INDIVIDUAL RIGHTS, THE HIGH COURT AND THE CONSTITUTION

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[Recent decisions of the High Court and dicta of its members suggest that the Court is inclined to assert an enhanced role in the protection of individual rights. The constitutional protection of individual rights can be pursued in three ways: broader interpretation of express guarantees; the implication of guarantees from provisions of the Constitution that, prima facie, *do not seem to be concerned with individual rights; and the implication of guarantees from general principles relating to the Constitution or Australian society. The present article examines the second and third of these methods, considering their implications for the Court's methodology and its role in the structure of government.]*

For most of the High Court's history, its principal constitutional concern has been the federal division of power. The Constitution apparently contained few guarantees of individual rights, and most of these had been shown to be largely ineffectual by literal reading of their provisions. However, in the last few years all this has changed. Decisions of the Court and extra-judicial utterances of its members regularly reflect a belief that the Court has a major role to play in protecting the individual against both the legislature and the executive. Individual rights have been found lurking in unlikely provisions of the Constitution. Recently, in *Nationwide News Pty Ltd v Wills*[1] and *Australian Capital Television Pty Ltd v Commonwealth*,[2] the Court found a freedom of political communication inherent in the basic structure of the Constitution. While federal questions will continue to arise it is now likely that, like the United States Supreme Court and the Canadian Supreme Court since the adoption of that country's Charter of Rights and Freedoms,[3] the High Court will derive a substantial part of its workload from 'individual rights' cases.

RIGHTS IN THE CONVENTION DEBATES

In contrast to their United States counterparts, the framers of the Australian Constitution do not provide any rich vein of constitutional theory or principle upon which interpretation of their work may be based. A random dip into the volumes of the Convention Debates (the only record of the collective wisdom of

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1 (1992) 177 CLR 1 (*Nationwide News*).

2 (1992) 177 CLR 106 (*Political Broadcasts*).

3 Gerry Ferguson, 'The Impact of an Entrenched Bill of Rights: the Canadian Experience' (1990) 16 *Monash Law Review* 211.

the framers) is more likely to reveal intense debate about railways or revenue than political philosophy. The debate on important clauses was often cursory and consistent with a lack of understanding about what those clauses meant.[4] The framers' discussion of individual rights conforms to this pattern. However, some propositions may be drawn from it.

First, in conformity with prevailing English thinking, the founders appear to have accepted that the citizen's rights were best left to the protection of Parliaments and the common law, and they were not concerned to protect the individual from oppression by majority will. Their drafts were predicated upon acceptance of the traditions of parliamentary supremacy, and they did not share the American framers' lack of faith in parliamentary sovereignty.[5] In contrast to the American experience of struggle against an overbearing state, the Australian framers had lived in an environment where government was the only body capable of performing many of the functions which, in other countries, were undertaken privately.[6] This confidence in Parliaments founded strong opposition to most attempts to include express rights in the Constitution, sometimes together with a view that entrenched rights were simply an unwarranted restriction on legislative power.[7] One speaker regarded the draft 'equal protection' clause as a poor reflection on Australian Parliaments, implying that they needed to be restrained from oppressing their people.[8]

Second, the founders did not expressly discuss whether to incorporate a Bill of Rights in the Constitution. They regarded themselves as practical men gathered together to draft a constitution which would be acceptable to all colonies and would secure the economic benefits of federation, and they did not see it as part of their task to set out fundamental relationships between individuals and governments.[9] They were, however, conscious of borrowing selectively from the US Constitution. They took those elements which they considered appropriate to the Australian context (and adopted them expressly), but there were several outbursts against slavish following of the US model.[10]

Third, the Convention Debates show a general unwillingness to include broadly framed guarantees in the Constitution.[11] At least some delegates feared

[4] This has been recognised by at least one present member of the High Court: *Breavington v Godleman* (1989) 169 CLR 41, 132-3 (Deane J); transcript of argument in *Bourke v State Bank of New South Wales* (No S44 of 1989), 6 March 1990, 49-52.

[5] Cf Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation: a Comparison of the Australian and the United States Experience' (1986) 16 *Federal Law Review* 1, 8.

[6] See, eg, Paul Finn, *Law and Government in Colonial Australia* (1987) 3.

[7] *Official Record of the Debates of the Australasian Federal Convention* (Sydney, 1891) vol I, 924-7 (see also 330-2); (Melbourne, 1898) vol IV, 350-3, 658-64, 667-90; (Melbourne, 1898) vol V, 1770-6 ('*Convention Debates*').

[8] Ibid (Melbourne, 1898) vol IV, 688 (Cockburn).

[9] Ibid (Sydney, 1891) vol I, 618-9 (Downer), 624, 627 (Gillies); (Adelaide, 1897) vol II, 267 (Solomon); (Melbourne, 1898) vol IV, 654-6; (Melbourne, 1898) vol V, 1735 (Higgins).

[10] Ibid (Sydney, 1891) vol I, 629-30 (Barton); (Melbourne, 1898) vol IV, 353 (Glynn), 654-5 (Higgins), 660 (Cockburn), 667-70 (Isaacs), 672 (O'Connor), 685-6 (Cockburn); (Melbourne, 1898) vol V, 1778 (O'Connor, Higgins).

[11] On this, and the discussion following, see generally John La Nauze, *The Making of the Australian Constitution* (1972) 227-32.

that unintended consequences might flow from the use of general language. The guarantees which were included (eg ss 80, 92, 116, 117) were those which the framers were convinced were necessary, and relatively careful attention was given to their potential consequences.[12]

I have argued elsewhere against the use of material from the Convention debates to establish the supposed intentions of the framers as an element in the interpretation of the Constitution.[13] There is no need to repeat those arguments here; although the point that a document which must endure into the future should be given interpretations which make it workable in modern Australia and not restricted by the (exclusively well-to-do male) attitudes of a century ago[14] is starkly illustrated by the great distance Australian society and its *mores* have moved from the views of the framers, including the openly racist attitudes which surfaced in some of their discussions of constitutional guarantees.[15]

The material on individual rights in the Convention Debates does, however, serve to reinforce the impression conveyed by the text of the Constitution that it contains few guarantees of individual rights. A recognition of the assumptions upon which the Constitution was based should make judges slow to turn the Constitution to ends which run counter to those assumptions.[16]

QUESTIONING THE DICEYAN PARADIGM

The founders' assumptions of parliamentary sovereignty and responsible government have, for most of this century, been shared by constitutional lawyers and commentators brought up on the theories of the nineteenth-century English constitutionalist A V Dicey.[17] However, in recent years some judges and others have begun to question the applicability of Diceyan notions of parliamentary sovereignty. It has appeared to some that, through rigorous application of party discipline and increasing reliance on expert advice, Parliament has come to be controlled by the Executive rather than the reverse and, therefore, cannot be relied upon to protect the rights of minorities or individuals.[18] Some have realised that Parliament could never have been a protection against what de Tocqueville called 'the tyranny of the majority' and have suggested that Parliament's decisions do not always represent the views of a majority in any

12 *Convention Debates* (Melbourne, 1898) vol IV, 665-7 (Forrest, Carruthers), 672 (O'Connor), 674 (Barton); vol V, 1775 (Cockburn (although the precise concern was arguably misconceived)).

13 Geoffrey Kennett, 'Constitutional Interpretation in the *Corporations* case' (1990) 19 *Federal Law Review* 223, 239-41.

14 Cf *Political Broadcasts* case (1992) 177 CLR 106, 136 (Mason CJ).

15 See, eg, *Convention Debates* (Melbourne, 1898) vol IV, 686-7, concerning whether an 'equal protection' clause would invalidate legislation controlling the employment of 'Chinamen'.

16 Cf *Political Broadcasts* case (1992) 177 CLR 106, 136 (Mason CJ).

17 A V Dicey, *An Introduction to the Study of the Constitution* (1st published 1885); Sir Owen Dixon, 'Two Constitutions Compared' in *Jesting Pilate and Other Papers and Addresses* (1965) 101-2.

18 See, eg, Sir Frank Brennan, 'Courts, Democracy and the Law' (1991) 65 *Australian Law Journal* 32, 34-5; Mr Justice John Toohey, '"A Government of Laws, and Not of Men"?' (1993) 4 *Public Law Review* 158, 163.

event.[19] These perceptions have led to, or perhaps been used to justify, an awakening of judicial interest in the constitutional entrenchment of individual rights.

This has taken place within a broader move by judges to assert the legitimacy of their role as law-makers.[20] In these circumstances the absence of an express Bill of Rights, and the failure of political moves to introduce either a full Bill of Rights or a modest strengthening of existing rights,[21] have ceased to be insuperable obstacles to the development of rights-based limitations on legislative power.

THE EXPRESS RIGHTS

The first and most obvious method for strengthening the constitutional protection of individual rights is to adopt more robust interpretations of the express rights. There is some room for argument about how many express rights the Constitution actually contains.[22] Section 41 might appear on its face to guarantee the right to vote in Federal elections,[23] but the High Court has so far not read it that way.[24] Section 92 in its application to 'trade' and 'commerce' was, until *Cole v Whitfield*,[25] the subject of disagreement as to whether it was designed to eliminate protectionism as between States[26] or was an express guarantee of an individual right to trade across state boundaries.[27]

The Constitution's express rights are generally accepted as being contained in s 51(xxxi) ('just terms' for acquisition of property), s 80 (trial by jury for indictable offences), s 116 (free exercise of religion) and s 117 (protection from discrimination by States on the ground of residence). All of these, except s 117, apply only to Commonwealth laws. Section 117, which is expressed only to apply to the States,[28] is supplemented by ss 51(ii) and 99, which prevent some discriminatory Commonwealth laws. The Court's approaches to these rights have been well documented by other writers,[29] and it is not proposed to rehearse them here. It is appropriate to note, however, that, with the exception of

19 Sir Anthony Mason, 'A Bill of Rights for Australia?' (1989) 5 *Australian Bar Review* 79, 81; Mr Justice Michael McHugh, 'The Law-making Function of the Judicial Process' (1988) 62 *Australian Law Journal* 15, 116, 123; Toohey, above n 18, 172-3.

20 See, eg, McHugh, above n 19; Toohey, above n 18.

21 Peter Bailey, *Human Rights: Australia in an International Context* (1990) 50-6.

22 Cf *Street v Queensland Bar Association* (1989) 168 CLR 461, 521-2 (Deane J).

23 Marcus Einfeld, 'Murphy and Human Rights' in Jocelynne Scutt (ed), *Lionel Murphy: A Radical Judge* (1987) 201-4; Peter Hanks, 'Constitutional Guarantees' in H P Lee and George Winterton (eds), *Australian Constitutional Perspectives* (1992) 95-6.

24 *King v Jones* (1972) 128 CLR 221; *R v Pearson; ex parte Sipka* (1983) 152 CLR 254 (Murphy J dissenting).

25 (1988) 165 CLR 360.

26 See, eg, *R v Vizzard; ex parte Hill* (1933) 50 CLR 30, 71 (Evatt J).

27 See, eg, *O Gilpin Ltd v Commissioner for Road Transport and Tramways (NSW)* (1935) 52 CLR 189, 205-6 (Dixon J); *Samuels v Readers' Digest Association Pty Ltd* (1969) 120 CLR 1, 5 (Barwick CJ).

28 There is a question whether s 117 has any application to the Commonwealth: *Leeth v Commonwealth* (1992) 174 CLR 455, 468 (Mason CJ, Dawson and McHugh JJ).

29 See, eg, Leslie Zines, *The High Court and the Constitution* (3rd ed, 1992) 325-30; Hanks, above n 23.

s 51(xxxi),[30] the express rights have traditionally been narrowly construed and often reduced to merely formal significance; but that recent cases have shown a marked dissatisfaction with the older authorities.[31] While many of those older authorities still stand, there is evidence that the Court is beginning to interpret the express guarantees in the broader manner appropriate to constitutional provisions.

This approach has obvious limitations. In some instances, such as s 80, a strongly rights-oriented reading faces considerable difficulties of language. Moreover, the list of express rights could not by any stretch of language amount to a comprehensive statement of fundamental rights. It is not surprising, therefore, that a Court which appears to be increasingly suspicious of Parliament and the Executive has looked to other methods of constitutionally entrenching individual rights.

RIGHTS IMPLIED FROM SPECIFIC PROVISIONS

The second method of enhancing the protection of rights is to discover guarantees in provisions of the Constitution that do not at first sight appear to be concerned with conferring rights. Since the Constitution is ultimately concerned with providing a system of government for the people, it might be thought that its provisions could often be interpreted so as to enhance individual rights. However, with the exception of the provisions of Chapter III, this method has not been particularly successful.

Political Participation Rights

Although there is no express right to vote in the Constitution, ss 7 and 24 require members of the Commonwealth Parliament to be 'directly chosen by the people'. These provisions might be thought to found an implication that the rights which comprise a fair electoral system — adult suffrage, equal electorates and so on — were guaranteed. However, any such suggestion was dealt a

30 The Court has employed a broad notion of 'property' which encompasses most, if not all, species of valuable rights: *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 285, 290, 295; *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 391; *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 119 ALR 629, 632, 638-9, 641. Traditionally, 'acquisition' was interpreted relatively literally and excluded mere extinction of rights; however, recent decisions have accepted that the extinction of a right may in some circumstances be equivalent to the acquisition of that right (eg where some person obtains a correlative benefit from that extinction). It is also accepted that s 51(xxxi) does not apply to 'acquisitions' which are merely incidental to some general scheme for regulating conduct or adjusting competing claims, or which are clearly authorised by Commonwealth powers and could not sensibly be subject to a requirement of 'just terms'. See *Mutual Pools and Staff Pty Ltd v Commonwealth* (1994) 119 ALR 577, *Georgiadis v AOTC* (1994) 119 ALR 629 and *Re Director of Public Prosecutions; ex parte Lawler* (1994) 119 ALR 655.

31 See, eg, *Church of New Faith v Commissioner for Pay-Roll Tax (Vic)* (1983) 154 CLR 120, where the Court began to develop a more tolerant definition of 'religion'; *Kingswell v R* (1985) 159 CLR 264, 318-19, where Deane J rejected what has become the settled view that s 80 applies only where Parliament has chosen to make an offence triable on indictment (also *Li Chia Hsing v Rankin* (1978) 141 CLR 182, 198 (Murphy J)); *Street v Queensland Bar Association* (1989) 168 CLR 461, where the ludicrously narrow interpretation given to s 117 in *Henry v Boehm* (1973) 128 CLR 482 was overruled.

serious blow by *Attorney-General (Cth) ex rel McKinlay v Commonwealth*,[32] where the High Court upheld Commonwealth electoral legislation that allowed a disparity in the populations of Commonwealth electorates of about 2:1.[33] Although five Justices allowed the possibility that 'grossly disproportionate'[34] electorates might cause a breach of the requirement of s 24, only Murphy J was prepared to strike down the law on the basis that the Constitution guaranteed electoral democracy.[35]

More recently, in the *Political Broadcasts* case,[36] McHugh J used ss 7 and 24 as a basis for holding that the Constitution contained an implied freedom of communication in respect of political matters. In the same case Dawson J, while denying the existence of an implied right, recognised that the requirement that representatives be directly chosen by the people 'must mean a true choice' and therefore limited the extent to which Parliament could restrict political debate.[37] The reasoning of McHugh J could also provide a basis for freedoms of assembly and movement, since they can be seen as essential to proper participation in political debate.

The view of McHugh J illustrates the potential of ss 7 and 24 as a source for the implication of rights. However, that analysis may well have been superseded by the broader implication of the majority in the *Political Broadcasts* case. It would appear that any case which might have been argued on the basis of ss 7 and 24 is now much more likely to be argued on the basis of the broader implication. Such an approach might well produce a different result if the facts of *McKinlay's* case were to come before the Court today.

Peace, Order and Good Government

It is worth mentioning in passing the argument that the grant of power to make laws 'for the peace, order [or 'welfare'] and good government of' the relevant territory[38] in Australian constitutions ('the POGG formula') constitutes a limitation on legislative power of a kind which may protect individual rights: some laws, it has been suggested, may be held to be invalid if they are so manifestly unjust that they cannot be conducive to 'peace, order and good government'.[39]

32 (1975) 135 CLR 1 (*McKinlay*).

33 For analysis see Peter Hanks, 'Parliamentarians and the Electorate' in Gareth Evans (ed), *Labor and the Constitution 1972-1975* (1977) 170-4.

34 Above n 32, 61.

35 Ibid 64.

36 (1992) 177 CLR 106.

37 Ibid 187.

38 The Constitution ss 51, 52; New South Wales Constitution Act 1902 (NSW) s 5; Constitution Act 1867 (Qld) s 2; Western Australian Constitution Statute 1890 (Imp). The Tasmanian and South Australian Parliaments derive their powers from the Australian Constitutions Act 1850 (Imp): see *The Public General Acts of Tasmania (Reprint) Classified and Annotated, 1826-1936* (1936) 823-4, Constitution Act 1934 (SA) s 5; Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 65. The exception is the Victorian Constitution, which empowers the Parliament to make laws 'in and for Victoria': Constitution Act 1975 (Vic) s 16.

39 *Sillery v R* (1981) 35 ALR 227, 234 (Murphy J); *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR

This suggestion has been firmly and, it is submitted, correctly, rejected by a unanimous judgment of the High Court in *Union Steamship Co of Australia Pty Ltd v King*,[40] and is therefore unlikely to become accepted. To regard the POGG formula as a limitation on power would impose an invidious task on the courts.[41] Other constitutional provisions have sometimes involved the High Court in 'political' controversy, but in those situations the Court has been able to justify its decisions by resort to traditional legal reasoning or to policies supposedly embodied in the Constitution (a process which limits the role played by the judges' own predispositions). The POGG formula is not readily susceptible to legal reasoning and it is difficult to discern any policy in it. It is difficult to imagine a decision based on its interpretation being anything more than an assertion of political opinion by a judge.

Section 109 and Popular Sovereignty

Section 109 of the Constitution provides a solution to the problem of inconsistent Commonwealth and state laws by providing that Commonwealth laws shall prevail. In *University of Wollongong v Metwally*[42] Gibbs CJ and Deane J made some comments which suggested that s 109 performed an important function of protecting the individual from the 'injustice' of being required to comply with contradictory laws, and possibly from being subjected to a law which is not able to be known at the time the acts to which it applies are committed.[43] These remarks, and particularly those of Deane J,[44] have sometimes been cited as indications of a new, rights-oriented approach to s 109 and to the Constitution generally.[45]

This emphasis on rights does appear to have influenced the interpretation of s 109 in *Metwally's* case. There, Commonwealth and state anti-discrimination laws had been held to be inconsistent,[46] and the Commonwealth had amended its legislation so as to declare an intention not to exclude the operation of the state legislation. The declaration was expressed to have retrospective as well as prospective effect: it purported to cause the state law to apply during the period in which it had been inoperative.

A majority (Gibbs CJ, Murphy, Brennan and Deane JJ) held that the retrospective validation of the state Act was not effective. Their reasoning characterised the retrospective amendment as an attempt to override s 109 by means of a 'fiction'. This reasoning has been described by Professor Zines as 'difficult to

372, 382-7 (Street CJ), 421-2 (Priestley JA), ('the *BLF* case'); Ian Killey, 'Peace, Order and Good Government: a limitation on legislative competence' (1989) 17 *MULR* 24.

40 (1988) 166 CLR 1, 9-10.

41 See, eg, *R v McChlery* [1912] AD 199, 220-1 (Innes J).

42 (1984) 158 CLR 447 (*Metwally*).

43 Ibid 458, 477.

44 Which were reiterated in *Breavington v Godleman* (1989) 169 CLR 41, 123.

45 See, eg, Bailey, above n 21, 88; Leslie Zines, *Constitutional Change in the Commonwealth* (1991) 42 and Zines, *The High Court and the Constitution*, above n 29, 331-2.

46 *Viskauskas v Niland* (1983) 153 CLR 280.

understand from the viewpoint of pure logic'.[47] As Zines points out, the Commonwealth's power to make retrospective legislation is not denied; nor is its ability to remove an inconsistency by declaring an intention not to cover the field. It would seem to follow that the Commonwealth may, by changing the effect of its law on past events, remove an inconsistency between its law and state law with respect to those events and thereby allow the state law to operate on them. There is no fiction involved in such a retrospective alteration of the law.

It is submitted that the only basis on which the majority view could be correct is that s 109 is a guarantee of an individual right. It must be based on the view that s 109 protects the right, suggested by Gibbs CJ, to know the legal consequences of one's actions at the time those actions are taken. It may be overly charitable to rationalise the majority's view thus, rather than simply to dismiss it as wrong.[48] However, such a rationalisation provides the only plausible justification for the conclusion of the majority. There is, running through their judgments, a strong but generally unarticulated aversion to the retrospective nature of the Commonwealth's amendment.[49] The majority's talk of overriding the Constitution may stem from a desire to prevent one instance of retrospective law-making out of a concern for fairness to the individual citizen.[50]

This does not make the decision any more logical. It is difficult to see why the retrospective removal of inconsistency for s 109 purposes should be distinguished from other retrospective legislation and prevented by a rule of law.[51] (It might be added that the decision did not enhance Mr Metwally's rights: he was denied a remedy for discrimination by the failure of the state law to revive).

Deane J's view of the Constitution as 'ultimately concerned with the governance and protection of the people from whom the artificial entities called Commonwealth and States derive their authority' has also produced the unlikely result that s 90, which makes the power to impose excise duties 'exclusive' to the Commonwealth Parliament, embodies a right. In *Capital Duplicators Pty Ltd v Australian Capital Territory (No 1)*,[52] a majority held that s.90 qualified the Territories power (s 122) and prevented the Parliament empowering a territory legislature to levy excises. Brennan, Deane and Toohey JJ, in a joint judgment, reasoned that s 90 was included 'for the protection of the people of the Commonwealth', including those who resided in an area which became an

[47] Above n 29, 331; see also H P Lee, 'Retrospective Amendment of Federal Laws and the Inconsistency Doctrine in Australia' (1985) 15 *Federal Law Review* 335, 340-1.

[48] Professor Zines attributes the decision to a combination of the 'rights' view and confusion: Zines, *The High Court and the Constitution*, above n 29, 332.

[49] See, eg, *Metwally* (1984) 158 CLR 447, 469 (Murphy J), 472 (Brennan J); see Lee, above n 47, 341.

[50] *Metwally* (1984) 158 CLR 447, 479 (Deane J).

[51] Deane J offered the reason that such an enactment by the Commonwealth reimposes a law as state law: ibid 479. However, while this result may be strange, it does not of itself undermine individual rights. Nor does it threaten the position of the States, which remain free to amend or repeal their own legislation (including while it is inoperative).

[52] (1992) 177 CLR 248.

internal Territory, from unequal excise duties.[53]

The Conferral of Judicial Power on the Courts

The vesting of judicial power in the courts by Chapter III of the Constitution is a rich source of individual rights, not only because of the importance of the exercise of judicial power, but also because the rights sought to be protected by the justice system are so often in the minds of practitioners and judges. Possible implications arise both from the vesting of judicial power generally in s 71 and from the conferral of specific jurisdiction on the High Court in ss 73 and 75. Issues arising from the latter category are more or less confined to the question whether a litigant may insist on being heard in the High Court as opposed to some other court exercising federal jurisdiction.[54] For reasons of space, those issues have been left for another day.

The effect of the vesting of judicial power in the courts by s 71 of the Constitution, as interpreted in cases such as the *Boilermakers'* case,[55] is that judicial power may only be conferred on 'courts', and those bodies may not also be vested with substantial elements of administrative power by the Commonwealth.[56] Judicial power is generally regarded as not susceptible of definitive description;[57] however, as a general rule it involves the conclusive determination, as between identified parties to a controversy, of existing legal rights.[58]

Suggestions that the vesting of judicial power in courts involves a limitation on legislative power, including the power of Parliaments descended from that of the United Kingdom, are not new. In *Liyanage v R*,[59] the Privy Council held that the Constitution of Ceylon established 'a separate power in the judicature' which 'cannot be usurped or infringed by the executive or the legislature'. Retrospective laws governing the sentencing of persons allegedly involved in an abortive *coup d'etat*, which 'constituted a grave and deliberate incursion into the judicial sphere' by depriving the judges of their normal discretion in dealing with those particular persons,[60] amounted to 'legislative judgments'[61] and were held to be beyond the power of the legislature.

In Australia, *Liyanage* was apparently approved, but not applied, by the High Court in *Australian Building Construction Employees and Builders' Labourers*

53 Ibid 279.

54 See, eg, *Smith Kline & French Laboratories (Australia) Ltd v Commonwealth* (1991) 103 ALR 117.

55 *R v Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 (*Boilermakers'* case).

56 The States are, of course, not bound by Chapter III in relation to their own Courts. *Quaere* whether federal jurisdiction could be conferred on a state court which exercised a substantial element of administrative power under state law.

57 See, eg, *Re Tracey, ex parte Ryan* (1989) 166 CLR 518, 537 (Mason CJ, Wilson and Dawson JJ).

58 See, eg, Zines, *The High Court and the Constitution*, above n 29, 151.

59 [1967] 1 AC 259.

60 Ibid 290.

61 Ibid 291, quoting Chase J of the United States Supreme Court in *Calder v Bull* (1799) 3 Dallas 386. See also Sir William Blackstone, *Commentaries on the Laws of England*, vol 1, 44, quoted in *Liyanage*: ibid 291.

Federation v Commonwealth.[62] Earlier, in *Hammond v Commonwealth*,[63] which concerned a witness's privilege against self-incrimination before a Royal Commission, Brennan J raised and left open the question whether 'Parliament could deprive him of that immunity when he stands charged with an offence against a law of the Commonwealth';[64] and in *Actors and Announcers Equity Association v Fontana Films Pty Ltd*,[65] Murphy J held invalid a provision which erected an irrebuttable presumption that a union was involved in the unlawful activities of its members, on the basis that it undermined the exercise of judicial power by the courts.

(i) Ex Post Facto Laws

The question of what limits are imposed on the power of the Parliament by the vesting of judicial power in the courts has arisen in four recent cases. The first of these was *Polyukhovich v Commonwealth*,[66] in which amendments to the War Crimes Act 1945 (Cth) had made certain acts committed outside Australia during the Second World War offences under Commonwealth law. A majority of the High Court held that the legislation was within the external affairs power. The Court was also called on to consider whether the law was invalid by reason of its retroactive operation. It was acknowledged that the power of the Commonwealth Parliament, within its nominated heads of power, is generally as ample as that of the Imperial Parliament (which, it has long been accepted, has power to pass retroactive laws of all kinds).[67] However, Deane and Gaudron JJ held that the retroactive operation of the law rendered it invalid.

The argument of Deane J may be briefly summarised as follows:

- The Constitution is 'structured upon the doctrine of the separation of judicial from legislative and executive powers'.[68] The objective of this separation is the protection of the subject from arbitrary judgment.
- This protection entails the exclusive vesting of judicial power in courts which act *as courts*: Parliament may not exercise judicial power itself or require the courts to exercise their power otherwise than in the judicial mode.
- One of the most important elements of judicial power is the adjudication of the guilt or innocence of a person accused of a criminal offence. This entails the ascertainment of whether 'the accused in fact committed a past act which constituted a criminal contravention of the requirements of a valid law which was applicable to the act at the time the act was done'.[69]
- A law which declares specific persons to be guilty without any trial at all (a 'bill of attainder' or a 'bill of pains and penalties') is plainly a usurpation of judicial power. Where a law makes persons guilty by reference to their having

[62] (1986) 161 CLR 88, 96.
[63] (1982) 152 CLR 188.
[64] Ibid 203.
[65] (1982) 150 CLR 169, 213-4.
[66] (1991) 172 CLR 501 (*Polyukhovich*).
[67] Ibid 534-5 (Mason CJ), 611 (Deane J), 642-4 (Dawson J), 718 (McHugh J).
[68] Ibid 606.
[69] Ibid 610.

committed some past act, so that a trial is needed only to determine whether a person falls within the guilty group, the law interferes with the judicial power by eliminating the question whether what the accused has done was a crime.

- An *ex post facto* criminal law (that is a law which attaches criminal sanctions to acts which were not crimes when committed) is therefore inconsistent with the vesting of judicial power in the courts.

Deane J noted that Chapter III is based on provisions in the US Constitution yet it omits the express prohibition of bills of attainder, but argued that the omission was not significant as the Australian framers omitted most express statements of rights. He also pointed out that in *R v Kidman*,[70] the leading case concerning the Commonwealth's power to make *ex post facto* criminal laws, the effect of Chapter III was not considered.

Gaudron J reached the same conclusion, concentrating on the nature of the power vested in the courts. An essential feature of the judicial power was 'that it be exercised in accordance with the judicial process'.[71] It would be 'a travesty of that process' for a court to be asked to determine legal consequences on the basis of facts which had not occurred. Equally, it would be a travesty of the judicial process if, in proceedings to determine whether a person had committed an act proscribed by and punishable by law, the law proscribing and providing for punishment of that act were a law invented to fit the facts after they had become known.[72] Her Honour noted that the significance of Chapter III had not been considered in *Kidman*, and also distinguished that case on the basis that the provision at issue there had simply re-enacted in statutory form an element of the common law.[73]

Of the majority who held that the impugned law did not offend against Chapter III, Toohey J came closest to the position of Deane and Gaudron JJ. He expressed the view that 'bills of attainder' (which, as he used the expression, included bills of pains and penalties) contravened Chapter III, but did not consider that the impugned law answered that description.[74] Turning to retroactive criminal laws generally, he observed that the 'general abhorrence' of such laws has its source in 'fundamental notion[s] of justice and fairness'.[75] 'Prohibition against retroactive laws' protected both the individual accused and the public interest and required 'fundamental protection'.[76] The process by which a political principle was converted into a rule of law was not spelt out, and neither were the criteria for determining when the principle can be displaced.

Toohey J concluded that '[i]t is not the case that a law (even a criminal law) that operates retroactively thereby offends Ch III'. On the other hand, '[i]t is

[70] (1915) 20 CLR 425.
[71] (1991) 172 CLR 501, 703.
[72] Ibid 704-5.
[73] Ibid 705.
[74] Ibid 685-6.
[75] Ibid 687-8.
[76] Ibid 688-9.

conceivable that a law, which purports to make criminal conduct which attracted no criminal sanction at the time it was done, may offend Ch III, especially if the law excludes the ordinary indicia of judicial process.'[77] This conclusion leaves important questions unanswered. However, his Honour found it unnecessary to pursue the topic further because the impugned law was not retroactive 'in any offensive way';[78] the conduct to which it attached criminal sanction had always amounted to murder and related offences under Australian law and (it could be assumed) the law of the place where the conduct took place.

Mason CJ, Dawson and McHugh JJ all cited *Kidman*, an authority directly on point which they had not been asked to reconsider.[79] However, all went beyond reliance on this authority and argued that a retroactive criminal law of the kind involved in the amendments to the War Crimes Act was not a usurpation of judicial power.[80] They did, however, recognise that some retroactive laws, including bills of attainder, would infringe Chapter III and therefore be invalid.[81]

The conclusion of Mason CJ, Dawson and McHugh JJ has much to recommend it. First, as a matter of interpretation, the omission of an express prohibition of *ex post facto* laws from the Australian Constitution must be significant:[82] in the absence of an express limitation, the logical course is to interpret the powers of the Commonwealth Parliament by reference to those of the Imperial Parliament. Secondly, as a matter of principle, there is an important difference between a bill of attainder, which is truly a legislative declaration of guilt, and a law which simply attaches penal consequences to past conduct (except, perhaps, for the extreme case in which the conduct penalised is known to have been engaged in only by an identified group of persons). Under the latter law, as in the case of a purely prospective law, a court determines whether the accused has committed the alleged acts and whether they constitute a crime. The 'judicial' character of this determination is not fundamentally altered by the fact that the law to be applied to those acts is not the law which would have been applied had the trial taken place immediately.[83] Thirdly, as a practical matter, legislation has proceeded for many years on the assumption that retroactive criminal laws could be enacted. To overturn that assumption would not only cause some disruption, but alter by judicial *fiat* a state of affairs which has existed with broad community acceptance for decades.

Despite the rejection by a majority of the view advanced by Deane and Gaudron JJ, the decision in *Polyukhovich* can be seen as a recognition that the vesting of judicial power in the courts gives rise to a guarantee of individual rights. The Constitution nowhere expressly forbids bills of attainder; yet a clear

[77] Ibid 689.
[78] Ibid 690.
[79] Ibid 538-9 (Mason CJ), 645 (Dawson J), 717-8 (McHugh J).
[80] Ibid 536-7 (Mason CJ), 647 (Dawson J), 721 (McHugh J).
[81] Ibid 536, 539 (Mason CJ), 647-8 (Dawson J), 721 (McHugh J).
[82] Ibid 536 (Mason CJ), 720 (McHugh J).
[83] Ibid 533 (Mason CJ), 647 (Dawson J).

majority considered that such legislation would probably be invalid.[84] McHugh J described the effect of Chapter III as a 'constitutional guarantee'.[85] Toohey J also saw the principle against retroactivity as a protection of individual rights,[86] and appeared to leave open the broader question whether the Court could invalidate a law 'because it is unjust'.[87]

(ii) Discrimination

In *Leeth v Commonwealth*,[88] the impugned law provided that, in setting the non-parole period for an offender sentenced under Commonwealth law, courts were to take into account the factors that were applied in setting a non-parole period for an equivalent sentence under the law of the State in which the offender was sentenced. Gaudron J regarded the law as conferring a power whose exercise was discriminatory between individuals on the basis of where they happened to be tried: consistently with her view in *Polyukhovich*, she held that this was inconsistent with the judicial process and incompatible with the conferral of judicial power on the courts.[89] Deane and Toohey JJ, in a joint judgment, also held the law invalid. They considered that the 'doctrine of legal equality' was 'implicit' in the vesting of judicial power in the courts,[90] and the provisions of Chapter III therefore constituted one of the factors which led them to consider that the Constitution 'adopted' that 'doctrine' (the implications of which are discussed below).

A majority, however, considered that the law was not an interference with judicial power. Mason CJ, Dawson and McHugh JJ accepted that a law which prejudged an issue in proceedings, or required a court to act contrary to the principles of natural justice, might be inconsistent with the exercise of judicial power. However, they did not regard the legislation in question as offending any general principle of equality or requiring the performance by the courts of a function which could be described as non-judicial. Rather, it reflected the Commonwealth applying its laws through state legal systems; a development that was clearly envisaged in the Constitution.[91]

Brennan J said that the argument for invalidity would have had 'much force' if the law had provided for different *maximum* sentences for the same offence depending where sentencing took place: the maximum sentence defines the extent of judicial power and a difference would offend the 'constitutional unity' of the Australian people.[92] However, the law at issue, in his view, did not concern the exercise of judicial power; rather, it defined the executive power to

[84] Also *Leeth v Commonwealth* (1992) 174 CLR 455, 470 (Mason CJ, Dawson and McHugh JJ).
[85] (1991) 172 CLR 501, 719.
[86] Ibid 688-9.
[87] Ibid 687.
[88] (1992) 174 CLR 455 (*Leeth*).
[89] Ibid 502-3.
[90] Ibid 486.
[91] Ibid 468-71.
[92] Ibid 475.

release a prisoner on parole.[93] It did not discriminate in the maximum penalties to which it exposed citizens and the regime it created was an 'inevitable consequence' of the constitutional regime whereby Commonwealth prisoners are incarcerated in state and territory prisons. If a discriminatory law was otherwise within power, the courts had a duty to administer that law.[94]

It is submitted that the majority position on the nature of judicial power in *Leeth* is correct (although, given that the impugned law concerned non-parole periods which were set by the courts, it is difficult to follow Brennan J's view that the law did not relate to judicial power). While it would be inconsistent with the notion of judicial power to require a court to perform its function in a manner that discriminated between people illogically or unjustifiably (for example, if Tasmanians were denied the right to call witnesses), the same argument does not apply to a law which imposes substantive rights and liabilities (including penalties) in a discriminatory manner: the duty of the courts is to apply such laws according to their tenor.[95] Furthermore, even if applying different sentencing regimes is seen as an attempt to direct the courts in the exercise of those powers, some such directions must be justifiable: the aim of allowing Commonwealth offenders (all of whom are held in state or territory prisons) to be dealt with in the same manner as other prisoners in the relevant State or Territory would appear to fall into that category.

(iii) Imprisonment

In *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*,[96] the Court considered amendments to the Migration Act 1958 (Cth) which provided for a 'designated person' (a non-citizen who fulfilled certain criteria and had been given a designation by a Commonwealth officer) to be held in custody until he or she was either deported or granted the right to remain in Australia. One of the provisions inserted by the amendments, s 54R, provided that 'a court is not to order the release from custody of a designated person'.

In a joint judgment Brennan, Deane and Dawson JJ noted that the 'most important' of judicial functions was the adjudgment and punishment of criminal guilt.[97] That function, because of the provisions of Chapter III, cannot be vested in the executive. Their Honours considered that, because detention in custody is normally by nature punitive, it would be beyond Commonwealth legislative power to authorise the detention of a citizen otherwise than by order of a court except in particular well-recognised circumstances (for example custody pending trial, mental illness or infectious disease). Citizens, at least in peace-time, therefore have 'a constitutional immunity from being imprisoned by

[93] Ibid 476.

[94] Ibid 480.

[95] Provided, of course, that such laws are within a head of power and do not infringe any of the constitutional guarantees against discrimination: eg ss 51(ii), 92, 99, 117.

[96] (1992) 176 CLR 1.

[97] Ibid 27.

Commonwealth authority except pursuant to an order by a court'.[98]

That immunity, however, did not fully extend to non-citizens. The traditional executive power to exclude or deport aliens could validly be supplemented by a power to detain a person for the purposes of expulsion or deportation: such detention was not punitive in nature and not an exercise of judicial power.[99] On this basis their Honours held the provisions for detention of designated persons to be valid. Other members of the Court reached the same view, but did not find it necessary to consider any general immunity from imprisonment.[100]

As to s 54R, however, the Court was divided. Mason CJ, Toohey and McHugh JJ construed s 54R as preventing the release only of a person *lawfully* held in custody.[101] On this view it did not prevent a court from determining whether a person was lawfully held and ordering her release if she was not. Gaudron J appeared to consider that s 54R exceeded the Commonwealth's power with respect to 'aliens'. Brennan, Deane and Dawson JJ were able to point to circumstances in which a person might be 'designated' and yet entitled to release and where s 54R, read literally, would prevent that release. On this basis, they considered that s 54R purported to derogate from the express vesting of jurisdiction in the High Court by s 75 of the Constitution and, in respect of all courts of competent jurisdiction, to direct those courts in the exercise of that jurisdiction. It was therefore an interference with judicial power.

If s 54R is read as it was by Brennan, Deane and Dawson JJ, the conclusion that it is inconsistent with Chapter III is unexceptionable. The alternative reading is perhaps more convincing; however, since on that view, s 54R added nothing to the other provisions of the Act, it is unclear whether anything turns on the point. Their Honours' reasoning on the other issues is perhaps more significant. In reaching the view that the detention by the executive of non-citizens for the purposes of deportation did not involve any interference with the judicial power, there was no need to declare a general immunity of the citizen from detention not ordered by the courts. That declaration (albeit hedged with some exceptions) involves a large step of reasoning from what is usually regarded as the central concept of judicial power (the determination of existing legal rights); and the assumption on which it is based (that imprisonment is generally punitive) is undermined by the exceptions which their Honours recognise. While it leads to a generally attractive conclusion, it is at least arguable that such a step should not be taken by a court unless it is necessary to decide a case.

(iv) Legal Representation and a Fair Trial

The rights potentially derived from Chapter III are further illustrated by *Dietrich v R.*[102] Olaf Dietrich was convicted of several serious offences after a

98 Ibid 28-9.
99 Ibid 32.
100 Ibid 10 (Mason CJ), 50 (Toohey J), 55-8 (Gaudron J), 69-74 (McHugh J).
101 Ibid 12-4 (Mason CJ), 50-1 (Toohey J), 69 (McHugh J).
102 (1992) 177 CLR 292 (*Dietrich*).

lengthy trial in which he was unrepresented: he did not have the resources to pay for representation and was granted legal aid only for a guilty plea. The High Court rejected his argument (through counsel) that he had a right to be provided with counsel at public expense if he was to be tried. However, a majority held that his trial had miscarried because a conviction would infringe his right not to be convicted except after a fair trial. The majority accepted the right to a fair trial as 'fundamental' to the criminal justice system[103] and considered that, except in extraordinary circumstances, the trial of an unrepresented person for a serious offence (where the person wished to be represented) would for these purposes be unfair and a conviction resulting from it would be quashed.[104]

The right established in *Dietrich's* case is a common law right. However, Deane and Gaudron JJ expressed the view that the right to a fair trial is entrenched, in relation to offences under Commonwealth law, by Chapter III of the Constitution.[105] It would seem, therefore, that at least two members of the Court would hold a law invalid if it required an offence under Commonwealth law to be tried in a manner which the Court regarded as unfair. Despite *dicta* acknowledging that a trial is not unfair merely because it is not perfect, it is difficult to imagine the Court sanctioning a procedure far removed from the present form of criminal trials. The right established in *Dietrich's* case is also significant in that, if it is accepted that the prosecution of persons accused of crimes is a duty of the executive, the right imposes, at least *de facto*, a positive duty on the executive to provide counsel for some of those persons.

Rights Implied from the Structure and Context of the Constitution

The third method of strengthening the protection of individual rights is to make more general implications. These may be based on the structure of the constitutional text and the political system it establishes; the assumptions which supposedly underlay its creation; the common law traditions upon which it was grafted; generalisations about the society in which the Constitution operates; or some combination of these factors.

The drawing of implications from the structure and background of the Constitution is not itself new: the High Court has long recognised that the federal structure of the Constitution forms the basis for some protection of the States from Commonwealth laws which discriminate against them or jeopardise their existence as such.[106] However, as Professor Zines has pointed out,[107] the implication from federalism applies to a limited range of issues, is reinforced by specific provisions and comes into play rarely; while an implication based on a

[103] Ibid 299 (Mason CJ and McHugh J), 326 (Deane J), 353 (Toohey J), 362 (Gaudron J); see also *Jago v District Court of New South Wales* (1989) 168 CLR 23.

[104] (1992) 177 CLR 292, 311, 315 (Mason CJ and McHugh J), 337 (Deane J), 357 (Toohey J), 374 (Gaudron J); cf *McInnis v R* (1979) 143 CLR 575.

[105] Ibid 326 (Deane J), 362 (Gaudron J).

[106] *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192.

[107] Zines, *The High Court and the Constitution*, above n 29, 338.

general notion of 'freedom' or 'equality' would call into question most of the political decisions of the Parliament and would supply few criteria for their assessment.

Individual Rights as a Factor in Characterisation

Issues of proportionality, reasonableness and so on will often be relevant to the question whether a law falls within Commonwealth legislative power, and manifest unfairness and infringement of fundamental freedoms have been seen as an indicator of a lack of 'reasonable connexion' to the relevant head of power. A recent example is *Davis v Commonwealth*,[108] where an attempt to prohibit the use of certain words and expressions without the consent of the Bicentennial Authority was held invalid largely because it contravened traditional standards of freedom of expression.[109] Similar reasoning was employed by Mason CJ, Dawson and McHugh JJ in *Nationwide News Pty Ltd v Wills*.[110]

The limitations of this technique are obvious. Most Commonwealth legislative powers, according to settled principles of interpretation, involve no questions of reasonableness or degree except in their 'incidental' areas. For instance, in *Seamen's Union of Australia v Utah Development Co*,[111] where the law under challenge (s 45D of the Trade Practices Act 1974 (Cth)) in effect forced workers to take part in trade and commerce, Murphy J suggested that he would have been receptive to an argument that the law was not within power because it infringed fundamental freedoms in this respect. There are strong policy arguments for a constitutional prohibition of civil conscription; however, ordinary principles of interpretation dictated that the law was one with respect to trade and commerce and therefore could not be invalidated as not falling within s 51(i).[112]

An Early Case

The case of *Re Smithers; ex parte Benson*[113] concerned the extent to which the power of the States to control the influx of members of the 'criminal classes' had survived federation. A New South Wales law made it an offence for persons convicted of certain crimes in other States to enter the State. In a bench of four, Isaacs and Higgins JJ held that the law contravened the freedom of 'intercourse' in s 92. Isaacs J expounded the view which was to become established as orthodox following the *Engineers'* case, arguing that the Court was restricted to the text of the Constitution in its reasoning.[114] Griffith CJ and Barton J held the law to be invalid on the basis that the retention by the States of the full 'police

108 (1988) 166 CLR 79.
109 Ibid 116 (Brennan J), 99-100 (Mason CJ, Deane and Gaudron JJ).
110 (1992) 177 CLR 1.
111 (1978) 144 CLR 120.
112 Cf Zines, *The High Court and the Constitution*, above n 29, 333-4.
113 (1912) 16 CLR 99 (*Smithers*).
114 Ibid 112.

power' was inconsistent with the existence of the Commonwealth. They adopted the reasoning of the United States Supreme Court in *Crandall v Nevada*,[115] holding that the rights which were necessarily vested in the federal government to enable it to function extended also to the citizen. These included the right 'to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it; to seek its protection, to share its offices, to engage in administering its functions' as well as access to the organs of federal government throughout the States.[116]

Smithers' case illustrates well the methodological difference between the original members of the Court and the later appointees, particularly Isaacs J, in the years preceding the *Engineers'* case. The decision in the *Engineers'* case was important not only for debunking the notion of 'reserved powers' of the States, thereby setting the interpretation of the Constitution on a generally centralist course, but also for establishing what has been described as a 'literalist' orthodoxy in Australian constitutional interpretation.[117] The discarded methodology of the original Court was, as *Smithers* demonstrates, capable of drawing implications from the Constitution in favour of the Commonwealth as well as the States.

Despite occasional judicial pronouncements on the acceptability of making implications from the general terms of the Constitution,[118] the Court has, until relatively recently, generally adhered to the *Engineers'* credo of seeking answers in the express terms of the constitutional text. Such a methodology is not favourable to the implication of individual rights. It is interesting, although ultimately pointless, to speculate what might have happened had the earlier approach, with its greater readiness to draw implications, survived (although the pre-*Engineers'* doctrine would have produced a rather less powerful Commonwealth Parliament with, arguably, less need for restriction).

The Theory of Murphy J

In a series of cases between 1975 and 1986 Murphy J articulated a view of the Constitution as guaranteeing certain individual rights which were not derived from particular provisions but from broader considerations. In some important respects those views prefigure the approaches of the Court in recent cases.

Murphy J's theory is best illustrated in *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth*,[119] in which it was contended that s 92

115 6 Wall 35 (1867), especially 44 (Miller J).

116 (1912) 16 CLR 99, 108 (Griffith CJ, quoting *Crandall*), 109-10 (Barton J).

117 Greg Craven, 'The Crisis of Constitutional Literalism in Australia' in H P Lee and George Winterton (eds), *Australian Constitutional Perspectives* (1992) 2-7.

118 *McGraw-Hinds (Australia) Pty Ltd v Smith* (1979) 144 CLR 633, 668-70 (Murphy J). The principle enunciated by Griffith CJ and Barton J in *Smithers'* case itself was considered in *Pioneer Express Pty Ltd v Hotchkiss* (1958) 101 CLR 536. In *Pioneer*, Dixon CJ and Menzies J confined themselves to saying that, if the suggested right did exist, the law in question did not interfere with it (550, 566). Taylor J had 'no doubt that some such implication is clearly justifiable'; however, he also thought that the law in question did not impair the right and that it was therefore unnecessary to consider its extent (560).

119 (1977) 139 CLR 54.

conferred a right to conduct interstate air services. Murphy J considered that s 92 did not confer such a right, but that it did not follow that freedom of intercourse was not guaranteed by the Constitution. In a passage which strikingly anticipated the *Political Broadcasts* case, he continued:

> In my opinion the concept of the Commonwealth and the freedom required for the proper operation of the legislative, executive and judicial branches in the democratic society contemplated by the Constitution necessitate the implication of such a guarantee....
>
> 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 any 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 in the Constitution...)[120]

These freedoms, he said, were 'not absolute, but nearly so'. They were 'subject to necessary regulation' but could not be restricted by legislation except for 'compelling reasons' (such as the requirements of quarantine and criminal justice and, in the case of broadcasting, the physical limits on the number of stations which can broadcast simultaneously).[121]

In other cases his Honour proposed various individual freedoms based on a view of the Constitution as the Constitution of a 'free society', based on responsible government and democratic principles.[122] These included freedoms of movement and communication and a guarantee against slavery or serfdom.

Miller v TCN Channel Nine Pty Ltd[123] was the only case decided during Murphy J's lifetime in which other Justices directly addressed an argument based on his theory of implied rights. None thought it worthy of serious consideration.[124]

The theory of Murphy J may be criticised on the ground that the resulting doctrine is open-ended and the content of the rights secured by it dependent on the judge's personal views about what fundamental human freedoms involve. Only the most general suggestions were given as to how implied freedoms are identified, and no guidance was offered on the question of what kind of regulation could validly infringe upon a right. The failure to move from sweeping rhetoric to detailed prescription is explained partly by the fact that doctrines such as these normally develop through series of decisions rather than springing forth fully formed. In all of the cases in which he articulated his

120 Ibid 87-8.

121 Ibid 88.

122 See, eg, *R v Director-General of Social Welfare for Victoria; ex parte Henry* (1975) 133 CLR 369, 388; *Buck v Bavone* (1976) 135 CLR 110, 137; *Uebergang v Australian Wheat Board* (1980) 145 CLR 266, 311; *McGraw-Hinds (Australia) Pty Ltd v Smith* (1979) 144 CLR 633, 670; *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556.

123 (1986) 161 CLR 556 (*Miller*).

124 Ibid 569 (Gibbs CJ); 579 (Mason J); 615 (Brennan J); 626 (Deane J); 636 (Dawson J).

theory Murphy J was a lone voice: his theory never formed part of the reasoning of a majority deciding a concrete result. Indeed, the theory was not always essential to Murphy J's own conclusion. As will be seen, however, an approach remarkably similar to that of Murphy J has gained the support of a majority of the Court and may see the development of a fully-fledged jurisprudence of implied rights.

The Disenchantment of Formalism

During the 1980s some members of the Court began to signal that they might be prepared, in appropriate circumstances, to find guarantees of individual rights which were not embodied in specific constitutional provisions. Speeches and papers by members of the Court suggested a growing interest in rights and in judicial law-making,[125] although the rush to embrace individual rights was not unanimous.[126] Hints were also given from the bench. In *Queensland Electricity Commission v Commonwealth*,[127] discussing the implied limitation on Commonwealth power arising from the federal system, Deane J described the preclusion of discrimination against a particular State as:

> within the preclusive scope of a related, or perhaps comprehensive, restraint upon Commonwealth powers which is arguably implicit in the written words of the Constitution. That other arguable restraint would arise as an implication of the underlying equality of the people of the Commonwealth under the law of the Constitution.[128]

In *Building Construction Employees and Builders Labourers' Federation of New South Wales v Minister for Industrial Relations*,[129] Street CJ, sitting in the New South Wales Court of Appeal, expressed a 'strong affinity' for attempts to revive the spirit of Sir Edward Coke's assertion in *Dr Bonham's* case that 'the common law will control Acts of Parliament', and adjudge an Act to be 'utterly void' if it is 'against common right and reason, or repugnant, or impossible to be performed'.[130] In *Union Steamship Co of Australia Pty Ltd v King*,[131] the High Court firmly rejected Street CJ's suggestion of limitations on legislative power based on the words 'peace, order and good government' in constitutional grants of power. However, the Court deliberately and tantalisingly went on to remark:

> Whether the exercise of that legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government and

125 Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation', above n 5; Sir Anthony Mason, 'Future Directions in Australian Law' (1987) 13 *Monash Law Review* 149, 162; McHugh, above n 19.

126 Justice Brennan adhered to an orthodox view of the courts' capacity to deal with oppressive laws in his Blackburn Lecture, above n 18, 37-8.

127 (1985) 159 CLR 192 (*Queensland Electricity Commission*).

128 Ibid 247-8.

129 (1986) 7 NSWLR 372, 385-7.

130 (1610) 8 Co Rep 107a, 108a; 77 ER 638, 652.

131 (1988) 166 CLR 1.

the common law is another question which we need not explore.[132]

Toohey J struck a similar note in *Polyukhovich*, where he raised and left open the question whether the Court could strike down a law because it was 'unjust'.[133]

Dicta of courts in other countries added fuel to the fire. Australian judges are of course not unaware of the constitutional jurisprudence of the United States which, although built on a written Bill of Rights, has made frequent use of relatively bold implications derived from the structure of the federation and the nature of society.[134] In Britain there have been occasional fleeting suggestions that the doctrine of parliamentary sovereignty has limits.[135] These dicta do not directly challenge Lord Reid's denial in *British Railways Board v Pickin*[136] that British courts have any power to 'disregard' Acts of Parliament: they can be rationalised as referring to the interpretation of statutes and, in any event, have not found many overt supporters among the Law Lords.[137] However, these mild assertions of a role for the courts in protecting individual rights may have helped to give courage to Australian judges.

The spirit of Dr Bonham has also walked the land in New Zealand. In a series of judgments between 1979 and 1984 in that country's Court of Appeal, Cooke J explored the suggestion that there are 'common law rights' which go 'so deep that even Parliament cannot be accepted by the Courts to have destroyed them'.[138] Cooke J's remarks do not appear to have formed part of the *ratio* of any decision or been taken up by other judges in New Zealand. However, they too may have contributed to the slow emboldening of the Australian judiciary.

A movement away from formalistic jurisprudence during this period has been noted by some commentators in the High Court's approach to constitutional questions in general.[139] The High Court has been seen as retreating from the assumption that the text of the Constitution was capable of yielding a single clear meaning and as adopting interpretations which it saw as giving effect to the underlying purpose or function of constitutional provisions. In some cases the Court has flirted with doctrines based on the supposed intentions of the

132 Ibid 10.

133 (1991) 172 CLR 501, 687.

134 See, eg, *Crandall v Nevada* 6 Wall 35 (1867); *Griswold v Connecticut* 381 US 479 (1965); the *BLF* case (1987) 7 NSWLR 372, 404 (Kirby P).

135 *Vestey v Inland Revenue Commissioners* [1980] AC 1148, 1172 (Lord Wilberforce); *R v Secretary of State for the Home Department; ex parte Brind* [1991] 1 AC 696, 748; also *Green v Mortimer* (1861) 3 LT 642, 643 (Lord Campbell LC); *Oppenheimer v Cattermole (Inspector of Taxes)* [1976] AC 249, 278.

136 [1974] AC 765, 782.

137 Cf *R v Secretary of State for the Home Department; ex parte Brind* [1991] 1 AC 696, 750 (Lord Templeman).

138 *Fraser v State Services Commission* [1984] 1 NZLR 116, 121; *L v M* [1979] 2 NZLR 519; *Brader v Ministry of Transport* [1981] 1 NZLR 73; *New Zealand Drivers' Association v New Zealand Road Carriers* [1982] 1 NZLR 374, 390; *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, 398.

139 See, eg, Craven, above n 117; Zines, *Constitutional Change in the Commonwealth*, above n 45, 64; Zines, *The High Court and the Constitution*, above n 29, 359-62.

Constitution's framers.[140] In others it has considered laws by reference to their practical operation as against purposes which the Court has ascribed to constitutional provisions in an attempt to give them a sensible operation in modern Australia.[141] By the early months of 1992 there was a growing perception among constitutional commentators of 'restlessness' in the High Court and an expectation that the Court, given an opportunity, would take an important step in the implication of individual rights.[142]

Deane and Toohey JJ and the Doctrine of Legal Equality

The notion of 'equality' as a limitation on legislative power, hinted at by Deane J in the *Queensland Electricity Commission* case,[143] appeared again in the joint judgment of Deane and Toohey JJ in *Leeth*[144] (which was discussed above in relation to judicial power). Their Honours rejected the argument, based on the familiar *expressio unius* rule of statutory interpretation,[145] that the presence of a number of express rights in the Constitution showed an intention not to incorporate further rights. The founders, they said, had chosen to incorporate fundamental doctrines by implication: arguments in the Convention Debates that the express guarantees were 'unnecessary' were cited in support of this proposition.[146]

Among the 'fundamental constitutional doctrines', existing when the Constitution was adopted, which the Court should take into account was the 'doctrine of legal equality'. This doctrine has two elements: the subjection of all persons to the same law; and the equality of all persons under the law and before the courts.[147] The common law, their Honours said, discriminated between persons 'by reference to relevant differences and distinctions, such as infancy or incapacity, or by reason of conduct which it proscribes, punishes or penalizes'.[148]

Deane and Toohey JJ found several reasons for concluding that the Constitution had 'adopted' this doctrine by implication. First, the conceptual basis of the Constitution was the 'free agreement' of 'the people', implicit in which was the equality of the people as parties to the compact. (The fact that the 'people' who were entitled to vote on the matter excluded women and Aboriginal people in several Colonies was apparently not significant). Secondly, the separation of powers and the vesting of judicial power in the courts meant

140 *Cole v Whitfield* (1988) 165 CLR 360, 387-92; *Port McDonnell Professional Fishermen's Association v South Australia* (1989) 168 CLR 340, 376-8; *New South Wales v Commonwealth* (1990) 169 CLR 482 (*Corporations* case).

141 See, eg, *Phillip Morris Ltd v Commissioner of Business Franchises (Vic)* (1989) 167 CLR 389; *Street v Queensland Bar Association* (1990) 168 CLR 461.

142 See, eg, Zines, *The High Court and the Constitution*, above n 29, 337; Craven, above n 117, 15.

143 See above n 128 and accompanying text.

144 (1992) 174 CLR 455.

145 *Expressio unius est exclusio alterius* (express inclusions mean implied exclusions): see Donald Gifford, *Statutory Interpretation* (1990) 27-9.

146 (1992) 174 CLR 455, 484-5.

147 Ibid 485.

148 Ibid 485-6.

that judicial power must be exercised in accordance with normal curial processes. Thirdly, once the *expressio unius* argument is rejected, it can be seen that the presence of some provisions which 'reflect the doctrine of legal equality' supports the existence of that doctrine as a general underpinning of the Constitution.[149]

If the 'doctrine of legal equality' consisted of applying the same body of laws to all persons, and applying them through neutral curial processes, all of this would be unexceptionable. It is a relatively simple matter, and eminently justifiable on policy grounds, to infer such a doctrine from Chapter III. Such a doctrine is essentially procedural: the courts are to be required to apply the same body of laws to all persons. It has nothing to say about a law which brings about different results for different people: it does not prevent such a law being enacted, but requires a court to apply that law to all according to its terms.

The 'doctrine' of Deane and Toohey JJ, however, makes no distinction between substantive and procedural rules, as is shown by their Honours' description of the common law quoted above and by the kinds of discrimination their doctrine prohibits. It proscribes laws which offend against the principle of 'equality', although it is not infringed by laws which discriminate between persons on grounds which can reasonably be seen as 'a rational and relevant basis' for discrimination. Most laws discriminate between people but, provided that the discrimination 'does not involve discrimination of a kind that infringes their inherent equality as people of the Commonwealth, such laws will not infringe the doctrine of equality under the law'.[150] Apart from the circularity in this reasoning, it converts a doctrine of equality *before* the law into one of equal treatment *by* the law. Several criticisms may be made.

First, the framers of the Constitution and the common law are unlikely and unwilling recruits to the cause of individual rights. The framers clearly did assume the existence of principles such as responsible government and the rule of law; however, the record of the Convention debates strongly suggests that they also regarded Parliament as the appropriate forum for deciding questions of 'equality' and 'discrimination'. The framers appeared to have no difficulty, for example, with racially discriminatory employment laws.[151] Their statements as to the 'necessity' of express guarantees say more about their views on the desirability of guarantees than their theories as to the doctrines inherent in the instrument. As to the common law, it may embody admirable theoretical guarantees of procedural equality, but it does not have a distinguished record as a guarantor of equality for women or religious minorities.[152]

Secondly, the whole purpose of law-making power is to bring about different results in different circumstances, based on the law-makers' conclusions as to appropriate criteria. Some restrictions on the ways in which laws may discrimi-

149 Ibid 487.

150 Ibid 488-9.

151 *Convention Debates*, above n 15.

152 See below n 199. Deane and Toohey JJ went some way to acknowledging this: *Leeth* (1992) 174 CLR 455, 486.

nate are set out in the Constitution, and others are arguably implicit in its provisions;[153] however, where the Constitution grants law-making power there is no warrant for the imposition of a general rule that 'equality' must be preserved.[154]

Thirdly, apart from discrimination which was contemplated in grants of legislative power and other provisions,[155] the identification of 'rational' and 'relevant' discrimination is, it is submitted, a somewhat mysterious process which, in effect, provides a recipe for overturning laws which the judges consider unfair. Its criteria are at least as indeterminate as those of Murphy J's theory and, in going well beyond what is required for a 'democratic society', less soundly based. It provides no coherent basis for limiting legislative power.

Freedom of Political Communication: The Nationwide News and Political Broadcasts Cases

The facts of these cases are well known. Very briefly, in the *Nationwide News* case the Court overturned a provision of the Industrial Relations Act 1988 (Cth) which prohibited acts likely to bring the Industrial Relations Commission or its members into disrepute, even if those acts amounted to justified criticism. Mason CJ, Dawson and McHugh JJ based their decision on analysis of the 'incidental' area of the industrial relations power. Other members of the Court based their decision on the existence of an implied freedom of political communication said to arise from the principle of 'representative democracy' which underlays the Constitution. In the *Political Broadcasts* case six Justices (all except Dawson J) recognised the existence of the implied freedom. On that basis five (all except Brennan and Dawson JJ) held invalid amendments to the Broadcasting Act 1942 (Cth) which prohibited paid political advertising in the electronic media during election periods and required broadcasters to make 'free time' available to candidates and parties in accordance with the legislation. The purpose of the present discussion is to consider the implications of the Court's reasoning for the interpretation of the Constitution.

(i) The Basis of the Implied Freedom

The approach of Mason, Brennan, Deane, Toohey and Gaudron JJ, eschewing the more 'textual' approach of McHugh J,[156] may have implications for the scope of the freedom. It suggests a preparedness to draw implications from broad, general concepts and may set a precedent for the finding of other implied rights and freedoms in the Constitution.

In setting out their reasons for finding the implied freedom, the majority was clearly concerned not to establish a mode of reasoning which could be criticised as giving judges the power to frustrate Parliament's will on the basis of personal

153 See, eg, ss 7 and 24, discussed above.

154 Cf *Leeth* (1992) 174 CLR 455, 467-8 (Mason CJ, Dawson and McHugh JJ).

155 Ibid 489 (Deane and Toohey JJ).

156 See above n 36 and accompanying text.

views as to what is fair and just.[157] Their judgments set some limits which are intended to preclude a forensic free-for-all in the creation of implied rights.

The implication is said to be drawn from the Constitution itself rather than from the nature of the society in which the Constitution operates.[158] This would appear to be an important distinction from the theory of Murphy J and to limit the potential for the implication of other freedoms. The distinction is perhaps not as definite as might be thought, since it is difficult to draw a boundary between implications drawn from the structure of the Constitution and those drawn from the institutional structure and expectations which have grown up in response to it.[159] However, Murphy J himself was arguably referring to Australian society to the extent that it was a product of the Constitution (its political institutions and systems) rather than attempting to encapsulate some sort of spirit of that society.[160] Although the Court's location of the implied freedom in the Constitution itself may help to limit any tendency for judges to strike down legislation which they simply think unjust or see as abrogating human rights, it is difficult to draw a clear boundary around the rights which can be implied from the notion of representative government in the Constitution itself.

There were also statements which suggested a stringent test for implications from the Constitution. In an evident attempt to head off criticism that the Court's reasoning would lead to the judicial creation of a Bill of Rights, Mason CJ said that an implication could be drawn from the overall structure of the Constitution, rather than the terms of a particular provision, only if it was necessary to preserve the integrity of that structure.[161] Implications must 'inhere' in the instrument,[162] or be part of a 'fundamental constitutional doctrine' which is 'assumed in the Constitution' or is 'taken to be so obvious that detailed specification is unnecessary'.[163] Three sources of structural implications were suggested: the federal system, the separation of powers (particularly judicial power) and representative government.[164]

The basis for the implied freedom nevertheless gives it considerable scope for extension. 'Representative government' may well require freedom of movement and association as well as freedom of communication, as Gaudron J acknowledged;[165] and it is not inconceivable that that term could come to stand for a

157 *Nationwide News* (1992) 177 CLR 1, 43-4 (Brennan J).

158 Ibid 44 (Brennan J); see also 69-70 (Deane and Toohey JJ); *Political Broadcasts* case (1992) 177 CLR 106, 134-5 (Mason CJ), 209-11 (Gaudron J). The only judge to refer to Murphy J in this connexion was Dawson J (185-6).

159 (1992) 177 CLR 1, 44 (Brennan J, quoting his judgment in *Queensland Electricity Commission* (1985) 159 CLR 192, 231).

160 See the passages cited at nn 120-122 above.

161 (1992) 177 CLR 106, 135.

162 Ibid.

163 Ibid 209 (Gaudron J).

164 Ibid; also (1992) 177 CLR 1, 69-70 (Deane and Toohey JJ, who suggested that the doctrine of responsible government as embodied in the 'Westminster' system of cabinet government could arguably be seen as the fourth general doctrine underlying the Constitution; however, it is difficult to envisage that doctrine as a source of individual rights).

165 (1992) 177 CLR 106, 212; see also Zines, *Constitutional Change in the Commonwealth*, above

free and democratic society in general, leading to the implication of further rights, although such an outcome would require a further shift by the Court.[166] Furthermore, there is no guarantee that other principles will not turn out to be 'fundamental' or 'assumed'. The Court has qualified its doctrine more by statements of intention than by clear limitations.

(ii) The Extent of the Freedom

The freedom is described in the majority judgments as extending to 'political and economic matters',[167] 'governments and political matters',[168] 'information and opinions about matters relating to the government of the Commonwealth',[169] 'public affairs and political discussion'[170] and 'political discourse'.[171] The basis of the freedom in 'representative democracy' does not restrict it to election campaigns: that much is implicit in the decision in *Nationwide News*, which did not concern an election campaign.[172] It is also established that the freedom is not confined to matters of political debate at the Federal level. The political affairs of the States are also important to the democratic character of the federation established by the Constitution; and the interaction of the various levels of government makes the separation out of purely federal matters impossible.[173]

The definition of 'political matters' leaves much to be determined. While some guidance may be taken from the fact that the freedom exists in order to secure representative government and relates to 'the government of the Commonwealth', there is clearly room for argument about the matters to which the freedom extends. For example, if sexual mores or multiculturalism were debated in the political arena, would defamatory statements about a person's private affairs or racially based aspersions fall within the freedom? Are statements about social questions which may not directly relate to institutions of government, such as gender relations, included? What of politically inspired *conduct*, such as street marches and other protests? And if the freedom exists to protect representative democracy under the Constitution, does it extend to discussions of change to the constitutional framework itself such as the present debate on republicanism? Mason CJ preferred to leave open the question whether there was a substantial difference between the implied freedom and a general freedom of communication.[174]

n 45, 51.

166 An implication from 'representative democracy' might, for example, provide an alternative basis for the decision in *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

167 (1992) 177 CLR 1, 47; (1992) 177 CLR 106, 149 (Brennan J).

168 (1992) 177 CLR 1, 50 (Brennan J).

169 Ibid 73 (Deane and Toohey JJ).

170 (1992) 177 CLR 106, 138, 141 (Mason CJ).

171 Ibid 208, 212 (Gaudron J).

172 See also *Political Broadcasts* case, ibid 215 (Gaudron J), 232 (McHugh J).

173 Ibid 142 (Mason CJ), 168-9 (Deane and Toohey JJ), 216 (Gaudron J).

174 Ibid 141.

(iii) Legitimate and Illegitimate Restrictions on Political Communication

The implied freedom, is, of course, not absolute. All of the Justices who recognised such a freedom also recognised that the freedom may at times be in conflict with other public interests and there would be circumstances in which a law which restricted political communication would nevertheless be valid. Examples given were the criminal law of conspiracy and laws prohibiting obscenity, sedition or advertisements for dangerous drugs and laws imposing censorship in wartime.[175] There is not space here to explore in detail the various formulations of the test to determine when a law restricting political communication will be valid. What can be said is that a law which restricts political communication will be valid if it is directed at the protection of some legitimate public interest and the Court regards it as proportional to the achievement of that protection.[176] Where a law targets ideas or information rather than a medium of communication, this would appear to be a difficult onus.[177]

The recognition that freedom of communication needs to be weighed against other interests is sensible and necessary. However, the Court has allocated to itself the difficult task of balancing the guarantee of free communication against other public interests which may lie behind laws restricting that freedom. Except for Brennan J, who did not join the majority in finding that Part IIID infringed the implied freedom, the justices who recognised the freedom did not appear to think that they should attach great weight to Parliament's judgment as to the balancing of interests involved.[178] This is a far cry from the view taken in *McKinlay's* case that 'representative democracy' described a 'whole spectrum' of institutions[179] and, within that spectrum, was a matter for Parliament. In many cases the balancing of interests will not be difficult. However, it is likely that cases will arise in which the Court's task will be both delicate and politically controversial. Unless it recognises that some 'margin of appreciation' must be left to Parliament, the Court is likely to become the subject of virulent (and to some extent justified) criticism.

(iv) Comment

Two specific aspects of the implied freedom recognised in the *Nationwide News* and *Political Broadcasts* cases deserve mention. The first is that, unlike most of the express rights and rights implied from particular provisions of the Constitution, but like the freedom recognised in *Smithers'* case, it may well limit the legislative powers of the States as well as the Commonwealth. Brennan J and Deane and Toohey JJ recognised that there were strong argu-

[175] (1992) 177 CLR 1, 77 (Deane and Toohey JJ); (1992) 177 CLR 106, 150 (Brennan J), 236 (McHugh J).

[176] (1992) 177 CLR 1, 50-1 (Brennan J), 77 (Deane and Toohey JJ); (1992) 177 CLR 106, 142-4 (Mason CJ), 169 (Deane and Toohey JJ), and generally 234-5 (McHugh J). Cf *Street v Queensland Bar Association* (1989) 168 CLR 461 (on s 117) and *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 (on s 92).

[177] (1992) 177 CLR 1, 77 (Deane and Toohey JJ); (1992) 177 CLR 106, 142-4 (Mason CJ), 169 (Deane and Toohey JJ).

[178] See especially (1992) 177 CLR 106, 144 (Mason CJ).

[179] (1975) 135 CLR 1, 56-7 (Stephen J).

ments in favour of such a result, not least that the state Constitutions are continued in effect 'subject to' the Commonwealth Constitution.[180] It might also be argued that the freedom of communication essential to representative democracy is at risk as much from state as from Commonwealth laws and, indeed, that the common law itself may be modified by the operation of the guarantee.[181]

The second aspect which should be noted is the Court's failure to recognise the similarity between its new doctrine and that expounded by Murphy J. Apart from two citations by Gaudron J[182] and respectful disagreement from Dawson J,[183] no member of the Court saw fit to discuss Murphy J's theory of implied rights.[184] Yet, as the passage from the *Ansett Transport Industries* case quoted above demonstrates, Murphy J had also suggested an implied freedom of communication based on the Constitution's establishment of a system of representative democracy. Other judgments of Murphy J show that he had developed a concept of implied rights as subject to limitation where necessary to protect other public interests. It is true that Murphy J proposed a general freedom of communication, and other freedoms, rather than one limited to 'political' matters. However, it has been argued above that the limitation of the new implied freedom to 'political' matters may not make it very different from a general freedom (assuming that that limitation is retained).

To recognise that the new implied freedom has much in common with the theory of Murphy J is to acknowledge that fears of the development from it of a doctrine under which there would be 'no logical limit as to the grounds on which legislation might be brought down'[185] are not wholly unjustified. At the very least the Court has arrogated to itself the function of determining what are the essential attributes of representative democracy and where the boundaries of acceptable limitations on communication lie. Material before the Court showed that many respectably democratic countries had partial or complete bans on election advertising;[186] yet a majority deemed a ban to be beyond the democratic pale. The values of the judges may therefore have become the law: for example, Deane and Toohey JJ appeared prepared to implement their sweeping (and largely unsubstantiated) policy judgement that, except in times of war and civil unrest, the public interest is *never* served by the suppression of well-founded

180 (1992) 177 CLR 1, 52 (Brennan J), 76 (Deane and Toohey JJ).

181 These issues were raised in *Theophanous v Herald and Weekly Times Ltd* (No M110 of 1993) and *Stephens v Western Australian Newspapers Ltd* (No S22 of 1993), which were argued in the High Court on 14-16 September 1993. At the time of writing, decisions in these cases are awaited.

182 (1992) 177 CLR 106, 212 (nn 4-5).

183 Ibid 185-6.

184 Mason J obliquely acknowledged Murphy J in an attempt (rather unconvincing, it is submitted) to justify the disparaging remarks in *Miller's* case (cited above n 124): (1992) 177 CLR 106, 133 n 82.

185 (1992) 177 CLR 1, 44 (Brennan J), citing the *BLF* case (1986) 7 NSWLR 372, 405 (Kirby P) and Zines, *Constitutional Change in the Commonwealth*, above n 45.

186 Senate Select Committee on Political Broadcasts and Political disclosures, *The Political Broadcasts and Political Disclosures Bill 1991* (PP 486/1991), Appendix 5; see also (1992) 177 CLR 106, 154 (Brennan J).

criticism of institutions of government.[187] These are matters which Parliaments might normally be expected to determine.

It is possible, however, that the notion of freedoms founded in the written Constitution's adoption of representative democracy will be easier to contain within limits than one based in a more general conception of the Constitution as that of a 'free society'. It is certainly more capable of restraint, and predictable, principled application, than the guarantees based on the 'equality' of persons which Deane and Toohey JJ appeared to suggest in *Leeth*. The precise basis on which a 'general' implication is founded may therefore be important to the development of doctrine based on such an implication.

CONCLUSIONS

Justifications for Judicial Creation of Rights

The entrenchment of individual rights has been a matter of political debate in Australia at various times, most recently in the 1980s.[188] In 1988, following the report of the Constitutional Commission, the Government put to referendum four relatively modest proposals of which three directly concerned individual rights. All of these proposals were resoundingly defeated.

While the defeat of various proposals to legislate, or amend the Constitution, for the protection of rights may be a result of political opportunism rather than a genuine expression of majority will, the fact remains that proposals to enhance the protection of rights have been put and have failed to gain a positive result from the popular processes provided for in the Constitution. It might therefore be asked what business it is of judges to effect that entrenchment by forging new constitutional rules.

In an article published in 1988, Mr Justice McHugh (then of the New South Wales Court of Appeal) argued for an 'incremental' model of judicial law-making.[189] In response to what he termed the 'anti-democratic objection' to judicial law-making he argued that the parliamentary system did not provide perfect democracy in any event, and that the courts could make a contribution to democracy. Apart from protecting people's access to political processes, the courts could decide between competing interests in a manner that was free of 'political pressures' and committed to procedural fairness. Judicial law-making, he said, was 'surely not as undemocratic as legislative inaction which fails to meet the need for law reform'.[190] He suggested that '[t]he courts, as much as the legislatures, are in continuous contact with the concrete needs of the community'.[191]

Justice Toohey considered the anti-democratic objection in a speech delivered a few days after the publication of the Court's reasons in the *Nationwide News*

[187] (1992) 177 CLR 1, 79.
[188] See generally Bailey, above n 21, 50-6.
[189] McHugh, above n 19, 117-22.
[190] Ibid 123.
[191] Ibid 124.

and *Political Broadcasts* cases.[192] While apparently rejecting the use of 'natural law' conceptions to found individual rights,[193] he suggested that, in an analogy with statutory construction, grants of power in a written constitution could be read as *prima facie* not authorising the abrogation of common law rights and in this sense 'an implied "bill of rights" might be constructed'.[194] Democracy, he said, should not be seen simply as majority rule but as also including a set of principles about the exercise of power.[195] In any event, judicial review of legislation under a written constitution was not even anti-majoritarian because, firstly, a parliamentary majority on a particular issue does not necessarily reflect majority opinion in the community and, secondly, popular amendment can overcome a court's rulings.[196] This latter point is, with respect, somewhat tenuous. While it is obvious that majority opinion often does not find its way into decisions of the legislature or executive, those arms of government are at least put in place by a democratic process and subject to re-election, unlike the courts.

While some judicial law-making is probably inevitable and necessary,[197] there is an important difference between the modification of ordinary legal rules (the main subject of Mr Justice McHugh's paper) and the creation of new constitutional rules. Obviously, while in Australia both classes of decision may be reversed by democratic processes, it is much harder for the people to change a constitutional rule through s 128 than for Parliament to change an ordinary legal rule. There is also a difference of principle. In one class of decision, the Court is presuming to stand in for another arm of government. Parliament may reverse the effect of the Court's decision and, in any event, faces the consequences of its action or inaction at the ballot box. In the other, the Court is presuming to stand in for the people and to change the effect of the very document which establishes the Court.

Of course, the boundary between judicial 'law-making' and the refinement or reconsideration of the Court's earlier interpretations may not always be clear. This raises the question of the methods by which so-called 'law-making' proceeds. New legal rules which arise by induction from earlier cases, or by exegesis of constitutional or statutory provisions, are within the normal canons of judicial method and may stand or fall according to their legal plausibility. Novel rules based on broad principles said to be inherent in a social system are much more difficult to assess or justify on legalistic criteria, and it may be difficult to find any criteria for judging them other than 'political' ones. Such developments are therefore open to the criticism that judges have stepped into the political arena.

The question of method highlights the distinctions between the creation of

192 Toohey, above n 18.
193 Ibid 166-8.
194 Ibid 170.
195 Ibid 171.
196 Ibid 173.
197 Cf McHugh, above n 19, 116-7.

some implied rights and the interpretation by judges of an express Bill of Rights. Proposals for a Bill of Rights have been criticised on the grounds that it would make judges the arbiters of 'policy' questions, bring them into the political arena and give them too much power.[198] Yet a Bill of Rights would call upon judges only to interpret a set of (admittedly broad) express provisions. The terms of those provisions would provide some limits, as well as minimum standards, for the extension of individual rights. If limitations on legislative power were based on 'peace, order and good government' or on some general notion of 'freedom' or 'equality', it would be much more difficult — perhaps impossible — to define a limit to the Court's power or duty to strike down legislation. Judges would have a broad power to overthrow democratic processes and would have few solid criteria for deciding when to exercise that power. It might be added, in response to Justice Toohey, that the common law may not be an appropriate source for the implication of individual rights. Its basis is the customary law of a heavily class-bound, patriarchal society in which most people had no right to vote, religious difference was not tolerated and radical political debate was routinely limited by persecution and imprisonment.[199] The United Kingdom's record in the European Court of Human Rights has shown that that country's laws fall well short of international standards.[200]

The other important distinction between implied rights and an express Bill of Rights is that the latter would have a popular mandate. Judges interpreting it would have direct authority from the people, presumably expressed through the authoritative process of a referendum under s 128, to overturn decisions of parliamentary majorities which did not meet certain standards. Implied rights, however, are the creation of judges and a small group of advocates. At least where they are not based on particular provisions of the Constitution or principles clearly central to it, no democratic authority can be claimed for them. As Justice Toohey says, '[s]ome principles are fundamental';[201] but who says which ones? The identification of 'fundamental' principles by the Court may be able to be rationalised as 'democratic', but it is very doubtful whether it complies with the form of 'democracy' established by the Constitution. The development of rules on this basis is a clear challenge to the assumptions of parliamentary sovereignty which underlay the Constitution;[202] and, in giving rule-making power to the Court, it is arguably contrary to the notions of popular sovereignty which are sometimes put in support of it.[203]

198 See, eg, Brennan, above n 18, 38. See also the discussion of these objections in Mason, 'A Bill of Rights for Australia?', above n 19, 81-5.

199 See, eg, Commonwealth, *Hansard*, Senate, 7 October 1992, 1280-1 (Senator Tate); on restriction of debate see, eg, Edward Thompson, *The Making of the English Working Class* (2nd ed, 1980) Part 1, especially 22, 191-2. See also the interesting admission of Deane and Toohey JJ in *Leeth*: (1992) 174 CLR 455, 486.

200 See, eg, Mason, 'A Bill of Rights for Australia?', above n 19, 80, 86.

201 Toohey, above n 18, 174.

202 Cf Susan Kenny, 'Ariadne's Thread, or Who Slays the Minotaur (The Constitution: Implied Rights and Freedoms and the High Court)', paper delivered to the Attorney-General's Department National Practitioner Forum on Constitutional Law, Canberra, 20 June 1991, 5, 15-6.

203 See, eg, *Metwally* (1984) 158 CLR 447, 477 (Deane J); *Capital Duplicators Pty Ltd v Australian*

The Court's Record on Rights

It is no longer particularly radical to point out that, with a few notable exceptions, judges are generally socially conservative,[204] or that their social and political views influence their approach to some legal questions. A judge's political stance is most likely to show through when broad discretions are able to be exercised, when there is not a clear or detailed set of rules to apply or when policy considerations are necessarily involved in a decision. Decisions on the constitutional protection of individual rights satisfy all of these criteria: the 'leeways of choice'[205] present in all judicial decision-making are at their widest. It might be expected, therefore, that the Court's record on individual rights would show a conservative bias: strong protection of rights of property and trade, less concern for general civil and political rights and minimal concern for victims of discrimination or disadvantage.

This expectation is largely borne out by the Court's performance prior to the 1980s. Section 51(xxxi) was given reasonably robust effect.[206] A reading of s 92 which turned it into a right to trade[207] was preferred, for many years, to the much more sensible view which finally prevailed in *Cole v Whitfield*.[208] Meanwhile, the other express rights were reduced to insignificance by narrow interpretations[209] and a majority failed to discern any but the most general democratic guarantees in s 24.[210]

The decision in the *Political Broadcasts* case, despite its radical tone, can be seen as continuing in this vein. That decision upheld 'free speech' for those who could afford to buy advertising in the electronic media, while overturning legislation designed to give election candidates access to the airwaves on a basis other than their ability to pay. Only Deane and Toohey JJ addressed this aspect of the case in their judgment. They doubted whether the cost of electronic advertising was really so high as to deter individuals or groups of individuals from communicating in that way; but considered that, in any event, restrictions on communicating through a medium were not justified by the fact that only a small number of people might use that medium.[211]

It might be argued that the *Political Broadcasts* case is about the rights of people with money and confirms the Court's bias in favour of property rights. However, the situation is more complex than that. The freedom of political communication posited by the majority is available to all citizens and capable of protecting the rights of ordinary people to hear and participate in political

Capital Territory (1992) 177 CLR 248, 274 (Brennan, Deane and Toohey JJ); *Leeth* (1992) 174 CLR 455, 484 (Deane and Toohey JJ).

204 High Court Judges have generally conformed to this pattern: see, eg, Graham Fricke, *Judges of the High Court* (1986) 5-6.

205 Cf Julius Stone, *Precedent and Law: Dynamics of Common Law Growth* (1985).

206 Above n 30.

207 See, eg, Zines, *The High Court and the Constitution*, above n 29, ch 8.

208 (1988) 165 CLR 360.

209 See above n 29 and accompanying text.

210 See above nn 32-35 and accompanying text.

211 (1992) 177 CLR 106, 175.

discussion (for example by attending and speaking at meetings and, arguably, by participating in protest action). It is the majority's conclusion that the legislation banning election advertisements infringed the freedom without sufficient justification that is questionable. Many democratic countries have similar bans;[212] and, as Brennan J pointed out,[213] it is entirely possible to take the view that electronic advertising makes little or no positive contribution to representative democracy. To these arguments it might be added that the impugned legislation promoted equality of access to the means of influencing opinion by limiting the power of the wealthy to buy advertising and making air-time available to all candidates free of charge.

Other recent cases show a broadening of the Court's concerns. In cases such as *Metwally*[214] and *Polyukhovich*[215] the Court has developed individual rights which can realistically be called upon by ordinary citizens in their dealings with organs of the state. Similar developments in the common law are evident in *Jago v District Court of New South Wales*[216] and *Dietrich*.[217]

This broadening of concerns extends only to matters which are of traditional concern to senior lawyers: civil liberties which have been recognised, if not entrenched, for centuries; the functioning of legal systems; and the proper exercise of judicial power. The Court is still a long way from upholding a constitutional freedom from discrimination on grounds of race or gender or a right to health care. However, while these criticisms may fairly be made, it should also be acknowledged that rights other than traditional civil and political rights would be very hard to find in the Constitution, at least without the kind of methodological free-fall warned against above. The difficulties are especially acute in the case of a right which is not reducible to a *limitation* on legislative power but instead requires the *exercise* of legislative power: there is probably no potential for such rights in the Constitution.

Prospects for the Future

As the previous paragraph emphasises, civilisation as we know it has not come to an end. The High Court has not presumed to strike down legislation on the basis of 'equality' or 'a free society', although some of its members have shown an inclination to do so. The main areas of the development of rights — the separation of judicial power and the establishment of 'representative democracy' — have a basis in identifiable features of the constitutional text which, if combined with a continuation of the judiciary's traditional commitment to legal reasoning, may supply limits to that development.

Defining those limits, however, is a different matter. In the case of 'representative democracy', it may be that they are a long way off. Comments in

212 See above n 186 and accompanying text.

213 (1992) 177 CLR 106, 161.

214 (1984) 158 CLR 447; see above n 42 and accompanying text.

215 (1991) 172 CLR 501; see above n 66 and accompanying text.

216 (1989) 168 CLR 23 (and as to statutory interpretation, see *Wentworth v New South Wales Bar Association* (1992) 176 CLR 239, 252).

217 (1992) 177 CLR 292; see above n 102 and accompanying text.

the *Political Broadcasts* case indicate that 'representative democracy' may well import most of the rights proposed by Murphy J in what seemed at the time to be impossibly radical statements. It is not inconceivable that that concept, perhaps combined with the idea of government under the Constitution and under the supervision of the courts, could come to represent a set of standards of fairness in the operations of public institutions and, possibly, limits on the intrusion of government into private life. Australian equivalents of the United States cases on abortion[218] are unlikely, but not impossible.

One important question which remains unanswered[219] is the extent to which implied rights will limit the law-making of the States. There are strong hints in the *Nationwide News* and *Political Broadcasts* cases that the implied freedom of political communication is capable of invalidating state laws. An individual right is not genuinely protected unless all levels of government are prevented from infringing it; yet most provisions of the Constitution impose requirements only on the Commonwealth. Unless the state Constitutions can be mined for implied rights, it is therefore likely that only the most general of implications (perhaps applied to the States through s 106 of the Constitution) can give rise to limitations on state power.

The Court will certainly not be denied opportunities to expand the number and coverage of implied rights. Even if it approaches these opportunities with caution, the course it has set will ensure that it retains an enormous influence over the way Australians live.

[218] *Roe v Wade* 410 US 113 (1973); *Webster v Reproductive Health Services* (1989) 57 *United States Law Week* 5023.

[219] But see above n 181.