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For and against Constitutional Rights

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Introduction

Let me make an immediate disclaimer. The title to this paper has an ambiguous ring. I am not of course against civil and human rights. I am strongly in favour of them. The question that the title is intended to raise, is how best to maintain and achieve them.

No one, let alone lawyers, can be blind today to the abuse of human rights which is endemic in so many countries of the world. It is not surprising therefore that there is enthusiasm for the Constitutional entrenchment of human rights.

This paper has a number of threads. One of them is that enthusiasm may need to be tempered by a degree of caution on the part of democratic countries in which there is a longstanding tradition of the common law. It is true that in English history there have been two monumental Constitutional documents, Magna Carta in 1215 and the Bill of Rights in 1689. I refer to these as Constitutional documents because of the great and enduring influence that they have had upon public affairs, even though neither is entrenched in the way in which rights and obligations are embedded in written constitutions susceptible of change only by significant majority vote or other elaborate processes. Apart however from instruments and enactments such as these, Westminster democracy and its progeny throughout the world, until recent times at least, has tended to proceed, on the basis of Dicey's theory of negative liberty and parliamentary supremacy: that is, not on the basis that inviolable and immovable rights of a defined kind were legislated so as to be available to all, but that anyone may do as he or she wishes, so long as it is not illegal under the written or the common law.

It is not surprising that this was the approach of the British peoples. Almost without exception they had resolved, ahead of other peoples and other places, to put their trust in popularly elected politicians: it would be for them, the politicians, at their peril to decree from time to time what should be proscribed; and, to a lesser extent, to the judges, to determine what was permissible under the common law. I say to a lesser extent, because it was always within the power of the legislature to override judicial decisions.

It is true, that Alexander Hamilton one of the originators of the United States Constitution, described the judiciary as the least dangerous branch of government. That description however was given at a time when parliament did not have the power and authority that it has today. It was said before the days of universal suffrage. It was also said at a time shortly after the North American colonies had been enmeshed in a bloody encounter with the armies of the British Executive. I am by no means sure that everyone in Australia would agree with Hamilton's opinion today. People in this country do not

2.

always remember that of the 24 paragraphs of the Declaration of Independence, 20 are assertions of gross tyranny on the part of the Executive, the King [and his Council], for example, "that he has plundered our seas, ravaged our coasts, burnt our towns, and destroyed the lives of our people". Such, ladies and gentlemen were the times.

The burning question today is whether it is safe to continue to put your trust in politicians: or whether the only sure way of guarding human rights is to incorporate them in a written instrument which can be changed only with the greatest deliberation and difficulty. Those who would advocate a constitutional guarantee of rights are those who sometimes express contempt and derision for politicians. Everyone from time to time becomes frustrated by the political process. Politicians themselves become frustrated by it. But politics is the art of the possible. That is another way of saying that politics always involves compromises. As Chief Justice Gleeson of the High Court recently said in his Boyer lectures, to despise politics is to despise democracy. Very often compromise is by no means a bad thing. An excessive exercise of a personal right can involve an intrusion upon the rights of others. In a civilized democratic society a compromise will usually be reached which requires that the individual right be exercised in a moderate way, perhaps not to avoid intrusion entirely upon the rights of others, but certainly to limit the extent of the intrusion.

Judges on the active list need to be careful in expressing views about matters which may be controversial in the political party sense. So too, sitting judges must be especially reticent extracurricularly about matters which may come before the courts. I doubt whether the need or otherwise for an entrenched bill of rights falls into either of these categories. I think it highly improbable that in the time left to me on the Court such a bill, certainly a Constitutionally entrenched bill, will become the law: and in any event the proponents and opponents of it are to be found on both sides, and in all niches of politics. Accordingly I do not think it inappropriate that I should draw attention to some misgivings that I hold about constitutionally entrenched rights. Indeed that I do have them will probably have already occurred to you, albeit, that I too may suffer some occasional irritation with politics and politicians, in the political process.

Let me digress slightly for a moment however, by referring to an expression that was used frequently at the Commonwealth Law Conference that I attended last week. It was "crass majoritarianism". The expression was used like a slogan, as if it raised an unquestionable, invincible argument in favour of entrenched human and civil rights. I took the expression to mean the imposition of the tyranny of the many over the few. Whatever validity it may, indeed probably does have in relation to other places, it is an expression which I think should be approached with some scepticism in this country. There is no doubt that minorities do need protection, and that such protection may, on occasions need to be extended to some positive discrimination in their favour. But the reality in Australia is that few of its governments are elected on huge majorities, and our system of checks and balances, not invariably, but ordinarily, means that most interests are not overlooked: in short the compromises which democracy involves, and to which I have already referred have been, or will be made. Nor should it be overlooked that Executive power is itself subject in this country to many, in some instances, relatively recently

3.

devised, checks which include, standing commissions with coercive powers to expose corruption in official life, ombudsmen, judicial review of administrative action, a rejuvenated system of parliamentary house committees, a strong and independent judiciary, and, unlike in the United States, the opportunity of members of parliament to question ministers of state in minute detail. Are all of these, our vociferous media, our existing Constitution and common law enough? The answer in several other countries, some with parliamentary systems like ours, has been no.

In this paper I will shortly discuss the recent changes by two of our siblings, and our parent, to their laws, expressly to give effect to defined human rights. I will also draw some contrasts between our Constitution and the rights which are entrenched in the Constitution of the United States. But before doing so I would like to introduce another thread which will run through this paper. I will introduce it with an anecdote for which I am indebted to Sir Harry Gibbs.

Some of you may remember the famous "winds of change" speech made by Harold McMillan in the second decade after the War foreshadowing the grant of independence by Britain to most of its remaining colonies. On the inception of the new nation there was conventionally a ceremony attended by many dignitaries at which the Imperial flag was lowered, to be replaced by the flag of the new nation. Among the dignitaries were usually a member of the Royal Family, a senior English politician and representatives of other nations. At one such ceremony in Africa the United States Secretary of State turned to a man of African appearance and observed to him that he must be proud to have been granted his freedom. The man replied "I ain't got no freedom, I'm from Alabama."

The thread is that no matter what may be written in the Constitutional document, and no matter how deeply imbedded in it a human right may be, it will be worth little or nothing, unless there is both the judicial, and more particularly, and more importantly, the political will to give effect to it. It was only when the late president of the United States Lyndon B Johnson was majority leader in the Senate that human rights legislation was steered through the Congress, almost one hundred years after the abolition of slavery in that county and almost 90 years after the XIVth Amendment to the Constitution in 1875¹ which was intended to make all citizens of the nation equal in all respects. Throughout those years, the United States Constitution, with its various amendments theoretically standing for the protection of all of the people of the United States, was held up as a model for other Constitutions, yet it was only because of the determination of a politician, (often derided for his ruthlessness and hypocrisy) and his influence on other politicians, that the energy and the will were found to implement its rights provisions.

¹ The relevant legislation in the period consisted of the *Civil Rights Act 1957 (US)*, the *Civil Rights Act 1960 (US)* and the *Civil Rights Act 1964 (US)*.

4.

Another example may be given. It was only when the dissents of Holmes J and Brandeis J of the United States Supreme Court, on the ambit of the much vaunted First Amendment to the United States Constitution in the third decade of the last century², that is about 140 years after its Constitutional incorporation, were taken up by a gratefully opportunistic media and politicians, that free speech started to become a reality, and evolve into the extraordinary licence that it has become in that country. Nor, it may be observed, did the United States Constitution secure any relief for the victims of the McCarthy inquisitions at about the same time as the High Court of Australia was striking down the Communist Party Act³, even though no provision of our Constitution said anything about freedom of political expression.

Another theme of this paper is that if human rights are to become written law it is better that they become so by enactment than by Constitutional entrenchment. When I have looked briefly at what has been done in recent time in other places I will tell you why I am inclined to think that is so.

The Australian Constitution

But first let me turn to our Constitution. It is true that it expressly confers few rights. Indeed the word "right" or "rights" is used only eight times.⁴ Although sections 7 and 24 of the Constitution provide that the members of the two houses of parliament shall be directly chosen by the people of the Commonwealth, Sections 9, 27, 29 and 30 effectively repose the prescription of methods of voting and qualification to vote, in the parliament. In other words, there is no express universal right of adult suffrage in the Constitution.

Section 51(xxix) is one of the very few provisions which does confer an express right, and that is a right to just terms on the acquisition of property. It is a curiosity that when an amendment was proposed to the Constitution in 1988 to confer the same rights in respect of takings by the States, a referendum in that respect failed. The explanation for that however must surely be that there were other, less popular questions asked in the same referendum to all of which one answer only was permitted, rather than a separate answer to each. There is a similar provision in the United States Constitution, (Amendment V), but the approach there has been somewhat different from the approach so far in Australia, which has tended to look to what the Commonwealth has acquired, rather than, as in the United States, to what the dispossessed has lost.

² See generally Samuel, *The Legacy of Holmes and Brandeis*, (1965) at 181-256.

³ *Communist Party of Australia v Commonwealth* (1951) 83 CLR 1.

⁴ See sections 41, 44, 51(xxii), 74, 78, 84, 100 and 117 of the Constitution.

5.

Section 44 of the Constitution provides a classic example of the traditional common law approach to rights. It is expressed in terms of disqualification, and sets out five categories of persons who shall be incapable of being chosen, or as sitting as Members of Parliament. Presumably anyone who is of the people of Australia within the meaning of sections 7 and 9, and is not expressly precluded from doing so by section 44 of the Constitution, has a right to stand for, and to be a member of the Parliament. In other words, everyone can do it unless they are expressly prohibited from doing it.

In a sense section 55 may confer a limited and somewhat vague right: that is, of being taxed under a written law which deals with one subject of taxation only. I doubt whether many people have derived much benefit from this, but it may be that the section has operated on occasions to ensure that some oppressive measures might not be introduced under cloak of, and with the added weight of the revenue laws. An attempt to make such a claim was recently made and failed in relation to Commonwealth measures, effectively to garnishee income payable to parents who failed to satisfy their obligations to support their children.⁵

I will leave aside section 75 of the Constitution for the present and the way in which, on occasions, it has had the effect of conferring rights upon not only citizens but also others within the boundaries of the Nation.

Section 80 confers a right to trial by jury. But it has serious limitations. It relates to Commonwealth offences on indictment only. It is a matter of choice by Parliament therefore which charges are to be laid by indictment.

No reference to rights in Australia would be complete without mention of section 92. It is, I believe, one of the only two Sections of the Constitution in which the word "free" is actually used. Despite the different ways in which it has been interpreted over the years there is no doubt that on occasions it has actually operated to enhance freedom. Perhaps the clearest example of that is the case of *Gratwick v Johnson*⁶ in which the High Court held that the wartime National Security Regulations could not prevent the travel of a citizen from one state to another.

One little noticed right which so far the Commonwealth has never to my knowledge directly sought to abridge except in the Tasmanian Dams Case⁷, is the right of a resident of a State, and indeed of the State itself, to the reasonable use of the waters of rivers, for conservation or irrigation, conferred

⁵ See *Luton v Lessells* (2002) 76 ALJR 635.

⁶ (1945) 70 CLR 1.

⁷ *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1.

6.

by Section 100 of the Constitution. An attempt to invoke that provision by the state of Tasmania in the Tasmanian Dam case failed for the reason that four of the seven Justices⁸ there were of the opinion that the section applied only to laws which were capable of being made under sections 51(1) and 98 of the Constitution. I make it clear that I express no personal opinion about this case. It is a fact however that in my thirty two years of practise at the Bar few decisions caused more consternation in the profession than this one. It was repeatedly questioned by those who were disappointed by the decision why the High Court had not given what they thought to be due effect to two of the few, guaranteed, express rights which the Constitution in terms conferred: that is, not only to water rights, (albeit the negative form of its expression) but also to just terms.

At this point it may be appropriate to refer to another difference between the Constitutions of the United States and Australia. Treaties in Australia are made by the Executive. They become part of our domestic law by enactment only. This has given rise to questions about their status and effect before or absent enactment. The decision by the High Court in *Teoh*⁹ would give the mere fact of their Executive adoption considerable practical legal effect. The more recent decision of the Court in *Lam*¹⁰ at least questions that. Such uncertainty is avoided in the United States as there treaties may only be made, pursuant to Article II Section 2, with the advice and consent of two thirds of the members of the Senate.

Section 116 also uses the word "free" to entrench freedom of worship, and to bar religious discrimination, but only in relation to Commonwealth offices and positions.

Section 117 has as its object, not civil, or human rights as such, but rights under State laws. It does not therefore protect against discrimination generally or particularly. It simply prohibits a limited form of discrimination, that is, discrimination on the basis of residence in another state.¹¹

Apart then from what can be said of section 75 of the Constitution I have really said everything that may be said on an occasion such as this about the inclusion of express civil rights in the Australian Constitution.

Section 75 does however have some teeth. Its importance lies in the fact that it constitutionally entrenches the right of any person who can make out a case for it, to obtain mandamus, prohibition or an injunction against an officer of the Commonwealth. These important writs are usually invoked in

⁸ Mason, Murphy, Brennan, and Deane JJ.

⁹ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

¹⁰ *Re Minister for Immigration and Multicultural Affairs; Ex Parte Lam* (2003) 77 ALJR 699.

¹¹ See *Street v Queensland Bar Association* (1989) 168 CLR 461.

7.

furtherance of civil rights of various kinds, and have proved to be adaptable to many situations, one of the most striking of which was the one in which some entrants to Australia recently found themselves, and were held to be entitled to a degree of procedural protection notwithstanding the legislature's attempt to reduce the protection by stringent ouster provisions.¹² Procedural protection is not lightly to be disparaged. It is by it that many valuable victories can be achieved.

In summary, it must be said that the Constitution does not in direct terms really confer very much at all in the way of express human rights. Against that however is the fact that the Commonwealth has sought to invoke the External Affairs power by the incorporation of treaties and conventions into domestic law, thereby indirectly legislating for some human or civil rights. But there are very few inhibitions upon the powers of the states to legislate for these directly, and in some cases they have done so. It is a question for you, and one which I will not attempt to answer conclusively, whether in all of the circumstances the Australian people are less free, or their rights more at risk in this country than they are elsewhere.

The United States

I will now make some further brief comments upon the United States Constitution and some of the Amendments to it. The first part of the First Amendment is almost an analogue of section 116 of our Constitution, but then it goes on to provide that Congress shall make no law abridging the freedom of speech, or of the press, or of the people peaceably to assemble, and to petition the government for a redress of grievances. Let me focus again for a moment upon the freedom of speech and of the press. The closest that we have come to this is a right of political communication found, it is said in an implication of the Constitution. I was not myself, before the decision in *Lange*¹³, conscious of any lack of vigour in the discussion of political affairs in this country, and indeed, I would suggest that until the decision of the United States Supreme Court in *Sullivan v New York Times*¹⁴ political discourse in that country might have been more inhibited than it has always been in this one.

The Second Amendment, sometimes described as the terrifying amendment¹⁵, and which includes the right of the people to keep and bear arms, might have seemed very desirable in December 1791 when it was effected. A different view of it could well be taken today in the United States, and, I

¹² See *Plaintiff S157/2002 v Commonwealth* (2003) 77 ALJR 454.

¹³ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

¹⁴ 376 US 254 (1964).

¹⁵ See Williams, "Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment" (1991) 101 *Yale Law Journal* 551.

8.

would not doubt, that it would be totally unpalatable as a Constitutional right in this country. Indeed the Second Amendment provides a good example of the perishability of a well-meaning, and once attractive solution to a short term problem, to a situation which is soon to become an embarrassing anachronism. It is also an example of the extremes to which a "right" may be put. The purpose of the Second Amendment was to ensure, that instead of large standing armies, of which the colonists of North America were deeply suspicious, citizens supplying their own armaments in the use of which they were adept, might readily constitute a militia to repel invaders or put down royalist revisionists. It was not intended to facilitate access by Chicago bootleggers to Tommy guns to mow down their business competitors.

I go next to the Sixth Amendment which provides that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury, and to have, among other things the assistance of counsel for his defence. The Seventh Amendment preserves the right of trial by jury in civil matters in which the value in controversy exceeds twenty dollars. Which country is better is off? Which country provides the better system? Again I offer no answer but I would make two points. Both the Sixth and the Seventh Amendments may very much stand in the way of necessary or desirable procedural and substantive reforms from time to time. The requirement of juries in so many cases has the capacity to overload the legal system beyond what any system could bear. It may also lead to the substitution of plea-bargaining as a matter of routine for a trial, and the consequential awareness of an accused person that the system cannot provide him with what the Constitution would give him, with the result that he will know that the prosecution will be anxious to accept a lesser plea. If everyone is to have a jury trial then it may be difficult for everyone to have a speedy trial. The second point that I would make is this. Without Constitutional guarantees, the courts in this country have found a way to ensure that the rights which the amendment refers will substantially be enjoyed in this country. Courts do have a jurisdiction to stay long delayed trials as abuses of process, and *Dietrich*¹⁶ holds that in serious cases indigent people should have the right to counsel. True it is that these are not entrenched rights but they have been shown to be effective ones.

Elsewhere

The United Kingdom, Canada and New Zealand have all recently adopted rights protection. Their methods of doing so have not however been uniform.

Canada

The Canadian Charter of Rights and Freedoms was enacted in 1982 and entrenched in the Canadian Constitution. It now forms Part 1 of that document.

¹⁶ *Dietrich v The Queen* (1992) 177 CLR 292.

9.

The entrenchment of the Charter was promoted as part of a "peoples' package" by which power would be transferred from the political elites to the people, to enhance Canadian democracy.¹⁷ Fifteen years afterwards however Justice McLachlin was to say at an anniversary conference that the Charter had thrust the Court into an "uncertain sea of value judgments." It has also been suggested, and with some force, that the political intent was to centralize political power.¹⁸

The primary guarantee of the Charter is found in s 1 which provides:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The rights and freedoms so protected are then set out in the subsequent sections. The first of these are described as "fundamental freedoms" and are contained in s 2:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communications;
- (c) freedom of peaceful assembly; and
- (d) freedom of association.

There then follows a treatment of a number of broad categories of rights.

Democratic rights: including that every citizen may vote in elections for the House of Commons and provisions setting the maximum term and minimum sitting frequencies of Parliaments at both federal and provincial levels (ss 3 to 5).

¹⁷ Fudge, "The Canadian Charter of Rights: Recognition, Redistribution, and the Imperialism of the Courts" in Campbell, Ewing and Tomkins (eds), *Sceptical Essays on Human Rights* (2001) at 336.

¹⁸ Fudge at 336.

10.

Mobility rights: including the right of every citizen to enter, remain in and leave Canada and to take up residence in any province (s 6).

Legal Rights: including the right to life, liberty and security of the person. Provision is also made asserting the right of all persons to be secure against unreasonable search and seizure and arbitrary detention or imprisonment (ss 7 to 9).

More specific provisions are included providing for the basic rights of persons arrested or in detention to be informed of the reason for their arrest, to instruct and retain counsel, and to seek a writ of habeas corpus (s 10).

THE PRESUMPTION OF INNOCENCE is expressly provided for, as is a guarantee that is topical in Australia at the moment, the double jeopardy rule (s 11).

The right not to be subjected to cruel and unusual punishment is protected (s 12) as is the right of a witness not to incriminate himself (s 13).

A party or a witness in any proceedings who does not speak the language of the proceedings, or is deaf, has the right to the assistance of an interpreter (s14). This is of course an important measure for those in Canada who do not speak English or French, but it is interesting to see what might be described as a procedural right elevated to the same level as other, perhaps more fundamental, rights.

Equality Rights: the Charter exhorts that every individual is equal before the law and has the right to the equal protection and benefit of it, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability (s 15). Laws, programmes or activities designed to ameliorate the conditions of disadvantaged individuals or groups are expressly excepted.

The Charter then moves on to a treatment of the official languages of Canada, English and French (ss 16 to 22) and language educational rights (s 23).

The enforcement of the Charter is dealt with in s 24 which provides that:

- (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
- (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

The result is the conferring of a very broad discretion on the courts to construct an appropriate remedy in the case of a breach of fundamental rights and freedoms. The satisfaction that this may bring to potential litigants will be tempered by the realization of a similarly broad discretion to admit or exclude evidence obtained as a result of a breach of any of the Charter rights.

A commentator, Judy Fudge observes that by the early 1990s the popular view of the Charter began to change as more cases came before the courts requiring its interpretation.¹⁹ Rights supporters were disappointed by what they saw as overly narrow interpretations of the rights and freedoms.²⁰ However, on occasions when victories were won, such as the recognition of the rights of homosexuals and lesbians, there was public backlash against judicially enforceable rights.²¹ In short, then came the criticism that the Charter had shifted power to determine the values of Canadian society to unaccountable judges.²²

In a series of cases, the Supreme Court of Canada condemned discrimination against homosexuals and lesbians as violations of their rights to equality under the Charter.²³ In *Canada (AG) v Mossop*²⁴ the Court invited a litigant who complained that his employer's refusal of his request to attend the funeral for his partner's father infringed the Charter, to frame his claim as a challenge to the constitutionality of the Canadian *Human Rights Act*. The Court was thereby indicating to the litigant that it would consider whether the fact that sexual orientation was not included as an unlawful basis for discrimination in the Act was unconstitutional. This followed the decision of the Supreme Court of Canada in *Schachter v Canada*²⁵, in which the Court held that, in a limited category of special circumstances, the courts may add to the text of legislative provisions so that they conform to the requirements of the Constitution. In *Mossop* the litigant chose not to pursue the argument.

¹⁹ Fudge at 337.

²⁰ Fudge at 337.

²¹ Fudge at 337.

²² Fudge at 338.

²³ Fudge at 341.

²⁴ [1993] 1 SCR 554.

²⁵ [1992] 2 SCR 679.

In *Vriend v Alberta*²⁶ the Court again confirmed *Schachter*, and added sexual orientation to the list of prohibited grounds of discrimination to Alberta human rights legislation. That is, the Court "read in" an additional item on to the list. In *M v H*²⁷ the definition of spouse in Ontario family law legislation, which did not include same sex couples, was found to be of no force or effect. Rather than reading a new concept into the legislation as it did in *Vriend*, the Court in *M v H* suspended its declaration for six months to allow the Ontario legislature to amend the Act. The result, however, was the same.

New Zealand

The New Zealand provisions for rights are not entrenched.

The New Zealand Bill of Rights Act was passed by the New Zealand Parliament in 1990. In 1985 it had been suggested by the New Zealand Government that the Bill of Rights might be enacted as a fully justiciable "constitutionalized" instrument.²⁸ However, a select committee of the New Zealand parliament rejected that idea and recommended the enactment of a statutory Bill of Rights.²⁹

During its passage through Parliament two major amendments were made to the Bill.³⁰ First, s 4 was inserted. It explicitly states that a court must not hold any provision of any enactment to have been impliedly repealed by the Bill of Rights. Similarly, a court may not decline to apply any provision of an enactment by reason that it is inconsistent with a provision in the Bill of Rights. The second change that was made was that a clause (rather like s 24 of the Canadian Charter) allowing a court to grant wide and novel remedies in the event of a contravention of a person's rights, was removed.³¹ The Bill of Rights was therefore designed to create no new remedies.

Section 5 provides that, subject to s 4, the rights and freedoms contained in the Bill may be subject only to such limits prescribed by law as can be demonstrably justified in a free and democratic society. The fact that s 5 is expressed to be subject to the limitation in s 4 raises questions as to the

²⁶ [1998] 1 SCR 493.

²⁷ [1999] 2 SCR 3.

²⁸ Allan "The Effect of a Statutory Bill of Rights where Parliament is Sovereign: The Lesson from New Zealand" in Campbell, Ewing and Tomkins (eds), *Sceptical Essays on Human Rights* (2001) at 377.

²⁹ Allan at 377.

³⁰ Allan at 378.

³¹ Allan at 378.

13.

effect and operation of s 5. These have been considered by the Court of Appeal and will be touched upon later.

Section 6 of the Bill of Rights introduces an interpretive principle to be followed by New Zealand courts: that wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in the Bill of Rights, that meaning must be preferred over any other meaning.

The Bill of rights contains a statement of rights and duties along the following lines:

Life and Security of the Person: including the right not to be deprived of life (s 8), subjected to torture or cruel treatment or punishment (s 9), subjected to medical or scientific experimentation (s 10) and the positive right to refuse medical treatment (s 11).

Democratic and Civil Rights: including the right to freedom of expression (s 14), freedom of peaceful assembly (s 16), freedom of association (s 17) and freedom of thought, conscience and religion (s 13). Also included within this group of rights are the right to vote for and be a member of the New Zealand parliament (s 12), the right to freedom of movement and residence in New Zealand (s 18) and the right of a person to practice their own religion or beliefs (s 15).

Non-Discrimination and Minority Rights: including the right to freedom from discrimination on the grounds of sex, marital status, religious belief, ethical belief, colour, race, ethnic or national origins, disability, age, political opinion, employment status, family status and sexual orientation (s 19).

Persons belonging to an ethnic, religious or linguistic minority must not be denied the right to enjoy the culture, practice the religion or use the language of that minority (s 20).

Rights relating to search, arrest and detention: including the right not to be subjected to unreasonable search and seizure (s 21) or arbitrary arrest and detention (s 22). Persons arrested have the right to being informed of the reasons for their arrest, consult and instruct a lawyer, remain silent, challenge the lawfulness of their arrest in court and be charged promptly or released or brought promptly before a court (s 23).

Persons charged with an offence have the right to be told promptly of the nature of the charge and to be released unless there is just cause for continued detention. Trial by jury for offences which carry a penalty of more than 3 months is guaranteed, as is free legal assistance (where the interests of justice require) for those without sufficient means to obtain their own lawyer and the free assistance of an interpreter (s 24).

Criminal Justice: the Bill of Rights sets out a minimum standard of criminal procedure for those charged with an offence including the right to be tried without undue delay, not to be compelled to

give evidence or incriminate oneself, the presumption of innocence and the opportunity to appeal to a higher court against conviction and sentence (s 25).

Retrospectivity and Double Jeopardy: the Bill of Rights also states that a person cannot be liable for conviction for anything that was not an offence at the time it occurred and that the double jeopardy rule must be observed (s 26).

Right to Justice: if a person's rights may be affected by a decision of a tribunal or public authority the person has the right to a fair hearing by an unbiased decision-maker and to apply for judicial review of the decision (s 27).

Suits against the Crown are also dealt with. The Bill of Rights provides that a person has the right to bring civil proceedings against and defend civil proceeding brought by the Crown in the same way as civil proceedings between individuals (s 27).

A commentator, James Allan who has expressed concern about the Bill, has discerned, and convincingly spoken against a tendency of the courts of New Zealand to "upgrade" it³²: that is, to attempt to enhance what is, after all, simply another statute, so as to make it more like an entrenched constitutional instrument. In support of this argument, the learned author cites some *obiter dicta* of Sir Robin Cooke. In *R v Butcher*, Cooke P said this³³:

"What can and should be said unequivocally is that a parliamentary declaration of human rights and individual freedoms, intended partly to affirm New Zealand's commitment to internationally proclaimed standards, is not to be construed narrowly or technically.

...

Certainly the Act is not entrenched. Still it is an affirmation of the basic rights of the people in New Zealand. The correct judicial response can only be normally to give it primacy, subject to the clear provisions of other legislation."

³² See Allan, "Oh That I Were Made Judge in the Land", (2002) 30 *Federal Law Review* 361; Allan, "Take Heed Australia - A Statutory Bill of Rights and its Inflationary effect", (2001) 6 *Deakin Law Review* 322; and Allan, "Turning Clark Kent into Superman: The New Zealand Bill of Rights Act 1990", (2000) 9 *Otago Law Review* 613.

³³ [1992] 2 NZLR 257 at 267, 270-271.

This jurist has recently expressed disdain for what he considers to be unwarranted reticence on the part of the High Court of Australia in an article in the *The Commonwealth Lawyer*.³⁴ Lord Cooke of Thorden, as he had by then become, wrote, that "the best the High Court [of Australia] has been able to do in that direction [that is of finding rights] is to discover in the Constitution, after nearly a hundred years, a hitherto unsuspected implied right - a right to defame politicians, subject to limited qualifications".³⁵ As a foreigner I would not presume to predict how history and the New Zealand people will come to judge this justification of, and incitement to what some might call, judicial adventurism.

Allan notes that judicial enthusiasm for the Bill of Rights has been seen most starkly in the context of criminal procedure. In the course of three years the Court of Appeal developed a rule for the prima facie exclusion of evidence obtained in breach of the Bill of Rights Act.³⁶

In *Simpson v Attorney-General (Baigent's Case)*³⁷ the Bill of Rights was given effect in the civil law. By a majority of 4 to 1, the Court of Appeal created a public law remedy sounding in the Bill of Rights Act notwithstanding the earlier parliamentary rejection of any novel remedies. The new remedy was distinguished from the ordinary remedy of breach of statutory duty.

It seemed for a time that *Baigent's Case* might perhaps be the high water mark of judicial development of the Bill of Rights³⁸ for in 1998, the Court of Appeal was reluctant to go as far as the Supreme Court of Canada in relation to same sex couples. In *Quilter v Attorney-General*³⁹ it was held that the New Zealand *Marriage Act* 1955 was intended to confine marriages to unions between man and woman. This was considered to be clearly inconsistent with the Bill of Rights "freedom from discrimination" provision, and therefore to prevail. *Quilter* highlights the significance of the inconsistency principle expressed in s 4 of the Act and the limitations it imposes as to the judicial implementation of the Bill of Rights.

³⁴ Cooke, "Final Appeal Courts: Some Comparisons" (2003) 12 *The Commonwealth Lawyer* 43.

³⁵ (2003) 12 *The Commonwealth Lawyer* 43 at 45.

³⁶ Allan at 381. See *R v Kirifi* [1992] 2 NZLR 8; *R v Butcher* [1992] 2 NZLR 257; *Ministry of Transport v Noort* [1992] 3 NZLR 260; *R v Goodwin (No.2)* [1993] 2 NZLR 390.

³⁷ [1994] 3 NZLR 667.

³⁸ Allan at 382.

³⁹ [1998] 1 NZLR 523.

However, in 2000, the Court was on the march again, indicating that it saw a significant role for itself in making value judgments when interpreting the Bill of Rights and the relationship of other enactments to it. In *Moonen v Film and Literature Board of Review*⁴⁰ it held that:

"In determining whether an abrogation or limitation of a right or freedom can be justified in terms of s 5, it is desirable first to identify the objective which the legislature was endeavouring to achieve by the provision in question. The importance and significance of that objective must then be assessed... Of necessity value judgments will be involved. ... Ultimately, whether the limitation in issue can or cannot be justified in a free and democratic society is a matter of judgment which the Court is obliged to make on behalf of the society which it serves and after considering all the issues which may have a bearing on the individual case, whether they be social, legal, moral, economic, administrative, ethical or otherwise."

The United Kingdom

The great bastion of the common law, the United Kingdom has also succumbed.

The European Convention of Human Rights and Fundamental Freedoms was signed on 4 November 1950, ratified by the United Kingdom on 8 March 1951 and became effective in Europe on 3 September 1953 (after ten States had ratified it). It is unnecessary to pursue the complications of its status in the United Kingdom as a result of ratification.

Following the election of the current Government in 1997, a White Paper was released in which it was argued that it was no longer enough to rely on the common law for the protection of rights. The authors of the paper advocated the incorporation of the Convention into the domestic law of the United Kingdom. The *Human Rights Act* 1998 was passed by the Parliament at Westminster on 9 November 1998. It applied to laws passed by the Parliament on and from 2 October 2000.

The rights protected under the Act are, with certain reservations, those set out in the Convention. They include (adopting the numbering in the Convention):

1. the right to life;
2. the right not to be subjected to torture or to inhuman or degrading treatment or punishment;
3. freedom from slavery or servitude;

⁴⁰ [2000] 2 NZLR 9 at 16-17.

17.

4. freedom from being required to perform forced or compulsory labour;
5. the right to liberty and security of person: no one is to be deprived of his or her liberty except in certain enumerated circumstances such as the lawful detention of a person after conviction by a competent court. This article also includes requirements for the treatment of persons arrested, such as, to inform them promptly of the reasons for their arrest and any charge against them. Those who are arrested are entitled to a trial within a reasonable time and to release pending trial. All those who are arrested and detained are entitled to take proceedings by which the lawfulness of the detention is to be determined speedily by a court. Those subject to arrest or detention in contravention of the Convention are granted an enforceable right to compensation;
6. the right to a fair trial by an independent and impartial tribunal which pronounces its judgments publicly. This article also includes provisions to confirm expressly the presumption of innocence and to ensure that a person is informed of the nature of the accusation made against him or her, to defend oneself in person, or by legal assistance of their own choosing (which is to be given free where the interests of justice require it and the person does not have the means to obtain his or her own legal advice), and to have the free assistance of an interpreter;
7. the freedom from being held guilty of any criminal offence under national or international law on account of any act or omission that was not an offence at the time it was committed;
8. the right to respect for his or her private and family life and his or her correspondence;
9. the right to freedom of thought, conscience and religion and the freedom to manifest his or her religion or belief in worship, teaching practice and observance;
10. the right to freedom of expression including the freedom to hold opinions and to receive and impart information and ideas without interference by public authority;
11. the right to freedom of peaceful assembly and association with others; and
12. the right to marry.

The protocols to the Convention, which have also been incorporated into the law of the United Kingdom by the Act include provisions dealing with:

1. the protection of property.
2. the right to education.
3. the right to free elections.
4. the abolition of the death penalty.

Section 6 of the Act provides that it is unlawful for a public authority to act in a way that is incompatible with a Convention right. Section 7(1) of the Act provides that:

- (1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may -
 - (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or

- (b) rely on the Convention right or rights concerned in a legal proceedings, but only if he is (or would be) a victim of the unlawful act.

Under s 8, the Court may, in relation to any act which the Court finds is, or would be unlawful, grant any relief or remedy within its powers and as it considers appropriate and just. Damages may only be awarded if, taking account all of the circumstances of the case, including any other remedy granted, the Court is satisfied that the award is necessary, to afford just satisfaction to the person whose rights had been contravened.

Section 3 of the Act imposes an interpretive obligation on courts to read legislation and give effect to it in a way that is compatible with the Convention. The section also makes it clear that this does not affect the validity, continuing operation, or enforcement of any incompatible primary legislation.

Section 4 confers a discretionary curial power to declare that a provision is incompatible with a Convention right. Such a declaration is not binding on the parties to a dispute about Convention rights and does not affect the validity, or operation of the primary legislation declared to be incompatible.

The only remedy available in the case of a declaration of incompatibility is the possibility of a "remedial order" under s 10. Section 10 empowers a **Minister**, if satisfied that there are compelling reasons to do so, to amend legislation, by order, so as to remove the incompatibility.

It does not appear so far that the Courts in the United Kingdom have been overrun by cases under the Act⁴¹. Rather, litigants have tended to raise it as an additional point of argument⁴². In the result, the reported cases do not reveal any great controversy over the implementation of the Act. Experience elsewhere however might suggest, that as time passes the cases will inevitably accumulate.

The courts have, in the meanwhile, followed the interpretive obligation imposed by s 3 of the Act. In *R v Offen*⁴³, for example, the Court of Appeal utilized s 3 to interpret legislation so as to hold it to be consistent with the Convention. In that case a provision of the *Crime (Sentences) Act 1997* which required the imposition of an automatic life sentence save in exceptional circumstances was considered.

⁴¹ Wicks, "The Impact of the Human Rights Act 1998 - An Update from the United Kingdom", (2001) *Public Law Review* 167 at 169.

⁴² Wicks, "The Impact of the Human Rights Act 1998 - An Update from the United Kingdom", (2001) *Public Law Review* 167 at 169.

⁴³ [2001] All ER 154.

The court interpreted "exceptional" to include situations in which the offender did not pose a significant risk to the public in order to ensure compliance with the Convention.

Conclusions

What then should we make of all this? Have Australians been worse off than the citizens of the United States and elsewhere? Are we worse off now? Is it an act of mindless chauvinism for Australia, of most of the current and former democratic dominions of the United Kingdom and that nation itself, to refrain from the entrenchment, or enactment of far-reaching human rights bills? If Australians do decide to act, should they do so by Constitutional entrenchment, or by amendable and repealable legislation? How far should such a bill go? Should the Courts be permitted, indeed encouraged to fashion new remedies to give full effect to, or even to enlarge rights? As I earlier said, arguments for and against affirmative answers to these questions are offered in all camps in politics.

My colleague Justice Kirby has marshalled many of the arguments against and in favour of a Bill of Rights⁴⁴: the latter being that democracy works ineffectively; that the Courts are already inescapably involved in politics; that the judiciary may and should act when an inept legislature should and will not; that social changes in the community mean that protection must be afforded to all members of it; that judicial power is not untrammelled anyway; that rights should stand above politics; that written rights promote community awareness; that they empower the powerless, and, because other have done it that makes a case for Australia to do it.⁴⁵ There is perhaps another argument not mentioned by Kirby J in favour of a Bill of Rights. It is that it would discourage any undue attenuation of the External Affairs Power by the central government at the expense of the Federation, and State rights and responsibilities.

The principal argument against a Bill of Rights, either entrenched or merely enacted, is that they plunge the Courts into the political cauldron. It has validity. That some cases already have a political element is no reason for a multiplication of cases having that element. The more the Courts decide political and social questions the less separate they will appear to be, and will in fact be, from the other powers. Railing against this, as recently as a fortnight ago, Justice Scalia of the United States Supreme Court said in an address at the University of Mississippi, rights such as grandparents' rights, abortion rights and the ban (now removed) on the death penalty are foreign to the text of the Constitution yet the Court found them. The Courts, unlike the politicians can rarely compromise. In litigation, even human rights litigation, someone has to win and someone always loses. Judges delude themselves if they

⁴⁴ See Kirby J, "A Bill of Rights for Australia - But do we need it?" Paper delivered in Brisbane to the Queensland Chapter - Young President's Association, 14 December 1997.

⁴⁵ I have not used Kirby J's actual words. I have tried to express in a phrase in each case the principal thrust of each of his arguments.

believe that they are fully attuned to the community and its differing values. The occasional foray to the Gabba to watch a Test from the members' stand, or even to eat a pie behind it in a throng of Rugby League supporters at Lang Park is no substitute for the electors' clinic at the member's electorate office, or the pit, even bear pit, as it sometimes seems, of the Parliament. In short the Courts lack, in many instances, the qualifications to decide social issues. I must say I would prefer not to have to decide social issues. If we must, then of course we will, despite that the history of deciding them in the United States is, to say the least, not a very happy or consistent one.

Another argument against Bills of Rights is, not that they are, or are not educative of the community, but that they give rise to unfulfillable expectations. As the Bible says "Oh that I were made judge in the land, that every man which hath any suit or cause might come unto me, and I would do him justice"⁴⁶ (2 Samuel 15:4). The truth in the United States is that not everyone can have a full-scale jury trial. The overloaded system would crumble away entirely if they did. In an interesting treatise, Sandler and Schoenbrod⁴⁷ explain the disappointment and inconvenience that rights legislation has frequently caused in the United States. I will quote a few passages from their book because the examples they provide actually happened.⁴⁸

"The federal government assumed the senior role of setting standards on how and when states and localities would deliver services. To get the federal money, governors and mayors had to promise to dance to the federal tune.

But who would make sure that the governors and mayors delivered on the promises they gave to secure the federal money? Answer: the courts. They stood at the ready. Judge Skelly Wright of the District of Columbia Court of Appeals expressed in 1971 the spirit of the times : 'Our duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy'.

Members of Congress, quick to perceive changes that work to their advantage, latched on to the courts' willingness to supervise state and local governments as a way to crown themselves with the heroic mantel of rights-bestower. The prospect of legislating

⁴⁶ Professor Allan's papers drew my attention to this reference also.

⁴⁷ Sandler and Schoenbrod, *Democracy by Decree - What Happens When Courts Run Government*, (2003).

⁴⁸ Sandler and Schoenbrod, *Democracy by Decree - What Happens When Courts Run Government*, (2003) at 19-20.

popular generalities and leaving them to be fleshed out by the courts was especially enticing. After all, what makes the work of elected politicians hard - and makes reelection even harder - is the clash of interests. For one example, those who want factories to reduce pollution clash with management, shareholders, customers, and employees, all of whom have an interest in avoiding the expense of pollution control. Politicians who dare enact rules resolving such clashes often come away feeling that they made more enemies than friends. If the policy-making burden were shifted to the courts, national legislators could have their cake and eat it, too. They could take credit for bestowing rights while lawyers and judges forced state and local officials to shoulder the blame for the costs. The state officials would have to impose the higher taxes, tougher regulations, or service cuts needed to comply with the federal mandates. This ploy came to be known among political types as the *unfunded mandate*.

Starting with the 1970 Clean Air Act, Congress gave everyone a *right* to healthy air. Who had the corresponding *duty* to clean it was not specified. The federal lawmakers passed that buck to the elected branches of state and local government by setting up an elaborate process in which state and local officials would have to decide who had to reduce their emissions and how much. To deflect the charge that this new right to clean air was not just hot air, the act authorized citizens to sue in court. The courts, not Congress, became the place where clean air policy would be made.

The state and local officials were not to blame for the dirty air, or no more to blame than Congress, but that was beside the point. Congress acted as if state and local officials were to blame, even though state and local officials had already done far more to reduce pollution from factories than the federal government had done or would do in the next decade. On the theory imported from the civil rights desegregation model that states and cities failed the people, Congress, in the words of the Supreme Court, took "a stick to the States" in the 1970 Clean Air Act.

The opportunity for political profit was irresistible. Legislators began to make names for themselves by searching out appealing causes and then turning them into statutory rights enforceable in federal court against state and local government. As former New York City Mayor Edward I. Koch explained why he, as a member of Congress, had voted to create a right to public transportation for people with disabilities: 'I voted for that. You'd be crazy to be against that. When you are a member of Congress and you are voting a mandate and not providing the funds for it, the sky's the limit.'

In relation to the topic of the unfulfillability of all hopes and expectations I will conclude by repeating in translation what Malouet said shortly after the French Revolution⁴⁹:

"Why then start by taking him to a high mountain, and showing him his empire without limits, when on coming down he will find limits at every step?"

Enacted Bills of Rights are difficult to change or dismantle, entrenched ones almost impossibly so. The Second Amendment to the United States Constitution, entrenching the right to bear arms has become an embarrassment to that country, and, as it has been described a matter of terror. Stating matters in absolute terms often does lead to embarrassment. Section 80 of our Constitution, rights under which were deliberately stated in flexible terms to apply to trials on indictment only, stands as a contrast with absolute requirements. I do not think that it can seriously be argued that any Federal Government has misused that flexibility. A similar approach has been adopted to any abridgment of legal professional privilege. In *Daniels's Case*⁵⁰ it was expressly held that statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of express words or a necessary implication to that effect. The rule against self-incrimination provides another example. The Parliament has I think been responsible and rational about it, and has sought to take it away rarely and exceptionally only. In my view there should be exceptions to a rule against self-incrimination. In entrenched Bills of Rights that is what it becomes, entrenched. Take also as an example the double jeopardy rule. Whether you are in favour of it or not, you may perhaps doubt whether it should remain for all purposes and for all times unchallenged or unchanged. As an entrenched Constitutional provision it probably never would change.

On the other hand there are still some who would still say that the High Court had been on occasions too flexible, and not always in the direction of freedoms or rights. Whether you think the decision in *Cole v Whitfield*⁵¹ a good solution or not to the problems raised by Section 92 of the Constitution, the decision is some way from Sir Owen Dixon's concept of the section as a "guarantee of individual liberty appropriate to the circumstances of a private enterprise or capitalist society ..."⁵².

⁴⁹ Malouet, on the Declaration of the Rights of the Man and the Citizen of 1789, "Pourquoi donc commencer par le transporter sur une haute montagne, et lui montrer son empire sans limites, lorsqu'il doit en descendre pour trouver des bornes à chaque pas?" *Archives Parlementaires*, viii, at 322-323.

⁵⁰ *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 77 ALJR 40.

⁵¹ (1988) 165 CLR 360.

⁵² Sawyer, *Australian Federal Politics and Law, 1929-1949*, (1963) at 66.

Rights Bills encourage and often prolong expensive litigation. The Canadian experience is that, in some 50% or so of the cases, numerous interveners turn up at the Court to seek to advocate, and are difficult to exclude from advocating, their own, often narrow, and sometimes not particularly worthy sectional interests. Their presence is effectively to turn the Courts into ill-equipped mini-parliaments, places of many voices but with few, or no compromises to offer.

Another argument is that the people by their representatives have already rejected Constitutional rights. Commonwealth Parliamentary enquiries in 1929 and 1959 resulted in rejections. A referendum in 1944 which proposed, among other things, a limited measure of protection for freedom of expression and the extension of freedom of religion was also defeated. And I have already mentioned the unsuccessful referendum in 1988.

The people of this country are not homogenous. Their needs, the climates and the regions differ. The central government is remote in location from many of those regions. Quentin Hogg, Lord Halisham, said of Mr Profumo when he was involved in the Christine Keeler scandal, that different branches of society have different standards at different times: that Mr Profumo's circle might not expect him to be chaste but that it would expect him to not to mislead Parliament. Times, aspirations, and standards do change. A centrally ordained Bill of Rights could itself produce divisive, and for some people and places, unacceptable outcomes. If rights need further protection perhaps that may be better achieved by the enactment of highly specific, carefully targeted measures, to avoid, if I may be forgiven a very current cliché, collateral casualties.

The same argument as is mounted against political power may be mounted against judicial power. History shows that power is addictive. Courts of new jurisdictions tend to be avid for power and enlargement of jurisdiction. If you give a judge a right to confer a new remedy you may be giving him or her an invitation to see what can be done with it, how far it will run, in other words, to explore how many facets this shiny new diamond may be shaped and cut into. Remember Courts, must conclusively state and settle matters. Parliaments can revisit them.

I have not covered all of the arguments for and against bills of rights. That would take many hours and be an even greater imposition on your patience than I have already made.

I will leave you with two ideas. The first is that the common law has in the past usually done its duty on rights. As early as 1765 William Blackstone recognized, perhaps a little, but not excessively optimistically, as generally then existing, even in those less democratic times, "the free enjoyment of

personal security, of personal liberty", and of private property, rights of access to Courts of law and to petition, and incidentally, of having and bearing arms for self-defence.⁵³

The second relates to one of my earlier themes: that without the political will and energy to enforce them, rights are of little or no value. I will leave you to decide whether what A P Herbert wrote in *Uncommon Law*⁵⁴ is correct.

"The pity is that there is there is not more judge-made law. For most of His Majesty's judges are much better fitted for the making of laws than the queer and cowardly rabble who are elected to parliament for that purpose by the fantastic machinery of universal suffrage ... My Lords, we are venerable, dignified, and wise, superior in almost every respect to the elected legislators in the House of Commons"⁵⁵.

⁵³ Blackstone, *Commentaries*, Vol 1 at 129 and 141.

⁵⁴ Herbert, *Uncommon Law*, (1984).

⁵⁵ I am indebted to James Allan ("Rights, Paternalism, Constitutions and Judges" in Huscroft and Rishworth, *Litigating Rights - Perspectives in Domestic and International Law* (2002) at 31) for this quote.