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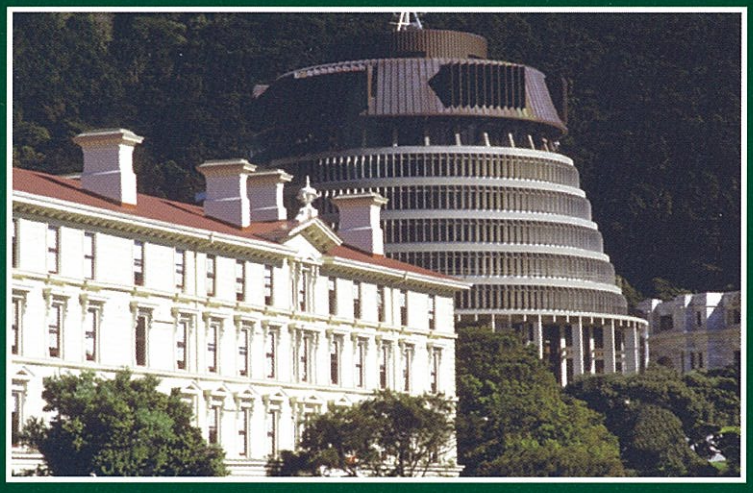

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THE CONSTITUTIONAL ROLE OF THE COURTS: A PERSPECTIVE FROM A NATION WITHOUT A BILL OF RIGHTS

George Williams*

This paper provides an Australian perspective on the constitutional role of the courts, with particular reference to judicial review and the protection of human rights. Professor Williams suggests a convergence between written and unwritten constitutional systems, and between systems that have bills of rights and those that do not, on the constitutional role of the courts.

I INTRODUCTION

The task of identifying and dissecting the constitutional role of the courts is not an easy one. While the courts are obviously of central importance in modern states that are based upon a system of democratic constitutionalism and the rule of law, the ambit and nature of their role is rarely expressed in a complete or even coherent form. This is understandable in a nation like New Zealand without a written constitution, but it is equally true in nations with such an instrument like the United States, Canada, and Australia. While the written constitutions of those nations commonly establish a separate judicial structure, and may provide some guidance as to the jurisdiction of the courts, they fail to set out in even the most basic terms how the courts are to exercise their role or even the limits of that role. Those constitutions generally do not even provide in express terms for the most fundamental of constitutional roles: the capacity to review legislative and executive action for consistency with constitutional and legal limits.

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The silence common in constitutional instruments about the proper role of the courts leaves much about their role to be gleaned from the practices of the courts themselves and from their own pronouncements and relations with the other arms of government. These conventions and cultural understandings surrounding the courts relate to such matters as how the courts are constituted, including notions of judicial tenure and independence, and the need for the separation of the personnel and functions of the courts from the legislature and executive.

The lack of express reference to the constitutional role of the courts reflects the fact that many aspects of this role remain hotly contested. Indeed, the role can only be seen as an evolutionary product of such contests, especially the sometimes adversarial relationship between the courts and the other arms of government that have taken place over the centuries of English and subsequent constitutional history. In England, the battle for supremacy between Parliament and the courts was ultimately a stand-off, with each institution respecting the other's autonomy up to a point and neither forcing to a final confrontation the unresolved tensions between them.[1] The outcome of such conflicts was to confirm both the courts' jurisdiction over questions of law and their ultimate deference to the power of Parliament.

The tension between these two ideas persists today. Echoes of old conflicts on the role of the courts can still be heard. In 1610 in *Dr Bonham's Case*, the Chief Justice, Sir Edward Coke, said:[2]

> And it appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void …

Writing in 1885, Albert Venn Dicey relegated *Dr Bonham's Case* to a footnote as "obsolete".[3] Despite this, the idea reappeared in New Zealand, Australia, and the United Kingdom in the 1980s and 1990s. Over 350 years after Sir Edward Coke's judgment, Sir Robin Cooke, as President of the New Zealand Court of Appeal, found that certain rights lie so

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1 The nearest to a showdown between the courts and Parliament was the series of cases beginning with *Stockdale v Hansard* (1837) 2 M & Rob 9; 174 ER 196. See the events as set out in Tony Blackshield and George Williams *Australian Constitutional Law and Theory: Commentary and Materials* (3 ed, Federation Press, Leichhardt, 2002) 93–97.

2 *Dr Bonham's Case* (1610) 8 Co Rep 107a, 118a; 77 ER 638, 652. See Jeffrey Goldsworthy *The Sovereignty of Parliament: History and Philosophy* (Oxford University Press, Oxford, 1999) 44–45.

3 A V Dicey *Introduction to the Study of the Law of the Constitution* (10 ed, Macmillan, London, 1960) 61–62 n.

deep that they are incapable of legislative repeal,[4] and thus that there might yet reside in the courts the power to adjudge legislation to be utterly void as against common right and reason.

This possibility of such a role being reasserted also influenced Australian judges. Chief Justice Street of the Supreme Court of New South Wales in the *BLF Case* declared himself to "have a strong affinity for the judicial philosophy revived by Sir Robin Cooke" and suggested that *Dr Bonham's Case* "may even yet provide encouragement for courts in putting down tyrannous legislation".[5] Even the High Court of Australia has not closed the door on this notion. In *Union Steamship Co of Australia Pty Ltd v King* the Court cited decisions of Sir Robin Cooke and stated:[6]

> Whether the exercise of … legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law … is another question which we need not explore.

These ideas have also emerged in the United Kingdom, where argument around the idea of common law constitutionalism has led to the development of the idea, based in part on the writings of Coke,[7] that "common law ought to be considered a constitutionally superior—or 'higher-order'—form of law".[8] Judges such as Sir John Laws of the Court of Appeal have also contributed to this debate.[9]

Recurrent debates such as this demonstrate that the constitutional role of the courts in common law nations such as New Zealand and Australia is far from static or settled. The proper role of the courts remains a legal and political battleground in which the weapons are concepts such as parliamentary sovereignty, democracy, and the rule of law and instruments such as the privative clause and the tools of statutory construction.[10] In Australia, such a battle is now being waged in the area of judicial review of migration

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4 *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, 398. See also *L v M* [1979] 2 NZLR 519, 527; *Brader v Ministry of Transport* [1981] 1 NZLR 73, 78; *New Zealand Drivers' Association v New Zealand Road Carriers* [1982] 1 NZLR 374, 390; *Fraser v State Services Commission* [1984] 1 NZLR 116, 121.

5 *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372, 386–387.

6 *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 10. See also *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399.

7 Thomas Poole "Back to the Future? Unearthing the Theory of Common Law Constitutionalism" (2003) 23 OJLS 435, 446–447.

8 Poole, above n 7, 450.

9 See Hon Sir John Laws "The Constitution: Morals and Rights" [1996] PL 622.

10 See for example *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476.

decisions, where the courts' willingness to review migration decisions made by the executive and administrative tribunals continues to come under strong attack from the executive.

In this article I make some observations about the constitutional role of the courts by examining their role in exercising a power of judicial review. My focus is upon how this power is now being applied with the benefit of human rights instruments like the Canadian Charter of Rights and Freedoms,[11] the New Zealand Bill of Rights Act 1990, and the Human Rights Act 1998 (UK). However, I examine these instruments and the function of judicial review from a different angle entirely. Not surprisingly, my perspective as an Australian is of someone living in the only Western nation where courts exercise judicial review without the benefit of any general rights-protecting instrument. From this perspective, I address questions that are central to the constitutional role of the courts, including: How are human rights protected without a bill of rights? What are the implications for the courts of not having a bill of rights? And what lessons can be learnt from a nation that lacks a bill of rights?

Australia offers insights into the constitutional role of the courts in nations that do possess a bill of rights. Sometimes it is only by looking from the perspective of an outsider that certain features of a system can be brought to light. The New Zealand constitutional system does the same in demonstrating to nations with a written constitution that judicial review of legislative action need not come in only one form, and that "weaker", non-entrenched forms of review can also be effective in acting as a check upon legislative and executive action. This insight has been of crucial importance in the Australian bill of rights debate, where the apparent impossibility of achieving a constitutionally entrenched bill of rights has been replaced by a cautious optimism amongst some that a legislative instrument like those operating in New Zealand and the United Kingdom might be achievable. Indeed, Australia's first bill of rights, the Human Rights Act 2004 of the Australian Capital Territory that comes into force on 1 July 2004, has been modelled on the legislative bills of rights of these two nations.[12]

II RIGHTS PROTECTION UNDER AUSTRALIAN LAW

Australia is alone in having a robust system of judicial review without a substantive human rights component. The reasons for this are twofold. First, with the enactment of the Human Rights Act 1998 (UK), Australia became the only Western nation without any form of bill of rights at any level of government. Second, although the Australian Constitution

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11 Part I of the Constitution Act 1982 (Canada Act 1982 (UK), sch B).

12 See Australian Capital Territory Bill of Rights Consultative Committee *Towards an ACT Human Rights Act* (2003).

does contain some scattered express and implied rights, these have generally been given such a narrow interpretation by the High Court as to be rarely invoked.[13] Indeed, although the Australian Constitution came into force in 1901, it was not until 1989 in *Street v Queensland Bar Association*[14] that the High Court first upheld a plaintiff's reliance upon an express civil and political right. Even then, the Court did not strike down the offending law, but found only that the law was "inapplicable" to the plaintiff.[15]

While Australia lacks a legal culture of judicial review on human rights grounds, it often prides itself on its human rights record. As Prime Minister John Howard has stated: "Australia's human rights reputation compared with the rest of the world is quite magnificent."[16] It is true that Australians are fortunate that the rule of law is firmly entrenched in the political and legal culture, and that the nation has an independent High Court where such issues can be aired. However, the Australian legal system does not protect many basic rights and individual liberty has little protection under the law. Even the right to vote, and freedom from discrimination on the basis or race or sex, exist only so long as parliaments continue to respect them. In the past, this respect has had its limits. As Brian Burdekin, a former Australian Human Rights Commissioner, has commented: "It is beyond question that our current legal system is seriously inadequate in protecting many of the rights of the most vulnerable and disadvantaged groups in our community."[17] This is demonstrated by Australia's contemporary human rights record, which includes matters such as mandatory sentencing, the mandatory detention of asylum seekers (including young children, sometimes for years at a time), the continuing dispossession of indigenous peoples, and Australia's over-bearing legal response to September 11 and the Bali attack.[18]

In the absence of a bill of rights, Australia also lacks the mechanisms, judicial or otherwise, for determining whether rights have been unduly undermined by national security laws. There is occasionally a role for judges in the rights-protection process, but this is usually at the margins of the debate, such as where constitutional provisions are

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13 See George Williams *Human Rights under the Australian Constitution* (Oxford University Press, Melbourne, 1999) ch 5.

14 *Street v Queensland Bar Association* (1989) 168 CLR 461.

15 *Street v Queensland Bar Association*, above n 14, 592.

16 Interview with Hon John Howard MP, Prime Minister (AM, Australian Broadcasting Corporation, 18 February 2000). The Prime Minister did, however, go on to recognise that "we've had our blemishes and we've made our errors."

17 Brian Burdekin "Foreword" in Philip Alston (ed) *Towards an Australian Bill of Rights* (Centre for International and Public Law, Canberra and Sydney, 1994) v, v.

18 As to the last area, see George Williams "Australian Values and the War Against Terrorism" (2003) 26 UNSWLJ 191.

relevant to human rights enforcement or in the interpretation of legislation. In the latter context, the courts have developed the common law so that the infringement of rights is minimised. According to Chief Justice Mason and Justices Brennan, Gaudron, and McHugh in *Coco v The Queen*,[19] "[t]he courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language." Hence, "a statute or statutory instrument which purports to impair a right to personal liberty is interpreted, if possible, so as to respect that right".[20]

However, Parliament is capable of abrogating a fundamental right via legislation if it operates within constitutional limits and is express and unambiguous in its legislative intent. There is no mechanism through which to analyse whether such abrogation is appropriate. Unlike in every other Western nation, the issue in Australia is purely political. Moreover, without a bill of rights, political and legal debate is usually unconstrained by fundamental human rights principles and the rule of law. Instead, the contours of debate may match the majoritarian pressures of Australian political life rather than the principles and values upon which our democracy depends. In these circumstances, any check upon the power of Parliament or government to abrogate human rights derives not from the courts but from political debate and the goodwill of our political leadership. This is not a check that is regarded as acceptable or sufficient in other comparable nations. This is one reason why, as Chief Justice Spigelman of the New South Wales Supreme Court has warned, the Australian legal system is now "threatened with a degree of intellectual isolation that many would find disturbing".[21]

III JUDICIAL REVIEW AND HUMAN RIGHTS WITHOUT A BILL OF RIGHTS

The power of the courts to declare legislation invalid is rarely given textual expression in a constitution, perhaps as if there lingered something distasteful about a court's being able to override a democratically elected parliament. The lack of textual expression of this role is even evident in newly drafted constitutions where the power of judicial review is accepted as implicit in the new constitutional order. One such example is the 1997 Fiji Constitution,[22] which states in section 2 that "This Constitution is the supreme law of the

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19 *Coco v The Queen* (1994) 179 CLR 427, 437. See also Susan Kenny "Principles of Statutory Interpretation Relating to Government" in P D Finn (ed) *Essays on Law and Government: Volume 2: The Citizen and the State in the Courts* (LBC Information Services, Sydney, 1996) 215, 233–237.

20 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 523 Brennan J.

21 Hon J J Spigelman "Access to Justice and Human Rights Treaties" (2000) 22 Sydney LR 141, 150.

22 Constitution Amendment Act 1997 (Fiji).

State" and that "[a]ny law inconsistent with this Constitution is invalid to the extent of the inconsistency". This provides a powerful, but only implied,[23] mandate to the courts to enforce this provision by striking down legislation for inconsistency with the Constitution.

More explicit treatment of this aspect of the constitutional role of the courts is contained in the 1996 South African Constitution.[24] It makes express what is usually left to implication. Chapter 8, "Courts and Administration of Justice", contains, among other provisions on the constitutional roles of the courts, section 172(1)(a) on "Powers of courts in constitutional matters", which states: "When deciding a constitutional matter within its power, a court … must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency".[25]

The absence of such a provision in other constitutions means that it has generally been left to the courts to themselves assert their role.[26] Hence, it was not the drafters, but Chief Justice Marshall of the United States Supreme Court in *Marbury v Madison*[27] who in "a Solomonic blend of diplomacy and defiance"[28] declared the role of that Court by stating that "[i]t is emphatically the province and duty of the judicial department to say what the

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23 This might also be seen as implied from the vesting of judicial power by s 117(1) in the various courts of Fiji, or from the vesting of jurisdiction by s 120(2) "in any matter arising under this Constitution or involving its interpretation".

24 Constitution of the Republic of South Africa Act 108 of 1996.

25 See also s 167 on the powers and functions of the Constitutional Court. Compare also the less explicit arts 93 and 100 of the Constitution of the Federal Republic of Germany and art 53 of the Constitution of the Republic of Vanuatu.

26 The courts are generally not shy in granting to themselves the powers that they believe they require to uphold the rule of law. In the aftermath of a coup d'etât, some courts have even declared that their role extends to a species of supra-constitutional jurisdiction that enables them to step outside the legal and constitutional order (which may even have created them) to determine whether that order has been replaced by a new governing regime. In *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645, 724 (PC), for example, Lord Reid for the majority held that the Privy Council could rule upon whether a new regime had become the lawful government of a nation. In narrow circumstances, the Court possessed the jurisdiction to hold that a revolutionary regime was lawful (despite the fact that the acts that led to its ascent to political power were themselves unlawful), and "must decide" upon the "status of a new regime which has usurped power and acquired control of that territory". See also *Republic of Fiji v Prasad* [2001] 2 LRC 743, 759 (Fiji CA) Sir Maurice Casey P for the Court; George Williams "The Case that Stopped a Coup? The Rule of Law and Constitutionalism in Fiji" (2001) 1 OUCLJ 73.

27 *Marbury v Madison* (1803) 5 US (1 Cranch) 137.

28 Tony Blackshield "The Courts and Judicial Review" in Sol Encel, Donald Horne, and Elaine Thompson (eds) *Change the Rules! Towards a Democratic Constitution* (Penguin, Ringwood, 1977) 118, 129.

law is."[29] Like nations such as the United States and Canada, Australia has a long tradition of judicial review of legislative and executive action. The year 2003 marks the centenary of the High Court of Australia, and there have been many occasions over that century when the Court has struck down Acts of the federal and state parliaments, including politically contentious legislation like the attempt to ban communism in the early 1950s.[30]

This power of judicial review is used routinely in Australia to assess legislation against express and implied constitutional limitations emanating from the federal structure created by the Australian Constitution and from the recognition in the Constitution of a separation of powers (and in particular a strict separation of judicial power). On the other hand, there is no established tradition in Australia of exercising the power of judicial review in order to safeguard human rights. In the absence of such a tradition, judges of the High Court have sought to develop such a role by reference to the rule of law, by implying rights from the text of the Constitution, and through recourse to international law norms.

A The Rule of Law

As Justice Dixon of the High Court stated, the Australian Constitution is:[31]

> an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as, for example, in separating the judicial power from other functions of government, others of which are simply assumed … . Among these I think that it may fairly be said that the rule of law forms an assumption.

In Australia, the rule of law is given expression through judicial review of governmental action, which is seen as a fundamental protection against the infringement of human rights through the exercise of arbitrary power.[32]

This power of judicial review is not set out expressly in the Constitution. The best that can be said is that this power can be implied from chapter III, "The Judicature". Thus, section 76 states that "[t]he Parliament may make laws conferring original jurisdiction on the High Court" in any of the matters then listed. Strangely, matters "arising under this Constitution, or involving its interpretation" are listed under section 76(i) as matters that the Parliament *may* include within the jurisdiction of the Court. Despite this, it is clear that the

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29 *Marbury v Madison*, above n 27, 177.

30 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.

31 *Australian Communist Party v The Commonwealth*, above n 30, 193. See also *Abebe v Commonwealth of Australia* (1999) 197 CLR 510, 560; *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 381; *Plaintiff S157/2002 v Commonwealth of Australia*, above n 10, 34, 52.

32 Sir W Harrison Moore *The Constitution of the Commonwealth of Australia* (2 ed, 1910, reprinted Legal Books, St Leonards, 1997) 322–324.

Constitution vests power in the High Court to review legislation for consistency with the Constitution.[33] As Sir Owen Dixon argued extra-judicially, the words of section 76(i) "impliedly acknowledge the function of the courts [to engage in judicial review]".[34] The express terms of section 75(v), which provide that the High Court *shall* have jurisdiction, mean that no such implication is needed in the case of judicial review of executive action.

In *Marbury v Madison* the United States Supreme Court found that it possessed the power to declare legislation to be inconsistent with the Constitution and therefore invalid. There is no equivalent single decision in Australia that establishes the authority of the High Court to review Acts of Parliament for unconstitutionality. The records of the 1890s Convention Debates at which the Constitution was drafted indicate that the framers of the Australian Constitution intended, or perhaps assumed, that the High Court would be the ultimate arbiter of constitutional power.[35] In the main, this has been uncritically assumed ever since. The 1951 decision in the *Communist Party Case* is the closest that the High Court has come to expressly declaring its role.[36] This decision also illustrates the importance of accepted, but textually unexpressed, rule-of-law principles in any constitutional system, but especially in a system without a bill of rights.

In the *Communist Party Case* the High Court heard a challenge to the attempt of the newly elected Menzies Government to suppress Australian communism by banning the Australian Communist Party. This policy received overwhelming public support, with one poll taken in May 1950 showing 80 per cent of electors in favour.[37] Among the more remarkable features of the Communist Party Dissolution Act 1950 (Cth) were the nine recitals that prefaced the operative sections of the legislation. Recitals four to eight set out Parliament's view of communism and the Communist Party, such as in recital five that the Party:

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33 P H Lane *The Australian Federal System* (2 ed, Law Book Co, Sydney, 1979) 1135–1144; G Lindell "The Justiciability of Political Questions: Recent Developments" in H P Lee and George Winterton (eds) *Australian Constitutional Perspectives* (Law Book Co, Sydney, 1992) 218–229; R D Lumb "The Judiciary, the Interpretation of the Constitution and the Australian Constitutional Convention" (1983) 57 ALJ 229, 229.

34 Sir Owen Dixon *Jesting Pilate* (Law Book Co, Sydney, 1965) 175.

35 James A Thomson "Constitutional Authority for Judicial Review: A Contribution from the Framers of the Australian Constitution" in Gregory Craven (ed) *The Convention Debates 1891–1898: Commentaries, Indices and Guide* (Legal Books, Sydney, 1986) 173, 186.

36 *Australian Communist Party v The Commonwealth*, above n 30. But see also *Plaintiff S157/2002 v Commonwealth of Australia*, above n 10 as analysed in Duncan Kerr and George Williams "Review of Executive Action and the Rule of Law under the Australian Constitution" (2003) 14 PLR 219.

37 L F Crisp *Ben Chifley: A Political Biography* (Angus & Robertson, Sydney, 1977) 390.

> engages in activities or operations designed to bring about the overthrow or dislocation of the established system of government of Australia and the attainment of economic, industrial or political ends by force, violence, intimidation or fraudulent practices.

Recital nine stated Parliament's belief that:

> [I]t is necessary, for the security and defence of Australia and for the execution and maintenance of the Constitution and of the laws of the Commonwealth, that the Australian Communist Party, and bodies of persons affiliated with that party, should be dissolved and their property forfeited to the Commonwealth, and that members and officers of that party or of any of those bodies and other persons who are communists should be disqualified from employment by the Commonwealth and from holding office in an industrial organization a substantial number of whose members are engaged in a vital industry.

The operative provisions of the Act then went on to implement these measures. Section 4 declared the Australian Communist Party to be an unlawful association, provided for its dissolution, and enabled the appointment of a receiver to manage its property. Section 5 provided the machinery for declarations by the Governor-General that organisations other than the Party were also unlawful. This provision targeted bodies that supported or advocated communism, were affiliated with the Party, or whose policies were substantially shaped by members of the Party or "Communists". Once unlawful, an association would be dissolved under section 6 and a receiver appointed under section 8. An organisation could be declared unlawful under section 5(2) where:

> the Governor-General is satisfied that a body of persons is a body of persons to which this section applies and that the continued existence of that body of persons would be prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution or of the laws of the Commonwealth.

Under section 9(2), the Governor-General could declare any person to be a "Communist" or member of the Australian Communist Party by applying a similar discretion to that laid out in section 5(2). "Communist" was defined by section 3 to mean "a person who supports or advocates the objectives, policies, teachings, principles or practices of communism, as expounded by Marx and Lenin". Once declared, section 10 meant a person could not hold office in the Commonwealth public service or in industries declared by the Governor-General to be vital to the security and defence of Australia. Should a person wish to contest a declaration by the Governor-General, he or she could do so under section 9(4), although section 9(5) provided that "the burden shall be upon him to prove that he is not a person to whom this section applies".

The Communist Party Dissolution Act was a draconian attack on several basic liberties, such as freedom of association and expression. It was an attack that, despite the hysteria of the time, was out of proportion to any threat posed by the Australian Communist Party to

the Australian polity.[38] More subtly, the legislation was also an attack upon the position of the High Court. Parliament had sought to recite itself into power. The recitals amounted to a statement that the Court should take notice that Parliament believed its legislation was valid under its implied power to legislate about Australian nationhood or under its defence power in section 51(vi) of the Constitution. The recitals were thus a challenge to the High Court's role as the arbiter of the scope of Commonwealth power under the Constitution.

Given the absence of a bill of rights and the public support for the Government's position, how did the High Court respond? Its answer was direct and decisive. The Court, with Chief Justice Latham dissenting, held the Communist Party Dissolution Act to be wholly invalid.[39] In argument before the High Court it was forcefully submitted that the Act was invalid due to its derogation of civil liberties and the democratic process.[40] However, the majority reasoning did not find the Act invalid because it breached constitutionally entrenched civil liberties, but because it could not be characterised as law falling within one of the subject matters of Commonwealth power. This conclusion rested on two findings. First, the Court refused to accept the Parliament's view of the legislation and the Australian Communist Party as expressed in the recitals. The recitals might be of some use in ascertaining the intention of Parliament in passing the Act, but could play no role in determining whether the Act actually fell within Commonwealth power. That was a decision for the High Court alone.

Second, the Court found that the Act lacked a sufficient connection with a head of power. The Governor-General's power to make declarations under sections 5(2) and 9(2) of the Act were found to be unreviewable by the Court and thus granted an unfettered discretion to determine the scope of Commonwealth power by declaring certain persons or organisations to be "prejudicial to the security and defence of the Commonwealth".[41] These sections were invalid because they imposed "legal consequences on a legislative or executive opinion which itself supplies the only link between the power and the legal

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38 George Williams "The Suppression of Communism by Force of Law: Australia in the Early 1950s" (1996) 42 AJPH 220. Compare Roger Douglas "A Smallish Blow for Liberty? The Significance of the Communist Party Case" (2001) 27 Monash ULR 253.

39 Compare *Dennis v United States* (1951) 341 US 494 and *Switzman v Elbling* [1957] SCR 285. But see George Winterton "The Significance of the *Communist Party* Case" (1992) 18 Melb ULR 630, 657–658 on the dangers of making comparisons between these cases and the *Communist Party Case*.

40 George Williams "Reading the Judicial Mind: Appellate Argument in the Communist Party Case" (1993) 15 Sydney LR 3, 17–22.

41 Communist Party Dissolution Act 1950 (Cth), ss 5(2), 9(2).

consequences of the opinion".[42] Underpinning both of the above findings was the view that responsibility for determining the scope of Commonwealth power lay with the High Court alone. The attempt by Parliament to determine the scope of its own power breached the cryptic maxim that "a stream cannot rise higher than its source".[43]

It has been argued that the decision in the *Communist Party Case* is "probably the most important ever rendered by the [High] Court".[44] The decision is important because it held invalid legislation that would have significantly impeded the political liberties of Australians. Argument of counsel on issues of civil liberties did find some voice in the Court's decision. In a departure from the legalism pervading the judgments, Justice Dixon stated:[45]

> History and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power. Forms of government may need protection from dangers likely to arise from within the institutions to be protected. In point of constitutional theory the power to legislate for the protection of an existing form of government ought not to be based on a conception, if otherwise adequate, adequate only to assist those holding power to resist or suppress obstruction or opposition or attempts to displace them or the form of government they defend.

Despite this and similar rhetoric,[46] the *Communist Party Case* cannot be cast as a decision of great civil libertarian proportions. In the result the Court struck down a law that infringed basic freedoms. However, despite the majority's clear dislike of the Act, the finding of invalidity did not depend upon the Act having breached any express or implied constitutional guarantee protective of human rights. Instead, the result flowed from the majority's finding that the Communist Party Dissolution Act could not be characterised as a law falling within a head of Commonwealth power.

In any event, the real significance of the *Communist Party Case* lies in the fact that the Court, in striking down the Communist Party Dissolution Act, entrenched its own position as the ultimate arbiter of the Constitution, and thus as an independent check upon the power of the legislature and the executive. In particular, the mantra that "a stream cannot rise higher

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42 *Australian Communist Party v The Commonwealth*, above n 30, 261 Fullagar J.

43 *Australian Communist Party v The Commonwealth*, above n 30, 258 Fullagar J. See L Zines *The High Court and the Constitution* (4 ed, Butterworths, Sydney, 1997) ch 11.

44 Winterton "The Significance of the *Communist Party* Case", above n 39, 653.

45 *Australian Communist Party v The Commonwealth*, above n 30, 187–188.

46 *Australian Communist Party v The Commonwealth*, above n 30, 193 Dixon J ("the rule of law"); 268 Fullagar J ("relaxation of a fundamental constitutional rule").

than its source" can be seen as a bulwark against the exercise of arbitrary governmental power. In the *Communist Party Case* the doctrine of judicial review was emphatically affirmed. As Justice Fullagar stated, "in our system the principle of *Marbury v Madison* is accepted as axiomatic".[47]

The Menzies Government subsequently sought to amend the Constitution to give the Commonwealth the power to proscribe communism (and thereby to override the High Court's decision).[48] The amendment was narrowly defeated at a popular referendum held in 1951.[49] The result suggested that despite the continuing public support for the idea that communism ought to be suppressed, the Australian people were not prepared to second guess the decision of the High Court.

B Implied Rights

In 1951, the High Court struck down the Communist Party Dissolution Act without reference to any express guarantees of human rights. Without a bill of rights, it is not surprising that other judges have looked to derive implications from the Constitution. There is a long history of the High Court deriving implications in the area of federalism. As Justice Dixon argued in *Melbourne Corporation v The Commonwealth* in 1947, the "efficacy of the system logically demands" that certain implications be given recognition,[50] in that case a limited immunity for the States from Commonwealth laws.

In charting the rights contained in the Australian Constitution by implication, Justice Murphy, a judge of the High Court from 1975 to 1986 and a former Attorney-General in the Whitlam Government, found what almost amounted to a bill of rights. The first case in which he suggested that the Constitution embodies implied freedoms was *The Queen v Director-General of Social Welfare for Victoria; Ex parte Henry*, in which he found that "[i]t would not be constitutionally permissible for the Parliament of Australia or any of the States to create or authorize slavery or serfdom."[51] He justified this conclusion in two sentences: "The reason lies in the nature of our Constitution. It is a Constitution for a free society." In other cases Justice Murphy implied freedoms of movement and

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47 *Australian Communist Party v The Commonwealth*, above n 30, 262 Fullagar J.

48 See Michael Kirby "H V Evatt, The Anti-Communist Referendum and Liberty in Australia" (1991) 7 Aust Bar Rev 93; L C Webb *Communism and Democracy in Australia* (Cheshire, Melbourne, 1954).

49 Section 128 of the Constitution provides that the Constitution can only be changed by such a referendum. For the result of the referendum, see Tony Blackshield and George Williams *Australian Constitutional Law and Theory: Commentary and Materials* (3 ed, Federation Press, Leichhardt, 2002) 1305.

50 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31, 83.

51 *The Queen v Director-General of Social Welfare for Victoria; Ex parte Henry* (1975) 133 CLR 369, 388.

communication,[52] a right to be heard before being subject to an adverse order,[53] and a freedom from "cruel and unusual punishment".[54] In *Ansett Transport Industries (Operations) Pty Ltd v Wardley* he even argued that: "It may be that an implication should be drawn from its terms that the Parliament's legislative powers do not extend to authorizing arbitrary discrimination between the sexes."[55] Justice Murphy's views on implied rights were rejected by other members of the High Court. In 1986 in *Miller v TCN Channel Nine Pty Ltd*, a case dealing with section 92 of the Constitution, Justice Murphy referred to "guarantees of freedom of speech and other communications and freedom of movement not only between the States and the States and the Territories but in and between every part of the Commonwealth."[56] This drew a series of stinging rebukes, including from Justice Mason that "[i]t is sufficient to say that I cannot find any basis for implying a new s 92A into the Constitution."[57]

Justice Mason became Chief Justice of the High Court in 1987. Five years later, in *Australian Capital Television Pty Ltd v Commonwealth*,[58] the Court, including its Chief Justice, held that the Constitution embodies a freedom to discuss matters relating to Australian government.[59] A majority of the Court applied this freedom to strike down sections of the Political Broadcasts and Political Disclosures Act 1991 (Cth) that severely limited political advertising on radio and television during election periods. The freedom of political communication discovered in *Australian Capital Television* was derived from the system of representative government created by sections 7 and 24 of the Constitution, which require, respectively, that the members of the Senate and the House of Representatives be "directly chosen by the people". It was held that this choice must be "genuine" or "informed", and that it may be inconsistent with government restrictions on public access to political information.

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52 For example, *Buck v Bavone* (1976) 135 CLR 110, 137.

53 *Taylor v Taylor* (1979) 143 CLR 1, 20.

54 *Sillery v The Queen* (1981) 180 CLR 353, 362.

55 *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237, 267.

56 *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 581–582.

57 *Miller v TCN Channel Nine Pty Ltd,* above n 56, 579. For further criticism see Paul Bickovskii "No Deliberate Innovators: Mr Justice Murphy and the Australian Constitution" (1977) 8 FL Rev 460; George Winterton "Extra-Constitutional Notions in Australian Constitutional Law" (1986) 16 FL Rev 223.

58 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106.

59 See on the influence or otherwise of the decisions of Justice Murphy on the subsequent High Court, Michael Coper and George Williams (eds) *Justice Lionel Murphy: Influential or Merely Prescient?* (Federation Press, Leichhardt, 1997).

The Court has implied other rights from chapter III of the Constitution, which establishes and defines federal judicial power. In *Re Tracey; Ex parte Ryan* Justice Deane suggested that the separation of judicial power effected by Chapter III power is "the Constitution's only general guarantee of due process".[60] Like implications drawn from sections 7 and 24 of the Constitution, implications from the separation of judicial power were the subject of considerable High Court activity over the 1990s. Indeed, in a system that lacks a bill of rights, it is difficult to overstate the potential importance of rights derived from Chapter III. In *Street v Queensland Bar Association*, Justice Deane, in the context of listing a number of constitutional rights, commented that "[t]he most important of them is the guarantee that the citizen can be subjected to the exercise of Commonwealth judicial power only by the 'courts' designated by Ch III (s 71)".[61]

Several implied rights have been derived from this source, many of them as yet undeveloped. For example, in 1991 in *Polyukhovich v The Commonwealth*,[62] which arose out of the prosecution of Ivan Polyukhovich for having committed war crimes in Ukraine when it was under German occupation during the Second World War, members of the Court held that certain aspects of the trial process are protected by the Constitution. What was protected, however, was not the human rights of the individual, but the structural implication that judicial power can only be vested so as to enable federal courts to function in accordance "with the essential requirements of a court".[63] Justices Deane and Gaudron found that the Commonwealth Parliament could not retrospectively establish criminal offences. While this did not attract the support of the other judges, a majority did hold that the Commonwealth could not enact a bill of attainder. In other cases, such as *Lim v Minister for Immigration, Local Government and Ethnic Affairs*,[64] members of the Court have held that the separation of judicial power protects Australians from the imposition of involuntary detention of a penal or punitive character by the legislature or executive.

C International Law

International law offers another source of principles and guidance for the interpretation of the Australian Constitution that might enable the creation of a rights jurisprudence.[65]

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60 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 580.

61 *Street v Queensland Bar Association,* above n 14, 521.

62 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501.

63 *Polyukhovich v The Commonwealth*, above n 62, 607 Deane J.

64 *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.

65 See Amelia Simpson and George Williams "International Law and Constitutional Interpretation" (2000) 11 PLR 205; Kristen Walker "International Law as a Tool of Constitutional Interpretation" (2002) 28 Monash ULR 85. See generally on the interaction between international law and the

While the High Court commonly refers to a range of extrinsic material in its interpretation of the Constitution, such as the debates at which the Constitution was drafted,[66] Justice Kirby is the only current member of the High Court to make use of international norms. He developed a distinctive "interpretative principle" in relation to international law when he stated in *Newcrest Mining (WA) Ltd v The Commonwealth*:[67]

> [I]nternational law is a legitimate and important influence on the development of the common law and constitutional law, especially when international law declares the existence of universal and fundamental rights. To the full extent that its text permits, Australia's Constitution, as the fundamental law of government in this country, accommodates itself to international law, including in so far as that law expresses basic rights. The reason for this is that the Constitution not only speaks to the people of Australia who made it and accept it for their governance. It also speaks to the international community as the basic law of the Australian nation which is a member of that community.

Justice Kirby applied this approach in his dissent in *Kartinyeri v Commonwealth*.[68] He referred to the prohibition in international law of "detrimental distinctions on the basis of race",[69] which he then applied to underpin his conclusion that the federal Parliament's race power[70] "does not extend to the enactment of laws detrimental to, or discriminatory against, the people of any race (including the Aboriginal race) by reference to their race".[71]

Justice Kirby's interpretative approach has not gained acceptance among the other members of the Court. In *Kartinyeri*, Justices Gummow and Hayne, while accepting that international law principles have a role to play in statutory interpretation, considered those principles, at least in the context of limiting legislative power, to be inappropriate for use in constitutional interpretation. In their view, the use of international law in *Kartinyeri* would have involved a sleight of hand as it would have meant applying "a rule for the construction of legislation passed in the exercise of the legislative power to limit the

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Australian legal system Hilary Charlesworth, Madelaine Chiam, Devika Hovell, and George Williams "Deep Anxieties: Australia and the International Legal Order" (2003) 25 Sydney LR 423.

66 See for example *Cole v Whitfield* (1988) 165 CLR 360, 385.

67 *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513, 657–658.

68 *Kartinyeri v Commonwealth*, above n 31.

69 *Kartinyeri v Commonwealth*, above n 31, 418.

70 Australian Constitution, s 51(xxvi): "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to … [t]he people of any race for whom it is deemed necessary to make special laws".

71 *Kartinyeri v Commonwealth*, above n 31, 411.

content of the legislative power itself".[72] Similarly, in *AMS v AIF*, Chief Justice Gleeson and Justices McHugh and Gummow observed that:[73]

> reliance … upon several international instruments to which this country is a party did not advance [the] arguments … . As to the Constitution, its provisions are not to be construed as subject to an implication said to be derived from international law.

Justice Callinan in *Western Australia v Ward* has most strongly rejected the approach of Justice Kirby and the premise that the Constitution speaks not only to the Australians people but also to the international community:[74]

> The provisions of the Constitution are not to be read in conformity with international law. It is an anachronistic error to believe that the Constitution, which was drafted and adopted by the people of the colonies well before international bodies such as the United Nations came into existence, should be regarded as speaking to the international community. The Constitution is *our* fundamental law, not a collection of principles amounting to the rights of man, to be read and approved by people and institutions elsewhere. The approbation of nations does not give our Constitution any force, nor does its absence deny it effect. Such a consideration should, therefore, have no part to play in interpreting our basic law.

IV THE AUSTRALIAN EXPERIENCE: PROBLEMS

The Australian experience demonstrates how a court may be able to protect some human rights without a bill of rights. It reinforces the importance for the protection of rights of a legal culture based upon the rule of law and enforced by an independent High Court. The decision of the High Court of Australia in the *Communist Party Case* is an example of this. However, Australia also demonstrates the limits of such a system. While it has proved effective in some cases in protecting democratic freedoms against legislative interference, it has proved inadequate in others. As a result, matters that come before the High Court are rarely argued or determined according to human rights principles. This reflects the reluctance of the Court to base its conclusions on such grounds, and is an inevitable result of the Australian Constitution's not containing a bill of rights.

The fact that human rights principles remain largely irrelevant to the exercise of judicial review by the High Court of Australia results in three problems. First, and most obviously, the lack of a bill of rights in Australia means that legislative violations of human rights, such as in the area of artistic expression or discrimination on the basis of race or

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72 *Kartinyeri v Commonwealth*, above n 31, 386.

73 *AMS v AIF* (1999) 199 CLR 160, 180.

74 *Western Australia v Ward* (2002) 191 ALR 1, 275 (HCA).

sex,[75] may not be capable of being raised in judicial proceedings. This means that such legislation may remain in force and that those affected have no remedy. Even where legislation infringing basic freedoms is litigated in the High Court, it is rarely adjudicated upon within a framework of human rights principles. Analysis according to such principles is seen as lacking political and legal legitimacy when there is apparently no legal standard, such as in a bill of rights, that can give rise to a rights-based approach to judicial review.

One consequence of this is that judicial and political battles over questions such as the right to a fair trial are instead mediated according to the structural features of the Constitution. These include federalism, the separation of judicial power (including the idea of the entrenched "essential" features of federal courts) and, to a lesser extent, representative government. This can transform concerns over human rights in Australia into debate about the relative powers of the Commonwealth and the States (a battle over States' rights) or about whether the courts are being asked to exercise functions appropriate to their role. This can also leave little or no room (nor even an opening) for concepts vital to effective human rights discourse, such as the "dignity and worth of the human person".[76] The set of tools of the Australian human rights lawyer is indeed very limited.[77]

It might be thought that such concerns have been lessened by the development of implied rights. However, these implied rights are not in fact human rights at all in that they do not inhere in the individual. As a unanimous High Court stated in *Lange v Australian Broadcasting Corporation* in regard to the implied freedom of political communication derived from sections 7 and 24 of the Constitution, "[t]hose sections do not confer personal rights on individuals. Rather they preclude the curtailment of the protected freedom by the exercise of legislative or executive power."[78] Analysis under such an implication always has as its primary focus the ambit of the affected governmental power and not the individual. This is reflected in the remedies available. The High Court has held that a breach of a constitutional right, including an express right, only entitles the successful party to a declaration that the

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75 Legislation such as the Racial Discrimination Act 1975 (Cth) and the Sex Discrimination Act 1984 (Cth) are limited in their scope and operation and in any event may be overridden by subsequent inconsistent federal legislation. See, for example, the Native Title Act 1993 (Cth), s 7.

76 Universal Declaration of Human Rights, UNGA Resolution 217A (III) (10 December 1948), preamble.

77 Compare David Kinley (ed) *Human Rights in Australian Law: Principles, Practice and Potential* (Federation Press, Leichhardt, 1998).

78 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560. They confirmed Justice Brennan's description in *Australian Capital Television Pty Ltd v The Commonwealth*, above n 58, 150 of the implied freedom as "an immunity consequent on a limitation of legislative power".

relevant law is invalid,[79] and to whatever consequences flow from this, rather than to any compensation for the effects of the unconstitutional action. In *Kruger v Commonwealth* Chief Justice Brennan and Justices Toohey and Gaudron, with support from Justice Gummow, held that even if a provision authorising the forced removal of Aboriginal children from their parents were unconstitutional, there would not be any entitlement to damages other than such damages that might be obtained under the common law. As Chief Justice Brennan found, "[t]he Constitution creates no private rights enforceable directly by an action for damages."[80]

Second, the lack of any judicial remedy also affects the parliamentary process. As nations such as Canada have shown, courts with a power of judicial review over human rights matters can initiate a "dialogue",[81] or other form of institutional interaction for want of a better term, with legislatures. Taking the courts out of the equation means that this dialogue does not emerge and that human rights issues are not the subject of appropriate deliberation. Without a bill of rights, Australia continues to suffer from a longstanding weakness in its democratic structure.

As there is no capacity for human rights principles to be raised in the courts, they can fail to receive examination by Parliament. Political debate and the Senate inquiry process[82] in the Australian federal Parliament is often sparked by concern that legislation may be declared unconstitutional. Without the possibility of post-enactment scrutiny by the judiciary on human rights grounds, there is little incentive for pre-enactment scrutiny to occur within the legislative process. Hence, a significant advantage of a bill of rights is not only the improvement in the capacity of a court to fulfil its constitutional role and in the dialogue that may follow a judicial decision, but the dialogue that begins within the legislative body before any such decision. Of course, this is not to say that public policy-making should always take place according to the contours of the perceived limits of a constitution, but as a statement of basic values, however imperfect, a constitution is often better than nothing. A serious weakness of the Australian system is thus that we lack any

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79 *South Australia v The Commonwealth* (1942) 65 CLR 373, 409 Latham CJ.

80 *Kruger v Commonwealth* (1997) 146 ALR 126, 142 (HCA).

81 See Peter W Hogg and Allison A Bushell "The *Charter* Dialogue between Courts and Legislatures" (1997) 35 Osgoode Hall LJ 75. This issue of "dialogue" has provoked intense debate in Canada. See Christopher P Manfredi and James B Kelly "Six Degrees of Dialogue: A Response to Hogg and Bushell" (1999) 37 Osgoode Hall LJ 513 and the further response by Peter W Hogg and Allison A Thornton "Reply to 'Six Degrees of Dialogue'" (1999) 37 Osgoode Hall LJ 529.

82 See for example Senate Legal and Constitutional Legislation Committee *Constitutional Aspects of the Native Title Amendment Bill 1997* (1997).

effective form of pre- or post-judicial decision dialogue on human rights matters. This can undermine the deliberative effectiveness of Parliament.

Third, Australia more generally lacks effective community deliberation (or dialogue) on human rights matters. This stems in part from the fact that human rights language and concepts, in the absence of a bill of rights and thus institutional engagement in such matters by legislatures and courts, lack political and legal legitimacy. This is not a problem if appropriate judicial and community outcomes can be reached in the absence of human rights analysis, but that is not a position that would be readily accepted in any other comparable constitutional system. As a consequence, Australia is an example of a country where, in the absence of a judicially enforceable bill of rights, the people do not always take rights seriously.

This may also be a consequence of the fact that Australians generally have little understanding of how the current system of government works. A 1987 survey conducted for the Constitutional Commission found that 47 per cent of Australians were unaware that Australia has a written constitution.[83] Similarly, the 1994 report of the Civics Expert Group[84] found that only 18 per cent of Australians have some understanding of what their Constitution contains, while more than a quarter of those surveyed nominated the Supreme Court, rather than the High Court, as the "top" court in Australia.

These three problems of the Australian legal system suggest a strong case for reform. This is not to say that the High Court of Australia can do more at the present time than achieve a limited or "stunted" rights jurisprudence. In the absence of a bill of rights, only so much can be achieved by broader interpretation of the express rights in the Australian Constitution and by the derivation and development of implied rights. The text of the Constitution is severely limited in its capacity to give rise to the comprehensive rights protection found in other national constitutions. There are also significant institutional constraints, including perceptions of the "proper" role of the Court in the eyes of the Australian community and the fact that the Court is limited to the cases that come before it. Hence, even with an infusion of ideas and concepts from international law, it would not be feasible for the High Court to fashion an implied bill of rights.

Legislative, and not judicial, innovation like that in New Zealand and the United Kingdom is required to bring about a bill of rights in Australia.[85] This is necessary not only because of the limitations inherent in the Constitution, but because the people's

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83 Constitutional Commission *Bulletin No 5* (1987).

84 Civics Expert Group *Whereas the People: Civics and Citizenship Education* (1994).

85 See George Williams *A Bill of Rights for Australia* (University of New South Wales Press, Sydney, 1999).

representatives must be involved in order to ground stronger rights protection in the popular will and bestow upon it democratic legitimacy. Without the support of the people through their representatives, the ultimate effectiveness of judicial review under any bill of rights is doubtful. The instrument may possess a level of legal efficacy, but it would be unlikely to play the more important roles of influencing community and political attitudes and of bringing about a culture of rights protection.

V CONCLUSION

The debate in Australia about the form of any bill of rights demonstrates a wider phenomenon. It suggests that despite the strong inertia that acts against almost any form of change to an established constitutional system, there are forces of convergence at work between written and unwritten constitutional systems on what might be regarded as the appropriate constitutional role of the courts. This may be one consequence of the development of a genuinely global debate on constitutionalism and questions of constitutional design.[86] It also reflects the fact that questions about the constitutional role of the courts tend to produce common answers and approaches among nations with like political, common law, and cultural traditions.

This convergence is evident in nations with a written constitution and strong tradition of judicial review in how they are debating and developing ways of limiting the power of the courts to have the final say over questions of human rights and social policy. This can be seen not only in the Australian bill of rights debate but in other nations with a written constitution. The override clause in the Canadian Charter of Rights and Freedoms is an interesting example of limiting judicial review though an explicit recognition of parliamentary sovereignty. Section 33(1) of that Charter provides that Canadian Parliaments can "expressly declare in an Act of Parliament or of the legislature … that the Act or a provision thereof shall operate notwithstanding" certain of the rights listed in the Charter. There are also pressures in a similar direction in other nations with written constitutions as reflected in the growth of new models and methods of explaining constitutional systems. One such model is based upon the idea of "dialogue"[87] between the courts and the other arms of government under which the courts are not seen as having the final say.[88]

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86 See for example Tom Campbell, Jeffrey Goldsworthy, and Adrienne Stone (eds) *Protecting Human Rights: Instruments and Institutions* (Oxford University Press, Oxford, 2003); Vicki C Jackson and Mark Tushnet (eds) *Defining the Field of Comparative Constitutional Law* (Praeger, Westport, 2002); and the International Journal of Constitutional Law.

87 See above n 81.

88 See also Mark Tushnet *Taking the Constitution Away from the Courts* (Princeton University Press, Princeton, 1999).

On the other hand, nations without a written constitution are developing novel forms of judicial review, such as the idea of judicial declarations of incompatibility,[89] over issues of human rights that give courts a greater power to influence political and legal development. Hence, the New Zealand and United Kingdom legislative bills of rights represent a move from what was largely a politically-regulated constitution to a more law-based constitution in which the law and the courts play a more significant role.[90] This move is also reflected in the re-emergence of debate in the United Kingdom about common law constitutionalism and the notion that the common law is a "higher" form of law than statute law.

In the 19th century, Dicey argued that a federal system with a written constitution "means legalism—the predominance of the judiciary in the constitution—the prevalence of a spirit of legality among the people".[91] This spirit can now also be detected among nations without either a federal system or a written constitution, but with legislative bills of rights. This change will no doubt continue to spark debate, at the centre of which will be fundamental questions about the proper constitutional role of the courts.

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89 See Human Rights Act 1998 (UK), s 4.

90 This is an important theme in works such as Dawn Oliver *Constitutional Reform in the UK* (Oxford University Press, Oxford, 2003).

91 Dicey, above n 3, 175.