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## Protecting Human Rights Without a Bill of Rights, 43 J. Marshall L. Rev. 769 (2010)

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# PROTECTING HUMAN RIGHTS WITHOUT A BILL OF RIGHTS

CHIEF JUSTICE ROBERT FRENCH\*

## I. INTRODUCTION

Unlike the United States, Australia does not have a Bill of Rights in its Constitution, nor does it have a Charter of Rights in statutory form. There is current debate about the desirability of a Human Rights Act for Australia, which would require statute law to be interpreted, where possible, consistently with the human rights set out in the Act. In one version of the proposal, the Human Rights Act would also require that where a statute was found by a Court to be incompatible with a human right, the Court would make a declaration of that incompatibility. Upon such a declaration being made, the relevant Minister would be required to inform Parliament of what he or she proposed, if anything, to do in response to the declaration.

In writing this Article, I do not intend to take a position in the current Australian debate. If a national Human Rights Act does come to pass, it may be that its interpretation and even its validity will be argued before the High Court. The object of this Article is to say something about the present position in relation to the protection of human rights in Australia by reference to the Australian Constitution and the common law of Australia. Whether greater protections are necessary and how they should be provided if they are needed are policy questions to be resolved ultimately in the national parliament.

It is helpful to begin by looking back to the debate about the inclusion of rights guarantees when the representatives of the six Australian colonies that became the states were drafting the Constitution at the end of the nineteenth century.

## II. HUMAN RIGHTS AND THE DRAFTING OF THE AUSTRALIAN CONSTITUTION

Andrew Inglis Clark was a leading intellectual force among the colonial delegates to the conventions that drafted the national Constitution. He was the principal proponent for the inclusion of rights guarantees in that Constitution. As Attorney-General for

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Tasmania, he was very familiar with the Constitution of the United States and with key Supreme Court decisions relevant to the Constitution. Clark was well aware of the Bill of Rights that comprised the first ten and fourteenth amendments to the United States Constitution. He believed in the natural or rational rights of man as a counter to what he called "the tyranny of the majority, whose unrestricted rule is so often and so erroneously regarded as the essence and distinctive principle of democracy."<sup>1</sup> After the 1890 Federation Convention in Melbourne, Clark prepared a preliminary draft of an Australian Constitution, which drew extensively from that of the United States.<sup>2</sup> It formed the basis for much of what was to appear in the Constitution as finally adopted. In his draft, Clark included four particular rights based on American influences. They were: (1) the right to trial by jury, (2) the right to the privileges and immunities of state citizenship, (3) the right to equal protection under the law, and (4) the right to freedom and non-establishment of religion.

Clark sought to expand the equal protection guarantee at the 1898 Convention.<sup>3</sup> He proposed that a state not be able to "deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of its laws."<sup>4</sup> He justified the prohibition by quoting the words of a leading American jurist, Justice Cooley of Michigan. He said,

A popular form of Government does not necessarily assure to the people an exemption from tyrannical legislation. On the contrary, the more popular the form, if there be no checks or guards, the greater perhaps may be the danger that excitement and passion will sway the public counsels, and arbitrary and unreasonable laws be enacted.<sup>5</sup>

A great part of the debate in relation to Clark's rights

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1. ANDREW INGLIS CLARK, *STUDIES IN CONSTITUTIONAL LAW* 386 (Sydney Publishing 1997) (1901).

2. A copy of Clark's draft is available at JOHN WILLIAMS, *THE AUSTRALIAN CONSTITUTION: A DOCUMENTARY HISTORY* 63-112 (Melbourne University Press 2005).

3. Clark did not attend the 1897-1898 Adelaide Convention and he sent written amendments to the 1898 Melbourne Convention. See JA LA NAUZE, *THE MAKING OF THE AUSTRALIAN CONSTITUTION* 67, 93 (Melbourne University Press 1972); H. REYNOLDS, *3 AUSTRALIAN DICTIONARY OF BIOGRAPHY: CLARK, ANDREW INGLIS (1848-1907)* 399-401 (Melbourne University Press 1969), available at <http://adbonline.anu.edu.au/biogs/A030378b.htm>.

4. MERCURY, Aug. 19, 1897. The amendment also appears in "Proposed Amendments to the Draft of a Bill to Constitute the Commonwealth of Australia", Australian Archives Mitchell, Series R216, Item 310 at 4 and cited in John M. Williams, *With Eyes Open: Andrew Inglis Clark and Our Republican Tradition*, 23(2) FED. L. REV. 149, 176 (1995).

5. Proposed amendments to the draft of a Bill to constitute the Commonwealth of Australia, Australian Archives Mitchell, Series R216, Item 310 at 4-5. See also Williams, *supra* note 4, at 177.

provisions took place at the 1898 Convention in Melbourne. There was opposition to rights guarantees that would affect the legislative powers of the states. This was particularly directed to the equal protection and due process guarantees. The authors of a recent text on bills of rights in Australian history have observed that

[t]hese proposals were attacked both on the basis that such guarantees were unnecessary for the protection of the rights of citizens in a polity based on representative and responsible government, and because they were seen as having the potential to restrict colonial laws that limited the employment of Asian workers.<sup>6</sup>

A racial basis for opposition to these guarantees was apparent from the remarks of the Premier of Western Australia John Forrest who said,

It is of no use for us to shut our eyes to the fact that there is a great feeling all over Australia against the introduction of coloured persons. It goes without saying that we do not like to talk about it, but still it is so. I do not want this clause to pass in a shape which would undo what is about to be done in most of the colonies, and what has already been done in Western Australia, in regard to that class of persons.<sup>7</sup>

At the time, and for a long time after federation, Western Australian laws prohibited persons of Asiatic or African descent from obtaining a miner's right and from mining on a goldfield. The colony also had a racially biased Immigration Act.

The equal protection proposal was based on the U.S. Fourteenth Amendment. Isaac Isaacs, one of the delegates who later became Chief Justice of Australia and subsequently the first Australian Governor-General, argued that the Fourteenth Amendment had been inserted in the U.S. Constitution after the Civil War because the southern states had refused to concede rights of citizenship to persons of African descent. The object of the amendment, as he characterised it, was to ensure that African Americans would not be deprived of the right of suffrage and various other rights of citizenship in the southern states. He did not think it necessary to insert such a clause in the Australian

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6. ANDREW BYRNES, HILARY CHARLESWORTH, AND GABRIELLE MCKINNON, *BILLS OF RIGHTS IN AUSTRALIA: HISTORY, POLITICS AND LAW* 25 (UNSW Press 2009) at 25; see also GEORGE WILLIAMS, *HUMAN RIGHTS UNDER THE AUSTRALIAN CONSTITUTION* 37-42 (Oxford University Press 1999).

7. *Official Record of the Debates of the Australasian Federal Convention*, 666 (Melbourne 1898) available at <http://www.aph.gov.au/senate/pubs/records.htm> (click on "Third Session, Melbourne, 22 January – 17 March 1898"); also cited in GEORGE WILLIAMS, *THE CASE FOR AN AUSTRALIAN BILL OF RIGHTS: FREEDOM IN THE WAR ON TERROR* 21 (UNSW Press 2004).

Constitution.<sup>8</sup>

In the event limited rights provisions were adopted based on those proposed by Clark, they comprised the right to trial by jury in cases of offences against the Commonwealth tried by indictment,<sup>9</sup> a prohibition on the Commonwealth establishing any religion or preventing the free exercise of any religion,<sup>10</sup> and the protection of the residents of one state from discrimination by another state on the basis of residence.<sup>11</sup> The anti-discrimination guarantee was the relic of Clark's equal protection proposal. It is important, however, to acknowledge that these are not the only sources of rights protection in the Commonwealth Constitution.

### III. THE SHAPE OF THE AUSTRALIAN CONSTITUTION

The Australian Constitution has eight chapters that deal with the following topics: Chapter I – The Parliament, Chapter II – The Executive Government, Chapter III – The Judicature, Chapter IV – Finance and Trade, Chapter V – The States, Chapter VI – New States, Chapter VII – Miscellaneous, and Chapter VIII – Alteration of the Constitution.

The law-making power of the Commonwealth is vested in the Commonwealth Parliament, which consists of “the Queen, a Senate, and a House of Representatives.”<sup>12</sup> Section 51 of the Constitution sets out the subjects upon which the Parliament of the Commonwealth is authorised to make laws. There are thirty-nine heads of power in that section.

Chapter II of the Constitution deals with the Executive Government. The key provision of that chapter is section 61 which provides: “The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen’s representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.” By convention, the Governor-General acts upon the advice of the Australian Ministers of the Crown through the Federal Executive Council that is established under section 62 of the Constitution. This section locates the effective executive power in the Ministers of the Crown.

Chapter III of the Constitution deals with the federal judicature. Each colony that became a state already had in place a court system. Those court systems continued after federation and

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8. *Official Record of the Debates of the Australasian Federal Convention* 668 (Melbourne 1898) available at <http://www.aph.gov.au/senate/pubs/records.htm> (click on “Third Session, Melbourne, 22 January – 17 March 1898”).

9. Commonwealth of Australia Constitution § 80.

10. *Id.* § 116.

11. *Id.* § 117.

12. *Id.* § 1.

continue today. The judicial power of the Commonwealth is vested in the High Court of Australia, such other federal courts as are created by the Parliament, and such other courts (that is, courts of the states) as are invested with federal jurisdiction. The High Court is the final appellate court for all Australian jurisdictions.<sup>13</sup>

The Constitution took effect in a society operating upon certain assumptions about the rule of law and basic freedoms reflected in the common law inherited from England. The common law that has over the years evolved and been modified, still provides the setting in which the Commonwealth and state constitutions and constitutional institutions operate and in which statutes are interpreted. It is part of the Constitution of Australia and of its states in a small “c” constitutional sense.

#### IV. HUMAN RIGHTS IN THE AUSTRALIAN CONSTITUTION

The absence of a bill of rights in the Australian Constitution is, in part, a function of our history. The movement towards the formation of an Australian federation, which began in the last decade of the nineteenth century, came from the colonists. It was driven by their concerns about foreign affairs, immigration, defence, trade and commerce, and industrial relations. There was some anxiety about the colonising activities of France and Germany in the region and such concerns could not be dealt with by a system of six separate colonial governments. The federation movement did not seek to rid Australia of British hegemony as there was no desire to assert against government generally, or the British government in particular, rights and freedoms for colonists. In fact, the rights most intensely debated were those of the individual colonies as proposed states, *vis a vis*, the proposed federal parliament.

The colonists saw themselves as essentially British. It has been argued persuasively that a consciousness of white nationalism was central to federation and the invocation of that consciousness has been described as related to a “cultural strategy in the processes of nation-building.”<sup>14</sup> It informed the inclusion in the Constitution of a power for the Commonwealth Parliament to make laws with respect to “[t]he people of any race, for whom it is deemed necessary to make special laws.”<sup>15</sup> The purpose of that provision, according to the constitutional commentators Quick and Garran writing in 1901, was to authorise the Commonwealth Parliament to localise the “people of any alien race”<sup>16</sup> within

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13. *Id.* § 71.

14. HELEN IRVING, *TO CONSTITUTE A NATION: A CULTURAL HISTORY OF AUSTRALIA'S CONSTITUTION* 100 (Cambridge University Press 1997).

15. Commonwealth of Australia Constitution § 51(xxvi).

16. SIR JOHN QUICK AND SIR ROBERT GARRAN, *THE ANNOTATED CONSTITUTION OF THE AUSTRALIAN COMMONWEALTH* 622 (Sydney, Angus &

defined areas, to confine them to certain occupations, and to restrict their immigration. It also extended to giving such people special protection and securing their return to their country of origin.<sup>17</sup>

The principal proponent of the power was Sir Samuel Griffith who later became Australia's first Chief Justice. The main debate was not whether there should be such a power, but whether it should be exclusive to the Commonwealth or shared with the states.

There was virtually no reference to the Aboriginal people of Australia during the Convention debates on the race power. Indeed, they were expressly excluded from the coverage of that power so that the states could retain legislative power with respect to them. It was not until 1967 that the Constitution was amended to remove that exclusion so that the Commonwealth Parliament would have the power to make laws for Aboriginal people, as well as the people of any other race. The oddity is that the beneficial amendment was grafted onto a provision originally conceived as supporting adversely discriminatory laws.

Having regard to the history of the federation movement, it is not surprising that the Constitution has little to say about the relationship between government and the governed. Australian legal academic, Professor George Williams, has suggested that many of the drafters of the Constitution were influenced by the nineteenth century English constitutional commentators, Bryce and Dicey.<sup>18</sup> Neither Bryce nor Dicey saw a need to expressly guarantee rights in written constitutions. In her writing, Professor Helen Irving has referred to colonial liberals and conservatives among the drafters of the Constitution. The conservatives, for the most part, were primarily concerned with states' rights. The liberals, however, represented liberal utilitarianism associated with the ideas of John Stuart Mill. Professor Irving wrote, "In the area of human rights, the majority, including most conservatives, took the Millsian approach, seeking the restriction of belief and action only in so far as their free expression harmed others."<sup>19</sup> The tendency, as she described it, was to respect rights and freedoms negatively from interference but not to declare them positively.

Sir Owen Dixon, a former Chief Justice of Australia, in comparing the United States and Australian Constitutions, attributed the omission of a bill of rights to a readiness on the part

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Robinson 1901).

17. *Id.*

18. See WILLIAMS, *supra* note 6, at 39. See also JAMES BRYCE, AMERICAN COMMONWEALTH (Macmillan 3d ed. 1912) (1906); ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (Macmillan, 10th ed. 1959).

19. IRVING, *supra* note 14, at 168.

of the framers of the Constitution to leave the protection of rights to the legislature and the processes of responsible government. He stated,

The framers of the Australian Constitution were not prepared to place fetters upon legislative action, except and in so far as it might be necessary for the purpose of distributing between the States and the central government the full content of legislative power. The history of their country had not taught them the need of provisions directed to the control of the legislature itself.<sup>20</sup>

In holding that there was no basis in the Constitution for implying general guarantees of fundamental rights and freedoms, another Chief Justice of Australia, Sir Anthony Mason, said in 1992,

To make such an implication would run counter to the prevailing sentiment of the framers that there was no need to incorporate a comprehensive Bill of Rights in order to protect the rights and freedoms of citizens. That sentiment was one of the unexpressed assumptions on which the Constitution was drafted.<sup>21</sup>

It is sufficient to say that there was probably a variety of reasons behind the absence in Australia's Constitution of a bill of rights, some related to the desire to maintain the capacity to discriminate against particular racial groups and others reflecting a loftier vision of the nascent Australian constitutionalism. Hypotheses more than 100 years after the event, however plausible, are unlikely to yield a single reliable explanation.

There are a number of provisions in the Commonwealth Constitution, including the survivors of the Clark proposals, which answer to some degree the description of human rights guarantees. Each of them may be dealt with briefly.

Section 51(xxiiiA) of the Constitution authorises the Commonwealth Parliament to make provision, among other things, for medical and dental services, but is subject to the limitation that it does not authorise any form of civil conscription. This section was introduced into the Constitution in 1946 after the High Court had struck down a law providing for the supply of pharmaceutical benefits paid for by the Commonwealth. The limitation on the constitutional power, which would exclude any form of civil conscription, was proposed by Robert Menzies to avoid the power being used to nationalise the medical and dental

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20. Sir Owen Dixon, *Two Constitutions Compared*, 28 A.B.A. J. 733 (1942), reprinted in SIR OWEN DIXON, *JESTING PILATE* 102 (Melbourne: Law Book, 1965), at 102 cited in H.P. Lee, *The Implied Freedom of Political Communication* in H.P. LEE HP AND GEORGE WINTERTON (EDS), *AUSTRALIAN CONSTITUTIONAL LANDMARKS* 386 (Cambridge University Press 2003).

21. *Australian Capital Television Propriety. Ltd. v. Commonwealth* (1992) 177 C.L.R. 106, 136 (Austl.).



professions.

Section 51(xxxi) of the Constitution authorises the Commonwealth Parliament to make laws with respect to “the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.” This has been taken as imposing a just terms requirement in respect of any compulsory acquisition by the Commonwealth of property belonging to the state or to a person. There is complicated case law that attaches to this provision. It extends to a very wide range of property interests described by Sir Owen Dixon in the *Bank Nationalisation Case* as “innominate and anomalous interests . . .”<sup>22</sup> A law that extinguishes a property right may bear the character of a law with respect to the acquisition of property.<sup>23</sup> In February last year, the Court held by a majority that the just terms guarantee extended beyond the states into the territories and, in particular, the Northern Territory of Australia.<sup>24</sup> In so doing, it overturned the 1969 decision *Teori Tau v. Commonwealth*.<sup>25</sup> As a result, the just terms guarantee applied to the acquisition of property rights conferred upon indigenous people under the Aboriginal Land Rights (Northern Territory) Act. This was a finding of some significance even though public reporting of the decision focussed upon the Court’s rejection of a challenge to the validity of statutes supporting the Northern Territory intervention.<sup>26</sup>

Section 75(v) of the Constitution confers on the High Court jurisdiction in any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. Under that provision, the High Court can prevent a public official, including a Minister of the Crown, from exceeding his or her lawful power and may require a minister or official to discharge a duty imposed upon him or her by law. The Court can also quash a decision that is made in excess of power. Chief Justice Gleeson described section 75(v) as providing in the Constitution “a basic guarantee of the rule of law.”<sup>27</sup> This section was inserted into the Constitution at the suggestion of the delegate Andrew Inglis Clark to avoid the deficiency in original jurisdiction identified by Chief Justice Marshall in *Marbury v. Madison*.<sup>28</sup> Because it is a constitutional provision, the original jurisdiction it confers on the

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22. *Bank of New South Wales v. Commonwealth* (1948) 76 C.L.R. 1, 349 (Austl.).

23. *Georgiadis v. Australian and Overseas Telecomm. Corp.* (1994) 179 C.L.R. 297.

24. *Wurridjal v. Commonwealth* (2009) 237 C.L.R. 309 (Austl.).

25. (1969) 119 C.L.R. 564 (Austl.).

26. *Wurridjal v. Commonwealth* (2009) 237 C.L.R. 309 (Austl.).

27. MURRAY GLEESON, *THE RULE OF LAW AND THE CONSTITUTION* 67 (ABC Books 2000).

28. 5 U.S. 137 (1803).

Court cannot be removed by statute.

Section 80 of the Constitution provides:

The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

The guarantee of trial by jury is contingent upon the offence being tried by indictment. There have been a number of cases in which the scope of this guarantee has been explored. Where it applies, it has been held to require a unanimous verdict of the jurors before a conviction can stand.<sup>29</sup> The Court recently heard a case in which it was argued that, consistently with section 80, there could be no appeal against a verdict of acquittal directed by the trial judge. The Court has reserved judgment in that case.

Section 92 of the Constitution provides: "On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free." There are two elements to this guarantee: one is freedom of trade and commerce, the other is freedom of intercourse. The latter freedom was relied upon to strike down national security regulations in 1945 that were found to prohibit interstate movement.<sup>30</sup> This aspect of section 92 has been said to be related to the freedom of movement guaranteed in article 12 of the International Covenant on Civil and Political Rights (ICCPR).

Section 116 of the Constitution, which is another of the Clark rights, provides: "The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth." This guarantee does not apply to the states but only to the Commonwealth. It has been litigated from time to time. For instance, in *Attorney-General (Vic); Ex rel Black v. Commonwealth*,<sup>31</sup> a challenge was brought to laws providing for grants to the states to be distributed to religious schools. The laws were said to establish a religion contrary to section 116. The challenge was rejected. In 1997, the High Court rejected an action brought by Aboriginal people claiming that policies of the Northern Territory designed to place Aboriginal children in foster care in church and state operated homes, had interfered with their freedom to practice their own religion. The majority held that the Aboriginal Protection Ordinance was not a

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29. *Cheatle v. R* (1993) 177 C.L.R. 541 (Austl.).

30. *Gratwick v. Johnson* (1945) 70 C.L.R. 1 (Austl.).

31. (1981) 146 C.L.R. 559 (Austl.).

law that could be characterised as a law “for prohibiting the free exercise of any religion.”<sup>32</sup>

Section 117 of the Constitution prohibits discrimination between residents of states. It provides: “A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.”

In an important decision in 1989, the Court struck down Queensland laws that required any legal practitioner wishing to practice in Queensland to have his or her principal practice there. Although on the face of it the law, which was a rule made by the Queensland Bar Association, applied to all legal practitioners, it also operated to discriminate against out of state practitioners.<sup>33</sup>

The specific guarantees to which I have referred may be seen as falling within the categories of civil and legal process rights and economic and equality rights. Australian constitutional law academic Professor Peter Bailey has made a persuasive case for their similarity to, if not identity with, a number of human rights and freedoms guaranteed under the ICCPR, the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>34</sup>

Chapter III of the Constitution provides for the federal judicial power to be exercised by the High Court, by Federal courts created by the Parliament, and also by state courts that are invested with federal jurisdiction. The High Court has resisted legislative or executive intrusions upon the judicial power. As one of the judges of the High Court, Justice Gummow, said in a case decided in 1998, “The legislative powers of the Commonwealth do not extend to the making of a law which authorises or requires a court exercising the judicial power to do so in a manner which is inconsistent with its nature.”<sup>35</sup> The Court has not gone so far as to import a “due process” requirement from the text and structure of Chapter III.<sup>36</sup> However, the constitutional scheme under which state courts may be invested with federal jurisdiction brings them within the protection of that chapter.

State parliaments cannot confer upon state courts’ functions which would so distort their institutional integrity as to make them unfit repositories for federal jurisdiction. It has been said that legislation that requires a court exercising federal jurisdiction

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32. *Kruger v. Commonwealth* (1997) 190 C.L.R. 1, 40 (Austl.).

33. *Street v. Queensland Bar Ass’n* (1989) 168 C.L.R. 461 (Austl.).

34. See PETER H. BAILEY, *HUMAN RIGHTS: AUSTRALIA IN AN INTERNATIONAL CONTEXT* (Butterworths 1990); PETER H. BAILEY, *THE HUMAN RIGHTS ENTERPRISE IN AUSTRALIA AND INTERNATIONALLY* (LexisNexis 2009).

35. *Nicholas v. The Queen* (1998) 193 C.L.R. 173, 232 (Austl.).

36. *Thomas v. Mowbray* (2007) 233 C.L.R. 307, 355 (Austl.).

to depart to a significant degree from methods and standards that have characterised judicial activities in the past may be repugnant to Chapter III.<sup>37</sup> In November 2009, the Court struck down a provision of a civil assets forfeiture statute in New South Wales that required the Supreme Court in that state to hear and determine, on an *ex parte* basis, an application by the New South Wales Crime Commission for an interim freezing order in relation to assets suspected of being the proceeds of crime. Under the legislation, an application to set aside the restraining order could not succeed unless the applicant proved that it was more probable than not that the interest in the property was not “illegally acquired property.” That in turn required the negating of a very widely drawn range of possibilities of contravention of the criminal law found in the common law and state and Federal statute law. In the joint judgment of Justices Gummow and Bell, their Honours characterised the process thus:

[97] The Supreme Court is conscripted for a process which requires in substance the mandatory *ex parte* sequestration of property upon suspicion of wrong doing, for an indeterminate period, with no effective curial enforcement of the duty of full disclosure on *ex parte* applications. In addition the possibility of release from that sequestration is conditioned upon proof of a negative proposition of considerable legal and factual complexity.

[98] Section 10 engages the Supreme Court in activity which is repugnant in a fundamental degree to the judicial processes as understood and conducted throughout Australia.<sup>38</sup>

There are other provisions of the Constitution that, it may be argued, have potential connections to human rights. These include the electoral and franchise provisions and other provisions relating to non-discrimination in taxing laws and in trade, commerce, or revenue. It is sufficient to say that these linkages with the relevant international human rights provisions are more difficult to make.

In addition to the particular guarantees to which reference has been made, the High Court has also held that there exists an implied freedom of political communication.

#### V. THE IMPLIED CONSTITUTIONAL FREEDOM OF POLITICAL COMMUNICATION IN AUSTRALIA

In two decisions delivered on September 30, 1992, the High Court recognised an implied constitutional freedom of communication on political matters in Australia. The first case,

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37. *Id.* (referencing Justices Gummow and Crennan).

38. *Int'l Fin. Trust Co. Ltd. v. New South Wales Crime Comm'n* (2009) 240 C.L.R. 319, 366-67 (Austl.).

*Nationwide News Propriety Ltd. v. Wills*,<sup>39</sup> involved a prosecution of *The Australian* newspaper which had published an article highly critical of the Australian Industrial Relations Commission. The article said, *inter alia*, "The right to work has been taken away from ordinary Australian workers. Their work is regulated by a mass of official controls, imposed by a vast bureaucracy in the Ministry of Labour and enforced by a corrupt and compliant 'judiciary' in the official Soviet-style Arbitration Commission."<sup>40</sup> The newspaper was prosecuted under section 299 of the Industrial Relations Act, which provided that "[a] person shall not . . . (d) by writing or speech use words calculated . . . (ii) to bring a member of the [Industrial Relations] Commission or the Commission into disrepute."<sup>41</sup>

The High Court held this section invalid. A majority of the Court (Justices Brennan, Deane, Toohey, and Gaudron) held it was invalid as infringing an implied freedom of political discussion. The minority (Chief Justice Mason and Justices Dawson and McHugh) held it invalid on the basis that it was not within the scope of a relevant head of power in the Constitution. Justices Deane and Toohey, in their joint judgment, based the implication upon the system of representative government, for which the Constitution provides:

The people of the Commonwealth would be unable responsibly to discharge and exercise the powers of governmental control which the Constitution reserves to them if each person was an island, unable to communicate with any other person. The actual discharge of the very function of voting in an election or referendum involves communication.<sup>42</sup>

They discerned in the doctrine of representative government "an implication of freedom of communication of information and opinions about matters relating to the government of the Commonwealth."<sup>43</sup> The implication operated at the level of communication and discussion between the people of the Commonwealth and their members of Parliament and other Commonwealth authorities. It also operated at the level of communication between the people of the Commonwealth themselves.

The other case in which judgment was delivered on September 30, 1992, *Australian Capital Television Propriety Ltd. v. Commonwealth*,<sup>44</sup> involved a challenge to new Commonwealth legislation proposing to impose a blanket prohibition on political

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39. (1992) 177 C.L.R. 1 (Austl.).

40. *Id.* at 96 (emphasis in original).

41. Industrial Relations Act (1988) (Cth) (Austl.).

42. *Nationwide News*, (1992) 177 C.L.R. at 72.

43. *Id.* at 73.

44. (1992) 177 C.L.R. 106 (Austl.).

advertisements on radio or television during Federal election periods. The majority (Chief Justice Mason and Justices Deane, Toohey, and Gaudron) held that the new provisions were invalid because they infringed the constitutionally guaranteed freedom of political discussion. Chief Justice Mason acknowledged the historical fact that the framers of the Constitution had not adopted the United States model of a bill of rights. He accepted that it was difficult, if not impossible, to imply general guarantees of fundamental rights and freedoms in the Australian Constitution. He went on to say,

the existence of that sentiment when the Constitution was adopted and the influence which it had on the shaping of the Constitution are no answer to the case which the plaintiffs now present. Their case is that a guarantee of freedom of expression in relation to public and political affairs must necessarily be implied from the provision which the Constitution makes for a system of representative government. The plaintiffs say that, because such a freedom is an essential concomitant of representative government, it is necessarily implied in the prescription of that system.<sup>45</sup>

It is important to note that the implied freedom of political communication did not confer enforceable rights on individuals. Rather, it operated to limit the law-making power of the Parliament to prevent it from encroaching upon that freedom.

The scope of the implied freedom has been considered in a number of cases involving defamation actions brought by politicians against media outlets.<sup>46</sup> As expounded in those cases, the implied constitutional freedom of political communication does not confer rights on individuals. Rather, it invalidates any statutory rule which is inconsistent with that freedom. In the context of defamation law, it also requires that the rules of the common law conform to the Constitution. This affects, *inter alia*, the scope of the defences of qualified privilege that might be raised by media publishers. It does not extend to invalidate laws that are reasonably appropriated and adapted to serve legitimate public ends particularly relating to criminal conduct.

There is a question about the range of “political matters” that fall within the implied freedom of communication. In *Australian Capital Television*, they were referred to as “the wide range of matters that may call for, or are relevant to, political action or decision.”<sup>47</sup> In the *Theophanous* decision they were said, by Chief Justice Mason and Justices Toohey and Gaudron, to extend to “all

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45. *Id.* at 136.

46. *Theophanous v. Herald & Weekly Times Ltd.* (1994) 182 C.L.R. 104 (Austl.); *Stephens v. West Australian Newspapers Ltd.* (1994) 182 C.L.R. 211 (Austl.); *Lange v. Australian Broad. Corp.* (1997) 189 C.L.R. 520 (Austl.); *Roberts v. Bass* (2002) 212 C.L.R. 1 (Austl.).

47. *Australian Capital*, 177 C.L.R. at 138.

speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about.”<sup>48</sup>

The freedom does not extend, however, to matters traditionally controlled by the criminal law. Justices Deane and Toohy said in *Nationwide News* that

a law prohibiting conduct that has traditionally been seen as criminal (eg conspiring to commit, or inciting or procuring the commission of, a serious crime) will readily be seen not to infringe an implication of freedom of political discussion notwithstanding that its effect may be to prohibit a class of communications regardless of whether they do or do not relate to political matters.<sup>49</sup>

The most recent High Court decision to consider the implied freedom of political communication was *APLA Ltd. v. Legal Services Comm'r (NSW)*.<sup>50</sup> There it was held by a majority that the implied freedom did not interfere with regulations restricting the advertisement of legal services. The communication prohibited was not political.

Some general observations may be made about the implied freedom of political communication. For one, it is not limited to citizens or individuals. Also, it offers no greater protection to the press or the media than it does for individuals. As one commentator observed, “The beneficiaries of the freedom are consistently described as ‘citizens’ or ‘electors’ or ‘the community’, without the media being accorded favourable, or indeed unfavourable treatment by virtue of any claimed role as watchdog.”<sup>51</sup> There is ongoing uncertainty about the scope of the “political communication” protected by the freedom.<sup>52</sup>

In areas relating to sedition, anti-terrorism, and anti-violification laws, censorship and obscene publications questions may be raised in future cases in regards to the interaction of restrictions imposed by such laws with the implied freedom of political communication. Their resolution may depend in part upon the scope of the concept of “political communication” and which restrictions are reasonably appropriate and adapted to serve legitimate ends compatible with the system of government provided by the Constitution.

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48. *Theophanous*, 182 C.L.R. at 124, citing ERIC BARENDT, *FREEDOM OF SPEECH* 152 (Clarendon Press 1985).

49. *Nationwide News*, (1992) 177 C.L.R. at 77.

50. (2005) 224 C.L.R. 322 (Austl.).

51. MICHAEL R. CHESTERMAN, *FREEDOM OF SPEECH IN AUSTRALIAN LAW: A DELICATE PLANT* 44 (Dartmouth 2000).

52. Adrienne Stone, *The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication*, 23 MELB. U. L. REV. 668 (1999); Adrienne Stone, *The Limits of Constitutional Text and Structure Revisited*, 28 U.N.S.W.L.J. 842 (2005).

## VI. AUSTRALIAN DEBATES ABOUT CONSTITUTIONAL AND STATUTORY PROTECTION OF HUMAN RIGHTS

Debate about the desirability of both constitutional and statutory bills of rights has been going on in Australia for many years. Attempts to introduce statutory bills of rights as Commonwealth law were made in 1973 and 1985. The 1973 Bill was strongly opposed and was not enacted. It lapsed in 1974 when Parliament was prorogued. The 1985 Bill was passed by the House of Representatives, but did not secure a majority in the Senate.

In 1985, the Attorney-General Lionel Bowen established a Constitutional Commission. That Commission recommended the inclusion in the Constitution of a new Chapter VIA guaranteeing specified rights and freedoms against legislative, executive or judicial action. A proposed new section 124E specified a number of these rights.

A constitutional alteration referendum was conducted in September 1988 and it did not involve the full suite of rights proposed by the Commission. Rather, it would have extended existing rights relating to religious freedom, compensation for the acquisition of property, and trial by jury. It also proposed a one vote, one value, principle. However, it was overwhelmingly defeated. The reasons for its defeat had to do with an associated proposal for four-year parliamentary terms and a perception that somehow the changes were going to enhance the powers of the Commonwealth Parliament to the disadvantage of the states. No further attempt has been made to incorporate guaranteed rights and freedoms into the Australian Constitution.

There have been initiatives at state and territory level in Australia to provide statutory protection for human rights. In 2004, the Australian Capital Territory enacted the *Human Rights Act* ("Act"). The Act was broadly modeled on similar legislation in the United Kingdom, and it declares a number of rights. All of the rights declared are said to be "subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society."<sup>53</sup>

The Australian Capital Territory legislation cannot affect the validity of any subsequent, inconsistent laws of the territory, nor can it affect Commonwealth laws that apply in the territory. When a law of the territory is held by the Supreme Court of the territory to be inconsistent with a human right protected by the Act, the Court may make a declaration of incompatibility.<sup>54</sup> Such a declaration does not affect the validity, operation, or enforcement of the law or the right or obligations of anyone. When such a declaration is made, the Attorney-General must put a copy of it to

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53. Human Rights Act, 2004, § 28 (Austl.).

54. Human Rights Act § 32.



the Legislative Assembly of the territory within six sitting days after the Attorney-General receives the copy. The Attorney-General must also prepare a written response to the Declaration of Incompatibility and present it to the Legislative Assembly not later than six months after the day the copy of the declaration was presented.

In 2006, the State of Victoria enacted a Charter of Human Rights and Responsibilities. The Charter is similar in its impact on legislation to the Act. The rights that it protects apply only to "persons."<sup>55</sup>

The topic of constitutional and statutory protection of human rights in Australia has frequently been a matter of controversy. A prominent element of the arguments advanced against the introduction of such rights protection in Australia is that it shifts power on important matters of social policy from elected politicians to unelected judges. There is no doubt that human rights and freedoms guaranteed in constitutions and statutes around the world are broadly expressed. The definition of their limits in particular cases by reference to public interest considerations necessarily requires normative judgments which may be seen to have a legislative character.

The phenomenon of judges interpreting broad, legal language and making normative decisions in that interpretation is not new. Such concepts as "reasonableness," "good faith," and "unconscionable conduct" found in the common law and in many statutes involve that kind of decision-making. The particular sensitivity of judgments about the scope of human rights guarantees is their impact on legislation. If a right is constitutionally guaranteed, then legislation held by a court to be incompatible may be invalid. If a statute guarantees the human right, then a subsequent inconsistent statute will not thereby be invalid. However, the declaration of incompatibility mechanism for which the Australian Capital Territory and Victorian legislation provides, is intended to impact the parliamentary process by requiring the Attorney-General to present the declaration to the Parliament and provide a response.

Significant controversy or lack of bipartisan political support will generally defeat any attempt to change the Constitution in Australia. For the foreseeable future there are unlikely to be any express provisions introduced into the Australian Constitution that protect or guarantee fundamental rights and freedoms of the kind set out in the ICCPR or the economic and social rights set out in the ICESCR.

Australia is a party to the ICCPR and the ICESCR and many

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55. Charter of Human Rights and Responsibilities Act, 2006, § 6 (Austl. Vic).

other treaties and conventions which are designed to protect and advance fundamental human rights and freedoms. The Commonwealth Parliament, by virtue of its power to make laws with respect to “[e]xternal [a]ffairs,”<sup>56</sup> has legislated to give domestic legal effect to certain human rights treaties, but not the ICCPR or the ICESCR. Laws giving effect to such conventions, which are laws passed by the Commonwealth, would override inconsistent state laws and thus could be seen as providing a quasi-constitutional guarantee of human rights and freedoms against state laws impinging on them. However, at the Commonwealth level human rights statutes would not affect the validity of a subsequent inconsistent Commonwealth law. Human rights statutes in Australia giving effect to international conventions include anti-discrimination laws in relation to race, sex, disability, and age.<sup>57</sup> The Migration Act provides for the issue of protection visas for persons who fall within the definition of “refugee” in the Refugees Convention of 1954. The Human Rights and Equal Opportunity Commission is a federal body, set up by statute to deal with complaints of infringements of the various anti-discrimination Acts and to promote and educate in relation to human rights. It also has an intervention role in judicial proceedings. Mention should also be made of the Privacy Act that has recently been the subject of a comprehensive review by the Australian Law Reform Commission, which has recommended, *inter alia*, the creation of the statutory equivalent of a Privacy Tort.

Consideration of the Constitution and statutes made under it does not cover the whole field of discourse relevant to protection of rights and freedoms in Australia. The common law of Australia, inherited from England and developed by our own courts, has a constitutional dimension and an impact on the protection of those freedoms. It is useful to consider aspects of that common law heritage.

## VII. THE COMMON LAW – A CONSTITUTIONAL LEGACY

The phrase “common law” refers to a body of principles or rules of law worked out on a case-by-case basis by courts in England and latterly in this country. The judicial law-making process is incremental and it has been described as being like “the sluggish movement of the glacier rather than the catastrophic charge of the avalanche.”<sup>58</sup>

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56. Commonwealth of Australia Constitution § 51(xxix).

57. Racial Discrimination Act, 1975 (Cth) (Austl.); Sex Discrimination Act, 1984 (Cth) (Austl.); Disability Discrimination Act, 1992 (Cth) (Austl.); Age Discrimination Act, 2004 (Cth) (Austl.).

58. SIR P.H. WINFIELD ET AL., WINFIELD AND JOLOWICZ ON TORT 17 (Sweet & Maxwell, 14th ed. 1994).

The common law has a constitutional dimension because, amongst other things, as Sir John Latham wrote in 1960, “in the interpretation of the Constitution, as of all statutes, common law rules are applied.”<sup>59</sup> That constitutional dimension is also reflected in the institutional arrangements the common law brings with it. At its core are public courts that adjudicate between parties and are the authorised interpreters of the law that they administer.<sup>60</sup> As Professor Goodhart said, the most striking feature of the common law is its public law, it being “primarily a method of administering justice.”<sup>61</sup>

In a lecture delivered last year, Chief Justice Spigelman of the Supreme Court of New South Wales recounted the role of “natural rights” in Blackstone’s formulation of the common law. Bentham attacked the idea of such rights as “nonsense on stilts.”<sup>62</sup> Blackstone’s language of natural rights does not have the same force today, but the role of the common law as a repository of rights and freedoms is of considerable significance. A recent, non-exhaustive list of what might be called rights said to exist at common law, include: the right of access to the courts, immunity from deprivation of property without compensation, legal professional privilege, privilege against self-incrimination, immunity from the extension of the scope of a penal statute by a court, freedom from extension of governmental immunity by a court, immunity from interference with vested property rights, immunity from interference with equality of religion, and the right to access legal counsel when accused of a serious crime.<sup>63</sup> To that list might be added: no deprivation of liberty, except by law, the right to procedural fairness when affected by the exercise of public power, and freedom of speech and of movement. These rights are, of course, of a limited nature and are contingent in the sense that, subject to the Constitution, they can be modified or extinguished by Parliament.

It is also important to recognise, as Professor Bailey pointed out in his recent book on human rights in Australia, that common law “rights” have varied meanings. In their application to interpersonal relationships, expressed in the law of tort, contract, or in respect of property rights, they are justiciable and may be said to have “a binding effect.” But “rights” to movement, assembly

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59. John Latham, *Australia*, 76 *LAW QUARTERLY REVIEW* 54, 57 (1960).

60. SIR FREDERICK POLLOCK, *THE EXPANSION OF THE COMMON LAW* 51 (London Stevens 1904).

61. A.L. Goodhart, *What is the Common Law*, 76 *LAW QUARTERLY REVIEW* 45, 46 (1960).

62. James Spigelman, Chief Justice of New South Wales, First Lecture in the 2008 McPherson Lectures at the University of Queensland, Brisbane: *The Common Law Bill of Rights* (Mar. 10, 2008).

63. Jennifer Corrin, *Australia: Country Report on Human Rights*, 40 *V.U.W.L.R.* 37, 41-42 (2009).

or religion, for example, are more in the nature of “freedoms.” They cannot be enforced, save to the extent that their infringement may constitute an actionable wrong such as an interference with property rights or a tort.<sup>64</sup>

The common law method, in contrast with that involved in the implementation of a bill of rights, is a case-by-case approach that develops the relevant principles incrementally. In 1983, Professor Daryl Lumb wrote of judges in a common law system without a constitutional Bill of Rights. He said,

The creativity of the judges is . . . restricted by the ground rules of the system which does not have its source in a fundamental constitutional document which is subject to final review by a constitutional court. As a corollary of this, the doctrine of parliamentary sovereignty enables the rules to be changed and even abrogated. Judicial decisions even of the most basic nature (whatever may be the conventions which restrict the legislative power) are subject to being superseded by legislation which, although open to interpretation, is not open to invalidation by a constitutional court.<sup>65</sup>

He went on to suggest that rights and freedoms at common law might be regarded as “residual in nature.” In my opinion, however, the word “residual” is too weak, having regard to the way in which the courts have approached the interpretation of statutes by reference to those rights and freedoms.

#### VIII. COMMON LAW RIGHTS AND FREEDOMS AND THE INTERPRETATION OF STATUTES

The common law has been referred to in the High Court as “the ultimate constitutional foundation in Australia.”<sup>66</sup> It has a pervasive influence upon constitutional and statutory interpretation. As Justice McHugh said in *Theophanous*, “The true meaning of a legal text almost always depends on a background of concepts, principles, practices, facts, rights and duties which the authors of the text took for granted or understood, without conscious advertence, by reason of their common language or culture.”<sup>67</sup>

The exercise of legislative power in Australia takes place in the constitutional setting of a “liberal democracy founded on the principles and traditions of the common law.”<sup>68</sup> The importance of

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64. PETER H. BAILEY, *THE HUMAN RIGHTS ENTERPRISE IN AUSTRALIA AND INTERNATIONALLY* (LexisNexis 2009).

65. RICHARD DARRELL LUMB, *AUSTRALIAN CONSTITUTIONALISM* 103 (Butterworths 1983).

66. *Wik Peoples v. Queensland* (1996) 187 C.L.R. 1, 182 (Austl.).

67. (1994) 182 C.L.R. at 196.

68. *R. v. Sec’y of State for the Home Dep’t, ex parte Pierson*, (1998) A.C. 539, 587 (Austl.).

the principles and traditions of the common law in Australia is reflected in the long-established proposition that statutory law is to be interpreted consistently with the common law where the words of the statute permit. In a passage still frequently quoted in the 1908 decision, *Potter v. Minahan*,<sup>69</sup> Justice O'Connor said, referring to the fourth edition of Maxwell on *The Interpretation of Statutes*,<sup>70</sup>

It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used (footnote omitted).

That statement was based upon a passage in the judgment of Chief Justice Marshall in *United States v. Fisher*.<sup>71</sup>

The principle enunciated in *Potter v. Minahan* has evolved into an approach to interpretation that is protective of fundamental rights and freedoms. It has the form of a strong presumption that broadly expressed official discretions are to be subject to rights and freedoms recognised by the common law. It has been explained in the House of Lords as requiring that Parliament "squarely confront what it is doing and accept the political cost."<sup>72</sup> Parliament cannot override fundamental rights by general or ambiguous words. The underlying rationale is the risk that, absent clear words, the full implications of a proposed statute law may pass unnoticed. "In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual."<sup>73</sup>

Although Commonwealth statutes in Australia are made under a written constitution, the Constitution does not in terms guarantee common law rights and freedoms against legislative incursion. Nevertheless, the interpretive rule can be regarded as "constitutional" in character even if the rights and freedoms that it protects are not. There have been many applications of the general

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69. (1908) 7 C.L.R. 277, 304 (Austl.).

70. PETER BENSON MAXWELL, ON THE INTERPRETATION OF STATUTES 122 (Sweet and Maxwell, 4th ed. 1905).

71. 6 U.S. 358, 390 (1805).

72. R. v. Sec'y of State for the Home Dep't, ex parte Simms, (2000) 2 A.C. 115, 131 (Austl.). See also R. v. Lord Chancellor, ex parte Witham, (1998) Q.B. 575 (Austl.); and David Dyzenhaus et al., *The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation*, 1 OXFORD U. COMMONW. L. J. 5 (2001).

73. R. v. Sec'y of State for the Home Dep't, ex parte Simms, (2000) 2 A.C. at 131 (U.K.).

rule which, in Australia, had its origin in *Potter v. Minahan*. It has been expressed in quite emphatic terms. Common law rights and freedoms are not to be invaded except by “plain words”<sup>74</sup> or necessary implication.<sup>75</sup>

The presumption, however, has not been limited to only those rights and freedoms historically recognised by the common law. Native title was not recognised by the common law of Australia until 1992. It is nevertheless the beneficiary of the general presumption against interference with property rights for native title is not considered extinguished by legislation unless the legislation reveals a plain and clear intent to have that effect. This presumption applies to legislation that may have predated the decision in *Mabo (No 2)* by many decades and in some cases by more than 100 years. As said in the *Mabo* decision, it is a requirement that flows from “the seriousness of the consequences to indigenous inhabitants of extinguishing their traditional rights and interests in land.”<sup>76</sup>

Two high profile cases involving the application of the presumption in the Federal Court in the last few years were full court judgments: *Minister for Immigration and Citizenship v. Haneef*<sup>77</sup> and *Evans v. New South Wales*.<sup>78</sup> In *Haneef*, the Full Court construed section 501 of the Migration Act narrowly. That section defined the circumstances in which a person would not pass the “character test” and so be liable for refusal or cancellation of a visa on character grounds. A person would fail the character test if “the person has or has had an association with someone else or with a group or organisation whom the Minister reasonably suspects has been or is involved in criminal conduct.”<sup>79</sup> The Court had to interpret the kind of “association” which would bring a person within the criterion. Was it good enough to be a relative or a friend of a person involved in criminal conduct? The Court said,

[Having regard to its ordinary meaning, the context in which it appears and the legislative purpose, we conclude that the association to which [the section] refers is an association involving some sympathy with, or support for, or involvement in, the criminal conduct of the person, group or organisation. The association must be such as to have *some* bearing upon the person’s character.<sup>80</sup>

In *Evans*, the Court was concerned with the validity of a regulation made under the World Youth Day Act. Under the

74. *In re Cuno* (1890) L.R. 43 Ch. D. 12, 17 (U.K.).

75. *Melbourne Corp. v. Barry* (1922) 31 C.L.R. 174, 206 (Austl.).

76. *Mabo v. Queensland (No 2)* (1992) 175 C.L.R. 1, 64 (Austl.).

77. (2007) 163 F.C.R. 414 (Austl.).

78. (2008) 168 F.C.R. 576 (Austl.).

79. Migration Act, 1958, § 501(6)(b) (Cth) (Austl.); cited in *Haneef*, (2007) 163 F.C.R. at 422.

80. *Haneef*, (2007) 163 F.C.R. at 447 (emphasis in original).

regulation, a person could be directed not to engage in conduct causing annoyance to participants in a World Youth Day event. The Full Court referred to cases about the presumption and to what Chief Justice Gleeson said in *Electrolux Home Products Propriety Ltd v. Australian Workers' Union*.<sup>81</sup> He stated,

The presumption is not merely a common sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law.<sup>82</sup>

In the *Evans* case, the regulation making power conferred by the Act, was interpreted according to the common law principle and found not to authorise a broadly stated regulation directed to conduct causing “annoyance to participants in World Youth Day events.”<sup>83</sup> It was interpreted, *inter alia*, in such a way as to minimise interference with freedom of speech.

In the quotation from Professor Lumb’s text on Australian constitutionalism mentioned earlier, the suggestion was made that common law rights and freedoms could be regarded as “residual.” Indeed, the common law has always adhered to the proposition that “everybody is free to do anything, subject only to the provisions of the law.”<sup>84</sup> This may suggest that freedom is what is left over when the law is exhausted. However, the interpretive principle in Australia and its equivalent in England, suggest that it is more than that. Trevor R.S. Allan put it thus:

The traditional civil and political liberties, like liberty of the person and freedom of speech, have independent and intrinsic weight: their importance justifies an interpretation of both common law and statute which serves to protect them from unwise and ill-considered interference or restriction. The common law, then, has its own set of constitutional rights, even if these are not formally entrenched against legislative repeal.<sup>85</sup>

By way of example, there has long been a particular recognition at common law that freedom of speech and the press serves the public interest. Blackstone said that freedom of the press is “essential to the nature of a free State.”<sup>86</sup> In 1891, Lord Coleridge characterised the right of free speech as “one which it is

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81. (2004) 221 C.L.R. 309.

82. *Id.* at 329.

83. *Evans*, 168 F.C.R. at 598.

84. *Att’y Gen. v. Observer Ltd. (No 2)* (1990) 1 A.C. 109, 283(Eng.); *Lange*, (1997) 189 C.L.R. at 564.

85. Trevor R.S. Allan, *The Common Law as Constitution: Fundamental Rights and First Principles in COURTS OF FINAL JURISDICTION: THE MASON COURT IN AUSTRALIA* 148 (Cheryl Saunders ed., Federation Press 1996).

86. 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 151-52 (Clarendon Press 1769).

for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done.”<sup>87</sup>

Despite its limits and vulnerability to statutory change, the common law gives a high value to freedom of expression, particularly the freedom to criticise public bodies.<sup>88</sup> Courts applying the common law may be expected to proceed on an assumption that freedom of expression is not to be limited save by clear words or necessary implication.

The application of the principle in support of freedom of expression was seen at the level of constitutional characterisation of powers in the decision of the High Court in *Davis v. Commonwealth*.<sup>89</sup> Nineteen eighty-eight was the bicentenary of European settlement of Australia and a company was established called the Australian Bicentennial Authority to plan and implement celebrations of the bicentenary. The Australian Bicentennial Authority Act was enacted to, *inter alia*, reserve to the Authority the right to use or licence the use of words such as “bicentenary,” “bicentennial,” “200 years,” “Australia,” “Sydney,” “Melbourne,” “Founding,” “First Settlement,” and others in conjunction with the figures 1788, 1988, or 88. Articles or goods bearing any of these combinations without the consent of the Authority would be forfeited to the Commonwealth. In their joint judgment striking down some aspects of these protections, Chief Justice Mason, and Justices Deane and Gaudron (Justices Wilson, Dawson, and Toohey agreeing) said,

Here the framework of regulation . . . reaches far beyond the legitimate objects sought to be achieved and impinges on freedom of expression by enabling the Authority to regulate the use of common expressions and by making unauthorized use a criminal offence. Although the statutory regime may be related to a constitutionally legitimate end, the provisions in question reach too far. This extraordinary intrusion into freedom of expression is not reasonably and appropriately adapted to achieve the ends that lie within the limits of constitutional power.<sup>90</sup>

The common law can, of course, only go so far. It does not provide the support for freedom of expression that would accord it the status of a “right.” It cannot withstand plainly inconsistent statute law.

The common law interpretive principle protective of rights

87. *Bonnard v. Perryman* (1891) 2 Ch. 269, 284 (U.K.); see also *R v. Comm’r of Police of the Metropolis, ex parte Blackburn* (No 2) (1968) 2 Q.B. 150, 155 (Austl.); *Wheeler v. Leicester City Council* (1985) A.C. 1054 (Austl.); *Observer Ltd.*, 1 A.C. at 220 (Austl.).

88. *Halsbury’s Laws of England* (4th ed. 1989) Vol 8(2) para. 107.

89. (1988) 166 C.L.R. 79 (Austl.).

90. *Id.* at 100; see *id.* at 116 (referencing Justice Brennan).



and freedoms against statutory incursion retains its vitality, although it has evolved from its origins in a rather anti-democratic, judicial antagonism to change wrought by statute. It has a significant role to play in the protection of rights and freedoms in contemporary society, while operating in a way that is entirely consistent with the principle of parliamentary supremacy. Whether it goes far enough, or whether we need a Human Rights Act to enhance that protection with judicial and/or administrative consideration of statutory consistency with human rights and freedoms, is a matter for ongoing debate.

#### IX. CONCLUSION

The role of constitutions and constitutional law can be of great significance in the protection of fundamental human rights and freedoms. So too can statutory provisions and the common law. Ultimately, however, these things will only have the importance that people who are served by the Constitution and the laws and those who exercise power under the Constitution and the laws attach to those freedoms. It is useful to finish with two cautionary observations. One was made by a great American judge and the other by the drafters of the Indian Constitution.

In a short but celebrated speech entitled "The Spirit of Liberty" delivered in 1944, Judge Learned Hand of the United States said,

Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court, can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.<sup>91</sup>

I do not adopt this statement in its full generality, but it underlines the importance of a culture of respect for human rights and freedoms within society. The debate is to what extent such a culture may be supported, nurtured and protected by law.

The other remark which I think is worth quoting, was made by Dr. B.K. Ambedkar who was Chairman of the Drafting Committee of the Constituent Assembly that drafted the Indian Constitution. On November 25, 1949, the day before that Constitution was accepted, he said,

I feel however good a Constitution may be, it is sure to turn out bad because those who are called to work it, happen to be a bad lot. However bad a Constitution may be, it may turn out to be good if those who are called to work it, happen to be a good lot.<sup>92</sup>

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91. Learned Hand, *The Spirit of Liberty* (May 21, 1944). See LEARNED HAND, *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 190 (Irving Dillard ed., Knopf 1952).

92. Shri Atal Bihari Vajpayee, Address given on the occasion of the 50th

Both of these observations, like most observations in these areas, should be treated as provisional, perhaps working hypotheses, but worthy of continuing consideration. They may help place our existing debate in a larger perspective.

