachment to the Rights of Man . . . as defined by the Declaration of 1789, reaffirmed and complemented by the Preamble to the Constitution of 1946'. An expression of adherence to the 1789 Declaration recurs (usually with additional reference to the principles of the Universal Declaration of 1948), in the current constitutions of the former French dependencies of Cameroon, Ivory Coast, Mauritania and Niger, and an analogous statement appears in the constitution of Malawi (formerly the British possession Nyasaland). For present purposes, these statements have been treated as incorporating by reference the lengthy and specific contents of the Declarations referred to and, as such, as amounting to bills of rights.

It was not possible to obtain complete and up-to-date information as to the existence or otherwise of a bill of rights in every country. The data was particularly slight for Iraq, Nicaragua, Panama, Sudan, Syria, Yemen PDR and Zaire: in each case, for the purposes of the table, a negative inference was drawn from such limited material as was available, but the conclusions are quite unreliable.

Sources: As above for 'Date of Current Constitution', but with particularly heavy reliance on the summaries in *Keesing's Contemporary Archives* for recent constitutional changes, in cases where correspondence to national governments was unanswered.

UN Covenants

The Covenants referred to are the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, both adopted by the United Nations General Assembly in December, 1966.

S = Signature, not yet followed by ratification

X = Ratified

Source: UN Economic and Social Council Report: E/CN4/907/Rev9 (5 January 1973).

Status of Rights

The evaluations made in these columns are quite impressionistic, and in many cases will no doubt provoke disagreement. But without some indication of practical realities, data about the presence or absence of bills of rights would be quite misleading.

Each judgment represents a balancing of assessments as to the state of political and civil liberty in the country in question. No ideal standard is postulated: the exercise is a comparative one. The main indicators in gauging political liberty are the nature and extent of popular participation in elections, and the extent to which elections in practice determine who governs. The main indicators of civil liberty are taken to be the freedom of the press, the incidence of arbitrary police action, the rights of the accused in the criminal process, and the nature of the treatment accorded to minority or other 'outsider' groups. Greater weight is given to civil than political rights, in order to avoid the cold-warrior-democrat bias that pervades much writing in this area.

States ranked 'R' in the table are those where rights are 'Substantially Respected' (not 'completely' respected, for there is arguably no country with a full spectrum of possible civil and political rights available to everyone). These are countries where civil liberties are paid better than lip service even though there might be imperfections in particular areas. They are constitutional democracies where the great majority of the people have the right and opportunity to participate in elections, and where a government can be voted out of office, or guaranteed to stay there no longer than the constitutionally prescribed length of time.

States ranked 'PR' are those where rights are 'Precarious'. They have the trappings of civil liberty and aspire to better things, but tend to be hampered by recurring political crises which may necessitate the imposition on occasion of martial law or special suppressive measures. Many countries in this category are relatively stable, but in a stage of incomplete transition from traditional society, or recent emergence from revolution: 'Partly Respected' may be a better description of the civil liberties climate than 'Precarious' in these cases.

States ranked 'NR' include the modern totalitarian states of both left and right, and

some rather more ancient feudal kingdoms and sheikdoms where elections (if held) have no significance, dissent is not tolerated, and the individual has no rights of any consequence against the State. This is not to say that all of them would be intolerable to live in. Much depends on how one ranks socio-economic rights (rights to a reasonable standard of living and working, to health, education and so on) as against civil and political rights, and here the emphasis is on the latter. The NR ranking is also used, perhaps controversially, for societies like South Africa and Rhodesia, where the rights of the white ruling minorities may for the most part be at the 'Substantially Respected' or at least 'Partly Respected' level.

Sources: Press reports; *Keesing's Contemporary Archives; ICJ Reviews;* Stebbins and Amoia's *Political Handbook*, 1972 Supplement. The major source was the *Comparative Survey of Freedom*, appearing in the January-February 1973 edition of *Freedom At Issue* (published by Freedom House Inc, New York), which purports to specify and rank the condition of political and civil liberty in every country in the world as at the end of 1972 (relying essentially on the same kinds of sources—*Keesing*, press reports and so on—as noted above, but more of them). A revised and updated version of the *Survey* appeared in the July-August 1973 edition of *Freedom at Issue* (No 20).

The Freedom House organization, whose publications have a marked but by no means outrageous right-wing bias, has published annual surveys of freedom for a number of years; that cited is the most recent and the most detailed. It employs a 'Free—Partly Free—Not Free' scale which corresponds largely but not completely with the present 'R—PR—NR' scale. The present writer, giving greater weight to the civil rights than to the formal trappings of democracy, and, in particular, to the treatment of minorities, has relegated a number of the Freedom House 'Free' States to the 'Precarious' category (eg Cyprus, Dominican Republic, El Salvador, Guatemala, Israel, Mauritius and Trinidad/Tobago) and has also been harsher on countries like Singapore and South Vietnam, which Freedom House ranks as 'Partly Free'.

The Relationship between Bills of Rights and the Status of Rights

	NR		PR		R		Total	
	N	%	N	%	N	%	N	%
Bill of Rights	47	44	27	25	34	31	108	100
No Bill of Rights	27	69	8	21	4	10	39	100

This table summarises the relationship between the existence of bills of rights and the status of those rights in practice as measured by the above criteria. It should not be taken too seriously, and is certainly not meant to be any guide to the likely utility of a bill of rights in a country like Australia, though some opponents of bills of rights would no doubt draw that conclusion. Bills of rights depend for their success, in practice, on a large number of preconditions, among which some kind of tradition of respect for civil and political rights undoubtedly ranks high. Bills of rights cannot stop the emergence of tyrannies any more than any other formal institutional arrangements, but they can perhaps make basically stable and democratic societies rather more just.