HUMAN RIGHTS AND THE SECOND CENTURY OF THE *AUSTRALIAN CONSTITUTION*

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I INTRODUCTION

In many countries with a written constitution, constitutional development in the second half of the 20th century was dominated by concepts of human rights. For example, Canada and South Africa gained Bills of Rights[1] while the United States saw an existing Bill of Rights expanded through judicial interpretation. In other nations, international norms and the proliferation of treaties and conventions acted as a catalyst for the examination of domestic human rights concerns. In countries without a written constitution, such as New Zealand and the United Kingdom ('UK'), international human rights standards were incorporated into domestic law through statutory Bills of Rights.[2]

Australia stands apart from these developments. As a result, according to Spigelman CJ of the Supreme Court of New South Wales, within a decade, British and Canadian court decisions in many areas of the law may become 'incomprehensible to Australian lawyers'. He has warned that the 'Australian common law tradition is threatened with a degree of intellectual isolation that many would find disturbing'.[3] While federal and State Parliaments have enacted important human rights legislation, particularly in the form of anti-discrimination statutes,[4] they have not brought about a constitutional or statutory Bill of Rights. Australia is alone among comparable nations in not having a domestic Bill of Rights in some form. This is surprising given that international human rights law has had a significant political and legal impact in Australia. Politically, international law has been widely invoked in debates on issues such as euthanasia, mandatory sentencing and the rights of children. Legally,

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1 See *Canadian Bill of Rights 1960* (Canada); *Canadian Charter of Rights and Freedoms 1982*; *Constitution of the Republic of South Africa* ch 2.

2 See *New Zealand Bill of Rights Act 1990* (NZ); *Human Rights Act 1998* (UK).

3 J J Spigelman, 'Access to Justice and Human Rights Treaties' (2000) 22 *Sydney Law Review* 141, 150.

4 At the federal level, see *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Disability Discrimination Act 1992* (Cth).

international law is applied by judges in the construction of statutes,[5] the development of the common law,[6] administrative decision-making,[7] and, to a lesser extent, constitutional interpretation.[8]

The lack of a domestic Bill of Rights might reflect the fact that Australia's human rights record is comparatively strong and that such an instrument is accordingly not needed. On 18 February 2000, Prime Minister John Howard, in discussing mandatory sentencing on the ABC's *AM* program, stated that 'Australia's human rights reputation compared with the rest of the world is quite magnificent'. While Australia undoubtedly has a better human rights record than many other nations, any implication that our record could not be significantly improved is not consistent with the historical record. As Brian Burdekin, a former Australian Human Rights Commissioner, commented in 1994:

> 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.[9]

Most Australians are secure in the knowledge that their basic rights are well protected and that the rule of law is firmly entrenched in our political culture. However, while middle class white Australia has little to fear from oppressive laws, this is not the correct indicator. What matters is how we treat the vulnerable in the community, such as the poor with little or no economic power, or people living in rural areas with dwindling access to basic services. Examined from this perspective, our human rights record is not strong. There have been many instances since Federation, including up to the present day, in which minority groups in the Australian community have suffered violations of their fundamental rights due to action by Australian governments.

For example, over most of the 20th century, Indigenous children (the 'Stolen Generations') were forcibly taken from their families for adoption or to be placed into institutions. In the 1997 report of the Human Rights and Equal Opportunity Commission, *Bringing Them Home*, it was found that:

> Nationally we can conclude with confidence that between one in three and one in ten Indigenous children were forcibly removed from their families and communities in the period from approximately 1910 until 1970.[10]

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5 See, eg, *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 38 (Brennan, Deane and Dawson JJ). Their Honours said: '[T]he courts should, in a case of ambiguity, favour a construction of a Commonwealth statute which accords with the obligations of Australia under an international treaty'.

6 See, eg, *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 42 (Brennan J). His Honour said: 'The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights'.

7 See *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

8 See, eg, *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 657-8 (Kirby J). His Honour said: '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'. See generally Amelia Simpson and George Williams, 'International Law and Constitutional Interpretation' (2000) 11 *Public Law Review* 205.

9 Brian Burdekin, 'Foreword' in Philip Alston (ed), *Towards an Australian Bill of Rights* (1994) v, v.

It is possible to point to many other examples, such as the White Australia Policy that governed Australian immigration practices, where human rights have been violated due to racist or otherwise inappropriate policies.[11]

Several contemporary controversies also reveal that our human rights record needs improvement. For example, our treatment and detention of refugees, themselves escaping persecution, torture or even execution for political or other reasons, is hardly humane or consistent with commonly held views about human dignity. Also relevant are mandatory sentencing laws under which people, a disproportionate number of whom are Indigenous, are being sent to prison for extended periods without a judge being able to take account of the actual circumstances of their offence. The regime of mandatory minimum sentencing for minor property offences operating since March 1997 in the Northern Territory[12] has meant that the imprisonment rates of Indigenous women and children have risen alarmingly, including imprisonment for offences such as the stealing of a packet of biscuits valued at AUD$3.00. The legislation imposes a 'three strikes and you're in' policy under which a third minor property offence will lead to automatic imprisonment of not less than 12 months.[13] Such legislation is inconsistent with the right to a fair trial and, if convicted, to have a just sentence fixed by a judge possessing the discretion to tailor the penalty to fit the crime.

II WHAT NEEDS TO BE DONE

Australia's record of human rights concerns is not unlike that of other comparable nations, including in the treatment of Indigenous peoples. However, unlike those other nations, Australia has not responded with a Bill of Rights or other like measures. In such circumstances, past and continuing human rights concerns in Australia present a strong case for reform. The Australian legal system ought to offer better protection for human rights and should contribute to the development of a political and community-based culture of rights. The legal system currently fails to achieve this – it does not protect many of our basic rights. Even the right to vote, and freedom from discrimination on the basis of race or sex, exist only so long as Parliament continues to respect them. In the past, this respect has had its limits.

The Australian legal and political system would be stronger for the infusion of human rights concepts. It might prevent some of the human rights violations of the first century of our Federation from being repeated. The next century of the *Australian Constitution* ('Constitution') should be about making up for lost time.

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10 Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (1997) 37.

11 See George Williams, *A Bill of Rights for Australia* (2000) 7-11.

12 *Sentencing Act 1995* (NT), as amended by the *Sentencing Act (No 2) 1996* (NT) and the *Sentencing Amendment Act 1998* (NT).

13 *Sentencing Act 1995* (NT) s 78A.

Developments in other nations in the field of human rights have largely passed us by. We should actively work towards a constitutional system that directly addresses basic human rights issues. This could deepen the roots of our democratic processes by developing a better understanding of the relationship between Australians and their government.

This would require a very different vision of Australian constitutionalism to that of the first century of our Federation. Even from the time of the framing of the Constitution in the 1890s,[14] our system of government has been dominated by the view of English constitutional theorist A V Dicey that civil liberties are adequately protected through the common law and political processes without the incorporation of guarantees of rights in a written constitution.[15] It has been said of the delegates to the Conventions that drafted the Constitution that,

> [l]ike anyone else within the English tradition, they must have felt that the protections to individual rights provided by the traditions of acting as honourable men were quite sufficient for a civilised society.[16]

This view is still strongly asserted in Australia as part of the argument that a Bill of Rights is not necessary because rights are well protected by the system of responsible government (under which the executive is answerable to Parliament which is in turn elected by the people). By contrast, other common law nations that once accepted this view have since enacted Bills of Rights. Even the British Parliament has enacted a Bill of Rights in the form of the *Human Rights Act 1998* (UK). Nations such as the UK have recognised that a modern pluralistic democracy requires more than just faith in the people's elected representatives and that explicit legal protection is required for minorities from majoritarian action, and even for the community at large.

In Australia today, two steps are needed. First, the few express and implied rights in the Constitution should be given a more robust interpretation consistent with the protection of individual liberty. The countervailing principle of parliamentary sovereignty has great weight, but it should not uniformly tip the scales in favour of the executive and Parliament. It should also be recognised that this first step is insufficient to bring about an adequate level of rights protection in Australia. Despite the 'discovery' of a wide range of constitutional rights by Murphy J,[17] the Constitution is not capable of giving rise to an implied Bill of Rights. To interpret the spare text of the instrument in this way would inevitably compromise the legitimacy of, and public support for, the High Court of Australia ('High Court') as the final interpreter of the Constitution.

Second, statute law and the common law, and in time the Constitution, should be reformed by the enactment of a domestic Bill of Rights. This is necessary because the current legal framework is incapable of giving rise to a satisfactory

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14 George Williams, *Human Rights under the Australian Constitution* (1999) 39-40.

15 A V Dicey, *Introduction to the Study of the Law of the Constitution* (first published 1885, 10th ed, 1959) 195-202.

16 R C L Moffat, 'Philosophical Foundations of the Australian Constitutional Tradition' (1965) 5 *Sydney Law Review* 59, 85-6.

17 See George Williams, 'Lionel Murphy and Democracy and Rights' in Michael Coper and George Williams (eds), *Justice Lionel Murphy – Influential or Merely Prescient?* (1997) 50.

level of rights protection. This second step would focus attention upon Parliaments and communities, and offers the chance to involve both in a drafting and consultation process that would also contribute to a stronger culture of rights protection. Such a culture would involve a tolerance and respect for rights built upon the values held and accepted by the Australian people.

III STEP ONE: REINTERPRETING THE CONSTITUTION

A Express Rights

The Constitution contains few express rights. The main ones are:

- s 41 – the right to vote;
- s 51(xxxi) – the right not to have the Commonwealth acquire property, except on just terms;
- s 80 – the right to trial by jury;
- s 92 – the right that 'trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free';
- s 116 – the right to freedom of religion; and
- s 117 – the right to freedom from disabilities or discrimination on the basis of State residence.

The drafting of these provisions is in most cases problematic and restrictive. Section 41, for example, only guarantees the right to vote where a person 'has or acquires a right to vote at elections for the more numerous House of the Parliament of a State', while s 80 only provides for a jury trial where, confusingly, the 'the trial [is] on indictment'. Even given such limitations, the High Court's approach to the civil and political rights in the above list (ie, excluding ss 51(xxxi) and 92) has been extremely narrow, with each of these rights being interpreted almost out of existence.[18] In fact, 1989 was the first time that a plaintiff was successfully able to invoke an express guarantee of a civil and political right in the High Court, in that case, s 117.

The reinterpretation of s 117 in *Street v Queensland Bar Association*,[19] and the strong language used by the High Court to develop an interpretation strongly protective of human rights, raised expectations that the Court might also adopt a broader construction of the other civil and political rights. This has not proved to be the case. Despite the Court developing a fixed (and arguably protective) view of what it means to have a 'jury trial',[20] s 80 remains a 'mere procedural provision'.[21] Similarly, the protection of the 'free exercise of any religion' in s 116 remains bound by an interpretation that owes more to form than substance. In *Kruger v Commonwealth* (*'Stolen Generations Case'*),[22] members of the High

18 See generally Williams, above n 14, 96-128.
19 (1989) 168 CLR 461.
20 See, eg, *Cheatle v The Queen* (1993) 177 CLR 541.
21 *Spratt v Hermes* (1965) 114 CLR 226, 244 (Barwick CJ).
22 (1997) 190 CLR 1.

Court adopted the test developed earlier in *Attorney-General (Vic); Ex rel Black v Commonwealth* (*'DOGS Case'*),[23] that is: 'To attract invalidity under s 116, a law must have the purpose of achieving an object which s 116 forbids'.[24] There has yet to be a case in the High Court in which s 116 has been applied.

Despite the obvious limitations in the drafting and scope of the express civil and political rights in the Constitution, they are capable of a wider operation than has so far been granted by the High Court. The Court should adopt as an interpretive principle the idea that such rights should be interpreted so far as is possible in a manner protective of human rights. This approach is consistent with that adopted by individual judges including Murphy J,[25] Gaudron J[26] and Kirby J. Justice Kirby stated in *Newcrest Mining (WA) Ltd v Commonwealth*:

> Where the Constitution is ambiguous, this Court should adopt that meaning which conforms to the principles of fundamental rights rather than an interpretation which would involve a departure from such rights.[27]

Such an approach would reveal that the express guarantees of civil and political rights in the Constitution are capable of a considerably greater operation than has thus far been shown.

B Implied Rights

The High Court has found that many doctrines and principles of constitutional law can be derived, by implication, from the Constitution. Despite the literalist rhetoric of the *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (*'Engineers Case'*),[28] there is a long history of the High Court deriving implications from the Constitution. As Dixon J argued in *Melbourne Corporation v Commonwealth* in 1947, the 'efficacy of the system logically demands' that certain implications be given recognition.[29] In that case, Dixon J recognised an implied immunity of the States from Commonwealth laws.

The first case in which an implication protective of human rights was derived from the Constitution was in 1912 in *R v Smithers; Ex parte Benson*.[30] In that case, Griffith CJ and Barton J found an implied freedom of movement between States and of access to government and to the seat of government. The modern approach to implied rights began with Murphy J, who sat as a judge of the High Court from 1975 to 1986. In a series of decisions, he held that the Constitution contains what almost amounted to an implied Bill of Rights. In *R v Director-General of Social Welfare (Vic); Ex parte Henry*,[31] for example, he found that: 'It would not be constitutionally permissible for the Parliament of Australia or

23 (1981) 146 CLR 559.
24 *Stolen Generations Case* (1997) 190 CLR 1, 40 (Brennan CJ).
25 *R v Pearson; Ex parte Sipka* (1983) 152 CLR 254, 268, 274.
26 *Stolen Generations Case* (1997) 190 CLR 1, 123, 131.
27 (1997) 190 CLR 513, 657.
28 (1920) 28 CLR 129.
29 (1947) 74 CLR 31, 83.
30 (1912) 16 CLR 99.
31 (1975) 133 CLR 369.

any of the States to create or authorize slavery or serfdom'.[32] In other cases, he implied freedoms of movement and communication,[33] a right to be heard before being subject to an adverse order[34] and a freedom from 'cruel and unusual punishment'.[35]

Justice Murphy derived such implications from a very broad reading of the Constitution. His finding in *R v Director-General of Social Welfare (Vic); Ex parte Henry*,[36] for example, was justified as follows: 'The reason lies in the nature of our Constitution. It is a Constitution for a free society'.[37] His approach frequently did not reason from the text of the Constitution, and as a result has lacked legitimacy and has generally not been followed by other judges. As Mason J remarked in rejecting Justice Murphy's finding in *Miller v TCN Channel Nine Pty Ltd* of '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':[38] 'It is sufficient to say that I cannot find any basis for implying a new s 92A into the Constitution'.[39]

Despite the rejection of Justice Murphy's approach, the High Court subsequently found that the Constitution does embody a range of implied freedoms. From the entrenchment of a system of representative government in ss 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', the High Court in *Australian Capital Television Pty Ltd v Commonwealth [No 2]* (*'Electoral Advertising Bans Case'*)[40] implied a freedom of political communication.[41] In recent decisions, the Court has been careful to ensure that this guarantee is carefully tied to and limited by the text of the Constitution, rather than being a free-standing right.[42] The Court has also explored the possibility that rights can be implied from the separation of judicial power achieved by Chapter III of the Constitution. The Court has held that this separation of federal judicial power prevents the legislature or executive from

32 Ibid 388.

33 *Buck v Bavone* (1976) 135 CLR 110, 137; *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633, 670; *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54, 88; *Uebergang v Australian Wheat Board* (1980) 145 CLR 266, 312; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 240; *Gallagher v Durack* (1983) 152 CLR 238, 248; *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 581-2.

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

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

36 (1975) 133 CLR 369.

37 Ibid 388.

38 (1986) 161 CLR 556, 581-2.

39 Ibid 579. Cf *Leeth v Commonwealth* (1992) 174 CLR 455 and the finding by Deane and Toohey JJ of an implied right to equality.

40 (1992) 177 CLR 106.

41 See generally Williams, above n 14, 165-93.

42 *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520.

imposing involuntary detention of a penal or punitive character[43] and that the Constitution requires due process under the law, at least of a procedural kind.[44]

The implication of rights from Chapter III and from the system of representative government provides a strong basis from which to imply further freedoms. The underlying methodology will enable the current, or a future, High Court to discover a range of further freedoms. For example, Chapter III might give rise to rights relevant to the criminal process, including the right to a 'fair trial' (or at least a right not to be subjected to an 'unfair trial'). As a result of the Court's decision in *Kable v Director of Public Prosecutions (NSW)*,[45] which held that State Supreme Courts could not be conferred with functions incompatible with the exercise of federal judicial power, some or all of these Chapter III rights might also be applicable to State criminal offences tried in State courts. Sections 7 and 24 could also support additional rights, such as the right to form and join political associations and perhaps even the freedoms of movement and assembly.

Over the coming years, the High Court should continue to explore the role of implications protective of human rights. It should, however, do so in a way that is ultimately referable to the text of the Constitution. Of course, exactly what may be seen as referable to the text will always be open to vigorous debate and contention. Nevertheless, this is clearly a more limited approach than that of Murphy J. It is also an approach that recognises that only certain forms of rights may be implied (there is no suggestion, for example, that the Constitution might support a right to life). This approach, given depth by emerging norms such as those in international law, would significantly widen the protection offered by the Constitution while also making it clear that the creation of a comprehensive Bill of Rights lies in the political and not the judicial realm.

IV STEP TWO: AN AUSTRALIAN BILL OF RIGHTS

Only so much can be achieved by broader interpretation of the express rights in the 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, that restrict the capacity of the High Court to shape the Constitution to better protect human rights. Hence, even with the infusion of ideas and concepts from international law, it should be impossible for the High Court to fashion an implied Bill of Rights.

Legislative, and not judicial, innovation is required to bring about a Bill of Rights. Hence, judicial protection of human rights must be accompanied by legal reform initiated by the political system. This is necessary not only because of the

43 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.
44 Ibid.
45 (1996) 189 CLR 51.

limitations imposed by the existing law and the Constitution, but because the people's 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 any Bill of Rights or like instrument is doubtful. It may possess a level of legal effectiveness, 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.

These objectives might be met through a Bill or Bills of Rights at the federal and State levels. Although I believe that better constitutional protection of some rights is warranted, I do not argue that we should immediately move to a referendum that would insert a Bill of Rights into the Constitution. As I have argued elsewhere,[46] a gradual and incremental approach to better rights protection is both more pragmatic and more appropriate.

In the first instance, any Bill of Rights ought to be in the form of a statute. This instrument would not be constitutionally entrenched and would protect only a narrow range of rights about which there is a general community consensus, such as the need for freedom from racial discrimination. The Bill of Rights should be drafted by Parliaments in consultation with the Australian people, such as through the formation of an open inquiry body constituted by members of Parliament and the community. As an Act of Parliament, the Bill of Rights could be developed and refined over time, perhaps through a provision that mandated review of the Bill every five years. New rights might be added and established rights redrafted for greater effectiveness. The Act could also be amended to enable Parliament to respond to judicial interpretations of the listed rights. Parliaments would interact with the rights listed in the Bill of Rights on an ongoing basis through the creation of a Joint Parliamentary Committee that would assess legislation for compliance with the Bill of Rights.

The role of the courts under the Bill of Rights would be an important but carefully limited one in what would be primarily a Parliament and community centred model. The courts ought to be given the power to interpret statutes and the common law in accordance with the Bill, as occurs under the New Zealand model, and to find that statutes are incompatible with the rights listed in the instrument, as in the UK model. Ideally, courts would also have the power to declare legislation to be ineffective where it breaches the listed rights, although this would not be strictly necessary and the UK model of a declaration of incompatibility would be a satisfactory starting point.

As community understanding of the rights protection process deepens and as courts develop a more sophisticated approach to such issues, it may be appropriate to insert some or all of the rights in the statutory Bill of Rights into the Constitution. In any event, it is only at this stage that it is possible to imagine that the Australian people would support such entrenchment at a referendum. The failure of the 1988 referendum, in which nationally only 30.33 per cent of voters registered a 'yes' vote, on a very narrow and limited set of rights issues,

46 George Williams, *A Bill of Rights for Australia* (2000).

strongly suggests that considerable work remains to be undertaken at the political and community level before another referendum is held upon human rights issues.

A possible exception to this is in regard to freedom from racial discrimination. Protection of this kind has existed in the *Racial Discrimination Act 1975* (Cth) for many years and its use in political discourse and on a number of occasions by Australian courts means that it would be an appropriate topic for a referendum in the short term. The discriminatory treatment of Australia's Indigenous peoples under the Constitution as enacted in 1901, and since the 1967 referendum, the silence of the Constitution on their status and history, would make such a referendum an important part of any reconciliation process.[47]

V CONCLUSION

There are many unexplored opportunities for better rights protection as part of the Constitution. Refinement and development of the High Court's interpretive methodology could enable the growth of a more sophisticated human rights jurisprudence, enriched by developments in comparative jurisdictions and by international human rights norms. This would be a very desirable development over the second century of the Constitution. However, constitutional development should not only focus upon the judicial sphere but should also involve significant reform initiated by the legislative sphere in partnership with the community. Parliaments should enact statutory Bills of Rights in order to improve legal protection and to foster and encourage the growth of an Australian culture of rights protection.

This vision poses a very considerable challenge for Australian lawyers. The development of a High Court rights jurisprudence and the enactment of a Bill of Rights would amount to a sea change from that of the first century of Australian Federation. Such a change in approach, however, is necessary and overdue. Australia needs a constitutional system that is imbued with basic concepts of popular sovereignty and human rights.

47 George Williams, 'Race and the Australian Constitution: From Federation to Reconciliation' (2000) 38 *Osgoode Hall Law Journal* 643.