LEGAL PROTECTION FOR FUNDAMENTAL RIGHTS AND FREEDOMS: EUROPEAN LESSONS FOR AUSTRALIA?

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I would say, without hesitation, that the rights of individuals in Australia are as adequately protected as they are in any other country in the world.[1]

[M]ost citizens of the [European Union] enjoy more protection of their rights than do the people of the lucky country.[2]

INTRODUCTION

The adequacy of the legal protection given to fundamental rights and freedoms is a topic of concern in both Australia and Britain, two jurisdictions which share a common legal heritage.[3] Both have witnessed extensive debates in recent times about the desirability or otherwise of a Bill of Rights designed to protect human rights.[4] The issue

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1 Sir Robert Menzies, *Central Power in the Australian Commonwealth: An Examination of the Growth of Commonwealth Power in the Australian Federation* (1967) at 54. See to the same effect G Sawer, "Protection of Human Rights in Australia" [1946] *Yearbook on Human Rights* 31 at 31: "There is probably no country in the world in which human rights, whether of individuals or groups, are more extensive or better protected than they are in Australia." Cf Justice J Toohey, "A Government of Laws, and Not of Men?" (1993) 4 *PLR* 158 at 163: "It cannot be said that individual liberties are as well protected in Australia as in those jurisdictions which have express constitutional guarantees of such liberties which preclude legislative or executive infringement."

2 J Dunn, "Time to lift our EC blinkers" *The Bulletin* July 7 1992 at 20.

3 See G Sawer, "Government and Law" in J D B Mitchell (ed), *Australians and British: Social and Political Connections* (1987) ch 2; G Barwick, "Law and the Courts" in A F Madden and W H Morris-Jones (eds), *Australia and Britain* (1980) 145. See also Justice J Toohey, "Towards an Australian Common Law" (1990) 6 *Australian Bar J* 185.

4 See M R Wilcox, *An Australian Charter of Rights?* (1993); R Brazier, *Constitutional Reform: Re-shaping the British Political System* (1991) ch 7; L Spender (ed), *Human Rights — The*

has been brought to the fore in Britain largely as a result of the unimpressive record of the United Kingdom before the European Court of Human Rights. British laws have been found to be inadequate in the protection given to fundamental rights and have had to be changed to reflect the requirements of the European Convention on Human Rights (referred to variously as the ECHR, the European Convention and the Convention in the following text and footnotes). The United Kingdom's membership of the European Community has also had a considerable impact both on the content of the law and on traditional legal attitudes. As the Chief Justice, Sir Anthony Mason, has commented, these European advances "will affect the traditional affinity between Australian law and English law and serve to emphasise our legal isolation."[5] The further significance of these developments for Australia is that the areas of the law which have been found to be in contradiction with fundamental rights are "all but identical with Australian common law"[6] and "[t]here is little reason to assume that legal protection of individual rights in Australia would measure up any better."[7] Judges in both Australia and Britain are coming to recognise the inadequacy of their traditional, common law conceptual framework where fundamental rights are concerned. The seeming paradox is that at a time when Australia seeks to assert its political distinctiveness from Britain, some of its judges continue to gain inspiration from the European legal experience in Britain.[8] This article examines the nature of current Anglo-Australian academic and judicial debates, drawing parallels where appropriate,

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Australian Debate (1987); M Zander, *A Bill of Rights?* (3rd ed 1985); C Campbell (ed), *Do We Need a Bill of Rights?* (1980); S Encel, D Horne and E Thompson (eds), *Change the Rules! Towards a Democratic Constitution* (1977); G Evans, "An Australian Bill of Rights?" (1973) 45(1) *Australian Quarterly* 4. See also the works cited within nn 144 and 185, below.

5 Sir Anthony Mason, "A Bill of Rights for Australia?" (1989) 5 *Australian Bar J* 79 at 80. There is no doubt that this sense of isolation has been accentuated by developments in Canada (Bill of Rights 1960 and Charter of Rights and Freedoms 1982) and New Zealand (Bill of Rights Act 1990). See Sir Ninian Stephen "Time to Take Stock" *Australian Financial Review Magazine* April 1992, 14 at 26; Sir Anthony Mason, "The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience" (1986) 16 *F L Rev* 1 at 8. In a way, however, these developments have served only to demonstrate the present affinity between the legal systems of Australia and Britain, and to emphasise their shared isolation from the Western mainstream: both countries having so far failed to adopt Bills of Rights. G Sturgess and P Chubb, *Judging the World: Law and Politics in the Worlds' Leading Courts* (1988) at 70, quote Sir Anthony Mason as having said: "The majority of countries in the western world do subscribe to a Bill of Rights on the basis that individual and minority rights often need protection, and the only effective protection is by a Bill of Rights. If we don't adopt a Bill of Rights I am inclined to think that we will stand outside the mainstream of legal developments in the western world."

6 N K F O'Neill, "A never ending journey? A history of human rights in Australia" in L Spender, above n 4, 7 at 15. See also Electoral and Administrative Review Commission, *Report on Review of the Preservation and Enhancement of Individuals' Rights and Freedoms* (1993) at 48; Senate Standing Committee on Constitutional and Legal Affairs, *A Bill of Rights for Australia? An Exposure Report for the Consideration of Senators* (1985) at 16.

7 B Gaze and M Jones, *Law, Liberty and Australian Democracy* (1990) at 32.

8 See, for example, *Dietrich v The Queen* (1992) 109 ALR 385 at 392-393 per Mason CJ and McHugh J.

and suggests why Australia increasingly may seek inspiration from developments in Europe.[9]

THE COMMON LEGAL INHERITANCE

Australia and Britain have remarkably few constitutional guarantees of fundamental rights. This is not to say, of course, that the two countries are without any such protections. The *Magna Carta* of 1215 ("that great confirmatory instrument ... which is the ground work of all our Constitutions"[10]) and the Bill of Rights of 1689 ("the product of an alliance between parliamentarians and common lawyers"[11]) remain, but they have a limited field of operation[12] and are inadequate as modern statements of fundamental rights.[13] And as subsequent discussion will demonstrate, the Australian Constitution does have something to say on the subject. It is nevertheless the case that the Anglo-Australian tradition has been to place faith in the common law, supplemented by legislation in specific areas, together with responsible and representative Parliamentary government, as the best means by which fundamental rights can be protected. As Sir Ninian Stephen has noted: "The 'founding fathers' of our Constitution took it for

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9 Cf Sir Harry Gibbs, "The Constitutional Protection of Human Rights" (1982) 9 *Monash U L Rev* 1 at 5: "The fact that the United Kingdom adheres to the European Convention may provide a reason why that country should adopt a bill of rights founded on that Convention. As an Australian I cannot comment on that aspect of that matter. However, no such consideration applies to Australia." But as was stated by M Cranston, "What are Human Rights?" in W Laqueur and B Rubin (eds), *The Human Rights Reader* (1979) 17 at 24: "[T]he rights set forth in the European Convention are not meant to be the rights of Europeans only, but to be the rights of all men. The European Convention is just as much a universal document, in this sense, as are the Universal Declaration and the Covenants of the United Nations. The European Convention confers certain positive rights on inhabitants of member states. But it claims moral rights for everyone as well-and indeed it would make no sense as a statement of *human rights* if it did not do so." (See also J Waldron (ed), *Nonsense upon Stilts: Bentham, Burke and Marx on the Rights of Man* (1987) at 178-180 and 197.) If this is accepted, the onus is on those who would share the reservation of Sir Harry Gibbs to demonstrate that fundamental rights are as well protected in Australian law as they are under the ECHR; or to identify those rights contained therein which are unsuitable for application in Australia or (more contentiously) the protection of which Australians do not deserve. (It is submitted that it would be impossible to conclude that the rights set out in the European Convention are "enjoyed" by all Australians; cf Toohey, above n 1 at 163-164. To fully resolve this argument, of course, one would need to engage in a comprehensive audit of fundamental rights in Australia.)

10 *Ex parte Walsh and Johnson: Re Yeats* (1925) 37 CLR 36 at 79 per Isaacs J.

11 S A de Smith and R Brazier, *Constitutional and Administrative Law* (6th ed 1989) at 72.

12 J G Starke, "Durability of the Bill of Rights of 1688 as Part of Australian Law" (1991) 65 *ALJ* 695. See also Electoral and Administrative Review Commission, *Report on Consolidation and Review of the Queensland Constitution* (1993), chs 2 and 9.

13 The Electoral and Administrative Review Commission's Issues Paper No 20, *Review of the Preservation and Enhancement of Individuals' Rights and Freedoms* (1992) at 45, makes the point that they can be seen as "antithetical to equality and freedom because of their discriminatory preoccupation with ... enshrining the Protestant faith and the rights of feudal land owners."

granted that individual rights were secure under the common law."[14] The preference has been not to set those rights out in a fundamental, constitutional statement of rights and freedoms. This reliance upon the common law owes much to British conservative philosophy of the eighteenth and nineteenth centuries.[15] Edmund Burke, for example, maintained that the common law was the only kind of structure in which individual rights could genuinely be secured.[16] Burke sought to replace academic speculation about rights with a practical conception of the subject, in order "to demonstrate the superiority of the politics of precedent to the politics of abstract principle".[17] Rights were those which had been prescribed by previous social orders and were to be found in their laws and customs. Government should have regard to this inheritance of collective wisdom about rights and not to the philosophy of natural rights. Common law precedents provided a stronger protection for individual liberties than abstract and ill-defined rights. As Davidson and Spegele have explained: "In Burke's view, all the justice one is ever going to get must already be there in the common law, so it is both irrelevant and erroneous to think it possible to reach beyond such norms for some alleged standard of natural right and justice."[18] Thus it was that Sir Robert Menzies felt able to assert that "to live in a common law country is ... the very best guarantee of the rights of the individual".[19]

In a legal system where reliance is placed upon the common law to protect fundamental rights, the judiciary plays an important role. The judges are seen as the protectors of individual rights through the application of the principle of the rule of law. As developed by Dicey, the rule of law means that regular law rather than arbitrary power should predominate and that all are equal before the law.[20] All are subject to the law and to its impartial administration by the courts. This rule of law arises as a result of individuals incrementally asserting rights as well as through the inclusion of these rights in the common law. In modern times this historic approach has come under increasing strain. Common law rights have been seen to possess two inherent weaknesses. First, they are always vulnerable to abrogation or removal by

14 Sir Ninian Stephen, above n 5 at 26. Similarly, Sir Anthony Mason, "The Role of a Constitutional Court in a Federation", above n 5 at 8: "[T]he founders accepted, in conformity with prevailing English legal thinking, that the citizen's rights are best left to the protection of the common law ... ".

15 See, more generally, M Loughlin, *Public Law and Political Theory* (1992) at 139-162. For a modern conservative view, see K Minogue, "What is Wrong with Rights" in C Harlow (ed), *Public Law and Politics* (1986) ch 11.

16 E Burke, *Reflections on the Revolution in France* (ed by J Priestley) (9th ed 1791); B W Hill (ed), *Edmund Burke: On Government, Politics and Society* (1975).

17 F P Lock, *Burke's Reflections on the Revolution in France* (1985) at 70.

18 A Davidson and R D Spegele (eds), *Rights, Justice and Democracy in Australia* (1991) at 27.

19 *Sydney Morning Herald* March 14 1974, quoted by M Sornarajah, "Bills of Rights: The Commonwealth Debate" (1976) 9 *Comparative and Int'l Law Jnl of South Africa* 161 at 164.

20 A V Dicey, *The Law of the Constitution* (2nd ed 1886) at 174 and 179-80. W H Moore, *The Constitution of the Commonwealth of Australia* (2nd ed 1910) at 398, maintained that Dicey's account of the rule of law had become "a commonplace amongst us." For discussion of Dicey's version of the rule of law, see G de Q Walker, *The Rule of Law: Foundation of Constitutional Democracy* (1988) at 128-139; E Barendt, "Dicey and Civil Liberties" [1985] *Public Law* 596. Dicey's view of the constitution owed a debt to Burke. See G W Keeton, *The Passing of Parliament* (1952) at 6.

statutory law. Secondly, common law rights are seldom declaratory, but are merely the balance remaining after prohibited conduct has been dealt with. The traditional view has been that freedom of expression, for example, is a residual right which exists only to the extent that it is not restricted by the law relating to defamation, contempt of court, obscenity, blasphemy, trade descriptions, and so forth.[21] As Lord Justice Browne-Wilkinson explained in *Wheeler v Leicester City Council*:

> Basic constitutional rights in this country such as ... freedom of speech are based not on any express provisions conferring such a right but on freedom of an individual to do what he will save to the extent that he is prevented from so doing by the law ... These fundamental freedoms therefore are not positive rights but an immunity from interference by others.[22]

The Australian Constitutional Commission reached the following conclusion:

> While we agree ... that Australians owe many of the freedoms they currently enjoy to the common law, we think that the faith which many people appear to have in the common law as a safeguard of their freedoms is misplaced. The common law affords some freedoms, but much of it is inhibitory.[23]

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21 See E Barendt, *Freedom of Speech* (1985) at 29; M Sornarajah, above n 19 at 176. The traditional approach has been increasingly challenged of late. See E Barendt, "Libel and Freedom of Speech in English Law" [1993] *Public Law* 449 at 459 et seq; T R S Allan, "Constitutional Rights and Common Law" (1991) 11 *Oxford J Legal Studies* 453 at 453-4 (a revised version of this article has been published as *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (1993) ch 6); A Boyle, "Freedom of Expression as a Public Interest in English Law" [1982] *Public Law* 574.

22 [1985] AC 1054 at 1065. See also *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 178 per Sir John Donaldson MR: "The starting point of our domestic law is that every citizen has a right to do what he likes, unless restrained by the common law ... or by statute."

23 *Final Report of the Constitutional Commission*, Volume 1 (1988) at 468. See also Electoral and Administrative Review Commission, above n 6, ch 4; B Gaze and M Jones, above n 7 at 27-41; C Anderson and G C Rowe, "Human Rights in Australia: National and International Legal Perspectives" (1986) 24 *Archiv Des Volkerrechts* 56 at 58-59; Sir Anthony Mason, "The Role of a Constitutional Court in a Federation", above n 5 at 12: "[T]he common law system, supplemented as it presently is by statutes designed to protect particular rights, does not protect fundamental rights as comprehensively as do constitutional guarantees and conventions on human rights"; Senate Standing Committee on Constitutional and Legal Affairs, above n 6 at 16-18. For a more optimistic account of the potential of the common law, see T R S Allan, "Constitutional Rights and Common Law", above n 21 esp at 453-460. One weakness of Allan's rose-tinted view of the common law is its basis in the view that "we should not mistake the deficiencies of particular judgments ... or the inadequacy of their reasoning, for the inherent defects of 'constitutional' adjudication at common law" (at 459). Allan appears to argue that constitutional rights can exist in the form of unarticulated premises underpinning common law decisions, irrespective of whether judges are aware of their existence and (presumably) regardless of the outcome of cases. One can see why the "mistake" which Allan describes is an easy one to make. This passage has been omitted from *Law, Liberty, and Justice*, above n 21, but essentially the same point is made. See esp at 148-151. Has not Allan underestimated the "symbolic or inspirational power" (ibid at 154) of a Bill of Rights? An increasing number of judges, after all, are telling us that such a document would give them greater scope to provide legal protection to fundamental rights than does the common law.

A further impetus to the revision of traditional attitudes in Britain has come from the fact that in recent times the European Court of Human Rights has concluded that in a number of areas the common law fails to provide the necessary protection for fundamental rights and freedoms.[24] In *Malone v Commissioner of Police for the Metropolis (No 2)*[25] an English judge (Megarry V-C) reluctantly chose to apply the traditional common law theory that restriction of a fundamental right is legal unless forbidden by law and decided that secret surveillance of telephone conversations was legal: "[I]t can lawfully be done simply because there is nothing to make it unlawful."[26] This was rejected by the European Court.[27] The reasoning of Vice-Chancellor Megarry was at odds with the positive language of the European Convention on Human Rights, which protects individuals against such interferences unless "prescribed by law".[28] The requirements which flow from this expression were stated authoritatively by the European Court in *Sunday Times v United Kingdom*:

> First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct ...[29]

The *Malone* case highlights the inadequacy of the traditional approach to the protection of fundamental rights. The common law will often fail to provide the necessary safeguard: it does not create or formulate positive rights. English judges increasingly appear to be aware of these flaws. Sir John Laws has commented:

> [T]he citizen should enjoy the assurance that where the subject-matter [of a governmental decision] engages fundamental rights such as freedom of speech and person, or access to the courts, any decision adverse to him will only survive judicial scrutiny if it is found to rest on a distinct and positive justification in the public interest.[30]

The second major aspect to the shared legal inheritance is the principle of responsible and representative Parliamentary government, and the faith placed in Parliament to protect the rights of citizens. This emphasis upon the legislature owes much to a second strand of British legal philosophy: that of pragmatic utilitarianism.[31] As Charlesworth has noted:

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24 Approximately 20% of the cases taken to the European Commission (the body which hears complaints before the matter proceeds formally to the Court) have involved the United Kingdom. And 75% of these cases have resulted in a finding against the British government. See J L Murdoch, "The European Convention on Human Rights in Scots Law" [1991] *Public Law* 40.

25 [1979] ch 344. The relevant law is now contained in the Interception of Communications Act 1985 (UK).

26 [1979] ch 344 at 381.

27 *Malone v United Kingdom* (1985) 7 EHRR 14.

28 Article 8. The text of this provision is to be found within n 52 below.

29 (1979) 2 EHRR 245.

30 Sir John Laws, "Is the High Court the Guardian of Fundamental Constitutional Rights?" [1993] *Public Law* 59 at 71. See also *R v Advertising Standards Authority; ex parte Vernons Ltd* [1992] 1 WLR 1289 at 1293 per Laws J.

31 H Collins, "Political Ideology in Australia: The Distinctiveness of a Benthamite Society" (1985) 114(1) *Daedalus* 147.

> The debates in the constitutional conventions during the 1890s indicate ... the attachment of the Australian drafters to the ideology of utilitarianism, which made the securing of the greatest happiness of the greatest number the focus of political concern ...[32]

This prevailing utilitarian philosophy would have been difficult to reconcile with the provision of legal protection for fundamental rights, since while "utilitarianism assures people that their interests will not be ignored or discounted, it does not assure that their interests, however fundamental, will not be out-weighed by the interests of large numbers of other people."[33] The distinguishing feature of utilitarianism is "moral assessment in terms of the consequences of actions or the contributions of actions to some goal",[34] whereas the concept of fundamental rights is primarily non-consequential. As Shestack has pointed out:

> [U]tilitarianism is a *maximising* and *collectivizing* principle that requires governments to maximize the total net sum of the happiness of all their subjects. This principle is in contrast to natural rights theory which is a *distributive* and *individualizing* principle that assigns priority to specific basic interests of each individual subject.[35]

The implication is that the informing principle behind constitutional arrangements should not be respect for individual rights, but the promotion of the greatest happiness of the greatest number. It was Bentham, of course, who in his "intolerably high-handed and unacceptable"[36] fashion referred to the idea of natural rights as "rhetorical nonsense, — nonsense upon stilts".[37] This was an attitude which he shared with Burke.[38]

Thus within the context of a federal system (which itself places certain limitations upon the organs of governance[39]), the Australian Constitution was designed to

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32 H Charlesworth, "Individual Rights and the Australian High Court" (1986) 4 *Law in Context* 52 at 53 (footnote omitted).

33 J W Nickel, *Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights* (1987) at 92. As the Australian entrepreneur Sly Moorcock observes to himself in B Elton, *Stark* (1989) at 66: "It was ridiculous, how were you to supposed to run a country for the good of all if you kept worrying about people's damn rights?"

34 G Maher, "Human Rights in the Criminal Process" in T Campbell (ed), *Human Rights: From Rhetoric to Reality* (1986) 197 at 214 (endnote omitted).

35 J J Shestack, "The Jurisprudence of Human Rights" in T Meron (ed), *Human Rights in International Law: Legal and Policy Issues* (1984) ch 3 at 88. Some modern theorists ("rule utilitarians") have argued that utilitarianism does have the potential to provide protection for individuality. See R G Frey (ed), *Utility and Rights* (1985); J Harsanyi, "Rule Utilitarianism, Equality, and Justice" (1985) 2 *Social Philosophy and Policy* 115; R M Hare, *Moral Thinking: Its Methods, Levels, and Point* (1981).

36 M Cranston, above n 9 at 20.

37 J Bentham, *Anarchical Fallacies (Works of Jeremy Bentham)* (ed by J Bowring), Volume II (1838-43) at 501. See J Waldron, above n 9 at 34-44.

38 See M Cranston, above n 9 at 18; and, more generally, J Waldron, above n 9.

39 Federalism possesses a Janus-like quality in relation to legal protection for fundamental rights. There is some truth in the following observation of G Sawer, above n 1 at 32: "[T]he mere existence of a federal scheme of government imposes restrictions on possible government interference with the individual. The Commonwealth and the states in collaboration could impose, on an Australia-wide scale, most of the restrictions on the individual which are legally competent to a fully sovereign unitary parliament ... . But this

establish the principle of responsible and representative government as practised in the Westminster system.[40] Australia adopted the British tradition that it is Parliament, together with the courts, which provides an effective means to protect fundamental rights and that no general Bill of Rights is required. It was Sir Robert Menzies who claimed:

> In short, responsible government in a democracy is regarded by us as the ultimate guarantee of justice and individual rights. Except for our inheritance of British institutions and the principles of the Common Law, we have not felt the need of formality and definition.[41]

This influence of British upon Australian legal thinking is well illustrated by Wynes's statement:

> As Dicey shewed, it is doubtful how much ... general declarations really achieve and we are undoubtedly as well protected under our own system which in this respect follows British precedent. Power should rarely be exercised arbitrarily where it is unlimited in extent and the presence of the "Bill of Rights" provisions in America bears eloquent testimony to the weakness of "popular government".[42]

Few would today express such complacent or arrogant views. The point hardly needs making that the domination of Parliament by the Executive in modern times, together with the commanding role of the political party, undercuts this approach to the protection of fundamental rights. The rapid growth in the field of judicial review of administrative action in both Australia and Britain is eloquent testimony to the fact that Parliament cannot be relied upon to ensure the accountability of the Executive to the law. One curious feature of this eager acceptance of British attitudes is that the Australian Constitution does contain a number of "rights provisions", albeit that these are aimed at limiting the powers of the Commonwealth Parliament rather than the

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degree of collaboration ... is rarely achieved ... ." This role of federalism as a potential protector of fundamental rights has also been stressed by B Galligan, "Parliamentary Responsible Government and the Protection of Rights" (1993) 4 *PLR* 100. But there is — in the absence of a Bill of Rights to secure uniform, *minimum* standards — considerable scope for variation from one State to another in the respect afforded to individual and minority rights. This recognition is implicit in Sawer's account, for he acknowledged "that the greater part of the law concerning ordinary civil liberties is in the domain of the states" (at 31; see also J Bryce, *Modern Democracies*, Volume II (1921) at 190) and that: "The states in particular could, if they wished, go far towards the destruction of security of the person, freedom of expression and freedom of association" (at 32). See, generally, C Anderson and G C Rowe, above n 23.

40 See, generally, J A La Nauze, *The Making of the Australian Constitution* (1972).

41 Sir Robert Menzies, above n 1 at 54. Similarly, *Report from the Joint Committee on Constitutional Review* (1959) at 46: "[A]s long as governments are democratically elected and there is full parliamentary responsibility to the electors, the protection of personal rights will, in practice, be secure in Australia." For a critical analysis of this strain of Australian legal thought, see B Galligan, above n 39.

42 A Wynes, *Legislative, Executive and Judicial Powers in Australia* (5th ed 1976) at 22. For criticism of this passage (which appeared in earlier editions) and more general discussion of the influence of Dicey in Australia, see R C L Moffat, "Philosophical Foundations of the Australian Constitutional Tradition" (1965) 5 *Sydney L Rev* 59 at 85-88.

Executive. Any such limits are, nevertheless, contrary to the Diceyan approach which maintains that Parliament is "an absolutely sovereign legislature".[43]

THE EUROPEAN DIMENSION

The concept of fundamental rights as natural rights of individual citizens has a long pedigree in European legal thought.[44] Bills of Rights to protect fundamental rights have long existed on the continent of Europe. Britain, with its unwritten constitution, has stood apart. Superimposed on British law there is now the European Convention on Human Rights. In 1950 the Council of Europe adopted the European Convention for the Protection of Human Rights and Freedoms, which came into force in 1953.[45] The Convention refers in its preamble to "a common heritage of political traditions, ideals, freedom and the rule of law." The principal enforcement bodies are the European Commission and Court of Human Rights. The Commission has jurisdiction to hear both interstate complaints and individual petitions from any person whose rights have been violated by a state party which recognises the right of individual petition (including the United Kingdom). If the Commission finds a case to be admissible, it holds a hearing of a judicial character at which the individual and the state are represented. The Commission attempts an amicable settlement. If these attempts fail, the Commission then reports to the Committee of Ministers, giving its opinion as to whether there has been a breach of the Convention. It is from the Committee of Ministers that a case may ultimately be referred to the European Court of Human Rights (by any member state or by the Commission, but not by the applicant). The Court has the power to declare that the law of a state party contravenes the Convention. The decisions of the Court are binding and unappealable. Their implementation is left to the states parties, under the oversight of the Committee of Ministers. There is an obligation on the part of the relevant government to rectify the situation and to bring its laws into line with the Convention. This moral and political obligation is a very strong one. Ultimately, a country could be suspended from the Convention for non-compliance. And it is difficult to see how a state could remain a member of the European Union in such circumstances.[46]

The impact of the Convention throughout Europe has been considerable. As Sturgess and Chubb have commented:

> [The Convention] has had a massive impact on the legal systems of member states. The existence of the human rights machinery has not only increased the awareness ordinary citizens have of their rights but has also had a preventative effect on governments. Member states now hesitate to adopt legislation which may be in conflict with the

43 A V Dicey, above n 20 at 35. On the influence of parliamentary sovereignty on the case law of the High Court, see Sir Anthony Mason, "The Role of a Constitutional Court in a Federation", above n 5 at 8-11.

44 See, generally, A S Rosenbaum (ed), *The Philosophy of Human Rights: International Perspectives* (1980). The relevant literature is voluminous. J J Shestack, above n 35, includes a very useful bibliography at 112-113.

45 Cmnd 8969.

46 See further the text accompanying nn 80-87, below.

> Convention ... There have been many instances where governments have changed legislation following a ruling that it breached the Convention.[47]

It seems unlikely, however, that when the United Kingdom signed the Convention in 1950, or accepted the right of individual petition to the Court of Human Rights in 1966, there was any real appreciation of the profound legal change which would be brought about. It was believed that the general principles enshrined in the Convention were already well protected under existing laws. This is why there was thought to be no need to incorporate the Convention into domestic law.[48] For some time, this analysis seemed to be correct. But in a series of cases over the last twenty years British law has been called into question by opinions of the European Commission and by decisions of the Court of Human Rights and of the Committee of Ministers.[49] As a distinguished British judge has commented: "It is a most singular feature that the law of this country, which has for so long prided itself on protecting individual freedom, has been found to be in breach of the ECHR on more occasions than any other signatory."[50] The Government has been required to accept the obligation to rectify the situation and to bring the law into line with the Convention.

Dudgeon v United Kingdom,[51] for example, involved legislation in force in Northern Ireland which penalised homosexual conduct. The Court held that the United Kingdom was in breach of the right to respect for private life provided for in Article 8 of the Convention.[52] The central issue before the Court was whether it could be said that the

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47 G Sturgess and P Chubb, above n 5 at 111.

48 See A Lester, "Fundamental Rights: The United Kingdom Isolated" [1984] *Public Law* 46. International treaties do not become a binding part of domestic law unless and until they are specifically incorporated by an Act of Parliament. See *Dietrich v The Queen* (1992) 109 ALR 385; *Kioa v West* (1985) 159 CLR 550; *Koowarta v Bjelke-Petersen and Ors* (1982) 153 CLR 168; *Simesk v McPhee* (1982) 40 ALR 61; *Bradley v Commonwealth* (1978) 128 CLR 557; *Chow Hung Ching and Anor v The King* (1948) 77 CLR 449; *Walker v Baird* [1892] AC 491; *The Parlement Belge* (1879) 4 PD 129. (For discussion of some of the earlier cases, see C A Alexandrowicz, "International Law in the Municipal Sphere According to Australian Decisions" (1964) 13 *Int'l and Comparative Law Quarterly* 78 at 86-95.) The provisions of an unincorporated treaty can still be of persuasive effect. See J Jaconelli, "The European Convention on Human Rights — The Text of a British Bill of Rights?" [1976] *Public Law* 226 at 228. For a thorough discussion of the legal significance of an unincorporated treaty, see R Higgins, "The Relationship Between International and Regional Human Rights Norms and Domestic Law", paper presented at the Judicial Colloquium, Balliol College, Oxford, September 21-23 1992 at 9-18.

49 See, generally, A W Bradley, "The United Kingdom before the Strasbourg Court 1975-1990", in W Finnie, C M G Himsworth and N Walker (eds), *Edinburgh Essays in Public Law* (1991) 185; F J Hampson, "The United Kingdom Before the European Court of Human Rights" (1990) 9 *Yearbook of European Law* 121; J A Andrews, "The European Jurisprudence of Human Rights" (1984) 43 *Maryland L Rev* 463.

50 Lord Browne-Wilkinson, "The Infiltration of a Bill of Rights" [1992] *Public Law* 397 at 398. J Frowein, as quoted in G Sturgess and P Chubb, above n 5 at 526, was correct to describe this as "a sort of judicial tragedy".

51 (1982) 4 EHRR 149.

52 Article 8 of the Convention provides:
1. Everyone has the right to respect for his private and family life, his home and his correspondence.

legislation was necessary in a democratic society, either for the protection of the rights and freedoms of others, or for the protection of the health and morals of others. The United Kingdom Government had argued that specific social and cultural conditions prevailing in Northern Ireland justified the legislation. The test which the Court applied was whether the interference with private life complained of was proportionate to the social need claimed for it. The Court referred to changed attitudes towards homosexual behaviour, noting that in the great majority of states signatory to the Convention it was no longer considered necessary to criminalise consensual homosexual activity. The Court stressed that the Northern Irish law under consideration was not being enforced in respect of homosexual acts between competent consenting individuals over the age of twenty one (the applicant merely having been threatened with prosecution). No evidence had been brought forward to demonstrate that this practice was injurious to moral standards in Northern Ireland, or that there had been any widespread public demand for stricter enforcement of the law.

In these circumstances, there was an absence of the requisite "pressing social need"[53] to justify the criminalisation of the acts in question. There was no evidence either of risk of harm to vulnerable sections of the community or of injurious effects upon the public as a whole. The Court found that the justifications for leaving the law unamended were not proportionate to the detrimental effects that the existence of the legislation had on the private life of a homosexual.[54] The fact that members of the public who regarded homosexuality as immoral might be offended or disturbed by the commission by others of homosexual acts in private could not, on its own, provide a justification for the application of penal sanctions when consenting adults alone were involved. This decision may have been unpopular in Northern Ireland, but the United Kingdom was obliged to implement it there.[55] The criminal law was changed to bring it into line with that elsewhere in the United Kingdom.[56]

Dicey maintained that the writ of *habeas corpus* had "done for the liberty of Englishmen more than could be done by any declaration of rights".[57] The decision in *Brogan v United Kingdom*[58] has shown that the European Convention offers rather greater protection to the citizen. At issue in *Brogan* was the validity of arrest and detention under the Prevention of Terrorism (Temporary Provisions) Act 1984 (UK) of suspected terrorists in Northern Ireland. The remedy of *habeas corpus* was of limited

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

53 (1982) 4 EHRR 149 at 167.

54 The Court has applied this decision in *Modinos v Cyprus* (1993) 16 EHRR 485.

55 In the same way, implementation of the decision in *Norris v Ireland* (1991) 13 EHHR 186 has led to a change in the law in the Republic of Ireland. See the Criminal Law (Sexual Offences) Act 1993, which in fact introduced a more liberal law than that which exists in the United Kingdom.

56 Homosexual Offences (Northern Ireland) Order 1982.

57 A V Dicey, above n 20 at 236.

58 (1989) 11 EHRR 117. See also *Ireland v United Kingdom* (1979-80) 1 EHRR 25 and *X v United Kingdom* (1982) 4 EHRR 188.

effect because the arrest and detention were pursuant to statutory powers. Article 5 of the Convention — which does not give way to a statutory power in the same way — provides (in part) that "[e]veryone arrested or detained in accordance with the provisions ... of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power."[59] The applicants in *Brogan* had been detained for periods ranging from four days and six hours to six days and sixteen and a half hours without being brought before a judge or other judicial officer. The Court held that this amounted to an unjustifiable delay which had deprived the applicants of their right to prompt judicial control of their detention, stating that there was very limited "scope for flexibility in interpreting and applying the notion of 'promptness'".[60] The Court did not accept the argument of the United Kingdom Government that the "undoubted fact that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the community as a whole from terrorism"[61] was sufficient in itself to guarantee compliance with the requirements of Article 5 of the Convention.[62]

The fact that the Convention has not been incorporated into British law means that effective judicial remedies for breaches of the Convention are lacking. And as Higgins has pointed out:

> Without incorporation rights not known in English law — privacy, generalized non-discrimination, rights of aliens, minority rights — cannot found a legal claim. Nor is the case law of the international tribunals directly applicable. Nor is familiarity with the detail of human rights law under the [ECHR] an everyday matter for the judiciary.[63]

Nevertheless, the Convention is still capable of having a considerable impact on the decisions of the courts. The Convention and the decisions of the European Court are treated as persuasive where there is an ambiguity in a statute and "as a legitimate aid to establish what the policy of the common law should be."[64] As regards statutory interpretation, the courts apply a proposition that Parliament intends its legislation to comply with the existing treaty obligations of the United Kingdom, including the Convention.[65] For this principle to be applied, however, there must be a real ambiguity. The words in the statute must be capable of bearing more than one interpretation. In *Ex Parte Brind*[66] the House of Lords held that the presumption that legislation complies with international treaty obligations did not apply so as to limit the meaning of clear

59 Article 5(3).

60 (1989) 11 EHRR at 135.

61 Ibid at 136.

62 The Government has derogated from the Convention to the extent that this case would require a change in the law. According to A Lester, "The Impact of Europe on the British Constitution" (1992) 3 *PLR* 228 at 229, "the very fact that the Government was driven to derogate shows the impressive power of the European guarantee of the right to liberty." Cf K Ewing and C Gearty, *Freedom Under Thatcher: Civil Liberties in Modern Britain* (1990) at 224-225. The European Court has held this derogation to be justified. See *Brannigan and McBride v United Kingdom* [1993] *The Times*, May 28.

63 R Higgins, above n 48 at 18.

64 Sir John Laws, above n 30 at 67.

65 *Garland v British Rail* [1983] AC 751; *Attorney-General v BBC* [1981] AC 303; *R v Miah* [1974] 1 WLR 683.

66 *R v Secretary of State for the Home Department; ex parte Brind* [1991] 1 AC 696. See D Kinley, "Legislation, Discretionary Authority and the European Convention on Human Rights " (1992) 13 *Statute L Rev* 63.

general words. Their Lordships expressed the view that the judges would be usurping their role if they were to incorporate by the back door a convention which Parliament had not incorporated into domestic law. But the House of Lords did recognise that stricter judicial scrutiny of administrative decisions is appropriate where fundamental rights and freedoms are affected. This is an example of what might be termed the "indirect effect" of the Convention upon British law. As Lord Browne-Wilkinson has said: "If the E.C.H.R. fulfils no other purpose, it has already ... and will continue to ... [bring] home to the judicial mind that there are wider principles, more fundamental than the merits of the particular case, and that ultimately our freedom depends on defending those principles, come what may."[67]

In the common law field, judges are increasingly coming to recognise "that the ECHR jurisprudence is a body of legal material to which the common law may legitimately have regard in arriving at the right result when faced with a difficult issue involving a conflict of rights."[68] The most striking examples to date are provided by the decisions of the Court of Appeal and the House of Lords in *Derbyshire County Council v Times Newspapers Ltd.*[69] Both courts made reference to Article 10 of the Convention[70] (and its attendant case law), which protects freedom of expression, in determining that a government body cannot sue in libel to protect its reputation. Were a government body to possess that right, it would have the effect of stifling legitimate criticism of its activities. It would have imposed an undesirable fetter on freedom of expression which was unnecessary in a democratic society.

There is a difference in approach between the Court of Appeal and the House of Lords in this case. The Court of Appeal utilised Article 10 when, in determining the scope of the common law of libel, it had "to balance the competing interests of the freedom of the press to provide information, to comment, criticise, offend, shock or disturb, against the right of a governmental corporation to be protected against the false, or seriously inaccurate, or unjust accounts of its activities."[71] The court overruled

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67 Lord Browne-Wilkinson, above n 50 at 410.

68 Sir John Laws, above n 30 at 64-65.

69 [1992] 3 WLR 28 (CA); [1993] AC 534 (HL). (The judgment of Morland J at first instance is reported at [1991] 4 All ER 795.) For discussion, see E Barendt, "Libel and Freedom of Speech in English Law", above n 21; B Bix and A Tomkins, "Local Authorities and Libel Again" (1993) 56 *MLR* 738; B Bix and A Tomkins, "Unconventional Use of the Convention?" (1992) 55 *MLR* 721.

70 Article 10 provides:

1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

71 *Derbyshire County Council v Times Newspapers Ltd* [1992] 3 WLR 28 at 64 per Butler-Sloss LJ. See also ibid at 45 per Balcombe LJ: "[A]rticle 10 requires a balancing exercise to be

a previous precedent,[72] the application of which would have permitted the council's action to proceed. A preference was expressed for the reasoning of the Supreme Court of the United States in *New York Times v Sullivan*[73] as to the undesirability of a common law rule which compelled the critic of government activity to guarantee the truth of his or her statements, on pain of unlimited damages. Such a rule would lead to self-censorship.

In the House of Lords the emphasis was on the development of the common law, rather than the application of the Convention. Lord Keith (with whom all the other judges agreed) observed:

> It is of the highest importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech.[74]

As the Court of Appeal had done, Lord Keith made reference to United States authorities, saying that the public interest considerations which underlay them were no less valid in Britain. His Lordship quoted from a decision of the Supreme Court of Illinois:

> [E]very citizen has a right to criticise an inefficient or corrupt government without fear of civil as well as criminal prosecution. This absolute privilege is founded on the principle that it is advantageous for the public interest that the citizen should not be in any way fettered in his statements, and where the public service or due administration of justice is involved he shall have the right to speak his mind freely.[75]

Lord Keith went on to hold that, as a matter of principle, government bodies should not be allowed to maintain a cause of action in libel: "It is contrary to the public interest because to admit such actions would place an undesirable fetter on freedom of speech."[76] In the conclusion to his judgment, Lord Keith made the following remark:

> The conclusion must be, in my opinion, that under the common law of England a local authority does not have the right to maintain an action of damages for defamation. This was the conclusion reached by the Court of Appeal, which did so principally by reference to Article 10 of the European Convention on Human Rights ... I have reached my conclusion upon the common law of England without finding any need to rely upon the European Convention.[77]

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conducted: the balance to be struck in this case is between the right to freedom of expression and such restrictions as are necessary in a democratic country for the protection of the reputation of a non-trading corporation which is also a public authority."

72 *Bognor Regis UDC v Campion* [1972] 2 QB 169; followed in Western Australia in *Church of Scientology Inc v Anderson* [1980] WAR 71.

73 376 US 254 (1964).

74 [1993] AC 534 at 547.

75 Ibid at 548 per Lord Keith (quoting Thompson CJ in *City of Chicago v Tribune Co* 307 Ill 595 at 607-608 (1929)).

76 Ibid at 549.

77 Ibid at 551. In *Attorney-General v Guardian Newspapers (No 2)* [1990] 1 AC 109 at 283-284, Lord Goff expressed the view "that in the field of freedom of speech there was no difference in principle between English law on the subject and Article 10 of the Convention." But as Sir Thomas Bingham, "The European Convention on Human Rights: Time to Incorporate" (1993) 109 *LQR* 390 at 398, has pointed out: "If in truth the common law as it stands were

Despite Lord Keith's evident lack of enthusiasm for applying the Convention, this case is of considerable significance as a precedent for "the development of the common law's substantive principles with the aid of the Convention".[78] It was only by having regard to the European human rights jurisprudence that his Lordship was able to reach the conclusion he did. Sir John Laws has said:

> I think it is no exaggeration to say that the decision of the House of Lords ... is a legal landmark. It points a way forward to a position in which it can no longer be fanciful to regard the superior courts in England as securing a real vindication of fundamental rights ... by development of the common law.[79]

The unincorporated European Convention also has a considerable potential for impact on domestic law by virtue of the United Kingdom's membership of the European Community.[80] European Community law is directly applicable within the United Kingdom and may, depending on the type of measure, also be of "direct effect".[81] The jurisdiction of the European Court of Justice extends to holding British legislation incompatible with Community law. In such circumstances, the Act concerned is overridden.[82] British courts are under an obligation to decide any issues of Community law arising before them "in accordance with the principles laid down by and any relevant decision of the European Court."[83] The European Court of Justice has a long established jurisprudence that international treaties for the protection of fundamental rights, most notably the European Convention, provide guidelines and indications for the standards which should be adopted in Community law.[84] The Court has demonstrated its preparedness to take the provisions of the ECHR into account when determining the legality of acts of the European Community.[85] Indeed, it has gone one stage further and has declared British legislation to be incompatible with Community legislation, having read into the Community legislation the condition of

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giving the rights of United Kingdom citizens the same protection as the Convention — across the board, not only in relation to Article 10 — one might wonder why the United Kingdom's record as a Strasbourg litigant was not more favourable " See also B Bix and A Tomkins, "Local Authorities and Libel Again", above n 69 at 741-743.

78 Sir John Laws, above n 30 at 67.

79 Ibid. For a surprisingly guarded interpretation of this case, see B Bix and A Tomkins, "Local Authorities and Libel Again", above n 69.

80 See N Grief, "The Domestic Impact of the European Convention on Human Rights as Mediated through Community Law" [1991] *Public Law* 555; M Waelbroeck, "La Convention Européenne des Droits de l'Homme Lie-t-elle les Communautés Européennes?" [1965] *Semaine de Bruges* 305.

81 European Communities Act 1972 (UK), s 2(1).

82 See, for example, *R v Secretary of State for Transport; ex parte Factortame (No 2)* [1991] AC 603.

83 European Communities Act 1972 (UK), s 3.

84 *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727; *Rutili v Minister for the Interior* [1975] ECR 1219; *Nold v Commission* [1974] ECR 491. See S Weatherill and P Beaumont, *EC Law* (1993) at 220-223; J H H Weiler, "Protection of Fundamental Human Rights within the Legal Order of the European Communities" in R Bernhardt and J Jolowicz (eds), *International Enforcement of Human Rights* (1987) 113. See also G De Burca, "Fundamental Human Rights and the Reach of EC Law" (1993) 13 *Oxford J Legal Studies* 283.

85 See, for example, *R v Ministry of Agriculture, Fisheries and Food; ex parte Fédération Européenne de la Santé Animale* [1991] 1 CMLR 507; *Orkem v Commission* [1989] ECR 3283.

compliance with fundamental rights. At issue in *R v Kirk*[86] was the validity of a Community regulation, and a statutory instrument made pursuant to it, which purported to operate retrospectively. The Court of Justice applied the principle enshrined in Article 7 of the Convention, that penal provisions may not be retroactive. The regulation, and consequentially the statutory instrument, were held to be invalid because of this infringement of a fundamental right. As Grief has noted: "Indirectly, therefore, the principle enshrined in article 7 of the Convention was used by the Court as a constraint upon the United Kingdom."[87] In those areas governed by European Community law, the Convention is in this way indirectly incorporated into domestic law. British courts are obliged to give priority to Community law, of which the principles of the Convention form an integral part.

The wide-ranging impact of the Convention is all the more remarkable when one considers that it remains in legal terms an international treaty intended to protect minimum standards of fundamental rights.[88] But as Gearty has pointed out:

> The European Convention on Human Rights ... carries it further than any other similar agreement, on account of the breadth and variety of its subject matter, the mode of its enforceability and its ability to penetrate domestic law ... [A]s the number of individual applications to Strasbourg has grown, so the jurisdiction has come to resemble more that of a domestic supreme court than an international tribunal.[89]

In a similar vein, Drzemczewski's view was that "there appears to be emerging a sort of European quasi-constitutional or common law, the maintenance of whose uniform minimum standards is considered the responsibility not only of the Convention's organs but also that of the domestic judiciary."[90] The significance of this development lies in the fact "that the enforcement of this common law must be effectively ensured on the domestic plane irrespective of whether or not the Convention's provisions have been incorporated into domestic law".[91] Thus, within the limits imposed by the United Kingdom Government's continuing refusal to incorporate the Convention, one can still be optimistic that the British courts will continue to explore the opportunities open to them to make use of the Convention and of the case law of the European Court. The impact of the series of cases where British law was found lacking in the protection afforded to fundamental rights should not be underestimated. This was an experience "which concentrated the mind wonderfully on the relevance of international human rights standards to the judicial process."[92]

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86 [1984] ECR 2689. See also *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651 (non-compliance with Articles 6 and 13 of the ECHR).

87 N Grief, above n 80 at 562.

88 See J G Merrills, *The Development of International Law by the European Court of Human Rights* (2nd ed 1993).

89 C Gearty, "The European Court of Human Rights and the Protection of Civil Liberties: An Overview" (1993) 52 *Cambridge L J* 89 at 95 and 93. See also at 89 of the same article: "It is not improbable that the Court will emerge over time as a supreme court of Europe, at least so far as human rights are concerned."

90 A Drzemczewski, *European Human Rights Convention in Domestic Law: A Comparative Study* (1983) at 326.

91 Ibid. Emphasis omitted.

92 A Lester, above n 62 at 237.

FUNDAMENTAL RIGHTS IN AUSTRALIA

Sir Owen Dixon is numbered amongst those who have taken the view that the "founding fathers" believed that the establishment of a representative democracy with responsible government would provide all the necessary protections for fundamental rights.[93] Indeed, Australian nationhood was not borne of a violent struggle with Britain. It was, rather, the result of negotiation and of a gradual progression. It is not too surprising, therefore, that "guarantees of individual right are conspicuously absent"[94] from the Australian Constitution. Bailey has suggested that: "The political rights included in the Constitution reflected the primary concern of the founders in ensuring continuance of the democratic Parliamentary tradition and continued effective operation of the States."[95] There is also a less charitable — if equally accurate — explanation which can be put forward to explain the lack of a rights focus in the Constitution: that the "founding fathers" saw dangers in provisions which would promote equality and prevent racial discrimination.[96]

It has become a commonplace view that the Constitution contains only a handful of rights provisions: trial by jury: s 80; freedom of religion: s 116; acquisition of property on just terms: s 51(31); rights of electors: ss 24 and 41; prohibition against discrimination towards interstate residents: s 117; and freedom of movement among the states: s 92.[97] As Bailey has commented:

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93 Sir Owen Dixon, *Jesting Pilate: And Other Papers and Addresses* (1965) at 101-102. Similarly, *Attorney-General (Cth); ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 24 per Barwick CJ: "[U]nlike the case of the American Constitution, the Australian Constitution is built upon confidence in a system of parliamentary Government with ministerial responsibility."

94 W H Moore, above n 20 at 615. See also ibid at 78: "Fervid declarations of individual right, and the protection of liberty and property against the government, are conspicuously absent from the Constitution; the individual is deemed sufficiently protected by that share in the government which the Constitution ensures him." (The same point is also made at 616.) See also *Re Bolton and Another; ex parte Beane* (1987) 162 CLR 514 at 523 per Brennan J. See, more generally, H Charlesworth, "The Australian Reluctance About Rights" (1993) 30 *Osgoode Hall LJ* 195. Section 46 of the Tasmanian Constitution does guarantee religious freedom, but it is not entrenched and can therefore be repealed or amended in the same way as any other Act of the Tasmanian legislature.

95 P H Bailey, *Human Rights: Australia in an International Context* (1990) at 84. See also E Campbell, "Civil Rights and the Australian Constitutional Tradition" in C Beck, *Law and Justice: Essays in Honor of Robert S Rankin* (1970) 295 at 303: "The federal Constitution was not to be an instrument by which the Australian people would affirm their commitment to democratic values or to make law out of political morality. It was to be simply a basic law defining and distributing powers between a national and regional governments and regulating relationships between them."

96 J Goldsworthy, "The Constitutional Protection of Rights in Australia" in G J D Craven (ed), *Australian Federation: Towards the Second Century* (1992) 151 at 154; J A La Nauze, above n 40 at 227-232; R C L Moffat, above n 42 at 86.

97 See, generally, P Hanks, "Constitutional Guarantees" in H P Lee and G Winterton (eds), *Australian Constitutional Perspectives* (1992) ch 4; D Solomon, *The Political Impact of the High Court* (1992) ch 5; L Zines, *The High Court and the Constitution* (3rd ed 1992) at 325-330; P H Bailey, above n 95, ch 4; N K F O'Neill, "Constitutional Human Rights in Australia" (1987) 17 *F L Rev* 85.

> [T]he rights provisions in the Constitution have been built into its interstices in typical British tradition. They tend to be specific and ad hoc rather than general statements of broad principle. They do not contain ringing phrases, with the possible exception of s 92, but are specifically detailed to address particular issues. Further, following the British ... tradition, the provisions rarely refer to rights as such. Rather, they address a particular issue. The fact that a right is being created is a matter of interpretation rather than of explicit statement.[98]

And the fact is that the few rights provisions contained in the Constitution have in the past been interpreted narrowly, thereby limiting their significance for the protection of fundamental rights.[99] This narrow approach can be attributed to the High Court's adoption of legalism as the appropriate basis for judicial interpretation of the Constitution.[100] Galligan has explained the doctrine thus:

> Legalism is the view of constitutional adjudication which holds that judges interpret the Constitution by reading the natural sense or plain meaning of its provisions ... Advocates of legalism contend that contextual and consequential factors of a political, economic and social nature are not taken into account in this decision-making process ... The Australian judiciary has tended to be impeccably nineteenth century and British in the manner in which it has conceptualised and discussed its role.[101]

More recently, however, the signs are that the High Court is not averse to a more expansive interpretation of the individual rights intrinsic to the Constitution.[102] Galligan has linked this to developments in legal philosophy:

> The persistence of Australian judges with very traditional and positivistic modes of legal thinking ... has come under increasing critical comment from academic lawyers during

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98 P H Bailey, above n 95 at 84.

99 See, for example, *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116 and *Krygger v Williams* (1912) 15 CLR 116 (on s 116); *R v Federal Court of Bankruptcy; ex parte Lowerstein* (1938) 59 CLR 556 and *R v Archdall and Roskruge; ex parte Carrigan and Brown* (1928) 41 CLR 128 (on s 80). For general discussion, see M Gaze and B Jones, above n 7 at 44-48; M Coper, *Encounters with the Australian Constitution* (1988) at 292-324; H Charlesworth, above n 32 .

100 See D Solomon, above n 97 at 184-186; L Zines, above n 97 at 14, 340-348, 359, 371-374; A Davidson, *The Invisible State: The Formation of the Australian State 1788-1901* (1991) at 257-260; Sir Anthony Mason, "The Role of a Constitutional Court in a Federation", above n 5 at 4-5. Lord Scarman, "The Common Law Judge and the Twentieth Century" (1980) 7 *Monash U L Rev* 1 at 6, observed that when he had occasion to "read some of the decisions of the High Court of Australia", they seemed "more English than the English. In London ... 'legalism' is currently a term of abuse." Other British observers of the Australian legal scene will have shared this perception.

101 B Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (1987) at 31-32. Cf J Goldsworthy, "Realism about the High Court" (1989) 18 *F L Rev* 27. According to L Zines, above n 97 at 371, "a refusal to consider the purpose of a constitutional provision or the consequences of legislation, in determining validity, is often regarded as a hallmark of legalism and formalism." See also J N Shklar, *Legalism: Law, Morals, and Political Trials* (2nd ed 1986) at vii-xiv and 1-28.

102 See, for example, *Street v Queensland Bar Association* (1989) 168 CLR 461, overruling *Henry v Boehm* (1973) 128 CLR 482. See G Ebbeck, "The Future for Section 117 as a Constitutional Guarantee " (1993) 4 *PLR* 89.

> the last couple of decades. Legalism is under threat as waves of modern realist criticism spread from North America and break over the Australian judicial citadel.[103]

This challenge to past orthodoxy is most clearly shown in the rejuvenation of the doctrine of implied fundamental rights in the Australian Constitution: the notion that some basic rights are so fundamental to Australian democracy that they should be recognised as implicit in the Constitution.[104] These freedoms, it has been argued, are "so elementary that it was not necessary to mention them in the Constitution".[105] In the past, arguments inviting courts to go down this route (whether by way of implied constitutional guarantees or presumptions derived from the common law) have not been successful. Justice Kirby felt constrained to conclude in *Building Construction Employees' and Building Labourers' Federation v Minister for Industrial Relations*:

> In the end, it is respect for long standing political realities and loyalty to the desirable notion of elected democracy that inhibits any lingering judicial temptation, even in a hard case, to deny loyal respect to the commands of Parliament by reference to suggested fundamental rights that run "so deep" that Parliament cannot disturb them. The conclusion does not leave our citizens unprotected from an oppressive majority in Parliament. The chief protection lies in the democratic nature of our Parliamentary institutions.[106]

It was the late Justice Murphy who made a number of unsuccessful attempts to have a doctrine of implied constitutional rights accepted by fellow members of the High Court.[107] In particular, in a series of chimerical judgments handed down in the 1970s

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103 B Galligan, above n 101 at 32. (One might now add the European influence to this comment.) According to M Atkinson, "Law Making Judges" (1981) 33 *U Tas L Rev* 33 at 37: "[N]o extra-judicial speech is now complete without some acknowledgment of the law making power." For examples of such "post-Realist" discussions of the judicial role, see A Lester, "English Judges as Law Makers" [1993] *Public Law* 269; Mr Justice M McHugh, "The Law-making Function of the Judicial Process" (1988) 62 *ALJ* 15 and 116; Lord Mackay, "Can Judges Change the Law?" (1987) LXXIII *Proceedings of the British Academy* 285; Lord Reid, "The Judge as Law Maker" (1972) 12 *J Society of Public Teachers of Law* 22.

104 *Australian Capital Television Pty Ltd v Commonwealth [No 2]* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1. See H P Lee, "The Australian High Court and Implied Fundamental Guarantees" [1993] *Public Law* 606. A similar approach had been indicated in a number of pre-Charter cases in Canada. See *Retail, Wholesale & Department Store Union, Local 580 et al v Dolphin Delivery Ltd* (1986) 33 DLR (4th) 174 at 184-185 per McIntyre J.

105 *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1979) 139 CLR 54 at 88 per Murphy J.

106 (1986) 7 NSWLR 372 at 405. Kirby P was speaking in the context of a State law, but the argument which he makes is one "which runs like a broad river through the decisions of the progressive judges" (A Davidson, above n 100 at 259).

107 *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 581-583; *Gallagher v Durack* (1983) 152 CLR 238 at 249; *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 109; *Sillery v R* (1981) 35 ALR 227 at 234; *Ubergang v Australian Wheat Board* (1980) 145 CLR 266 at 311-312; *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633 at 667-670; *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1979) 142 CLR 237 at 267; *Seamen's Union of Australia v Utah Development Co* (1978) 144 CLR 120 at 157; *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54 at 88; *Buck v Bavone* (1976) 135 CLR 110 at 137; *R v Director-General of Social Welfare (Vict); ex parte Henry* (1975) 133 CLR 369 at 388. In the corpus of these judgments

and 1980s, he expressed the view that the provisions of the Constitution providing for the election of Parliament required freedom of movement, speech and other communication between the States and in and between every part of the Commonwealth. He maintained that a representative system of government required these same freedoms between elections, describing them as "not absolute, but nearly so".[108]

The recent decision of the High Court in *Australian Capital Television Pty Ltd and Ors v Commonwealth of Australia [No 2]*[109] suggests that perhaps Justice Murphy's attempt to read rights into the Constitution should no longer be regarded as quite so heterodox.[110] In this case the High Court held invalid most of Part IIID of the Broadcasting Act 1942 (Cth), as introduced by the Political Broadcasts and Political Disclosures Act 1991 (Cth), which purported to regulate the broadcasting of political advertisements.[111] Six members of the High Court held that the Constitution contains an implied guarantee of freedom of communication as to public and political discussion. Chief Justice Mason and Justices Deane, Toohey and Gaudron held the regime in Part IIID to be wholly invalid.[112] Chief Justice Mason found that the legislative powers of the Commonwealth Parliament were subject to an implied limitation which precluded it from making a valid law "trenching upon that freedom of discussion of political and economic matters

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Murphy J made reference to a number of implied freedoms (movement and communication) and prohibitions (arbitrary discrimination, slavery and serfdom, and cruel and unusual punishment). See also his judgment in *Dugan v Mirror Group Newspapers* (1979) 142 CLR 583 at 607-608, where some reliance was placed on the decision of the European Court of Human Rights in *Golder v United Kingdom* (1979-80) 1 EHRR 524. For discussion of Justice Murphy's views, see L Zines, above n 97 at 335-336; M Coper, above n 99 at 263-264 and 324-331; G Winterton, "Extra-Constitutional Notions in Australian Constitutional Law" (1986) 16 *F L Rev* 223 at 228-235. M Coper, above n 99 at 328, has made the important point "that the idea of implied rights is not simply a Murphy invention." Two earlier High Court authorities cited are *Pioneer Express Pty Ltd v Hotchkiss* (1958) 101 CLR 536 and *R v Smithers; ex parte Benson* (1912) 16 CLR 99.

108 *Ansett Australian Industries (Operations) Pty Ltd v Commonwealth* (1979) 139 CLR 54 at 88.

109 (1992) 177 CLR 106. For a critique of this decision, see D Z Cass, "Through the Looking Glass: The High Court and the Right to Speech" (1993) 4 *PLR* 229.

110 See R Snell, "Come Back Lionel" (1992) 17 *Alternative Law J* 206. The Constitutional Commission, above n 23 at 445, had observed: "Justice Murphy suggested on a number of occasions that implications ... could be made from the very nature of Australian society as a free and democratic society. We are, however, inclined to think that the views of Murphy J in this regard would not be embraced by most members of the Court" (footnote omitted). In a somewhat different context, it is interesting to see that in *Dietrich v The Queen* (1992) 109 ALR 385 the majority of the High Court seemed prepared to voice their approval of aspects of Murphy J's dissenting judgment in *McInnis v The Queen* (1979) 143 CLR 575 concerning the necessity of legal representation for a fair trial.

111 The legislation professed to prohibit the broadcasting on television or radio during an election period of advertisements containing political matter. It also required the provision of free time for the use of certain political parties and candidates. For a British argument that a "ban on political advertising is too hard to sustain in principle", see E Barendt, *Broadcasting Law: A Comparative Study* (1993) at 153. For contrary arguments, see D Z Cass, above n 109; K D Ewing, "New Constitutional Constraints in Australia" [1993] *Public Law* 256; *Report of the Senate Select Committee on Political Broadcasts and Political Disclosures* (1991).

112 McHugh J thought that the regulation enforced in the Territories was valid.

which is essential to sustain the system of representative government prescribed by the Constitution."[113] In their joint judgment, Justices Deane and Toohey were clear that the Constitution does contain implications of freedom of communication which extend to all matters apt for an ordered and democratic society: "Freedom of political communication is implicit in, and of fundamental importance to, the effective working of the doctrine of representative government which is embodied in our Constitution."[114] Justice Dawson made a powerful dissent, making the old argument that the Constitution put its faith in Parliament and that implied constitutional guarantees which fettered its powers were undemocratic. He observed:

> [T]hose responsible for the drafting of the Constitution saw constitutional guarantees of freedoms as exhibiting a distrust of the democratic process. They preferred to place their trust in Parliament to preserve the nature of our society and regarded as undemocratic guarantees which fettered its powers. Their model in this respect was, not the United States Constitution, but the British Parliament.[115]

Justice Dawson was adamant in his view that, "there is no warrant in the Constitution for the implication of any guarantee of freedom of communication which operates to confer rights upon individuals or to limit the legislative power of the Commonwealth."[116]

In a number of the judgments in this case one can discern the influence of the jurisprudence of the European Court of Human Rights. This is particularly evident in the numerous references to a test of "proportionality". It is a special feature of the judgment of Justice Brennan, who put forward as the test for the validity of a law which impacted upon freedom of expression the "proportionality between the restriction which a law imposes on the freedom of communication and the legitimate interest which the law is intended to serve."[117] The proportionality test is indeed a familiar one in European law[118] and lay at the heart of the *Dudgeon* case,[119] where, it will be recalled, the European Court held that the adverse effects on the privacy of

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113 (1992) 177 CLR 106 at 149.

114 Ibid at 174. See also their joint judgment in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 74: "Inherent in the Constitution's doctrine of representative government is an implication of the freedom of the people of the Commonwealth to communicate information, opinions and ideas about all aspects of the government of the Commonwealth ... ".

115 *Australian Capital Television* (1992) 177 CLR 106 at 186. Dawson J placed considerable emphasis upon *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 38 CLR 129, which he regarded as having laid to rest the ghost of the heresy that implied limitations having their origin outside the Constitution could be imported into it. For discussion of the significance of the *Engineers'* case, see L Zines, above n 97 at 7-15.

116 *Australian Capital Television* (1992) 177 CLR 106 at 184.

117 Ibid at 157. See also the judgment of Mason CJ at 140-144 and 149-151. Similarly, *Davis v Commonwealth* (1988) 166 CLR 79 at 100, per Mason CJ, Deane and Gaudron JJ: "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." See also *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436.

118 See J Jowell and A Lester, "Proportionality: Neither Novel Nor Dangerous" in J Jowell and D Oliver (eds), *New Directions in Judicial Review* (1988) 51.

119 (1982) 4 EHRR 149. See further text accompanying n 51.

homosexuals in Northern Ireland were disproportionate to the aim of protecting health and morals and the rights and freedoms of others. The decision in the oft-cited *Sunday Times v United Kingdom*[120] concerned a conflict between the right of freedom of speech and the right to a fair trial. The House of Lords had granted an injunction which restrained the newspaper from publishing an article concerning the drug Thalidomide which had caused birth deformities. Their Lordships held that publication would interfere with the administration of justice in proceedings concerning allegations of negligence on the part of the manufacturers. It could thus amount to criminal contempt of court. The European Court held that the restraint on publication violated Article 10 of the Convention.[121] It constituted a clear infringement of the newspaper's freedom of expression. The circumstances did not amount to a social need sufficiently urgent to outweigh the public interest in freedom of expression. The restraint was thus disproportionate to the legitimate aim of maintaining the authority of the judiciary.[122]

In the *Australian Capital Television* case Justice Brennan's conclusion was that the provisions of Part IIID were valid, except to the extent that they purported to "impose a burden on the functioning of the States". He pointed out that similar legislation to that under scrutiny operated in a number of Western democracies and that Parliament was permitted what the European Court called a "margin of appreciation" in the exercise of powers which affect basic rights.[123] In striking the balance between human rights standards and differing national standards, the European Commission and Court grant national legislatures and courts a degree of deference. The Commission and Court do not automatically substitute their views for those of the national legislature or court concerned.[124] If a margin of appreciation is found to exist, and the national authority has not strayed outside its boundaries, there is no ground for intervention.[125] The operation of the doctrine is illustrated by *Handyside v United Kingdom*.[126] A publisher had been convicted in England of publishing the English translation of an obscene work, when it was freely available elsewhere in Europe and in other parts of the United

120 (1979) 2 EHRR 245. See also *Sunday Times v United Kingdom (No 2)* (1992) 14 EHRR 229, where the European Court held that the House of Lords had unnecessarily interfered with freedom of expression when it restrained publication of extracts from Peter Wright's book, *Spycatcher*. See *Attorney-General v Guardian Newspapers Ltd* [1987] 1 WLR 1248 for the (majority) decision of the House of Lords.

121 See text within n 70.

122 This decision led to the enactment of the Contempt of Court Act 1981 (UK).

123 (1992) 177 CLR 106 at 159.

124 See P van Dijk and G J H van Hoof, *Theory and Practice of the European Convention on Human Rights* (2nd ed 1990) at 585-606; G Cohen-Jonathan, *La Convention Européenne Des Droits De L'Homme* (1989) at 187-193; J G Merrills, above n 88 at ch 7; R St J MacDonald, "The Margin of Appreciation in the Jurisprudence of the European Court of Human Rights" in *International Law and the Time of its Codification: Essays in Honour of Roberto Ago* (1987) 187; H C Yourow, "The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence" (1987) 3 *Connecticut J Int'l Law* 111; T A O'Donnell, "The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights" (1982) 4 *Human Rights Quarterly* 474.

125 *The Observer and The Guardian v United Kingdom* (1992) 14 EHRR 153; *Lingens v Austria* (1986) 8 EHRR 407; *Barthold v Germany* (1985) 7 EHRR 383.

126 (1979-80) 1 EHRR 737. See C Feingold, "The Little Red Schoolbook and the European Convention on Human Rights" (1978) 3 *Human Rights Rev* 263.

Kingdom. The Court held that the conviction was for the purpose of protecting morals within the terms of Article 10(2), taking the view that there is no uniform conception across Europe of what is necessary for such protection. There are limits to this "margin of appreciation" doctrine. As Bradley has explained in relation to the *Sunday Times* case:

> While the injunction against the newspaper was not "unnecessary" simply because it would not have been issued in a different legal system, the Court by a majority did not consider that a "pressing social need" existed for the ban sufficient to outweigh the public interest in publication of the article.[127]

A second recent, strongly "pro-rights" decision of the High Court is that in *Nationwide News Pty Ltd v Wills*.[128] At issue in this case was the validity of a contempt provision of the Industrial Relations Act 1988 (Cth)[129] under which a publisher who had published a vitriolic attack on the Industrial Relations Commission had been prosecuted. The High Court was unanimous in declaring unconstitutional the provision which made it an offence to write or say anything which was likely to bring the Commission or its members into disrepute, with Justices Brennan, Deane, Toohey and Gaudron all invoking an implied constitutional guarantee of freedom of political expression. Justice Brennan pointed out that: "Freedom of public discussion of government (including the institutions and agencies of government) is not merely a desirable political privilege; it is inherent in the idea of a representative democracy."[130] Justices Deane and Toohey noted that the total ban would operate even if the criticism were "justified and true".[131]

The *Australian Capital Television* case, in particular, demonstrates the potential volatility of the interpretation of the Constitution. It is indicative of a preparedness on the part of the High Court to expand the constitutional protection afforded to fundamental rights. It is too early to say how, or whether, the doctrine of implied fundamental rights will develop in the future. If the High Court were to endorse fully a version of the doctrine, this would have profound implications for expansion of coverage of those rights which can be found in (or "read into") the Constitution. It is arguable that "an implied 'bill of rights' might be constructed".[132] One limit to the approach is that personal rights are not created directly,[133] as they would be in an "explicit" Bill of Rights. Limits are set on legislative and executive power, which establish an area of freedom secure from governmental interference. Justice Brennan explained in the *Australian Capital Television* case that the constitutional guarantee of freedom of political communication "cannot be understood as a personal right the scope of which must be ascertained in order to discover what is left for legislative regulation; rather, it is ... an immunity consequent on a limitation of legislative power."[134] It also merits pointing out that the decision indicates the degree to which the meaning to be

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127 A W Bradley, above n 49 at 205.
128 (1992) 177 CLR 1.
129 Section 229(1)(d)(ii).
130 (1992) 177 CLR 1 at 48.
131 Ibid at 68.
132 Justice J Toohey, above n 1 at 170.
133 See D Speagle, "Case Note: *Australian Capital Television Pty Ltd v Commonwealth*" (1992) 18 *MULR* 938 at 947.
134 (1992) 177 CLR 106 at 150.

given to an implied right can be dependent upon the membership of the High Court.[135] Although Justice Brennan agreed with the majority of his colleagues in the *Australian Capital Television* case as to the existence of the implied right in question, both there and in the *Nationwide News* case he propounded a rather different view as to the role of the judiciary *vis-à-vis* that of the legislature in its protection:

> The role of the court in judicially reviewing a law that is said to curtail the freedom unduly and thereby exceed legislative power is essentially supervisory. It declares whether a balance struck by the Parliament is within or without the range of legitimate legislative choice. In a society vigilant of its democratic rights and privileges, it might be expected that the occasions when the Parliament deliberately steps outside the range of legitimate choice would be few.[136]

With his recognition of the existence of a "margin of appreciation" to be granted to Parliament, Justice Brennan's philosophy is most redolent of the approach of the European Court of Human Rights.[137] Those judges in the majority in the *Australian Capital Television* case took a more uncompromising approach to restrictions on the freedom of political communication.

The most likely criticism of the doctrine of implied rights is that the judges are seizing "a blank cheque".[138] Writing before the most recent High Court decisions, Zines described the then emerging trend as "highly dangerous and certainly undesirable":

> [L]egislative restrictions, which are not based on any specific provisions, provide no guidance or check to judicial aggrandisement or personal predilections ... To accept only ... "a free and democratic society " (as Murphy J. did) ... as the starting point in reasoning is to invite a judge to discover in the constitution his or her own broad political philosophy.[139]

It would be a mistake to think that the majority of the High Court is unaware of these difficulties. (Indeed, there is an explicit reference to the views of Professor Zines in

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135 This realist observation is not a novel one. It accords with the view expressed some sixty-five years ago by the minority in the *Report of the Royal Commission on the Constitution* (1929) at 245: "The present position is such that the Commonwealth Constitution is broad or narrow according to the way it is construed by the High Court, and the Constitution depends upon the trend of thought of the individuals who for the time being form that body."

136 (1992) 177 CLR 1 at 52. (Of the other judges, Gaudron J was closest in approach to Brennan J.) A parallel can be drawn with his judgment in *Leeth v Commonwealth* (1992) 174 CLR 455 where Brennan J, although appearing to recognise an implied constitutional guarantee of equality, was likewise unwilling to employ it to strike down the legislation under scrutiny.

137 The way in which Brennan J made use of the concept is open to question. The doctrine of the margin of appreciation may be appropriate for an international tribunal, but it is arguable that is not applicable when an issue pertaining to the scope of a fundamental right comes before a national court. According to Y Ghai, "Derogations and Limitations in the Hong Kong Bill of Rights", in J Chan and Y Ghai (eds), *The Hong Kong Bill of Rights: A Comparative Approach* (1993) ch 8 at 182, the doctrine should be confined "to the relationship between an international tribunal on the one hand and national institutions ... on the other. It cannot have a place when the issue arises in a purely national context." See also ibid at 181.

138 L Zines, *Constitutional Change in the Commonwealth* (1991) at 52.

139 Ibid at 51-52.

Justice Brennan's judgment in the *Nationwide News* case.[140]) The High Court has not indicated that it is prepared to go as far as Justice Murphy in implying fundamental rights into the Constitution.[141] The implied right to political speech identified in the *Australian Capital Television* and *Nationwide News* cases is based firmly on those provisions in the Constitution which appear to encapsulate a representative democracy.[142]

A related criticism may be that the doctrine of implied rights is in some sense "undemocratic". One version of this critique would hold that the courts should rule on fundamental rights only with proper authority derived from a Bill of Rights. As Winterton has stated:

> In view of the current ... controversy over the introduction of a *statutory* Bill of Rights in Australia ... and the United Kingdom, the introduction of an open-ended *constitutional* Bill of Rights by judicial fiat appears both surreptitious and, indeed, undemocratic — which is particularly ironic in view of its justification in community values, including democracy.[143]

A second argument would be the familiar one that the protection of rights ought to be the preserve of the democratically elected legislature, rather than that of the judiciary relying upon constitutional implications or common law presumptions.[144] The

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140 (1992) 177 CLR 1 at 44.

141 Some members of the High Court (apart from Murphy J) have indicated their preparedness to go further and to identify rights (for example, equality) implied by the Constitution as a whole and not derived from specific provisions. In their joint judgment in *Leeth v Commonwealth* (1992) 174 CLR 455 at 486, Deane and Toohey JJ observed that: "Implicit in that free agreement [that is, the Constitution] was the notion of the inherent equality of the people as the parties to the compact." Brennan J also appeared sympathetic to this notion. In *Street v Queensland Bar Association* (1989) 168 CLR 461 at 554, Toohey J made reference to "the principle that Australia was to be a commonwealth in which the law was to apply equally to all its citizens " (citation omitted). And in *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192 at 247, Deane J identified an "implication of the underlying equality of the people of the Commonwealth under the law of the Constitution."

142 Sections 7 and 24. See H P Lee, above n 104.

143 G Winterton, above n 107 at 234. See also *Building Construction Employees' and Building Labourers' Federation v Minister for Industrial Relations* (1986) 7 NSWLR 372 at 406 per Kirby P: "Substituting judicial opinion about entrenched rights for the lawful powers of Parliament, unless anchored in a Bill of Rights duly enacted, inevitably runs into the difficulties of explaining what those 'common law rights' are and of explaining how they are so basic that they cannot be disturbed."

144 This is but a variant of "the political arguments against a Bill of Rights ... that it is dangerous in that it transfers power to the unelected ... judiciary" (S Lee, "Bicentennial Bork, Tercentennial Spycatcher: Do the British Need a Bill of Rights?" (1988) 49 *U Pittsburgh L Rev* 777 at 787.) For examples of literature in this vein, see K Ewing, *A Bill of Rights for Britain?* (1990); P Hanks, "Moving Towards the Legalisation of Politics" (1988) 6 *Law in Context* 80; A C Hutchinson and A Petter, "Private Rights/Public Wrongs: The Liberal Lie of the Charter" (1988) 38 *U Toronto LJ* 278; Lord McCluskey, *Law, Justice and Democracy* (1987) ch 5; H J Glasbeek and M Mandel, "The Legalisation of Politics in Advanced Capitalism: The Canadian Charter of Rights and Freedoms" (1984) 2 *Socialist Studies/Etudes Socialistes* 84; J A G Griffith, "The Political Constitution" (1979) 42 *Modern L Rev* 1. Those who advocate Parliament as the appropriate forum in which protection can be provided for

sentiment would appear to be that expressed by a past Chief Justice, Sir John Latham: "The remedy for alleged abuse of power or for the use of power to promote what are thought to be improper objects is to be found in the political arena and not in the Courts."[145]

Neither of these contentions is particularly attractive or convincing. As Lee has pointed out:

> Just as the Court has no mandate to imply all manner of rights, the Parliament cannot claim, by the mere fact of election, a mandate to abrogate without any reasonable basis fundamental rights ... The mere fact that parliamentarians are elected does not enable them to arrogate to themselves the legislative power to traverse necessary implications which accord with a constitution embodying values of a representative democracy.[146]

The effect of a doctrine of implied constitutional guarantees may be to limit the sovereignty of Parliament, but the democratic rights of the electorate are not diminished. Judicial employment of the doctrine shifts the onus[147] onto those who wish to restrict a fundamental right to utilise the (deliberately difficult) mechanism for constitutional amendment. It should be seen as a development of the recognised judicial technique of interpreting legislation so as not to impinge upon common law freedoms[148] (or of the principle that, "where possible, statutes will be interpreted so as not to conflict with the established rules of international law"[149]). As Justice Toohey has explained:

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fundamental rights must beware of adopting a romanticised and exaggerated view of its capacities. Although public choice theory remains controversial, its insights should make one aware of the possibilities that the legislative process can be corrupted by special interests and that its outcomes are not always motivated by public interest concerns. For a balanced discussion, see D A Farber and P A Frickey, *Law and Public Choice: A Critical Introduction* (1991). A failure to engage adequately with public choice theory is a major weakness of J Waldron, "A Right-Based Critique of Constitutional Rights" (1993) 13 *Oxford J Legal Studies* 18.

145 *South Australia v Commonwealth* (1942) 65 CLR 373 at 429.

146 H P Lee, above n 104 at 627-628.

147 One might term this the "burden of proof". See R J Gaskins, *Burdens of Proof in Modern Discourse* (1992) ch 2.

148 See Justice M Kirby, "Human Rights: The Role of the Judge", in J Chan and Y Ghai, above n 137, ch 10 at 234: "[T]here is a kind of compact between the courts and the 'political' branches of government that the courts will declare the meaning and effect of laws made by the other branches and the others will accept that declaration. In doing so, the courts will presume that those other branches did not (unless they made their intention absolutely clear) intend to derogate from 'basic rights', as the courts in turn declare them." And as Kirby P has explained in his judicial capacity in *Yuill and Ors v Corporate Affairs Commission of NSW* (1990) 20 NSWLR 386 at 404: "[T]he asserted role of the courts is not an undemocratic usurpation of Parliament's role ... Instead, it is the performance of a role auxiliary to Parliament and defensive to basic rights." This latter observation appeared in the context of a discussion of legislative, as opposed to constitutional, interpretation. There is a difference between frustrating Parliament's desire to legislate contrary to a fundamental right by means of restrictive statutory interpretation, rather than the application of an implied constitutional guarantee. Parliament can overcome the former more easily than the latter.

149 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 204 per Gibbs CJ (citation omitted). See, further, text accompanying n 157 below.

> [I]t might be contended that the courts should ... conclude ... that where the people of Australia, in adopting a constitution conferred power to legislate with respect to various subject matters upon a Commonwealth Parliament, it is to be presumed that they did not intend that those grants of power extend to invasion of fundamental common law civil liberties — a presumption only rebuttable by express authorisation in the constitutional document. *Just as Parliament must make unambiguous the expression of its legislative will to permit executive infringement of fundamental liberties before the courts will hold that it has done so, it might be considered that the people must make unambiguous the expression of their constitutional will to permit Parliament to enact such laws before the courts will hold that those laws are valid.*[150]

The reality is that there is growing judicial recognition that the legal protection afforded to fundamental rights by the bare text of the Constitution (and by statutory and common law) is inadequate. In the continuing absence of a Bill of Rights, it is to be hoped that the High Court will continue to engage in providing the best such protection it can.[151] For, as Justice Kirby has observed, "judges, considering what to do in a particular case before the court, may often have little confidence that restraint on their part will be rewarded with a finely tuned, sensitive and energetic protection of rights by the vigilant executive and legislative branches of government."[152]

AUSTRALIA AND THE INTERNATIONAL ENVIRONMENT

The International Covenant on Civil and Political Rights (ICCPR or Covenant) was adopted by the United Nations in 1966 and came into force in 1976. It expands upon the civil and political rights contained in the Universal Declaration of Human Rights adopted by the United Nations in 1948. The ICCPR sets out the various civil and political rights regarded by the international community as fundamental. Australia ratified the Covenant in 1980 and it became applicable the same year.[153] It was the ICCPR which acted as the catalyst for the attempts made in the 1970s and 1980s to enact a Bill of Rights.[154] Article 2 of the Covenant provides:

> Where not already provided for by existing legislative or other measures, each State party to the present Covenant undertakes to take necessary steps, in accordance with the constitutional processes and with the provisions of the present Covenant, to adopt such

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150 Justice J Toohey, above n 1 at 170 (emphasis added). See also *Seamen's Union of Australia v Utah Development Co* (1978) 144 CLR 120 at 157 per Murphy J: "The Constitution is a framework for a free society."

151 The defence of the notion of implied constitutional rights outlined in the preceding paragraphs could be applied to the broad view of the concept, associated particularly with Murphy J, as well as to the narrow approach taken in the *Australian Capital Television* and *Nationwide News* cases. The argument in the text focuses upon the latter, since that approach has the support of a majority of the High Court.

152 Justice M D Kirby, "The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms" (1988) 62 *ALJ* 514 at 528. But cf the quotation within n 144.

153 See G Triggs, "Australia's Ratification of the International Covenant on Civil and Political Rights: Endorsement or Repudiation?" (1981) 31 *Int'l and Comparative Law Quarterly* 278. The United Kingdom ratified the Covenant in 1976.

154 This history is recounted in P H Bailey, above n 95; and also in B Galligan, "Australia's Rejection of a Bill of Rights" [1990] *J Commonwealth and Comparative Politics* 344 at 357-365.

> legislative or other measures as may be necessary to give effect to the rights recognised in the present Covenant.

The Article goes on to provide that each state party shall ensure effective remedies to any person whose rights or freedoms are violated, and that they shall have access to judicial remedies for any breaches of those rights. Despite these requirements, the Covenant has been incorporated into Australian domestic law to a very limited extent.[155] The ICCPR has been selectively — randomly — implemented. Australia has yet to meet its obligations under the Covenant.

The unincorporated Covenant nevertheless has the potential to have a considerable impact on the decisions of the courts. It appears to be coming to occupy a role similar to that of the European Convention in Britain in the development of the common law and in the interpretation of statutes. There are considerable similarities between the Articles of the ECHR and the ICCPR, and the European case law will be of persuasive value. (The decisions of the Human Rights Committee on the Covenant are much less developed as a source of case law than those under the European system.) In relation to the common law, as Justice Brennan observed in *Mabo v Queensland [No 2]*:

> [It] does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration.[156]

And as the Chief Justice has said of statutory law:

> [T]here is a prima facie presumption that the legislature does not intend to act in breach of international law. Accordingly, domestic statutes will be construed, where the language permits, so that the statute conforms to the State's obligations under international law. The favourable rule of statutory interpretation goes some distance towards ensuring that the rules of domestic law are consistent with those of international law.[157]

There are three means of enforcing the fundamental rights recognised under the ICCPR. The only one which is mandatory is a requirement under Article 40 for a state party to submit periodic reports to the Human Rights Committee. The two other avenues are optional. Article 41 permits a state party recognising the competence of the Human Rights Committee to deal with complaints by one state party alleging violation of the obligations imposed under the Covenant.[158] This has not been used in practice. The third possibility is accession to the Optional Protocol. Article 2 of the Optional

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155 Human Rights and Equal Opportunity Commission Act 1986 (Cth). See C Caleo, "Implications of Australia's Accession to the First Optional Protocol to the International Covenant on Civil and Political Rights" (1993) 4 *PLR* 175 at 184-186. A contrast can be drawn with the Racial Discrimination Act 1975 (Cth), which fully implements the International Convention on the Elimination of All Forms of Racial Discrimination.

156 (1992) 175 CLR 1 at 42 (Mason CJ and McHugh J concurring). See to the same effect *Dietrich v The Queen* (1992) 109 ALR 385 at 404 per Brennan J.

157 Sir Anthony Mason, "The Relationship Between International Law and National Law, and its Application in National Courts", paper presented to the 64th Conference of the International Law Association, Broadbeach, August 20, 1990, at 7. See also *Dietrich v The Queen* (1992) 109 ALR 385 at 424-427 per Dawson J.

158 Australia accepted this mechanism with effect from January 1993.

Protocol provides that, "individuals who claim any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the [Human Rights] Committee for consideration." The potency of a decision of the Human Rights Committee is conferred by means of the obligation contained in Article 2(1), whereby a state party agrees to respect and ensure to all individuals within its jurisdiction the rights recognised in the Covenant.[159]

Australia acceded to the Optional Protocol in 1991.[160] This event has caused considerable interest[161] and appears to have heightened awareness amongst the judiciary. In *Mabo v Queensland [No 2]* Justice Brennan remarked that accession to the Optional Protocol would bring "to bear on the common law the powerful influence of the Covenant and the international standards it imports."[162] But accession to the Optional Protocol has not affected the legal status of the Covenant in domestic law.[163] The potential for judges to make use of the Covenant in their decisions was already there,[164] although accession may encourage judges to make greater use of international human rights norms and to have regard to the jurisprudence of the Human Rights Committee.[165] What accession to the Optional Protocol signifies is a commitment by Australia to international human rights scrutiny and brings it into line with other major Western countries (with the notable exception of the United States).

There are dangers, however, in attaching too much significance to accession to the Optional Protocol. The enforcement procedures have a number of significant weaknesses. In the first place, as Charlesworth has pointed out: "The right of individual communication with the Human Rights Committee is not a judicial procedure."[166] The

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159 See T Opsahl, "Human Rights Today: International Obligations and National Implementation" (1979) 23 *Scandinavian Studies in Law* 153.

160 The United Kingdom has not yet done so.

161 See C Caleo, above n 155.

162 (1992) 175 CLR 1 at 42 (Mason CJ and McHugh J concurring). On the impact of recognition of the individual application on judicial attitudes, see R Higgins, above n 48 at 3-6 and 14-15.

163 This elementary point has been reiterated in *Dietrich v The Queen* (1992) 109 ALR 385 at 391 per Mason CJ and McHugh J and at 434-435 per Toohey J. As Dixon J observed in *Chow Hung Ching and Anor v The King* (1948) 77 CLR 449 at 478: "[A] treaty ... has no legal effect upon the rights and duties of subjects of the Crown and speaking generally no power resides in the Crown to compel them to obey the provisions of a treaty " (citation omitted).

164 See, for example, *Jago v District Court of NSW* (1988) 12 NSWLR 558 at 569 per Kirby P; *Daemar v The Industrial Commission of NSW and Ors* (1988) 12 NSWLR 45 at 53 per Kirby P; *McInnis v The Queen* (1979) 143 CLR 575 at 588 per Murphy J; *Dowal v Murray* (1978) 143 CLR 410 at 430 per Murphy J; *Dugan v Mirror Group Newspapers* (1978) 142 CLR 583 at 607-608 per Murphy J. See also Sir Ronald Wilson, "The Domestic Impact of International Human Rights Law" (1992) 24 *Australian J Forensic Science* 57 at 60-63; J Dugard, "The Application of Customary International Law Affecting Human Rights By National Tribunals" (1982) 76 *Proceedings of the American Society of Int'l Law* 245 at 250-251.

165 See, for example, *Dietrich v The Queen* (1992) 109 ALR 385 at 392 per Mason CJ and McHugh J, 425-426 per Dawson J. See also *Director of Public Prosecutions for the Commonwealth v Saxon* (1992) 28 NSWLR 263; *R v Astill* (1992) 63 A Crim R 148; *R v Greer* (1992) 62 A Crim R 442.

166 H Charlesworth, "Australia's Accession to the First International Covenant on Civil and Political Rights" (1992) 18 *MULR* 428 at 430. See, generally, D McGoldrick, *The Human*

Committee is not a judicial body; it is not a Supreme Court of Human Rights.[167] Nor are the views expressed by the Committee legally binding. As Opsahl has written: "There are no means of enforcement, apart from the Committee's moral authority and the potential pressure of public opinion."[168] There is no equivalent to the follow-up procedure in the European system from the report of the Commission to the binding decisions by the European Committee of Ministers or the Court of Human Rights.[169]

The problem of enforcement may give rise to acute difficulties in Australia's federal system of government. The first Australian complaint lodged with the Human Rights Committee under the Optional Protocol concerned the operation of Tasmanian criminal law in relation to homosexuals.[170] The applicant complained that Tasmanian law criminalising homosexual acts between consenting adults in private[171] breached Article 17 of the Covenant, which guarantees a right to privacy, and Article 26, which guarantees a right to equality before, and equal protection of, the law. The Committee having determined that the Tasmanian law violates the Covenant[172] (and this was not a foregone conclusion, since the Committee leaves a "margin of discretion" to individual countries, in view of the wide range of legal systems and cultures among parties to the Optional Protocol[173]), a number of options arise. The Commonwealth Government may be able to exert pressure on the Tasmanian Government to change the law. Or it could exercise the external affairs power in the Constitution to ensure compliance with the Committee's view.[174] This would require a change of policy on the part of the Commonwealth Government to reflect a greater willingness to intervene in cases of human rights violations by the States than it has shown to date.[175] In and of itself,

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Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights (1991); L Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (1981).

167 A H Robertson and J G Merrills, *Human Rights in the World* (3rd ed 1989) at 69.

168 T Opsahl, "The Human Rights Committee" in P Alston (ed), *The United Nations and Human Rights: A Critical Appraisal* (1992) 369 at 431. See also Australian Law Reform Commission, "International Protection of Human Rights" (1992) 63 *Reform* 31 at 35.

169 The Special Rapporteur for Follow Up is not an adequate alternative.

170 *Toonen v Australia*, Comm No 488/1992.

171 Criminal Code (Tas), s 122.

172 See, "Tasmania's anti-gay laws 'violate human rights'", *The Times* 12 April 1994 at 12.

173 See *Hertzberg and Ors v Finland*, Comm No R14/61, Decision of April 2, 1982, (1982) 3 *Human Rights Law J* 174: "It has to be noted ... that public morals differ widely. There is no universally applicable common standard. Consequently, in this respect, a certain margin of discretion must be accorded to the responsible national authorities." The Committee took the view that the censorship in Finland of broadcasts dealing with homosexuality did not conflict with Article 19.

174 Section 51(29). See *Richardson v Forestry Commission* (1988) 77 ALR 237; *Commonwealth v Tasmania* (1983) 158 CLR 1.

175 On which see the Joint Committee on Foreign Affairs, Defence and Trade, *A Review of Australia's Efforts to Promote and Protect Human Rights* (1992) at xxvii and 27-30. The Joint Committee "believes that the arguments ... concerning States' rights carry less weight than those which stress the need for Australia to speak with one voice, to uphold its principles on human rights, to work to upgrade our practice and standards on human rights as a whole nation" (at 30). See also Senate Standing Committee on Constitutional and Legal Affairs, above n 6 at 60. Legislation to override a State interest would not be without

therefore, accession to the Optional Protocol is of limited direct significance for Australian law. Its importance lies in the fact that it may have an indirect influence as an encouragement to the courts to have greater regard to the ICCPR as a source of fundamental rights norms. It may also lead to a renewal of the debate concerning the necessity of a Bill of Rights. But if there is a need for a (constitutionally entrenched) Bill of Rights, this has not been met by accession to the Optional Protocol.[176]

The operation of the ICCPR does not equate to that of the ECHR, which has, in Lillich's words, "established the most effective enforcement regime yet known, regional or universal".[177] The regional procedure under the Convention is more effectual than the international procedure under the Covenant. The regional system in Europe "offers several advantages in the area of logistics, local trust and homogeneity".[178] There are factors present in the operation of the European system which are absent in the international one. There is a considerable commonality of economic, political and legal interests in Europe. This appears "to facilitate debate over the substance of the rights to be protected, to assist in the development of ... familiar systems of redress and, consequently, to enhance actual promotion and protection of human rights."[179] Further, there is a degree of interdependence among European countries which results in "a reciprocal tolerance and mutual forbearance ... that can secure the cooperative transformation of universal proclamations of human rights into more-or-less concrete realities."[180] This conclusion as to the preferability of a regional human rights regime, in terms of competence in defence of fundamental rights,[181] is an uncomfortable one for Australia. It is difficult to see Australia becoming part of a regional regime for the protection of fundamental rights.[182] As Yamane has noted:

> Unlike the European Convention on Human Rights which was made possible by a relative homogeneity of political institutions, a common conception of the respect of human rights and the will for European integration by the Member States, Asian countries have fewer common denominators for establishing a regional mechanism for the protection of human rights.[183]

And while Australia and Asia may be in relative geographic proximity and economically interdependent, there is only limited cultural or juridical affinity.[184]

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precedent. See, for example, the Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975 (Cth).

176 Similarly, H Charlesworth, above n 166 at 431.

177 R B *Lillich, International Human Rights: Problems of Law, Policy, and Practice* (2nd ed 1991) at 646.

178 T Opsahl, above n 168 at 440.

179 B H Weston, R A Lukes and K H Hnatt, "Regional Human Rights Regimes: A Comparison and Appraisal" (1987) 20 *Vanderbilt J Transnational Law* 585 at 589 (footnote omitted).

180 Ibid.

181 Similarly, C M Tucker, "Regional Human Rights Models in Europe and Africa: A Comparison" (1983) 10 *Syracuse J Int'l Law and Commerce* 135 at 139-40, 168; T Buergenthal, "The American and European Conventions on Human Rights: Similarities and Differences" (1981) 30 *American Univ Law Rev* 155 at 155-156.

182 Cf Joint Committee on Foreign Affairs, Defence and Trade, above n 175 at 57-58.

183 H Yamane, "Asia and Human Rights" in K Vasak and P Alston (eds), *The International Dimensions of Human Rights, Volume 2* (1982) 651 at 663 (endnote omitted).

184 See R Little and W Reed, *The Confucian Renaissance* (1989) at 83-84 and 88-89. See also the Bangkok Declaration issued by a number of Asian states in April 1993, reported at (1993)

Australia itself must be prepared to take responsibility for the protection of fundamental rights.

CONCLUSION

This is not the place to rehearse fully the arguments for and against a Bill of Rights.[185] A Bill of Rights would set out the parameters of fundamental rights and freedoms, thereby limiting the scope for governmental or legislative encroachment.[186] It could incorporate international obligations into domestic law[187] and provide effective judicial remedies in the case of infringement. In the Australian context, a Bill of Rights could serve to "demystify appeals to the common law or the heritage of English law".[188] The most powerful argument against a Bill of Rights is that judicial interpretation of its generalities would involve a shift of political power to the judges and away from Parliament. It is a common argument that for the judiciary to adopt the role of enforcing a Bill of Rights would be undemocratic. But, as Justice Samuels has explained:

> [T]he answer to this is that such a system of judicial review is as much a part of the democratic system of government as election of the people's representatives. Elected representatives recognise that the courts are there to ensure obedience to the constitution in the way in which he or she casts his or her vote in the legislature.[189]

2(2) *Bill of Rights Bulletin* 78. Australia was not a party to this statement of "the aspirations and commitments of the Asian region" (ibid). Asia has done little to develop a regional approach to the protection of fundamental rights. See H Yamane, "Approaches to Human Rights in Asia" in R Bernhardt and J Jolowicz (eds), above n 84 at 99; H Yamane, above n 183. (It is interesting to note that the definition of Asia adopted at 666-667 of this latter work is such as to exclude Australia.)

185 Compare, for example, R Dworkin, *A Bill of Rights for Britain* (1990) with J Waldron, above n 144. See also J Goldsworthy, above n 96 at 160-176; R Blackburn, "Legal and Political Arguments for a United Kingdom Bill of Rights" in R Blackburn and J Taylor (eds), *Human Rights for the 1990s* (1991) 108; J Finnis, "A Bill of Rights for Britain? The Moral of Contemporary Jurisprudence" (1985) LXXI *Proceedings of the British Academy* 303.

186 This observation is based on the assumption that the rights will be enforced satisfactorily.

187 On the issue of incorporation, see J Jaconelli, "Incorporation of the European Human Rights Convention: Arguments and Misconceptions" (1988) 59 *Political Quarterly* 343; R Kerridge, "Incorporation of the European Convention on Human Rights into United Kingdom Domestic Law" in M P Furmston, R Kerridge and B E Sufrin (eds), *The Effect on English Domestic Law of Membership of the European Communities and of Ratification of the European Convention on Human Rights* (1983) 247; J Jaconelli, above n 48. Amongst those in favour of a Bill of Rights for Britain, there is a debate between those who advocate incorporation of the European Convention, and those who favour a tailor-made document. The latter group tend to the view that the Convention is somewhat out-dated, since it is based on the prevailing view of fundamental rights in the immediate post-war years. But the political reality seems to be that it is either an incorporated Convention or nothing, despite the contrary example provided by Canada and New Zealand. See further the British works cited in n 4.

188 Electoral and Administrative Review Commission, above n 6 at 55.

189 Justice G Samuels, "A bill of rights for Australia?" (1979) 51(4) *Australian Quarterly* 91 at 96-97.

It is no coincidence that it is the most senior members of the judiciary in both Australia[190] and Britain[191] who are prominent amongst those voicing their support for a Bill of Rights. They have come to know better than most the inadequacy of their traditional common law approach to the protection of fundamental rights. As Sir Ninian Stephen has commented: "There appears to be growing support for such a Bill of Rights in Australia, even amongst those once inclined to defend the adequacy of the common law."[192] Short of incorporation of the ICCPR into Australian law or the ECHR into British law, there are limits to what even the most enlightened judge can do to assimilate (international) rights norms into his or her reasoning. There is scope in the development of the common law and in the interpretation of legislation, but a "court cannot deny the validity of an exercise of a legislative power expressly granted merely on the ground that the law abrogates human rights and fundamental freedoms or trenches upon political rights which, in the court's opinion, should be preserved."[193] The particular problem which arises is with unambiguous legislation[194] which either advertently or inadvertently conflicts with the Covenant or the Convention. In Britain there is no domestic remedy in the courts.[195] The European remedy can be effective in securing an eventual change in the law, even if it is expensive both in financial terms and in time. In Australia the scope would not appear to be very much greater, although the High Court can strike down legislation which conflicts with the Constitution and there is the embryonic notion of implied rights. As Justice Brennan stated in the *Nationwide News* case:

> [W]here a representative democracy is constitutionally entrenched, it carries with it those legal incidents which are essential to the effective maintenance of that form of government. Once it is recognised that a representative democracy is constitutionally prescribed, the freedom of discussion which is essential to sustain it is as firmly entrenched in the Constitution as the system of government which the Constitution expressly ordains.[196]

It is a question of the extent to which the High Court is prepared to incorporate rights requirements into the text of the Constitution.

It has been suggested that the international remedy available under the Optional Protocol to the ICCPR will prove to be of limited value in the provision of legal protection for fundamental rights in Australia. In apparent contrast to this sentiment, Justice Kirby has observed that: "Having just begun the process of escaping the unquestioning capture by the ideas of the English legal system, Australian lawyers, on

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190 Including the Chief Justice (see Sir Anthony Mason, "A Bill of Rights for Australia?", above n 5), even if not "enthusiastically" (ibid at 79).

191 Including the Lord Chief Justice (see Lord Taylor, *The Judiciary in the Nineties* (1992) at 13-14) and the Master of the Rolls (see Sir Thomas Bingham, above n 77). A particularly influential voice has been that of Lord Scarman. See, for example, his *English Law-The New Dimension* (1974) and "Human Rights in an Unwritten Constitution" [1987] *Denning L J* 129.

192 Sir Ninian Stephen, above n 5 at 26.

193 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 43 per Brennan J.

194 Or a settled common law rule which is a binding authority upon the court concerned, subject to the willingness of a higher court to allow an appeal and overrule the obstructive precedent.

195 Unless the measure is contrary to European Community law.

196 (1992) 177 CLR 1 at 48-49.

the brink of a new century, must now face the prospect of international scrutiny of their system of laws."[197] For the reasons explained earlier, this faith in international supervision strikes one as over-optimistic.[198] As the Constitutional Commission recognised in 1988, what is required is greater domestic scrutiny.[199] (And as Justice Kirby himself has advocated on numerous occasions, norms derived from international human rights agreements can have an important role to play.[200]) The Constitutional Commission recommended the addition of a new Chapter VIA, "Rights and Freedoms", to the Constitution, together with some expansion of the existing rights provisions.[201]

Particular mention has been made of the fact that in the *Australian Capital Television* case,[202] which concerned that most quintessentially Australian question of how the Constitution should be interpreted, some of the Justices gained inspiration from European experience as refracted through the medium of British law.[203] There is a degree of irony in this situation, but it is not one which should be seen as a matter for regret. The Australian and British legal systems are both contending with the same issues when they seek to update their approach to the protection of fundamental rights and freedoms. Both are in the course of "escaping" from the past. It has been seen in relation to freedom of expression that, within their different legal and political contexts, the Australian and British courts are grappling with similar arguments concerning a fundamental right. In neither country would traditional constitutional analysis seem to recognise the existence of a positive right to freedom of expression. The freedom would be regarded as a residual right only, with its reach dependent upon the extent of common law or statutory restrictions.[204] Both countries are bound by Article 19 of the ICCPR not to impose any unnecessary restrictions on freedom of expression, and Britain is similarly bound by Article 10 of the ECHR. It will be interesting to see whether Article 19 of the Covenant has the same effect on the common law and

197 Justice M Kirby, "The New World Order and Human Rights" (1991) 18 *MULR* 209 at 213.

198 The point can be put more strongly. Sir Thomas Bingham, above n 77 at 19, has spoken in relation to Britain of "the insidious and damaging belief that it is necessary to go abroad to obtain justice." If this is true in the European setting, then the implications for Australia in the international context are disquieting. See also J Dugard, "Human Rights, Apartheid and Lawyers. Are there any Lessons for Lawyers from Common Law Countries?" (1992) 15 *UNSWLJ* 439 at 446-447.

199 See the Constitutional Commission, above n 23 at 20-24 and ch 9. See also Electoral and Administrative Review Commission, above n 6 .

200 See Justice M Kirby, "Human Rights: The Role of the Judge", above n 148 at 236-239; Justice M Kirby, "The Australian Use of International Human Rights Norms: From Bangalore to Balliol — A View from the Antipodes" (1993) 16 *UNSWLJ* 363; Justice M Kirby, "The Bangalore Principles of Human Rights Law" (1989) 106 *South African LJ* 484 and (1989) 58 *Nordic J Int'l Law* 206; Justice M Kirby, above n 152; Justice M Kirby, "Domestic application of international human rights standards", *Australian Foreign Affairs Record*, May 1988 at 186-188. (The same material is reproduced in a number of these publications.)

201 The 1988 attempt to effect amendments to the Constitution to implement some of these latter proposals was notably unsuccessful. See H P Lee, "Reforming the Australian Constitution: The Frozen Continent Refuses to Thaw" [1988] *Public Law* 535.

202 (1992) 177 CLR 106. See also *Dietrich v The Queen* (1992) 109 ALR 385.

203 For an early discussion of this possibility, see C Anderson and G C Rowe, above n 23 at 100-103.

204 See the text accompanying above nn 21-22.

constitutional law of Australia as Article 10 of the Convention continues to have in Britain.[205] Australia will continue to derive much enlightenment from the fate of the common law of Britain and its traditional nostrums in the European milieu; and also from the attempts of the judiciary to update its conceptual framework. A full divorce between the two legal systems seems to be as far away as ever.

205 As evidenced, for example, by the judgments of Neill LJ in *Middlebrook Mushrooms v TGWU* [1993] IRLR 232 and *Rantzen v Mirror Group Newspapers* [1993] 3 WLR 953.