A Judicially Created Bill of Rights?

LESLIE ZINES*

In any comparison of the United States and Australian constitutional law, it has been commonplace to point to the presence in the former and the absence in the latter of a Bill of Rights. The distinction has been put on the basis that the Australians, unlike the Americans, put their faith in parliamentary democracy. British political notions, backed up by British constitutional history, pointed to Parliament as the protector of liberties and to the electorate as the ultimate check on Parliament. This view was expressed by John Quick and Robert Garran, W Harrison Moore and Sir Owen Dixon, and probably embraced by most of the delegates at the various Constitutional Conventions.[1]

These historical events and attitudes led Mason CJ in *Australian Capital Television Pty Ltd v Commonwealth*[2] to declare that:

> it is difficult, if not impossible, to establish a foundation for the implication of general guarantees of fundamental rights and freedoms. To make such an implication would run counter to the prevailing sentiment of the framers that there was no need to incorporate a comprehensive Bill of Rights in order to protect the rights and freedoms of citizens. That sentiment was one of the unexpressed assumptions on which the Constitution was drafted.

This had not been the opinion of Murphy J who, in a series of cases, attempted to infer from the structure and context of the Constitution a general, though unexpressed, Bill of Rights. This was based on the view that the Constitution assumed a free and democratic society. From this premise Murphy J deduced that persons had rights (as against all Australian Parliaments) to freedom of movement and communication as well as freedom from discrimination and cruel and unusual punishments. The following passage gives the tone of the broader arguments used by Murphy J:

> Elections of federal Parliament provided for in the Constitution require freedom of movement, speech and other communication, not only between the States, but in and between every part of the Commonwealth. The proper operation of the system of representative government requires the same freedoms between elections. These are also necessary for the proper operation of the Constitutions of the States (which now derive their authority from Ch. V of the Constitution). From these provisions and from the concept of the Commonwealth arises an implication of a constitutional guarantee of such freedoms, freedoms so elementary that it was not necessary to mention them

* Emeritus Professor, Research School of Social Sciences, Australian National University, Canberra.

1 Harrison Moore, W, *The Constitution of the Commonwealth of Australia* (1st edn, 1902; 2nd edn, 1910); Dixon, O, "The Two Constitutions Compared", *Jesting Pilate* (1965) at 102; Federal Convention Debates (Melbourne, 1898) at 664–91.

2 (1992) 177 CLR 106 at 136.

> in the Constitution ... . The freedoms are not absolute, but nearly so. They are subject to necessary regulation (for example, freedom of movement is subject to regulation for purposes of quarantine and criminal justice; freedom of electronic media is subject to regulation to the extent made necessary by physical limits upon the number of stations which can operate simultaneously). The freedoms may not be restricted by the Parliament or State Parliaments except for such compelling reasons.[3]

In one of the Commonwealth Lectures I gave at the University of Cambridge in 1988 I declared that:

> Murphy J's attempt to put a full-scale Bill of Rights into the Constitution by process of implication was not taken up by other High Court judges, but some judges have made tantalising suggestions from time to time that the nature of the polity might make certain types of laws invalid.[4]

Since then, more has been said and decided. The issue today is rather to what extent has Australia received, and to what extent is it likely to receive, a Bill, Charter or Chapter of Constitutional Rights, not by amendment in accordance with section 128 of the Constitution, but by a process of High Court judges finding rights implied in the Constitution. So far, the principal source of such rights has been the doctrine of the separation of judicial power and the provisions of the Constitution relating to elections and representative government. (I do not propose, here, to discuss the relationship of rights to the concept of proportionality.)

1. *Rights Derived from the Separation of Judicial Power*

So far as inferences from particular provisions are concerned, the concept of judicial power in section 71 looks like being a great reservoir of rights which will be found to include a number of those rights relating to the justice system to be found in various constitutions and treaties and which were recommended by the Constitutional Commission. One of the disadvantages, however, of using Chapter III, even on the broadest construction, is that it refers only to federal judicial power.

The view that section 71 of the Constitution requires that only courts may exercise the judicial power of the Commonwealth goes back a long way. The doctrine means that one aspect of the rule of law is assured, namely, that so far as federal jurisdiction is concerned, the courts have a monopoly over conclusive determination of disputes regarding existing rights and duties under the law. This formulation still leaves open a great many questions as to the distinction between the creation of rights and duties by the Legislature or the Executive (perhaps retroactively) and their determination under existing law.

A. *Due Process*

The rights that will be regarded as particularly under judicial protection were declared in *R v Quinn*[5] to be "basic rights which traditionally and therefore

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3 *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54 at 88.
4 Zines, L, *Constitutional Change in the Commonwealth* (1991) at 46.
5 (1977) 138 CLR 1.

historically are judged by that independent judiciary which is the bulwark of freedom".[6] The "classic example" was said to be a trial for the determination of criminal guilt. It is but a short step to infer that the requirement of judicial proceedings by a court requires certain basic procedures, whether they be called "natural justice", "fairness" or "procedural due process". Indeed section 71 was referred to by Deane J as the Constitution's only general guarantee of procedural due process.[7] This was expanded by Mason CJ, Dawson and McHugh JJ in *Leeth v Commonwealth*.[8] They said:

> It may well be that any attempt on the part of the legislature to cause a court to act in a manner contrary to natural justice would impose a non-judicial requirement inconsistent with the exercise of judicial power, but the roles of natural justice are essentially functional or procedural ...[9]

This guarantee of procedural due process raises many issues regarding the legislature's ability to alter the incidence of judicial proceedings and many of the common law rules that govern such proceedings and which are sometimes referred to as "fundamental". Many such rules, or similar rules, are entrenched in constitutions or are contained in provisions of international conventions. Many were recommended as alterations to the Commonwealth Constitution by the Constitutional Commission. For example, in *Dietrich v R*[10] it was held (per Mason CJ, Deane, Toohey, Gaudron and McHugh JJ; Brennan and Dawson JJ, dissenting) that, in the absence of exceptional circumstances, when an indigent person charged with a serious offence is unable to obtain legal representation, the trial should be adjourned, postponed or stayed until the legal representation is available. This decision was based on the concept of a "fair trial" and the court referred to numerous constitutional provisions and provisions of international conventions relating to the right of an indigent accused to counsel.

If this is what a "fair trial" requires, it will probably be found to be entrenched in Chapter III of the Constitution in relation to federal offences. It was stated to be so entrenched by Deane J[11] and Gaudron J.[12] Certainly if the right to counsel is in a particular case an essential element in a fair trial, it is difficult to see any judge deciding that Parliament may require courts exercising federal judicial power to conduct an unfair trial. Interestingly, the privilege against self incrimination, although seen as a human right and a fundamental common law principle, is not regarded as beyond federal legislative power to impair or abolish.[13]

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6 Id at 11.
7 *Re Tracey; ex parte Ryan* (1989) 166 CLR 518 at 580.
8 (1992) 174 CLR 455.
9 Id at 470.
10 (1992) 109 ALR 385.
11 Id at 408.
12 Id at 436.
13 *Sorby v Commonwealth* (1983) 152 CLR 281; *Environment Protection Authority v Caltex Refining Company Pty Ltd* — delivered 24 December 1993.

B. Bills of Attainder and Retroactive Laws

The doctrine of the separation of powers also raises the issue of whether there are implied in the Australian Constitution two guarantees that are expressly declared in the United States' Constitution. The latter Constitution prohibits the enactment of a Bill of Attainder or an ex post facto law. A "Bill of Attainder" is interpreted by the United States Supreme Court to be an enactment which imposes punishment on a specified person or members of a specified group without a judicial trial. Historically, "Bill of Attainder" referred to an Act which inflicted punishment by death; an enactment which imposed other forms of punishment was called a "Bill of Pains and Penalties". However, the phrase "Bill of Attainder" has been held in the United States to refer to both types of enactment.[14] That is how I shall refer to it in this comment.

In *Polyukhovich v Commonwealth*,[15] six judges agreed that the Australian Constitution prevented the Commonwealth Parliament from enacting a Bill of Attainder in the above sense because it was inconsistent with the separation of judicial power provided for in section 71 of the Constitution. It amounted to a declaration of guilt by the legislature and was, therefore, an improper exercise by Parliament of judicial power. It would leave to a court only the duty of determining whether the person charged was the person (or member of the class) specified in the Act. While this view would make the specific provision in the United States' Constitution redundant (because that Constitution also provides for the separation of judicial power) the reasoning seems to me to be unimpeachable.

Much more controversial is the view of some judges that a retroactive criminal law is a breach of the separation of powers. This alleged principle could of course only apply to Federal criminal laws. In *Polyukhovich* the *War Crimes Act* (1945) provided that a person was guilty of an indictable offence against the Act if that person committed in Europe between 1 September 1939 and 8 May 1945 a "war crime". The latter expression was defined to include acts which would, if committed in Australia, have amounted to murder or manslaughter, provided that they were committed in the course of hostilities or of an occupation.

The validity of the Act was upheld by Mason CJ, Dawson, Toohey and McHugh JJ, with Brennan, Deane and Gaudron JJ dissenting. One argument was that the Act was not within Commonwealth legislative power and, in particular, was not a law with respect to external affairs. The other major argument was that a retroactive criminal law such as this was inconsistent with the separation of judicial power, that is to say that (as in the case of a Bill of Attainder) it amounted to a purported exercise of judicial power by the legislature.

Only Brennan J accepted the first argument and held that the Act was invalid on that ground. It was, therefore, unnecessary for him to discuss the validity of the legislation under section 71. A majority of the court held that the Act was not inconsistent with the separation of powers. Deane and Gaudron JJ held otherwise.

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14 *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 535.
15 Ibid.

It does not follow, however, that the general issue is decided in favour of retroactive federal criminal laws. The reasoning of the majority judges was not uniform and, in different circumstances, Toohey J might go with Deane and Gaudron JJ. As indicated above, Brennan J has not yet expressed his view.

It had for many years been assumed that, as a result of *R v Kidman*[16] the mere fact that an Act (whether criminal or otherwise) operated retroactively did not affect its validity. A number of judges in *Polyukhovich,* however, pointed out that the issue was not, in the earlier case, discussed in relation to the separation of powers. Nevertheless *Kidman* was for decades regarded as having upheld federal power to enact retroactive criminal laws and other types of laws.

Other cases have also upheld laws retrospectively altering substantive rights even where the affected rights were an issue in litigation. That, however, was to be distinguished from attempted interference with the judicial process itself. This matter has been extensively examined by Professor George Winterton.[17] The leading illustration of illicit interference was a decision of the Privy Council in *Liyanage v R*[18] where an Act of Ceylon was passed after particular persons were charged in relation to an abortive coup and were in custody. The law was held invalid as a usurpation of judicial power. It was described by the court as a special direction to the judiciary as to the trial of particular identifiable persons charged with particular offences on a particular occasion. It legalised their imprisonment while waiting on trial, specifically changed the rules of admissible evidence to cover inadmissible evidence obtained during imprisonment and retrospectively altered the punishment imposed on them. There is no doubt that this decision would be followed in Australia. The principle preventing improper interference with a judicial process has long been accepted in this country.[19] It was on this ground, among others, that a majority of the High Court held invalid a provision of the *Migration Act* (1958) which purported to prevent any court from ordering the release from custody of certain non-citizen "boat people" who had arrived in Australia between 1989 and 1992.[20]

In *Polyukhovich,* Mason CJ, Dawson and McHugh JJ did not regard the *War Crimes Act* as amounting to a legislative usurpation of judicial powers. They pointed out that the Act penalised persons according to a generally applicable rule, rather than, as in the case of a Bill of Attainder, specifying persons or groups by name or identifiable characteristics. In the latter case the court would merely be left with the task of determining whether the person charged came within the description in the Act. If so, guilt followed automatically. Under the *War Crimes Act* the court was required to determine whether

16 (1915) 20 CLR 425.

17 In his paper entitled "The Separation of Judicial Power as an Implied Bill of Rights", delivered at the Conference on Future Directions in Australian Constitutional Law at the Australian National University on 3 and 4 December 1993.

18 [1967] 1 AC 259.

19 *Huddart Parker v Moorehead* (1909) 8 CLR 330; *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333 at 346; *Hammond v Commonwealth* (1982) 152 CLR 188; *Sorby v Commonwealth* (1983) 152 CLR 281; *Australian Building Construction Employees and the Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88 at 96.

20 *Lim v Minister for Immigration* (1992) 176 CLR 1.

a particular accused had contravened prescribed rules of conduct. The Act did not make any determination of fact. As Toohey J pointed out:

> the requirement of proof of conduct and the necessary state of mind which constitutes murder was too particular in its nature to amount in these circumstances to a disguised description of the group membership.[21]

Deane and Gaudron JJ considered that a retroactive criminal law was a usurpation by Parliament of judicial powers. They regarded such a law as a legislative judgment of guilt. For Deane and Gaudron JJ there was no relevant difference between a law which declared that persons who had certain characteristics were guilty of an offence and one which provided that persons who had committed certain acts were guilty of an offence. In Gaudron J's words, the function of the court in the latter case was merely "determination, as a matter of fact, whether some person is the person or answers the description (whatever form it takes) of the person declared guilty by the Act."[22] Deane J said that the function of the court under the Act in determining whether the plaintiff engaged in the relevant conduct merely camouflaged the usurpation of judicial power because it ousted an essential step in the judicial process, that is, determining whether past conduct constitutes a criminal contravention of the law. He reasoned that, in the instant case, a court would normally acquit the accused because the past conduct did not constitute a contravention of the law at the relevant time. He then said:

> In place of that inevitable judicial determination it imposes a legislative enactment of past guilt which it requires courts, in violation of the basic tenet of our criminal jurisprudence and the doctrine of the separation of judicial from legislative and executive powers, to apply and enforce.[23]

All this strikes me as very circular. The majority judges replied that the functions of a court are the same as in the case of ordinary prospective laws, namely, ascertainment of facts, application of law, and determination of guilt or otherwise. The difference is that the law operates on the past facts though it did not at the time when they were performed. That difference distinguishes the usual criminal case from one arising under a retroactive law. That is what the issue in this case was about. To assert that all the features of a trial under a prospective law are essential to the judicial process is to beg the question that was before court.

The attempt of Deane and Gaudron JJ to distinguish retrospective civil laws from criminal laws is difficult to understand in relation to the separation of powers (although not from the viewpoint of a proposed constitutional guarantee). There is no doubt that the conclusive determination of a controversy about existing rights and duties under the law is an exclusive judicial function, and this applies as much to rights and duties under the civil law as under the criminal law.

Deane J said that:

> [T]he boundary between what is permissible as falling within the limits of legislative power and what is forbidden as an usurpation of judicial power is

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21 Above n14 at 686.
22 Id at 706.
23 Id at 613.

> likely to be blurred in civil matters. The reason is that both the legislature and the judicature may, within the limits of their respective functions under the doctrine of the separation of powers, each settle questions of rights and liabilities under the civil law. The position is different, however, in the case of the law which operates to make criminal an act which was not a crime when done.[24]

Gaudron J simply stated that the position was different in the case of a law which acts retrospectively upon civil rights, obligations or liabilities, because the "functions of a court in civil proceedings is the determination of present rights, obligations and liabilities".[25] I must confess to having trouble understanding this. Ultimately I think the difference that these judges found between criminal cases and civil cases must be based on the importance given to historical considerations and social values. In the judgments there are copious references to international conventions, constitutional provisions, historical writings and judgments expressing abhorrence of ex post facto criminal laws.

Toohey J held that the Act did not constitute a Bill of Attainder. It did not amount to a legislative judgment as to guilt. He did react strongly, however, to a submission by Mr Dennis Rose QC, for the Commonwealth, that Chapter III did not empower the High Court to hold that an otherwise valid law was unconstitutional merely because it was an unjust law. Toohey J then dealt with the general international abhorrence of retroactive criminal law at some length, seemingly on the basis that it was relevant to Chapter III. He was not very clear however in explaining the connection and spoke rather generally. He said that retrospective laws would not necessarily offend Chapter III, but he did not "share dicta which may be thought to suggest that an ex post facto law can never offend Chapter III."[26] He found it unnecessary to pursue that issue because the Act was not "offensively retroactive" in relation to the plaintiff. Murder was universally condemned and it constituted a grave moral transgression. The lack of provision in Australian law in 1942 applying to the alleged acts of the plaintiff, therefore, did not mean that he had "no cause to abstain" from that conduct.[27]

Having regard to Toohey J's judgment and the silence of Brennan J on the question, it is possible that we will ultimately get an implied constitutional guarantee against some forms of retroactive criminal laws. It is a guarantee I strongly favour, but I have doubts about how those judges who support it can say it derives from the Australian Constitution. I feel that the reasoning of Deane and Gaudron JJ is rather contrived, while that of Toohey J seems to be little more than a declaration of a judicial obligation to prevent injustice being enacted by Parliament.

C. Disguised Legislative Punishment

The principle that only a court may conclusively determine criminal and civil liability under the law directs attention to camouflaged attempts by Parliament

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24 Id at 608.
25 Id at 705.
26 Id at 689–90.
27 Id at 690–1.

to punish persons for past conduct. Such an attempt has to be distinguished from the imposition by legislation of harsh prospective statutory liabilities or duties on a section of society. If the distinction is one of "substance" rather than "form", there is much scope for the application of judicial values including those relating to human rights.

An obvious case of "camouflage" occurred in the *Industrial Lighting* case.[28] National Security Regulations laid down rules for the lighting of industrial premises. They were held not to be within the defence power. One provision, it was argued, offended the separation of powers. It provided that if the Minister was of the opinion that there had been a contravention of the regulations he could direct that the premises should not be used until the lighting conformed to the regulations. Only Latham CJ and Starke J dealt with the judicial power argument and accepted it. That view seems to me undoubtedly correct. The provision can clearly be seen as authorising an administrative trial and punishment for an offence.

A rather more difficult case is the *Communist Party* case.[29] The legislation there prescribed no relevant rules of conduct. The main object of the Act was to dissolve the Communist Party and bodies controlled by communists and to forbid communists from holding office in certain trade unions and the public service if the Governor-General was satisfied that the person was likely to engage in activities prejudicial to defence etc. The Act was held invalid on the ground of lack of power. One argument was made that the Act amounted to a usurpation by Parliament of Commonwealth judicial power. This was rejected by Latham CJ,[30] Webb J[31] and Fullagar J.[32] It was not dealt with by the other judges. Professor Winterton rightly contrasts the cursory treatment of judicial power in this case with what he described as "the current Court's greater sensibility on such matters".[33] As he points out, the High Court's view on the invalidity of Bills of Attainder would result in at least more attention now being given to this issue and, perhaps, produce a different result. The present emphasis of the court on "substance" as against "form" is also relevant in this respect.[34] For example, Fullagar J, as Winterton points out, dismissed the judicial power argument on the "excessively formalistic" ground that the provision of the Act was a law made by Parliament and "making laws is not a judicial function".[35] That did not stop him describing the Act the following year as one which "imposed of its own mere force and without the possibility of judicial intervention what were really penalties upon a particular organisation" and what were "really penal consequences to the formation of an opinion of the Executive, not judicially examinable, that a person or a body of persons was engaged, or likely to become engaged, in activities prejudicial to defence."[36] That seems to me to be a reasonable description of a Bill of Attainder

28 *Victorian Chamber of Manufacturers v Commonwealth* (1943) 67 CLR 413.
29 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.
30 Id at 172–3.
31 Id at 234–5.
32 Id at 268–9.
33 Above n17 at 10.
34 Zines, L, *The High Court and the Constitution* (3rd edn, 1992) at 359–62.
35 Above n29 at 268–9.
36 *Marcus Clark and Co Ltd v Commonwealth* (1952) 87 CLR 177 at 253.

and the usurpation of judicial power. The *Communist Party* case was one step further removed from the clearer usurpation of judicial power evident in the *Industrial Lighting* case, but it was obvious from the preamble and matters within judicial notice that the communist bodies and persons were being dealt with because of the Parliament's and Government's views as to their past acts and present predilections.

Other situations raise more difficult issues. It has been suggested by three judges that, with certain exceptions, a federal Act which provided for the incarceration of persons would be in breach of the separation of powers, even though the imprisonment was not consequent on a breach of any legal rule or provision. In a joint judgment, Brennan, Deane and Dawson JJ said that (apart from an accused's custody pending trial, the detention of those who are ill mentally or with infectious disease, or those imprisoned for contempt of Parliament or by a military tribunal) citizens cannot be detained involuntarily except pursuant to a sentence imposed by a court after a criminal trial. The reason given was that:

> the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.[37]

Later this statement was qualified by the phrase "at least in times of peace". Gaudron J could not accept this statement because of her view that there might be other cases beyond the presently accepted categories where detention would not breach Chapter III.[38]

It may be, therefore, that the Court will declare a substantive right to liberty from detention except on accepted grounds arising merely from the separation of judicial power. Winterton does not approve of this, saying that it is not obvious that all involuntary detention, other than the traditional exceptions, is punitive.[39] Lindell also disapproves.[40]

It seems to me that one should, at least, begin with a suspicion that incarceration by legislative decree is, in effect, a legislative punishment, placing the onus on the Commonwealth to show that (outside the accepted categories) it is not. More difficulty arises, I think, where harsh treatment other than detention is prescribed. In that case there might be temptation for libertarian judges to hold that laws they consider unjust or too severe in their effects are in breach of section 71 of the Constitution. For example, it has been suggested by Dawson and Toohey JJ that the imposition of a federal levy on a person or group which did not constitute "taxation" might, in certain circumstances, "even amount to a bill of attainder" or of pains and penalties and so constitute a usurpation of judicial power in contravention of section 71 of the Constitution".[41]

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37 Above n20 at 27.

38 Id at 55.

39 Above n17 at 11.

40 Lindell, G J, "Recent Developments in the Judicial Interpretation of the Australian Constitution", paper delivered at the Conference on Future Directions in Australian Constitutional Law (ANU), 3–4 December 1993, 44 n135.

41 *Mutual Pools and Staff Pty Limited v Commonwealth* (unreported) 9 March 1994; Court pamphlet at 41–4.

One old example of an argument in terrorem was whether a law requiring aliens to be boiled in oil was a law with respect to aliens. It seems that today the argument would be whether it amounts to a usurpation of judicial power.

2. *Rights Based on Representative Government*

In the Commonwealth Lectures I gave in 1988, to which I referred earlier, and in *The High Court and the Constitution* in 1987, I said that it could be argued that many provisions (which had not given rise to High Court cases) assumed certain liberties and freedoms, and I instanced the reference to an "election" in the Constitution as arguably denoting a degree of free speech and movement.[42] This has now been broadly accepted by the High Court, although most of the judges seem to have gone somewhat further. In *Australian Capital Television Pty Ltd v Commonwealth*[43] six of the seven judges (Dawson J dissenting) were of the view that there existed a constitutional right to freedom of communication on political matters which limited the powers of the Commonwealth Parliament in the absence of any indication to the contrary. In *Nationwide News Pty Ltd v Wills*[44] Deane, Brennan, Toohey and Gaudron JJ relied on an implication of freedom of communication about matters relating to the government of the Commonwealth for declaring invalid a provision relating to "contempt" of the Industrial Relations Commission.

There is, I think, a great deal to be said for this view both as a matter of legal interpretation and on broader constitutional policy grounds. Even if we stay close to the express words and provisions, the Constitution undoubtedly prescribes a system whereby federal parliamentarians are "chosen" by the people (sections 7, 24, 29). Other provisions refer to "elections" and "electors" (for example, sections 8, 9, 10, 12, 30, 31, 32, 41, 47). One does not have to be an imaginative or free-wheeling interpreter of the Constitution to accept that these concepts assume in the context of our society and polity a sufficient degree of freedom of communication and assembly to ensure that the electors can make a considered and informed choice. McHugh J referred to the words "directly chosen by the people" as encompassing all steps directed to the election "nominating, campaigning, advertising, debating, criticising and voting" and, in respect of all those, there is, he said, a right to "participate, associate and communicate".[45]

For the purposes of the case McHugh J felt he need go no further than upholding the freedom in connection with those activities. He left open whether there was a general freedom to communicate on matters concerning the Commonwealth arising from the fact of Federation, similar to the freedom of movement declared in *Crandall v Nevada*[46] and upheld by two High Court judges in *R v Smithers; ex parte Benson*.[47]

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42 Above n4 at 42. Zines, L, *The High Court and the Constitution* (2nd edn, 1987) at 339; (3rd edn, 1992) at 338.
43 Above n2.
44 (1992) 177 CLR 1.
45 Above n2 at 231–2.
46 73 US 35 (1868).
47 (1912) 16 CLR 99.

McHugh J, therefore, navigated fairly close to the shore represented by the express provisions of the Constitution. Even Dawson J, who dissented in the case and who criticised the concept of implied rights in the language and spirit of the *Engineers'* case[48] interpreted the constitutional requirement of "choice" as meaning "a true choice", which involved at least "an opportunity to gain an appreciation of the available alternatives".[49] He would, therefore, have held invalid legislation which had the effect of denying the electors access to information necessary for the exercise of a "true choice". Unlike McHugh J, he considered that the legislation was compatible with the constitutional provisions.

Other judges went further by reasoning from the express provisions to the general system of government those provisions were intended to create, namely, one of representative government. McHugh J accepted that the Constitution gave effect to "representative government" or "democracy", but he used those concepts as a background against which the words of sections 7 and 24 of the Constitution had to be interpreted.[50] The other judges were prepared to go more immediately to the generalised institution or system and to ask what is necessarily involved in such a system. The terms used to describe it were, variously, "representative government", "representative democracy" and, in the case of Gaudron J, "a free society governed in accordance with the principles of representative parliamentary democracy".[51]

They all reasoned that freedom of communication in relation to public and political affairs, concerning the Commonwealth, was an essential component of such a system and that this freedom was not confined to the election periods. This was because representative government required communication between the electors and their representatives and among the electors themselves — in other words "between all persons, groups and other bodies in the community".[52] An emphasis was placed on the accountability of members of Parliament to the people and, therefore, the responsibility of members of Parliament to take into account the views of the people. Similarly, the judgment of the elector depends upon free discussion in the media and elsewhere of public affairs.[53]

There is some dispute as to whether it was proper for the judges to generalise to this extent from the specific provisions of the Constitution relating to elections. Associate Professor Goldsworthy has supported the degree of judicial constraint and caution shown by Dawson J.[54] I have much sympathy for the general approach and for the concerns of Goldsworthy, as I indicate more clearly below. It does seem to me, however, that it is a reasonable conclusion from reading the Constitution in its historical and social context that the object of the specific powers was to create a system of representative government,

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48 (1920) 28 CLR 129.
49 Above n2 at 187.
50 Id at 228–9.
51 Id at 210.
52 Id at 139, per Mason CJ.
53 Id at 135–41, per Mason CJ. See also *Nationwide News* above n44 at 72–3, per Deane and Toohey JJ.
54 Goldsworthy, J, "Implications in Language, Law and the Constitution", a paper delivered at the Conference on Future Directions in Australian Constitutional Law, ANU, 3–4 December 1993.

and that such a system requires freedom of communication in relation to public affairs and a degree of freedom of association, assembly and movement. This implication from the express provisions does not seem any more removed from a truly "interpretive" approach to the Constitution than the reasons given for supporting the doctrine of the separation of judicial power and the implied restrictions on federal power to make laws binding or affecting the States.

It is of course possible to argue that the intention of the framers was to entrench a system of voting and representation, leaving it to the common law, the political process and conventions to ensure that a full-blooded system of representative government existed. As Goldsworthy has said: "The Constitution may be intended to implement some general principle only to a partial extent."[55] It certainly cannot be said that we have lacked a system of representative government or democracy over the last 90 years, despite the ignorance of nearly all, until 1992, that there was a constitutional entrenchment of that system.

No line of argument in respect of that issue is, of course, conclusive. Looking at the matter from a broader political and social viewpoint, it seems to me that the usual reasons given for not having a Bill of Rights strengthen the argument in favour of inferring a judicially enforceable system of government arising from the provisions of the Constitution relating to elections.

The concept of the supremacy of Parliament has its modern justification in democratic theory. In this way, Dicey was able to distinguish the legal sovereign (Parliament) from the political sovereign (the electorate).[56] This justification can only be valid while conditions exist which support the operation of the political process. In the Commonwealth Lectures, referred to above, I remarked as follows:

> Assuming that the main argument against judicial review of legislation is that the democratic determination of policy issues was preferable to that of unelected and technically irresponsible judges, it was said that a Constitution should at least safeguard the democratic process.[57]

Obviously, judicial review of the conditions and processes of representative or democratic government can only take place in so far as the Constitution permits. I agree with most of the High Court judges that it may be implied from the provisions of the Commonwealth Constitution that provide for or assume an electoral process and a Parliament consisting of representatives of the people.

One problem with this approach is that it may open up a Pandora's box of implied rights and freedoms. Some of the terms used in the judgments such as "democracy" and (to use Gaudron J's words) a "free society governed in accordance with the principles of representative parliamentary democracy" are capable of evoking the full panoply of a bill of rights. Four judges expressly referred to the fact that the framers had rejected the model of the United States' Bill of Rights (Mason CJ, Brennan, Dawson and McHugh JJ). The problem, therefore, is the blurred line between those freedoms which are a

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55 Id at 28.

56 Dicey, A, *The Law of the Constitution* (10th edn, 1960) at 76, 432.

57 Above n4 at 34.

sine qua non of representative government and those which are primarily concerned with the liberty of the individual and the protection of minorities.[58] This issue is at the heart of Goldsworthy's concerns because of the tendency of some judges, at any rate, to suggest that there can be implied from the Constitution an array of rights recognised by the common law.[59]

If a broad or loose view is taken of the conditions necessary for representative government, an ironic situation could arise. The preservation of the political institutions and processes that are said to be an alternative to enacting a bill of rights will result in making the latter unnecessary, because it will all be implied in the Constitution.

In my view, therefore, the court, in inferring what rights are necessary for the purposes of representative government, should cleave closely to that conception and not be tempted to adopt broad and liberal constructions. Even so, the difficulties are great; for example, there are bound to be problems in distinguishing speech related to political and public events and other forms of speech. Indeed some of the judges, in leaving open the possibility that free communication generally is implied in the notion of representative government, may have been aware of this difficulty.[60] Difficulties may also arise in relation to freedom of assembly and association; but the court should, in this area, be mindful of its limited role, namely, to ensure representative government, not a free and liberal society.

The concept of freedom to communicate regarding public affairs in relation to the Commonwealth was held to extend to all political matters, even though they related primarily to State or local government. This is a realistic view, having regard to the interrelationship of federal and State politics and policies, evidenced by national political parties, federal parliamentary debate and Commonwealth control or influence over many matters outside its direct control, by virtue of the use of section 96 grants; for example, Commonwealth control of universities.

The issues not decided in the *Australian Capital Television* case were how all this affected the States. One issue is whether the States may impair freedom of speech in relation to Commonwealth public affairs; the other is whether there are any similar implications of entrenched representative government in the States, arising out of State Constitutions or the Commonwealth Constitution.

On any view it is difficult to see how it could be argued that a State may impair a system of representative government established (by implication) by the Commonwealth Constitution in respect of the Commonwealth's sphere of government. If, for example, freedom of communication in public affairs in relation to the Commonwealth is necessarily implied in the Constitution, it is because it is regarded as essential for the operation of the system. It makes little sense to argue that the system of representative government was subject to State attack and not Commonwealth attack. In any case, the general federal doctrine that the Commonwealth may not prevent a State from existing or

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58 This issue is examined by Kirk, J, "Constitutional Implications from Representative Democracy", Honours Research Paper, 1993, ANU.

59 Above n54.

60 Above n2 at 141, per Mason CJ; at 212, per Gaudron J; at 232, per McHugh J.

functioning seems applicable in reverse. Admittedly that doctrine, as at present worded, may not exactly fit the current situation; but it would seem to come within the same policy on which it is based and which flows from the concept of federalism.[61] As to that issue, a number of statements in the judgments suggest that State power is limited by the implied federal freedom of communication.[62]

Insofar as State constitutions and other State legislation refer to voting, elections and so on, they are equally open to the implication that the object of provisions is responsible government; but of course this is of little importance if those provisions may be changed, expressly or impliedly, by a later Act of Parliament that can be passed in the normal way. Generally speaking, State constitutions come within the category of "flexible" as distinct from "rigid" constitutions. In the case of Western Australia and New South Wales, however, a referendum is required to change various provisions of the respective Acts which, in my view, produce the same type of implications that the High Court has found in provisions such as section 7 and section 24 of the Commonwealth Constitution.[63] I do not think that the entrenchment provisions of the constitutional legislation of the other States come within that category.[64] If the concept of representative government is upheld in the States' sphere, it will probably be based on the Commonwealth Constitution.

There are suggestions in some of the judgments that the Constitution recognises or assumes the democratic nature of the States. It is true that there are a number of references to State Parliaments (for example, sections 111, 123, 124) and other provisions refer to the electoral processes and laws of the States (for example, sections 10, 25, 30, 31, 41, 123, 128). The latter provisions however seem of a transitional nature. On a strict reading of these provisions, the most that can be said is that there is an assumption that at the time of Federation the States had democratic systems of representative government. But section 106 specifically refers to the ability of the States to alter their Constitutions "in accordance with the Constitution of the States". Professor Blackshield has said that if the States' Constitutions are seen as, in effect, re-enacted by section 106 of the Commonwealth Constitution, it should be noted that the section contains the expression "subject to this Constitution". He then says, "if those words now govern the validity of the State Constitutions, then any fundamental principles embodied in the Commonwealth Constitution may flow on through section 106 to the State Constitution as well".[65] However, this seems to me to divorce the implied principle of responsible government entirely from the provisions relating to voting and elections at the Commonwealth level. Such an implication seems to have no basis at all in any of the express provisions or in the general structure of the Constitution. If a majority of the court should decide the issue along those lines it would come

61 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31; above n34 at Ch 14; cf Brennan J, above n2 at 163.

62 Above n44 at 52 per Brennan J; at 76, per Deane and Toohey JJ; at 216-7, per Gaudron J.

63 *Constitution Act* 1902 (NSW) ss7B, 11B, 26; *Constitution Act* 1889 (WA) s73.

64 For references to the various provisions, see Hanks, P, *Constitutional Law in Australia* (1991) at 98–99.

65 Blackshield, A R, "The Implied Freedom of Communication", paper delivered at the Conference on Future Directions in Australian Constitutional Law (ANU) 3–4 December 1993.

close to (or be the same as) the approach of Murphy J and of some of the judges in *Leeth v Commonwealth*[66] which I discuss and criticise below.

Once it is accepted, however, that the States cannot interfere with the implied rights declared in *Nationwide News* and *Australian Capital Television*, it becomes more difficult to argue that there is a State sphere of interest which is distinct from the Commonwealth sphere of interest, so far as freedom of communication is concerned. That is because a majority held that *all* political and public affairs come within the implied right of communication that was upheld in those cases. In other words, the system of representative government of the Commonwealth requires free communication on public matters related to the Commonwealth or the States. State legislative power is therefore restricted to this full extent by the implied right.

3. *Rights Based on "Fundamental Principles"*

In *Union Steamship Co of Australia v King*,[67] the High Court rejected the view followed by Street CJ[68] that the general phrases conferring law-making power such as "peace, order and good government" gave the court jurisdiction to strike down legislation on the ground that it did not promote or secure the peace, order and good government of the State. The judges went on to add, however, that:

> whether the exercise of that legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system and the common law, a view which Lord Reid firmly rejected in *Pickin v British Railway Board* is another question which we need not explore.[69]

This was the first time, I think, that it had been suggested in the High Court that there might be restrictions on legislative or executive power which are not found, express or implied, in the Constitution or some other binding superior law. The possibility of such restrictions was later raised by Toohey J in *Polyukhovich v Commonwealth*.[70] Counsel for the Commonwealth had argued that if a law is characterised as one with respect to external affairs, Chapter III did not "enable the court to say, for example, that this is an unjust law". This argument drew the following response from Toohey J:

> Whether a court may declare a statute to be invalid because it is unjust is a question which goes to the very heart of the relationship between the courts and Parliament.[71]

He then referred to an article by Professor Walker criticising Dicey's notion of parliamentary sovereignty,[72] and added "But that question does not arise here".[73]

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66 Above n8 at 484–5.
67 (1988) 166 CLR 1.
68 *Building Construction Employees and Builders Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372.
69 Above n67 at 10.
70 Above n14.
71 Id at 687.
72 Walker, G de Q, "Dicey's Dubious Dogma of Parliamentary Sovereignty" (1985) 59 *ALJ* 276.
73 Above n14 at 687.

Generally, however, where judges have suggested that common law principles may limit power, they have argued that those principles are assumed by or implied in the Constitution as a whole or its general structure. In *Nationwide News Pty Ltd v Wills* Deane and Toohey JJ referred to various types of implied limitations on federal power as including those "which flow from the fundamental rights and principles recognised by the common law at the time the Constitution was adopted as a compact of the Federation".[74] The idea that "injustice" or "fundamental" common law principles can limit the power of the political organs of government opens up a vast and uncertain area of constitutional limitations. If adopted it would increase to a great extent the discretionary power of the judiciary. These suggested principles were put into effect by Deane and Toohey JJ in *Leeth v Commonwealth*.[75]

In that case the majority of the court upheld a federal provision which required the court, in sentencing a federal offender, to have regard to State or Territory provisions, in the place where it was sitting, relating to the minimum period required to be served before the offender would be eligible to be released on parole. The majority were Mason CJ, Brennan, Dawson and McHugh JJ. Deane, Toohey and Gaudron JJ dissented. Deane and Toohey JJ considered that federal power (in the absence of any indication to the contrary) was limited by a doctrine of the underlying equality of the people of the Commonwealth under the law and before the courts. This doctrine was denied by Mason CJ, Dawson and McHugh JJ. The other majority judge, Brennan J, seemed to accept the doctrine of equality, but regarded the law under consideration as consistent with it. Gaudron J was the only judge not to express a view; her dissent was based on the ground that the provision was inconsistent with Chapter III of the Constitution in requiring a court to exercise a power in a way that would necessarily discriminate on the basis of State or Territory.

At present, therefore, there are three judges in favour of the doctrine of equality and three judges against. How did Deane, Toohey and Brennan JJ arrive at their conclusion? Basically, Deane and Toohey JJ relied on doctrines of common law "as part of the very structure of the Constitution".[76] They regarded the "doctrine of legal equality" as being "in the forefront of those doctrines". They had to admit, however, that it was necessary to put to one side the position of the Crown, and the discriminatory treatment at common law of half the human race, namely, women, was described as being among "some past anomalies".[77] In support of their conclusion, they referred to the agreement of "the people" to unite, to covering clause 5, declaring that the Constitution was binding on the "people of every part of the Commonwealth" and to the separation of judicial power. They said that at the heart of the duty to act judicially was the provision to the parties of "equal justice".[78]

Mason CJ, Dawson and McHugh JJ, of course, pointed to the many provisions in the Constitution that made express provision against discrimination or required uniformity, for example, sections 51 (ii)(iii), 99, 92, and 117. The

74 Above n44 at 69.
75 Above n8.
76 Id at 485.
77 Id at 486.
78 Id at 487.

dissenting judges dismissed this argument as a misuse of the *expressio unius* maxim.[79] Indeed the existence of those provisions was regarded by them as reflecting the general doctrine of equality rather than denying its existence.

Brennan J, a member of the majority, also seemed to accept an implied guarantee of equality. He relied on only one of the grounds mentioned by the dissenting judges, when he said that an inequality of maximum penalties for a federal offence would be offensive to the constitutional unity of the Australian people "in one indissoluble Federal Commonwealth" recited in the first preamble to the *Constitution Act*.[80]

If these views should secure the agreement of a majority of the High Court, we shall have acquired by implication something similar to the "equal protection" provision of the Fourteenth Amendment of the United States' Constitution, but applicable to the federal legislature. More importantly, there will have occurred a great transfer of power from the Parliament to the judiciary. As all laws treat people in different ways, the court would potentially at any rate become a censor of all Federal legislation, including taxation, appropriation, criminal and regulatory laws. The judiciary would be called upon to determine whether the different treatment of different people in all these cases was just or fair or relevant to some important social interest. It was for this reason that a New Zealand Committee on Human Rights and the Australian Constitutional Commission rejected provisions providing for equality, preferring instead one forbidding discrimination on specific grounds.[81]

More importantly, it seems clear, on any basis, that the framers of the Constitution did not intend to give such sweeping power to the court. It is difficult to see how the many and differently worded provisions relating to discrimination, preference and uniformity, could be regarded as superfluous or inserted out of abundant caution. Also, it is well known that the framers expressly rejected a provision for "equal protection of the laws".[82] As Sir Owen Dixon once said, "our Constitution makers refused to adopt any part of the Bill of Rights of 1791 and *a fortiori* they refused to accept the Fourteenth Amendment".[83] It is also by no means obvious that when the "people" referred to in the preamble agreed to unite in a Commonwealth, they intended that, without more, the High Court should strike down legislation of the Parliament that they created, on the ground that, in the Court's view, the difference in treatment accorded to various persons or groups by legislation could not be justified.[84]

If various provisions aimed at preventing discrimination, preference and lack of uniformity are merely reflections of a general principle of equality, it can be similarly reasoned that the specific powers given to the Commonwealth Parliament are merely examples of a general principle, mentioned from time to time by delegates, that the Commonwealth Parliament was to be given power over all subjects which could not be as effectively dealt with by the States.[85]

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79 Id at 484–5.
80 Id at 478.
81 *Final Report of the Constitutional Commission* (1988) Vol 1 at 536–48.
82 La Nauze, J, *The Making of the Australian Constitution* (1972) at 229–32.
83 Dixon, O, *Jesting Pilate* (1965) at 102; above n40 at 36.
84 Above n54 at 23–31.
85 Convention Debates (Sydney, 1891) at 523 per Griffith; Convention Debates (Melbourne,

The reasoning of Deane and Toohey JJ, in particular, is made more worrying by the suggestion that the legislative power of the Commonwealth is limited generally by "fundamental principles of the common law". As Goldsworthy has pointed out, this seems to take us back to the doctrine expounded by Boothby J which the *Colonial Laws Validity Act* (1865) was designed to remedy, with the difference, that it is the common law of Australia laid down by the High Court, rather than the "law of England" which would provide the limiting factor today.[86] It is difficult to see why the reasoning of Deane and Toohey JJ is not also applicable to State laws as well as federal laws. If fundamental rules of the common law were regarded as intended to limit federal power under the Commonwealth Constitution, the same reasoning seems to apply to the power given under State Constitutions (apart from any argument regarding their incorporation under section 106 of the Commonwealth Constitution).

In *Leeth*, Deane and Toohey JJ referred to the fact that at the Conventions opponents of a Bill of Rights declared that such rights were "unnecessary".[87] I agree with Lindell that it is most likely that what the delegates meant was that Parliament would not act in the manner sought to be prohibited.[88] The democratic process and representative government were regarded as robust enough to prevent tyranny. To limit governmental power by reference to fundamental principles of the common law has, at best, a tenuous link with anything in the Constitution and resembles more notions of "higher law" or "natural law", which depend very much on personal values.

In New Zealand, Sir Robin Cooke has asserted that some common law rights may go so deep that even Parliament cannot destroy them.[89] The instances he gave, however, were extreme ones, namely, depriving ordinary citizens of the ability to resort to the court for the determination of their rights and the legalising of torture to obtain confessions. It is clear from the use of this doctrine by Deane and Toohey JJ to introduce a guarantee of equality that they do not think of it as a sort of reserved judicial power to be resorted to in extreme circumstances when the very nature of our society seems in peril (although whether the court could do anything worthwhile if we had sunk so low as a society is another question).

In early American legal and constitutional history, the natural rights of man and the common law rights of Englishmen, were often used interchangeably as both standards of political morality and as principles of the higher law, which could result in the invalidity of legislation or executive action that otherwise complied with the express provisions of the Constitution.

In *Fletcher v Peck*[90] Johnson J referred to a Georgian statute which revoked land grants as having violated general principles of justice which would

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1898) at 214 per Barton.

86 Above n54.

87 Above n8 at 485, n57.

88 Above n40 at 42, n129.

89 *Fraser v State Services Commission*, [1984] 1 NZLR 116 at 121; *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 at 398; *New Zealand Drivers' Association v New Zealand Road Carriers* [1982] 1 NZLR 374 at 390.

90 10 US 87 (1810).

"impose laws even on the Deity".[91] In the same case, Marshall CJ declared the Act invalid "either by general principles which are common to our free institutions or by the particular provisions of the Constitution".[92] He went on to say that the "nature of society and government" could limit legislative power.[93] Many years later a city law authorising taxation to finance an issue of bonds to assist private industry was invalidated on the general ground that a State must use its powers for the general welfare and could not redistribute resources from one citizen to another.[94]

From after the Civil War natural law notions were embraced in a number of cases, usually in defence of vested rights. Gradually, however, these principles came to be regarded as embodied in due process clauses of the Fifth and Fourteenth Amendments. This was regarded by some as a more acceptable means of achieving the same result.[95]

It came about therefore that common law rights relating to property and liberty of contract became vested rights which could be impaired only on grounds that the court regarded as "reasonable" having regard to other social interests and whether the law restricted liberty or property rights no more severely than the advantage to the community could justify.[96]

It is clear that fundamental principles of the common law or other supposed assumptions of the founders may serve the same purposes as a direct resort to natural law concepts. It has been suggested by Smallbone in a thought-provoking article that if we have to go down this path, it might be better to follow Coke's principle in *Dr Bonham's* case[97] of a common law check on legislative power, rather than an implied bill of rights which purports to be the intention of the framers. He gives a number of cogent reasons.[98]

Whatever path is taken, however, it seems to me that the basic objection remains. If a judge is minded to regard certain interests or liberties as fundamental and important, it matters little in result if he or she decides that a law is invalid because it breaches a principle implied in the Constitution, or because it is contrary to a natural law principle, such as the nature of a "free society" or is contrary to the common law that controls the power of Parliament. The only thing that can be said in favour of one rather than another is that an open application of personal philosophy is better than a disguised one.

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91 Id at 143.
92 Id at 139.
93 Id at 135.
94 *Loan Association v City of Topeka*, 87 US 655 (1874).
95 Currie, D, *The Constitution of the United States in the Supreme Court* (1988) at 381; Tribe, L, *American Constitutional Law* (1978) at 432.
96 Kelly, A and Harbison, W, *The American Constitution. Its Origins and Development* (1948) Ch 19 and 20.
97 (1609) 8 Co Rep 107a.
98 Smallbone, D, "Recent Suggestions of an Implied 'Bill of Rights' in the Constitution, Considered as Part of a General Trend in Constitutional Interpretation" (1993) 21 *Fed LR* 254.