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GOD, LOCKE AND MONTESQUIEU: SOME THOUGHTS CONCERNING THE RELIGIOUS FOUNDATIONS OF MODERN CONSTITUTIONALISM

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Abstract

Christianity has played an enormously important role in the origins and development of modern constitutionalism. Indeed, Christian principles are enshrined in the most significant documents in Western legal history, including the English *Bill of Rights* (1689) and the *American Declaration of Independence* (1776). First, this paper analyses the profound impact of Christian philosophy on the development of modern constitutionalism. Secondly, this paper discusses the ongoing marginalisation of Christianity in Western societies, explaining how the secular intolerance of our day could constitute a threat to our fundamental rights and freedoms.

I FIRST CONSIDERATIONS

Christianity teaches that God is both Creator and Sustainer. He rules providentially over the world. In that sense, all of life is under law and is best understood as the expression of the will of Jesus Christ, the incarnate Word or Logos, the meaning according to which the world has been created. Western constitutional law was founded upon the idea that laws regulating human society should reflect the eternal wisdom and law of God. In an earlier age people believed that if a human law departed from the divine wisdom it was running against the grain of the universe and was something less than law in its fullest sense. A deviation from law, as Augustine once suggested, is really no law at all. This proposition is fundamental to the way we understand law in the west, even today.¹

—Professor Nicholas Aroney

According to our Western legal tradition, liberty presupposes the existence of laws serving as an effective check against arbitrary power. In the constitutional struggle of parliamentary forces against the Stuarts in seventeenth-century England, the receptive attitude towards Christianity allowed philosophers such as John Locke² to develop a

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¹ Nicholas Aroney, 'Society's Salt' (2008) 608 *Australian Presbyterian*, 5.

² With regard to the kind of Christianity John Locke adhered to, Victor Nuovo provides this insightful information:

Locke's Christianity was strongly messianic, which is to say, he believed that Christian doctrine must be understood as Scripture presents it, embedded in a sacred history that runs from the creation of Adam to the Last Judgement. In this connection, Locke adhered to the doctrine of divine dispensations. The proper place in this history to treat

political theory where the main justification for the state rested on the protection of our most fundamental rights to life, liberty and property.³ In *Second Treatise on Civil Government* (1690), Locke elaborated on a 'state of nature' predating the creation of the state in which people were governed not by positive laws but only by a natural law that everybody was able to recognise and uphold. 'This law of nature', Locke explained,

stands as an eternal rule to all men, legislators as well as others. The rules that they make for other men's actions must, as well as their own and other men's actions, be conformable to the law of nature, i.e. to the will of God of which that is a declaration. And the fundamental law of nature being the preservation of mankind, no sanction can be good or valid against it.⁴

Locke hereby contends that our most basic rights are independent of, and antecedent to, the state. Once it is established, the state 'hath no other end but the preservation of these rights, and therefore can never have a right to destroy, enslave, or designedly to impoverish the subjects'.⁵ According to him, the civil ruler puts himself into a 'state of war' against society every time he attempts to undermine those basic rights of the individual. Being God-given and inalienable, our basic rights to life, liberty and property *set limits* on governmental power, providing lawful justification for civil resistance against political tyranny should our basic rights be grossly violated. To the extent that the government does not recognise and protect these basic rights, it actually ceases to be a legitimate authority and can be dismissed by the people for breach of trust. As Locke puts it,

Whenever the legislators endeavour to take away and destroy the property of the people [i.e., their rights to life, liberty and property], or to reduce them to slavery under arbitrary power, they put themselves into a state of war with the people, who are thereupon absolved from any further obedience, and are left to the common refuge which God hath provided for all men against force and violence.⁶

The general belief expressed in the American Declaration of Independence is that 'all men are created equal and are endowed by their Creator with certain unalienable rights'.

the themes of the *Two Treatises* is prior to the Mosaic theocracy and the founding of the messianic kingdom. The nature and function of the civil state are properly considered, then, only under the general providence of God which prevailed under the Adamic and Noachic dispensations. The counterpart of the *Two Treatises* is *The Reasonableness of Christianity*, whose central theme is the founding of the transcendent Kingdom of God. The difference between the two realms and their respective authorities is a central theme of the *Epistola de tolerantia*.

Victor Nuovo, 'Review of Jeremy Waldron's God, Locke and Equality' (2003) *Notre Dame Philosophical Reviews*.

³ In *God, Locke and Equality*, Jeremy Waldron argues that Locke's political writings present an idea of human equality (and dignity) that is deeply grounded in Christian theology, and that this idea is a 'working premise' of his whole political theory' whose influence is observed, among other things, 'in his arguments about property, family, slavery, government, politics, and toleration'. – Jeremy Waldron, *God, Locke and Equality: Christian Foundations of John Locke's Political Thought* (Cambridge University Press, 2002) 151.

⁴ John Locke, *Second Treatise of Government* (c.1681) ch 11, sec 135.

⁵ Ibid.

⁶ Ibid ch 19, sec 222.

In the American colonies of the eighteenth century, Locke was, after the Bible, ‘the principal authority relied on by the preachers to bolster up their political teachings’.⁷ The colonists viewed their successful revolution as inspired and justified by these Christian principles of natural law. They further aimed to enshrine these very principles in their new system of constitutional government. That these American Founders undeniably drew from such Christian principles during the composition of their Declaration of Independence is well explained by Professor John Eidsmoe:

The Declaration of Independence of 1776 was drafted by a congressional committee consisting of Thomas Jefferson, Benjamin Franklin, Roger Sherman, John Adams, and Robert Livingston. The Declaration clearly states that the united colonies are entitled to independence by the “Laws of Nature and of Nature’s God.” They further declared that “all men are created equal,” and that they are endowed “by their Creator” with certain inalienable rights. They closed by appealing to the “Supreme Judge of the world for the rectitude of [their] intentions,” declaring their “firm reliance on the protection of Divine Providence,” and pledged their lives, their fortunes, and their sacred honor. The “Creator” God they trusted was more than the impersonal and uninvolved god of the deists; the term providence implies a God who continually provides for the human race. And the reference to the laws of nature and of nature’s God reflects their belief in the law of nature and the revealed law described by Blackstone.⁸

Western constitutionalism is therefore founded upon the belief in laws which, according to Sir Edward Coke, ‘God at the time of creation of the nature of man infused into his heart for his preservation and direction’.⁹ This amounts to saying that a legal system without God’s natural law is not protective of liberty but rather of licence. Such a distinction between liberty and licence was one commonly made by natural rights theorists like Locke and Blackstone. In describing the ‘state of nature’, or world without government, Locke contended that ‘though this be a *State of Liberty*, yet it is *not a State of License*’.¹⁰ On this passage, law professor Randy E. Barnett explains that ‘[b]y liberty is meant those freedoms which people *ought to have*. License refers to those freedoms which people *ought not to have* and thus those freedoms which are properly constrained’.¹¹

In his famous *Commentaries*, Sir William Blackstone asserted that ‘God, when he created man, endued him with freewill to conduct himself in all parts of life. He laid down certain immutable laws of human nature whereby freewill is in some degree

⁷ William Molyneux, *Case of Ireland’s being bound by acts of parliament in England stated* (1689) 100. Quoted from JM Kelly, *A Short History of Western Legal Theory* (Oxford University Press, 1992) 219.

⁸ John Eidsmoe, ‘Operation Josiah: Rediscovering the Biblical Roots of the American Constitutional Republic’, in H Wayne House (ed.) *The Christian and American Law: Christianity’s Impact on America’s Founding Documents and Future Direction* (Kregel, 1998) 91; Blackstone’s *Commentaries on the Laws of England* was a huge success in America – for many, it was their first comprehensive and clear insight into the English legal system and it was this example which many future American lawmakers modelled their laws upon.

⁹ Sir Edward Coke, *Calvin’s Case* (1608) 7 Coke Rep 12 (a); 77 Eng rep 392.

¹⁰ Locke, above n 4, ch 2, sec 6.

¹¹ Randy E Barnett, *The Structure of Liberty: Justice and The Rule of Law* (Oxford University Press, 1998) 2.

regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws'.¹² This so being, Blackstone also believed that authentic liberty is defined and regulated by eternal or natural laws which everyone is able to discover by 'right reason'. However, if there is no reference point for law, there is also no absolute basis upon which judgement can be made. The result is a noticeable lack of an objective moral standard binding on all individuals and in all circumstances. At worst, law becomes merely what a judge (or a dictator) arbitrarily says it is.¹³

In *Commentaries*, Blackstone also stated that the common law had been established according to both the natural and the revealed law of God: 'On these two foundations, the law of nature and the law of revelation depends all human laws; that is to say, no human law should be suffered to contradict these'.¹⁴ The argument that the natural law is 'dictated by God Himself'¹⁵ echoed the sentiments of his English predecessors. This sentiment, reflecting the inherency of natural law in the common law, was adopted by the American Framers, with their view of common law and natural law developing to virtually echo Blackstone's works.

Blackstone's portrayal of the common law revealed the natural law foundations of American constitutionalism. Accordingly, the acceptance of natural law was faithfully mirrored in the American judiciary, with many of its court members placing their reliance on natural law when adjudicating on matters during the nineteenth century.¹⁶ Within this juridical context, natural law was actively promoted by leading jurists such as Joseph Story, the first Dane Professor of Law at Harvard University and Associate Justice of the United States Supreme Court. Justice Story linked the natural law to the rights of conscience, which 'are given by God, and cannot be encroached upon by human authority, without a criminal disobedience of the precepts of natural, as well as revealed religion.'¹⁷

As can be seen, Christian jurisprudence has played an enormously important role in the origin and development of modern constitutionalism. The view adopted by the American Founders is that people cannot know the natural moral order and their inalienable rights from their own reasoning unaided by God's revelation. There are, of

¹² Sir William Blackstone, 'Of the Nature of Laws in General', in *Commentaries on the Laws of England*, Vol. I, (Macmillan, 1979) 29-30.

¹³ John W. Whitehead, *The Second American Revolution* (Crossway Books, 1988) 80. The relevance of God for the achievement of the Rule of Law was well explained by Locke when he contemplated the final result for society, and even more for liberal democratic society, if there was no acknowledgement of the divine law. The result would be moral anarchy: 'If man were independent [of God] he could have no law but his own will, no end but himself. He would be a god to himself, and the satisfaction of his own will the sole measure and end of all his actions'. —John Locke, *Ethics*, cap.28. Quoted from John Dunn, *The Political Thought of John Locke: A Historical Account of the Argument of the 'Two Treatises of Government'* (Cambridge University Press, 1982) 1.

¹⁴ Eidsmoe, above n 8, 90.

¹⁵ Blackstone, above n 12, 39, 41.

¹⁶ *Ibid.*

¹⁷ Joseph Story, *Commentaries on the Constitution of the United States* (William, Gray, and Co, 1833) 1399.

course, those who resist the idea of a supernatural lawgiver because they fear it may lead to intolerance or even theocracy. They have it entirely wrong. For if they are really 'endowed by their Creator with certain unalienable rights', they are therefore entitled to preserve these rights no matter their ideological or religious convictions. Conversely, asked Thomas Jefferson, the author of the American Declaration of Independence, rhetorically: 'How can the liberties of a nation be secure when we have removed their only secure basis, a conviction in the minds of the people that these liberties are a gift of God?'¹⁸

II CHRISTIANITY AND SEPARATION OF POWERS

In the eighteenth century, the scientific works of the English scientist Sir Isaac Newton, especially his discovery of the laws of gravity, were interpreted as strong evidence of the creative genius of God's handiwork in nature.¹⁹ After all, Newton himself was the first to argue that his scientific discoveries confirmed the existence of a 'Creator of the universe who certainly is not mechanical ... [but] incorporeal, living, intelligent, omnipresent'.²⁰ According to Newton, 'this most beautiful system of sun, planets, and comets can only proceed from the counsel and domination of an intelligent and powerful being'.²¹ As a result, Newtonian science laid down the foundations for the investigation of the 'nature of laws' in general.

The Frenchman Charles-Louis de Secondat, Baron de La Brède et de Montesquieu, was one those great philosophers of the eighteenth century who sought to extend Newton's scientific studies to the explanation of the nature of laws as applied to humans as physical beings and their respective societies. He spent nearly two decades writing *L'Esprit des Lois* ('The Spirit of the Laws'), which was published in 1748 and received its first English translation in 1750. The book soon became enormously popular, most notably amongst Americans during debates over the ratification of the United States Constitution. Those who supported the Constitution and those who opposed it relied heavily on his lessons for their arguments. With the exception of the Bible, Montesquieu's book was cited more than any other in American political works prior to and following the revolutionary periods of 1760–1805.²² The first chapter of this

¹⁸ Quoted from RJ Rushdoony, *The Politics of Guilt and Pity* (Thoburn Press, 1978) 135.

¹⁹ Newton also stated: 'God governs the world invisibly, and he has commanded us to worship him, and no other God. ... he has revived Jesus Christ our Redeemer, who has gone into the heavens to receive and prepare a place for us, and... will at length return and reign over us... till he has raised up and judged all the dead'. Quoted from Alvin J Schmidt, *How Christianity Changed the World* (Zondervan, 2004) 232.

²⁰ Quoted from Morris Kline, *Mathematics in Western Culture* (Oxford University Press, 1953) 260.

²¹ Richard Westfall, 'Isaac Newton', in Garry Ferngren (ed.), *Science and Religion* (John Hopkins University Press, 2002) 155.

²² See Edward S Corwin, *The Higher Law Background of American Constitutional Law* (1928-1929) (Liberty Fund, 2008) 54. Indeed, as Fareed Zakaria points out: '[D]uring the founding of the American Republic "Montesquieu was an oracle". James Madison, Thomas Jefferson, John Adams, and others consciously tried to apply his principles in creating a new political system. He was quoted by them more than any modern author (only the Bible trumped him).' Fareed Zakaria, *The Future of Freedom: Illiberal Democracy at Home and Abroad* (NW Norton, 2003) 45.

political treatise was entirely dedicated to the following description of the nature of laws in general:

Laws, in their most general signification are the necessary relations arising from the nature of things. In this sense all beings have their laws...

They who assert that a blind fatality produced the various effects we behold in this world talk very absurdly; for can anything be more unreasonable than to pretend that a blind fatality could be productive of intelligent beings? ...

God is related to the universe, as Creator and Preserver; the laws by which He created all things are those by which He preserves them. He acts according to these rules, because He knows them; He knows them, because He made them; and He made them, because they are in relation to His wisdom and power...

Particular intelligent beings may have laws of their own making, but they have some likewise which they never made. Before there were intelligent beings, they were possible; they had therefore possible relations, and consequently possible laws. Before laws were made, there were relations of possible justice...

We must therefore acknowledge relations of justice antecedent to the positive law by which they are established: as, for instance, if human societies existed, it would be right to conform to their laws; if there were intelligent beings that had received a benefit of another being, they ought to show their gratitude; if one intelligent being had created another intelligent being, the latter ought to continue in its original state of dependence; that an intelligent being who had done harm to another, ought to suffer requital; and so on.²³

Montesquieu saw the natural law as encompassing a superior law instructing humans to distinguish right from wrong, to form their consciences and to guide their actions according to the right path. He argued that human societies also create their own laws, averring that such laws, being the product of mere human will, can be either just or unjust. However, the abuse of positive law is essentially the abuse of authority, and so it does not negate the intrinsic goodness of the natural law. Of all existing laws, Montesquieu contended, the natural law is superior and antecedent to any other law, and the subjection to natural law does not constitute a restriction upon individuals and societies, but it is rather a prerequisite for their healthiest functioning.

Montesquieu, however, acknowledged that positive laws must vary from time to time, from place to place, according to economic, cultural and geopolitical circumstances. This observation does not make of him a legal positivist. Rather, Montesquieu was only commenting on the fact that sociological factors are important to clarify the distinct nature of societies and their particular laws. The legislator must thereby take local habits and customs into account before enacting any positive legislation. The argument that positive laws shall reflect the condition of life of those who live by them earned Montesquieu the deserved title of 'father of legal sociology'.

But it goes without saying that Montesquieu also believed that both the physical natural law and the moral natural law are derived from God. Although the physical world has no other choice but to obey the laws of physics and electromagnetism, humans are free

²³ Charles-Louis de Secondat, Baron de La Brède et de Montesquieu, *The Spirit of Laws* (1750), Book I, ch 1.

to disobey even the laws created by them. Montesquieu acknowledged that, indeed, 'constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go'. To prevent this, he added, 'it is necessary from the very nature of things that power should be a check to power'.²⁴ From here, it can be seen that a vital assumption upon which Montesquieu's notion of separation of powers is based is that humans are sinful, and will inevitably contravene the laws of God. That Montesquieu believed the division of powers to be fundamental to counteract the concentration of power because he regarded people to be inherently corrupt and self-centred, is observed in the following statement:

Man, as a physical being, is like other bodies governed by invariable laws. As an intelligent being, he incessantly transgresses the laws established by God, and changes those of his own instituting. He is left to his private direction, though a limited being, and subject, like all finite intelligences, to ignorance and error...²⁵

Montesquieu's theory of separation of powers rested upon the religious belief that an unrestrained human heart moves towards moral and civil degradation. Therefore it was logical for him to hold that society is safe only if governmental power does not entirely rest in the same body or authority. With the power divided, if one branch were to become corrupt, the others may still be able to check its wayward influence.²⁶ This sinful nature of humans, prominent in the works of Montesquieu, and a central concept in Christianity, not only justifies but necessitates the separation of powers that was adopted by the American Founding Fathers. It therefore comprises a fundamental element of Western constitutionalism.²⁷

²⁴ Ibid Book XI, ch V.

²⁵ Ibid Book I, ch I.

²⁶ See David Barton, *Original Intent* (Wallbuilders, 2005) 215.

²⁷ That Christianity was a main source of inspiration for Montesquieu's doctrine of separation of powers is also made visible by comments such as the following:

The Christian religion is a stranger to mere despotic power. The mildness so frequently recommended in the Gospel, is incompatible with despotic rage with which a prince punishes his subjects, and exercises himself in cruelty. As this religion forbids the plurality of wives, its princes are less confined, less concealed from their subjects, and consequently have more humanity: they are more disposed to be directed by laws, and more capable of perceiving that they cannot do whatever they please. While the Mahometan princes incessantly give or receive death, the religion of the Christian renders their princes less timid, and consequently less cruel. The prince confides in his subjects, and the subjects in the prince. How admirable the religion, which, while it seems only to have in view the felicity of the other life, constitutes the happiness of this! ... We owe to Christianity, in government a certain political law, and in war a certain law of nations, benefits which human nature can never sufficiently acknowledge. –Book XXIV, Chap. 3.

And this:

From the characters of the Christian and Mahometan religions, we ought, without any further examination, to embrace the one, and reject the other: for it is much easier to prove that religion ought to humanize the manners of men, than that any particular religion is true. It is a misfortune to human nature, when religion is given by a conqueror. The Mahometan religion, which speaks only by the sword, acts still upon men with that destructive spirit with which it was founded. –Book XXIV, Chap. 4.

III RADICAL SECULARISM AND THE DENIAL OF THE CHRISTIAN LEGAL TRADITION

Unfortunately, it appears to me that the unique contribution of Christianity to the development of Western constitutionalism has been deliberately obscured in more recent times. Despite the historical record, today's Western societies are largely viewed as 'secular', and a general perception appears to suggest that Christian philosophy should have no bearing on the law. As a result, our Christian heritage is almost never mentioned, much less promoted, in the political and intellectual discourse. When it is mentioned among public figures, these principles are often the object of criticism or contempt.

This undeniable anti-religion sentiment has now evolved and is currently used to downgrade the long-established Christian background of Western constitutionalism. Many westerners are now convinced that there should be no relationship between 'religious' values and their countries' legal systems. Were this to be the case, the road would be open not just to the rejection of our Christian heritage but also to the suppression of 'religious' opinion, which would be anything but authentic democracy.²⁸

The idea of an entirely secular public square has achieved significant academic support in western societies.²⁹ The idea is that everyone ought to support their positions about law, politics, and public policy on non-religious grounds.³⁰ This limitation of public debate to only 'neutral' secular rationales is thought necessary to preserve civil discourse. One the most notable proponents of the secular view was the late legal-political philosopher John Rawls,³¹ who advocated that religion cannot be part of the public discourse, for religion involves metaphysical beliefs and positions not capable of rational discussion. Rawls contended that we should 'bypass' religion and try to dialogue on matters of 'overlapping consensus.'³² The legal-political philosopher Ronald Dworkin has articulated the same philosophy when he commented that the liberal state 'must be neutral on ... the question of the good life. ... [P]olitical decisions must be, so far as is possible, independent of any particular conception of the good life.'³³

These proponents of the neutral public square believe that it is possible to detach citizens from their religious convictions, and that their reasoning abilities are capable of being exercised in a religiously neutral manner.³⁴ Behind the secularist approach and

²⁸ See Nicholas Tonti-Fillipini, 'Religion in a Secular Society' (2008) 449 *Quadrant Magazine*, 82–85.

²⁹ Frederick Mark Gedicks, 'Public Life and Hostility to Religion' (1992) 78 *Virginia Law Review* 671.

³⁰ See Stephen L Carter, *The Culture of Disbelief* (Anchor Books, 1994) 54–55.

³¹ See John Rawls, *Political Liberalism* (Columbia University Press, 2nd ed, 2005).

³² *Ibid* 152.

³³ Ronald Dworkin, 'Liberalism', in Stuart Hampshire (ed) *Public and Private Morality* (Cambridge University Press, 1978) 127.

³⁴ See Carter, above n 29, 56. In Chapter 3 of *God, Locke and Equality*, Waldron compares Locke's idea of political equality which is based on Christian philosophy with what he argues to be the inadequacy of Rawls' secular counterpart. Waldron, above n 3, 44–81.

the desire for a neutral, secular public square lies the assumption that traditional religious beliefs are fundamentally subjective, divisive and irrational.³⁵ In large measure this is what explains the radical secularist support for an ‘impregnable’ wall of separation between church and state.³⁶ Since traditional religions are deemed ‘divisive’ and ‘irrational’, radical secularists demand that these religions be limited exclusively to the realm of private conviction.³⁷ Consequently, a citizen’s religious conviction should be ‘privatised’ and excluded from public debate. Cardinal George Pell has commented that the foundations for such ‘secular democracy’ appear to rest upon ‘the invention of a wholly artificial human being who has never existed, pretending that we are all instances of this species.’³⁸

It appears to me that the new form of secular fundamentalism that we have witnessed in more recent times constitutes a radical attempt to redefine what it really means to live in an open and democratic society. As seen above, radical secularism amounts to an unconstitutional attempt to privilege one form of religious discourse over another.³⁹ Although these radical secularists are intent upon eliminating Judeo-Christian traditions, their rejection of religion does not necessarily mean that they have rejected all types of faith. As Cardinal Pell commented in his 2009 inaugural term lecture at Oxford Divinity School, the limited scope that secularists are prepared to concede to traditional beliefs is actually based on their own religious assumption that human beings have created God,

³⁵ Ibid 54–55; Gedicks, above n 28, 693–96. This association of religion with radicalism and bigotry tends to be reinforced by the unfair association of religion in general with the worldwide rise of radical religious nationalistic groups, particularly in the so-called third world, with the corresponding violence that has often occurred. Mark Juergensmeyer, ‘The New Religious State’ (1995) 27 *Comparative Politics* 379.

³⁶ David T Koyzis, *Political Visions and Illusions: A Survey & Christian Critique of Contemporary Ideologies* (InterVarsity Press, 2003) 65–68.

³⁷ See Carter, above n 30, 54–55. See also Michael W McConnell, ‘Religious Freedom at a Crossroads’ (1992) *University of Chicago Law Review* 115, 122–25.

³⁸ Cardinal George Pell, ‘Is There Only Secular Democracy?’ (2004) 412 *Quadrant Magazine* 11. Tonti-Fillipini points out:

It seems... that we are witnessing in Australia... a very aggressive exclusionist form of secularism, which views religious belief and practice with arrogant intolerance and dismissiveness... Notwithstanding the legal position, many politicians and others have behaved in a way that does not respect the Australian Constitution by demanding that bishops, priests, ministers, churches, and other religious bodies stop “meddling” in politics. Such *ad hominem* attacks represent an egregious appeal to prejudice and unjust discrimination against certain people or institutions. It is also hypocritical in the strict sense because such advice is usually given by, but not expected to apply to, those whose religion is variously described as secular, humanist, atheistic, or agnostic. Tonti-Fillipini, above n 28, 82–84.

³⁹ In an instance where “neutrality” was used to make a good point, the Supreme Court warned that ‘a pervasive bias or hostility to religion ... could undermine the very neutrality the Establishment Clause requires.’ *Rosenberger v Rector*, 515 US 819, 839–40, 845–46 (1995). See also *Lee v Weisman*, 505 US 577, 598 (1992) (an ‘all-pervasive attempt to exclude religion ... could itself become inconsistent with the Constitution’). See also R Albert Mohler, *Culture Shift* (Multnomah, 2008) 15–21.

and not that God has created human beings.⁴⁰ Thus, even when secularists presume to have banished ‘religion’ from the public square, they have done no more than to infuse it with their own religious worldview. In other words, they have privatised all religions except their own, which they have actually privileged above all others.

If religion is defined as that which posits a transcendent deity, secular humanism is not a religion. But if religion is defined more broadly, in a way that includes non-theistic worldviews like Buddhism and Confucianism, then this concept certainly applies to secular humanism.⁴¹ Indeed, for purposes of protecting the free exercise of religion, the U.S. Supreme Court has recognized as religious various belief systems that do not include the existence of God. In a famous footnote in *Torcaso v Watkins* (1961), the court listed a number of ‘religions ... which do not teach what would generally be considered a belief in the existence of God,’ including ‘Buddhism, Taoism, Ethical Culture, Secular Humanism, and others.’⁴² Similarly, the High Court of Australia has commented that the definition of religion must not be confined only to theistic religions but that such definition should also include non-theistic religions.⁴³

There is nothing in the written constitutions of Western societies to justify the denial of equal rights to free speech on religious grounds. To the contrary, as mentioned before, Western constitutionalism owes much to the influence of Christianity on its development. The bottom line is that it is utterly impossible to create a religiously neutral public square unless religion is defined in such a way as to exclude certain groups. Indeed, anyone who views the moral obligation of Christians to act according to their own convictions as something that disqualifies them from political life appears to actually be promoting an intolerant form of secular fundamentalism.⁴⁴

Alexander Hamilton, the principal architect of the American Constitution, stated in 1787: ‘The sacred rights of mankind are not to be rummaged for amongst old parchments or musty records. They are written, as with a sunbeam, in the whole volume of human nature by the hand of divinity itself, and can never be erased or obscured’.⁴⁵ Likewise, the political institutions of Australia are built on Judeo-Christian foundations, ‘notwithstanding the indication of modern secularists to lay claim on them’.⁴⁶ Despite assertions to the contrary, therefore, Western constitutionalism is deeply founded upon

⁴⁰ Cardinal George Pell, ‘Varieties of Intolerance: Religious and Secular,’ *Inaugural Hilary Term Lecture*, Oxford University Newman Society, The Divinity School, Oxford University, March 6, 2008, 7.

⁴¹ As philosopher Roy Clouser has argued in his exhaustive study of the definition of religion. See Roy Clouser, *The Myth of Religious Neutrality* (University of Notre Dame Press/IN, 2nd ed, 2005).

⁴² *Torcaso v Watkins*, 367 US 488, 495 n 11 (1961); and compare *United States v Seeger*, 380 US 163 (1965) (the test for religious belief is whether the belief occupies a place ‘parallel’ to a belief in God).

⁴³ *Church of the New Faith v Commissioner for Payroll Tax* (1983) 154 CLR 120.

⁴⁴ See Cardinal Joseph Ratzinger (Pope Benedict XVI), *Doctrinal Note on Some Questions Regarding the Participation of Catholics in Political Life*, Congregation for the Doctrine of the Faith, London, 2003, 13.

⁴⁵ Quoted from James A Joyce, *The New Politics of Human Rights* (St Martin’s Press, 1978) 7.

⁴⁶ Alan Anderson, ‘Rendering unto God: Revolutionary Secularism and the Campaign to Kick Religion out of Public Life’ (2010) 62(1) *IPA Review* 15.

the general assumption that puts God, not the state, as the ultimate creator of our most fundamental rights. And as the late historian William Orton put it,

The fundamental values of the liberal tradition were in fact exemplified, formulated, and wrought into the texture of Western society by Christianity, not only as a school of thought but as a way of life and feeling: as a religion, in short. It is not safe to assume that the Christian ethos will persist while the faith and doctrine that gave birth are being deliberately abandoned. The logic of thought, the evidence of history, and the testimony of current events are all opposed to that assumption.⁴⁷

IV AN EXAMPLE OF HISTORICAL REVISIONISM: AUSTRALIAN HISTORY CURRICULUM

There is nonetheless a deliberate attempt on the part of some academics and politicians to undermine the values and traditions of Western civilisation. To provide a small example of this, take into account, for instance, the school curriculum that the Australian government has just prepared.⁴⁸ The curriculum covers English, maths, science and history. In history, the curriculum focuses heavily on Australian Aboriginal history and Asian ways of seeing the world while failing to recognise the impact of Western values in shaping Australia's cultural, legal, economic and political development. Rather than acknowledging that this is predominantly a Western nation, in terms of language, legal and political institutions, and history, the document defines Australia in terms of a 'diversity of values and principles'. There is no mention whatsoever of basic concepts such as separation of powers, the Westminster system of government, or significant events in Western history such as the Magna Carta and the English Bill of Rights.

Another incredible omission in this Australian curriculum is that concerning the Christian foundations of Western civilisation. It refers to Christianity only twice, and only in the context of studying other religions, particularly Islam. Here the document deliberately underestimates the significance of Christianity while overestimating any meaningful contribution that Islam may have made. Rather than attempting to project a moral equivalence, the curriculum should ask the students, among other things, to identify the impact of Christianity on the development of human rights and constitutionalism in the West. By way of contrast, the students should be asked to study why Islamic governments have imposed the death penalty as a mandatory punishment against adult converts from Islam.⁴⁹

⁴⁷ William A Orton, *The Liberal Tradition: A Study of the Social and Spiritual Conditions of Freedom* (Yale University Press, 1945) 57.

⁴⁸ Australian Federal Curriculum, *History* (13 October 2010) ACARA Australian Curriculum Consultation Portal <http://www.australiancurriculum.edu.au/Documents/History_curriculum.pdf>.

⁴⁹ Patrick Sookhedo, *Faith, Power and Territory: A Handbook of British Islam* (Isaac Publishing, 2008) 24. Cambridge-based Muddathir 'abd Al-rahim has dismissed arguments for a rethink of the apostasy laws, noting that 'all Muslim schools of thought have been in full and well-founded agreement' about this. 'What the Prophet says' about the treatment of apostates, chided this reviewer, 'cannot ... be simply ignored or wished away'. Review of Saeed & Saeed, *Freedom of Religion, Apostasy and Islam*, by Muddathir 'abd Al-rahim, in *International Journal of Middle East Studies*, Cambridge, November 2005.

But it is not just the importance of Christianity that has been neglected. The proposed curriculum makes not a single reference to the struggles for rights and freedoms prior to the advent of the United Nations, such as that which occurred in Western societies during the 1688 Glorious Revolution in Great Britain and afterwards by American revolutionaries in the eighteenth century. In 1776, thirteen American colonies in their Declaration of Independence broke their ties with England, stating that they were assuming,

among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them. We hold these truths to be self-evident, that all men are created equal, and that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness. ... That wherever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government.

For them the whole purpose of human rights was to protect individuals against excessive government power. The proposed curriculum for history completely fails to acknowledge any of these historical facts. It only asks the students to consider the role of the United Nations in promoting and protecting human rights. One doubts whether these students will learn that, ultimately, the United Nations' Universal Declaration of Human Rights (1948) relies very heavily on a Western legal tradition in which our most fundamental rights are not regarded as government-conferred, but rather government-recognised.⁵⁰ Elaborated under the auspices of Eleanor Roosevelt and her commission, when Roosevelt, an avowed Christian, summed up the attitude of the framers of the UN Universal Declaration of Human Rights, she commented that this was 'based on the *spiritual* fact that man must have freedom in which to develop his full stature and through common effort to raise the level of human dignity.'⁵¹ According to Ngaire Naffine, 'the Universal Declaration reflects the natural law view that rights inhere naturally in human beings: rights are not legal constructs as the strict Legalists insist. They are not the product of law, they are not posited into being by law, but rather precede law and indwell in human beings as a natural property'.⁵²

⁵⁰ Of course, one doubts also whether these students will also learn that, ultimately, the United Nations is notoriously corrupt, and that it has developed a tradition of shamefully delaying to respond to human rights violations. Moreover, countries with an appalling human rights record such as China, Cuba, Saudi Arabia, Sudan and Zimbabwe are often elected and re-elected to UN agencies, with Libya, another notorious human rights abuser, even serving as Chairman of the UN Human Rights Commission in 2003.⁵⁰ Surely any decent study of 'the struggle for rights and freedoms' would necessarily have to address these facts. But then I have just said 'decent'. See Brett D Schaefer, 'The United Nations Human Rights Council: Repeating Past Mistakes', *Heritage Foundation*, Lecture N.968, September 6, 2006. See also Brett D Schaefer, 'The United Nations Human Rights Council: A Disastrous First Year', *Heritage Foundation*, Backgrounder No.2038, June 1, 2007. See also Freedom House, *The Worst of the Worst: The World's Most Repressive Societies* (Freedom House, 2007).

⁵¹ 'Statement by Mrs Franklin D Roosevelt', Department of State Bulletin (December 1948) 751. Quoted from Ngaire Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Hart Publishing, 2009) 103.

⁵² *Ibid* 102.

V CONCLUSION

A visible fact in these days of postmodernism and multiculturalism is the gradual abandonment of Christian values, principles, and traditions.⁵³ As a result, the religious foundations of modern constitutionalism have been undermined. Indeed, a general belief in God-given laws appears to more authoritatively prescribe and guarantee the inalienability of our most basic rights – rights that are not conferred on us by other human beings and therefore cannot legitimately be denied to us by any human authority. This is why the late Harvard Law Professor Harold J Berman once explained that ‘it is a profound mistake ... to consider the relation of law to religion ... solely in terms of the *legal foundations of religion*. It is necessary also to consider this relation in terms of the *religious foundations of legal freedom*’.⁵⁴ If this is true, it seems to me that it is quite imperative to re-discover these religious foundations that we have so much despised or taken for granted in Western societies.⁵⁵

⁵³ See David Martin Jones, ‘When Ideology Displaces Reason’ (2010) 470 *Quadrant Magazine*, 12.

⁵⁴ Harold J Berman, *Faith and Order: the Reconciliation of Law and Religion* (William B Eerdmans, 1993) 210. (emphasis added). On the imperative of religious freedom as fundamental, not just for believers but for how much freedom there is in a free society, see Michael Casey, ‘Religious Freedom – The Basis of All Our Freedoms’ (2010) 469 *Quadrant Magazine*, 80-83.

⁵⁵ We should also take this advice by Jeffrie G Murphy into consideration: ‘The rich moral doctrine of the sacredness, the preciousness, the dignity of persons cannot in fact be utterly detached from the theological context in which it arose and of which it for so long formed an essential part. Values come to us trailing their historical past; and when we attempt to cut all links to that past we risk cutting the life lines on which those values essentially depend. I think that this happens in the case of ... any ... attempt to retain all Christian moral values within a totally secular framework. Thus “All men are created equal and are endowed by their Creator with certain unalienable rights” may be a sentence we must accept in an all or nothing fashion – not one where we can simply carve out what we like and junk the rest’. Jeffrie G Murphy, ‘Constitutionalism, Moral Skepticism, and Religious Belief’ in Alan S Greenwood (ed), *Constitutionalism: The Philosophical Dimension* (Greenwood Press, 1988) 249.

RETHINKING THE FEDERAL BALANCE: HOW FEDERAL THEORY SUPPORTS STATES' RIGHTS

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Abstract

Existing judicial and academic debates about the federal balance have their basis in theories of constitutional interpretation, in particular literalism and intentionalism (originalism). This paper seeks to examine the federal balance in a new light, by looking beyond these theories of constitutional interpretation to federal theory itself. An examination of federal theory highlights that in a federal system, the States must retain their powers and independence as much as possible, and must be, at the very least, on an equal footing with the central (Commonwealth) government, whose powers should be limited. Whilst this material lends support to intentionalism as a preferred method of constitutional interpretation, the focus of this paper is not on the current debate of whether literalism, intentionalism or the living constitution method of interpretation should be preferred, but seeks to place Australian federalism within the broader context of federal theory and how it should be applied to protect the Constitution as a federal document. Although federal theory is embedded in the text and structure of the Constitution itself, the High Court's generous interpretation of Commonwealth powers post-Engineers has led to increased centralisation to the detriment of the States. The result is that the Australian system of government has become less than a true federation.

I INTRODUCTION

Within Australia, federalism has been under attack. The Commonwealth has been using its financial powers and increased legislative power to intervene in areas of State responsibility. Centralism appears to be the order of the day.¹

Today the Federal landscape looks very different to how it looked when the Australian Colonies originally 'agreed to unite in one indissoluble Federal Commonwealth',² commencing from 1 January 1901. The original Australian federation was premised on the significance and centrality of the States which was of utmost concern to the framers, as evidenced by their commentary at the Constitutional Conventions of the 1890's³ and

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¹ Anne Twomey and Glenn Withers, A Report for the Council for the Australian Federation, *Federalist Paper 1 Australia's Federal Future: Delivering Growth and Prosperity*, April 2007, Executive Summary.

² Preamble, Commonwealth of Australia Constitution Act 1900 (UK), and section 3.

³ These Conventions were:

The Australasian Federation Conference, held in Melbourne, commencing on 6 February 1890 until 14 February 1890. At the 1890 Conference the delegates resolved that Australia should federate, and

that when they returned to their colonies they would seek to influence their respective governments to elect delegates to attend a further conference. For commentary on the 1890 Convention see Robin Sharwood, 'The Australasian Federation Conference of 1890' in Robin Sharwood (ed), *Official Record of the Proceedings and Debates of the Australasian Federation Conference 1890* (Legal Books, 1990), 465.

The National Australasian Convention held in Sydney, commencing on 2 March 1891 until 9 April 1891 where its delegates came up with a draft Constitution. It was intended that this draft would be presented to the people of each colony, however, the Parliaments of the colonies were reluctant to have a final draft imposed on them and were sceptical at accepting the work of a convention that was 'indirectly representative' of them. See John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, 1901), 143-144. See also JA La Nauze, *No Ordinary Act: Essays on Federation and the Constitution* (Melbourne University Press, 2001), 173; and Zelman Cowan, 'Is it not time?' The National Australasian Convention of 1891', in Patricia Clarke (ed) *Steps to Federation: Lectures Marking the Centenary of Federation* (Australian Scholarly Publishing, 2001), 26.

The Australasian Federal Convention 1897/8 where the people of each colony (with the exception of Queensland who did not attend) elected delegates to attend. This conference was held in several sessions. The First Session was in Adelaide on 22 March 1897 until 23 April 1897. During this session delegates came up with a new draft, which was however, substantially similar to that of the 1891 Convention. The Delegates then returned to their colonies so that the colonial legislatures could consider and debate the draft. See John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, 1901), 165-182. On 2 September 1897, the Delegates resumed the Convention in Sydney to consider and debate the amendments suggested by their respective Parliaments which amounted to 286 in total. Due to the number of amendments, the Convention proceeded to 'settle some of the most important questions' which could be categorised under four main areas: 'the financial problem, the basis of representation in the Senate, the power of the Senate with regard to money Bills, and the insertion of a provision for deadlocks'. However, by the time the Sydney session was adjourned on 24 September (due to the departure of the Victorian delegates for their general election) only half of the draft Constitution had been considered: See John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, 1901), 182-194. See generally JA La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972).

The next and final session of the Convention was scheduled for 20 January 1898 in Melbourne, and went until 17 March 1898. The Melbourne session had the extensive task of reviewing the whole of the draft Constitution thus far in order to come up with a final document that was agreeable to the Convention. On the final day of the Convention, 17 March 1898, it was resolved that the delegates would ensure that a copy of the draft would be made available to their voters, and many 'pledged themselves to its support': John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, 1901), 194-205.

Each of the colonies passed enabling legislation, with the exception of Western Australia who requested amendments. Despite the path toward federation being impeded by Western Australia, the British Government invited a delegation from the colonies to visit Britain, and to discuss and negotiate the Bill with the British Colonial Secretary with a view to achieving submission of the Constitution Bill to the British Parliament. Several changes to the draft were requested by the Colonial Secretary. However in the end, only one change to section 74 concerning appeals to the Privy Council was made. The Constitution Bill was introduced the Bill into the House of Commons on 14 May 1900. It passed through the House of Lords and Committee without any amendment, on 5 July 1900, and received Royal Assent on 9 July 1900. Finally, Western Australia passed an enabling Act on 31 May, which received Royal Assent on 13 June 1900. A referendum took place in Western Australia on 31 July 1900, and achieved a majority of 'yes' votes. This was followed by both Houses of Western Australian Parliament passing addresses to the Queen to pray that Western Australia be included as an

the text and structure of the Constitution they drafted. The premise of equality between the Commonwealth and the States and the role of the States in facilitating and consenting to federation in the first place was discussed by Callinan J in his dissenting judgment in *Work Choices*. His Honour stated:

The whole Constitution is founded upon notions of comity, comity between the States which replaced the former colonies, comity between the Commonwealth as a polity and each of the States as a polity, and comity between the Imperial power, the Commonwealth and the States. It is inevitable in a federation that the allocation of legislative power will have to be considered from time to time. Federations compel comity, that is to say mutual respect and deference in allocated areas.⁴

This ‘mutual respect’ between the Commonwealth and State governments was strictly safeguarded by the early High Court of Australia, who applied the reserved powers⁵ and implied intergovernmental immunities doctrines⁶ to give effect to the intentions of the framers and to protect the position of the States. The early High Court’s interpretation of the Constitution with a view to giving effect to the intentions of those who drafted it is known as ‘intentionalism’ or ‘originalism’.⁷

However, the federal landscape was irreparably altered by the High Court as a result of the *Engineers* decision⁸ in 1920, where the High Court rejected the reserved powers and

original state to the federation. The Queen signed a proclamation on 17 September 1900, proclaiming that the Commonwealth of Australia would commence on 1 January 1901: John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, 1901), 221-251. See also Geoffrey Sawer, *The Australian Constitution* (Australian Government Publishing Service, 1975), 22-23; and JA LaNauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972), 248-269.

⁴ *New South Wales v Commonwealth of Australia* (*‘Work Choices’*) (2006) 229 CLR 1, 322.

⁵ The ‘reserved powers doctrine’ was implied by the early High Court on the basis of the federal nature of the Constitution. It provided that the powers of the Commonwealth prescribed by the Constitution should be read narrowly so as not to detract from the power of the States ‘reserved’ by section 107 of the Commonwealth Constitution. See *Peterswald v Bartley* (1904) 1 CLR 497; *R v Barger* (1908) 6 CLR 41; *Huddart, Parker & Co v Moorehead* (1909) 8 CLR 330.

⁶ The ‘implied intergovernmental immunities doctrine’, also called the ‘immunity of instrumentalities doctrine’, like the reserved powers doctrine was an implication based on the federal nature of the Constitution. It recognised that the Commonwealth and State governments were sovereign in their own rights and consequently, could not legislate so as to interfere with the operation of each other’s affairs. See *D’Emden v Pedder* (1904) 1 CLR 91 at 111 where the High Court stated, ‘When a State attempts to give its legislative or executive authority an operation which, if valid, would fetter, control or interfere with the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorised in the Constitution, is to that extent invalid and inoperative’; *Deakin v Webb* (1904) 1 CLR 585; *Commonwealth v New South Wales* (1906) 3 CLR 807; *Federated Amalgamated Government Railway & Tramway Service Association v New South Wales Railway Traffic Employees Association* (1906) 4 CLR 488 (*‘Railway Servants Case’*); *Baxter v Commissioner of Taxation (NSW)* (1907) 4 CLR 1087.

⁷ For a discussion of the various types of constitutional interpretation generally see James A Thomson, ‘Principles and Theories of Constitutional Interpretation and Adjudication: Some Preliminary Notes’ (1981-1982) 13 *Melbourne University Law Review*, 597; For criticism of intentionalism/ originalism, see The Hon Justice Michael Kirby, ‘Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?’ (2000) 24 *Melbourne University Law Review*, 1; For a more favourable approach to intentionalism/ originalism, see Jeffrey Goldsworthy, ‘Originalism in Constitutional Interpretation’ (1997) 25 *Federal Law Review* 1.

⁸ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 (*‘Engineers’*).

implied intergovernmental immunities doctrines in favour of an expansive, rather than restrictive, characterisation of federal powers. This literalist approach, which requires the Constitution to be interpreted as a statute, applying ordinary principles of constitutional interpretation, resulted in the powers of the Commonwealth being interpreted generously.

The aftermath of *Engineers* was a series of High Court decisions in which Commonwealth powers continued to be interpreted expansively.⁹ In fact, Craven described this winning streak as one which ‘must rival any win-loss ratio in the history of either professional sport or dubious umpiring.’¹⁰ An attempt was made to undo some of the damage caused by *Engineers* in the *Melbourne Corporation* case¹¹, but its principles have been watered down, and in practical reality have had limited success for the States.¹²

The High Court’s decision in *Engineers* has continued to have ramifications for the States up until the present time. The decisions in *Ha*¹³ and *WorkChoices*¹⁴ are examples of recent notable losses to the States, with *Ha* resulting in a revenue loss to the States of \$5billion per annum¹⁵, and *WorkChoices* resulting in the Commonwealth effectively taking the power to regulate employment away from the States, with 85% of employees now being brought under the Federal jurisdiction.¹⁶ In *Work Choices*, the majority confirmed that the literalist approach from *Engineers* should be applied when interpreting the powers of the Commonwealth.¹⁷ Hence, through its methods of interpretation, the High Court has shifted the federal balance from one that protects the

⁹ *Engineers* (1920) 28 CLR 129.

¹⁰ Greg Craven, *Conversations with the Constitution: Not Just a Piece of Paper* (University of New South Wales Press, 2004), 78.

¹¹ *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 (*‘Melbourne Corporation Case’*). The Melbourne Corporation Principle was an attempt to undo some of the potential damage to the States that could result from the decision in *Engineers*. The principle has three limbs and acknowledges that, following *Engineers*, the Commonwealth can enact legislation that interferes with the affairs of the States provided that: (1) the Commonwealth legislation does not threaten the continued existence of a State/s; (2) discriminate against a State by singling it out by imposing a burden such as taxation, or some other control; or (3) ‘unduly’ interfering with the government of the State.

¹² The discrimination limb of the Melbourne Corporation Principle was applied in *Queensland v Electricity Commission* (1985) 159 CLR 193, but the High Court’s decision in *Austin v Commonwealth* (2003) 215 CLR 185 confirmed that discrimination alone was not enough to invalidate Commonwealth legislation on the basis of the Melbourne Corporation Principle. See for example Kirby J at 200 who stated, ‘The presence of discrimination against a State may be an indication of an attempted impairment of its functions.’ Although Kirby J was writing in dissent, he was in agreement with the majority’s reformulation of the Principle into two limbs. The Principle has only been successfully applied in several cases to invalidate Commonwealth legislation. These cases include: *Queensland v Electricity Commission* (1985) 159 CLR 193; *Austin v Commonwealth* (2003) 215 CLR 185; and *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272.

¹³ *Ha v New South Wales* (1997) 189 CLR 465 (*‘Ha’*).

¹⁴ *Work Choices Case* (2006) 229 CLR 1.

¹⁵ Twomey and Withers, above n 1, 34.

¹⁶ *Work Choices Case* (2006) 229 CLR 1, 69, per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.

¹⁷ *Work Choices Case* (2006) 229 CLR 1, 103, per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.

position and rights of the States to one that promotes, and indeed that has resulted in, centralisation.

This paper seeks to consider the federal balance in a new light. Academic arguments about the federal balance are primarily premised upon these existing theories of constitutional interpretation – ‘intentionalism’ and ‘literalism’.¹⁸ However, instead of debating which of these existing methods of constitutional interpretation should prevail, it is submitted that it would be judicious to go back a step, and look at the meaning of federalism itself, drawing upon federal theory. When federal theory itself is examined, it becomes evident that a true federal system is one in which the States are equal and sovereign¹⁹, participants, rather than being second rate agents of the Commonwealth. Hence, it is arguable that methods of constitutional interpretation have become irrelevant to determine whether federalism or centralism should prevail, and in any event, judges and academics cannot agree which of the methods of constitutional interpretation should be preferred.

This paper commences with outlining a basic definition of ‘federalism’, premised upon its key characteristics. This definition is then expanded upon, and supported by, an analysis of three key theoretical texts relied upon by the framers of the Constitution. These are: James Bryce’s, *The American Commonwealth*;²⁰ Edward A Freeman’s *History of Federal Government in Greece and Italy*; and Alexander Hamilton, James Madison and John Jay’s *The Federalist Papers*.²¹

This paper then discusses federal theory posited by theorists such as John Stuart Mill, A V Dicey, KC Wheare, KR Cramp, Pierre-Joseph Proudhon, Geoffrey Sawer, JA LaNauze, Daniel J Elazar, Greg Craven, and Nicholas Aroney to further explain these characteristics and emphasise the centrality of the States in a Federal system of government.

In addition, this paper then outlines the Federal nature of the Constitution, specifically how the structure and provisions of the Constitution establish a federal system, and the

¹⁸ Note: ‘Living Constitution’ is also a method of Constitutional Interpretation employed by the High Court. Justice Kirby was an advocate of this approach. See, for example (insert case name and quote). The Living Constitution method could be used to suggest that centralisation is more appropriate to meet the demands of modern society than federalism, which has become outdated.

¹⁹ I have used the term ‘sovereign’ and ‘sovereignty’ throughout this paper to describe the power of the states in a federal system. By this terminology, I mean ‘supreme power’. To expand on this, both the Australian States and Commonwealth have ‘sovereign power’ in their respective jurisdictions. That is, the Australian federation is a system of ‘dual sovereignty’ in which the state and federal governments are autonomous in their own spheres and of equal importance. For a discussion of ‘sovereignty’ see Max Frenkel, *Federal Theory* (1986), 69-76.

²⁰ James Bryce, *The American Commonwealth* (MacMillan and Co, 1889). For a discussion of the role that Bryce’s, *The American Commonwealth*, played in the formation of the Commonwealth Constitution, see Matthew N C Harvey, ‘James Bryce, “The American Commonwealth”, and the Australian Constitution’ (2002) 76 *The Australian Law Journal* 362.

²¹ Harvey, (at 366), identifies these sources as being frequently cited by the founders at the Melbourne Conference and the Constitutional Conventions: Bryce, 70 times, Freeman, 45 times; and Hamilton, Madison and Jay, 25 times.

central role of the States embodied in the Constitution. As part of this discussion, commentary from the Constitutional Convention Debates will be examined to highlight the intended central role and retention of constitutional powers of the states after federation that was translated into the final constitutional document by the framers. Whilst this material lends support to intentionalism as a preferred method of constitutional interpretation, the focus of this paper is not on the current debate of whether literalism, intentionalism or the living constitution method of interpretation should be preferred, but seeks to place Australian federalism within the broader context of federal theory and how it should be applied to protect the Constitution as a federal document.

This paper concludes with an examination of different models of federalism to show how Australia has departed from the true federal model prescribed by federal theory, in which the States are sovereign and have equal standing with the central (Commonwealth) government.

In summary, an examination of federal theory illustrates that a system of federal government in which the States are inferior to the Commonwealth, is something less than a true federation. It therefore follows that because federalism is the cornerstone of the Australian Constitution, the federal balance must be restored.

II DEFINING FEDERALISM: WHAT IS A FEDERAL SYSTEM OF GOVERNMENT?

Many theorists have attempted to define federalism with reference to its key characteristics. For example, Sawyer identifies the following characteristics as having to exist for a governmental system to be properly defined as ‘federal’. According to Sawyer, federalism requires:

- (1) An independent country with a central government that has the institutionalised power to govern the whole of the country;
- (2) The country is divided into separate geographical regions which have their own institutions of government to govern in their particular regions;
- (3) The power to govern is distributed between central and regional governments;
- (4) The distribution of power between the central and regional governments is set out in a constitution and is rigidly entrenched by the constitution so that it cannot be amended by the central government or any region or regions;
- (5) The constitution contains rules to determine any conflict of authority between the centre and the regions. In most constitutions, the general rule is that the law of the central government will prevail;
- (6) The distribution of powers between the central and regional governments is interpreted and policed by a judicial authority. The judicial authority has the constitutional power to make binding decisions about the validity of legislation and government action, or where there is a conflict of the laws of the central and regional governments.²²

²² Geoffrey Sawyer, *Modern Federalism* (Pitman Australia, 1976), 1. Sawyer also defines ‘federalism’ similarly in Geoffrey Sawyer, *Australian Federalism in the Courts* (Melbourne University Press, 1967) 1, as having:

... three common features; first, the existence in a geographical area of several governmental units, one having competence over the whole area, the others over

Similarly, Lijphart has listed ‘five principal attributes’ of federalism as follows:

1. A written constitution which specifies the division of power and guarantees to both the central and regional governments that their allotted powers cannot be taken away;
2. A bicameral legislature in which one chamber represents the people at large and the other the component units of the federation;
3. Over-representation of the smaller component units in the federal chamber of the bicameral legislature;
4. The right of the component units to be involved in the process of amending the federal constitution but to change their own constitutions unilaterally;
5. Decentralized government, that is, regional government’s share of power in a federation is relatively large compared to that of regional governments in unitary states.²³

Aroney discusses the complexity of pinpointing an exact definition of federalism. From a constitutional perspective, Aroney defines federalism as follows:

... the defining feature of a federal system is the existence of a ‘division of power’ between central and regional governments. The basic idea is that of a political system in which governmental power is divided between two territorially defined levels of government, guaranteed by a written constitution and arbitrated by an institution independent of the two spheres of government, usually a court of final jurisdiction.²⁴

defined parts of it, and sharing between them the power to govern; second, a relation between the governing units such that each has a reasonable degree of autonomy within its prescribed competence; third, an inability of any one unit to destroy at will the autonomy of the others.

Many more criteria could be added, such as: that each unit government should possess the means of exercising its competence without relying on instrumentalities of other units; that the area of competence of the unit governments should in each case be substantial; that the areas of competence should be judicially interpreted and adherence to them judicially enforced; that the possibilities of *de facto* coercion or inducement of one government by another should not be such as to impair in a substantial way the legal autonomy of the weaker unit.

Sawer’s ‘federal principles’ have been re-iterated by other constitutional law academics such as Irving who states:

A federation is a political system in which the power to make laws is divided between a central legislature and regional legislatures. The centre makes laws for the nation as a whole, while the regions make laws for their region only. Both sets of laws impact directly upon the lives of the citizens. The power of the centre is limited, in theory at least, to those matters which concern the nation as a whole. The regions are intended to be as free as possible to pursue their own local interests. Historically, federations have adopted written constitutions in which this division is described, and which include a means of settling disputes between the regions and the centre.

See Helen Irving (ed), *The Centenary Companion to Australian Federation* (Cambridge University Press, 1999), xix.

²³ Arend Lijphart, *Non-Majoritarian Democracy: A Comparison of Federal and Consociational Themes* (1985) in Daniel J Elazar, *Exploring Federalism* (The University of Alabama Press, 1991), 22-23.

²⁴ Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009), 17.

However, from a political science perspective, Aroney notes that this constitutional definition, whilst a good starting point, does not adequately explain how federalism operates in reality:

Rather than displaying a strictly defined distribution of responsibility between two or more 'co-ordinate' levels of government, federal systems tend in practice to resemble something more like a 'marble cake', in which governmental functions are shared between various governmental actors within the context of an ever-shifting set of parameters shaped by processes of negotiation, compromise and, at times, cooperation.²⁵

In fact, Aroney argues that 'conceptualising federalism' is difficult and that the changing nature of the concept of federalism depends upon who is defining it.²⁶ This paper, although defining federalism from a constitutional viewpoint, aims to clarify some of this potential confusion by defining federalism with reference to its key characteristics, expanding upon what federal theory says about these characteristics, and finally, outlining different models of federalism in order to determine how the High Court has shifted the federal balance from one premised upon the equality of the States to one that has supported increased centralisation. As a result, this paper aims to provide a more complete picture of this 'marble cake'.

It is submitted that the following definition of a federal system of government can be derived from an examination of these definitions and is supported by works of various other constitutional and political theorists whose work will be discussed later in this paper. The following definition identifies four key characteristics of a federal system of government and highlights, as a central characteristic, the sovereignty and independence of the States in a Federation. It also highlights federalism's objective to protect and preserve the balance of power between the Federal and State governments. This paper contends that a Federal system of government can be defined with reference to the following four characteristics:

1. The constitution is written, and thereby difficult to alter, so its institutions and their powers cannot be easily interfered with;
2. The Constitution specifies, and thereby limits, the powers of the Commonwealth government, leaving the balance of 'unwritten' powers to

²⁵ Ibid 18.

²⁶ Ibid 17. Further, Aroney argues that the constitutional definition does not take into account how power is allocated, and does not adequately explain the type of power that each level of government has. That is, are powers 'enumerated, residual, or reserved'? (at 18-19). In addition, Aroney argues that, the type of power allocated to each level of government tends to be determined by the manner in which the federal system of government came to be formed in the first place (at 19). Using this example, Australian federalism came about through a process of 'integration' (ie. by modifying the system already in existence) whereby the States agreed to allocate some of their existing powers to a central government. This led to the Commonwealth's powers being 'enumerated' and state powers being 'residual' (at 19). However, a different type of federal system could be formed by a process of 'disintegration' (at 19), where the current system of government is completely abandoned to start the new federal system of government afresh. This could result in a different division of powers between the central and regional governments. Aroney also argues that the constitutional definition of 'federalism' in terms of a division of powers, does not explain the difference between a 'federation' and a 'confederation' (at 19-20).

the States. That is, specific legislative and other powers are divided between the Commonwealth and State governments;

3. The sovereignty of the Commonwealth and State governments is protected so they can exercise these powers free of interference from one another;
4. The Constitution establishes an independent High Court of appeal to act as an independent constitutional ‘umpire’ to ensure that these powers are not transgressed or eroded. That is, it is the role of this court to maintain the ‘federal balance’ of power between the Commonwealth and State governments, including to determine the demarcation of any disputes between the two levels of government.

This paper will now expand on the commentary of key political and constitutional theorists, commencing with those relied upon by the framers of the Australian Constitution, with respect to these characteristics. This discussion will serve to illustrate how the States and the maintenance of States rights are central to any conceptualisation of federalism.

III DEFINING FEDERALISM: THREE KEY TEXTS REFERRED TO BY FRAMERS

The four key characteristics of a federation identified above can also be found when reviewing three key constitutional texts that the framers of Australia’s Federal constitution examined and discussed in the various debates leading up to the formation of the Australian Constitution. The first, and most significant of these, is James Bryce’s *The American Commonwealth*.²⁷

A James Bryce: *The American Commonwealth*

Following over 200 years since federation, governance by two levels of government – State and Commonwealth – is a familiar and every day concept to citizens and residents of Australia. However, at the time of the Melbourne Conference in 1890 (the first conference to discuss federation), the concept of federalism was largely unfamiliar to the Delegates, who were mostly British, Irish or Scottish and predominantly familiar with Britain’s unitary system of government.²⁸ As a consequence, the delegates primarily looked to Bryce’s, *The American Commonwealth*, for guidance as to the form that the new Constitution should take. In *The American Commonwealth*, Bryce detailed the American system of government, as a ‘Federation of States’²⁹, in two volumes. In outlining this, Bryce provided detailed commentary about the operation of federalism in American government, and the importance of the States in the American federal system.

1 A written constitution that is difficult to alter

²⁷ James Bryce, *The American Commonwealth* (MacMillan and Co, 1889).

²⁸ JA LaNauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972), 12.

²⁹ Bryce, above n 27, 305.

As noted above, Bryce outlined the provisions, including institutions and powers, of the American federal system, established in its written constitution. Hence, there is somewhat of an assumption in Bryce's work as to the importance of specifying these in a form that was difficult to alter. Bryce did however, acknowledge that although it is possible to have a federation without a written constitution (such as the Achaean League), a written constitution serves as a 'fundamental document' which serves to 'define and limit the power of each department of government'.³⁰ In contrasting the (written) United States Constitution which can only be altered with the consent of the people, with the unwritten British Constitution which is instead subject to Parliament, Bryce pointed out the important role of a rigid constitution to 'safeguard the rights of the several states...[by] limiting the competence of the national government'.³¹

2 *Division of power between Federal and State governments*

Bryce noted that in a federal system of government, there is a 'distribution of powers'³² between a central 'federal' government and state governments. These powers are categorised as 'Executive, Legislative and Judicial'.³³ Bryce noted that the central federal government and state governments³⁴ operate separately, but at the same time complement one another:

The characteristic feature and special interest of the American Union is that it shows us two governments covering the same ground, yet distinct and separate in their action. It is like a great factory wherein two sets of machinery are at work, their revolving wheels apparently intermixed, their bands crossing one another, yet each set doing its own work without touching or hampering the other.³⁵

As part of the 'distribution of powers'³⁶ between the federal and state governments, Bryce noted that there are five classes of powers:

Powers vested in the National Government alone.
Powers vested in the States alone.
Powers exercisable by either the National government or the States.
Powers forbidden to the National government.
Powers forbidden to the State Governments.³⁷

Firstly, powers that are exclusive to the national government, primarily relate to matters that pertain to the country as a whole, whereas exclusive state powers pertain to more everyday local governance issues. Bryce outlined the nature of these powers:

The powers vested in the National government alone are such as relate to the conduct of the foreign relations of the country and to such common national purposes as the army and navy, internal commerce, currency, weights and measures, and the post-office, with

³⁰ Ibid 33, footnote 1.

³¹ Ibid 33.

³² Ibid 306.

³³ Ibid 303.

³⁴ Ibid 29.

³⁵ Ibid 318.

³⁶ Ibid 306.

³⁷ Ibid 307.

provisions for the management of the machinery, legislative, executive and judicial, charged with these purposes.

The powers which remain vested in the States alone are all the other ordinary powers of internal government, such as legislation on private law, civil and criminal, the maintenance of law and order, the creation of local institutions, the provision for education and the relief of the poor, together with taxation for the above purposes.³⁸

Secondly, powers that are concurrent (i.e. that can be exercised by both the Commonwealth and the States) include: certain legislative powers, with federal legislation prevailing over state legislation if there is a conflict of laws; taxation and judicial powers (that is, both federal and state courts).³⁹ If there is any doubt about whether a power belongs to the federal government, or state governments, the power is deemed to belong to the state governments unless the Constitution has specifically allocated it to the Commonwealth.⁴⁰ In other words, ‘... when a question arises whether the national government possesses a particular power, proof must be given that the power was positively granted. If not granted, it is not possessed.’⁴¹

Thirdly, powers that are ‘forbidden’ to *both* the federal government and the States include a constitutional prohibition on granting a ‘title of nobility’ at both state and federal level,⁴² and the acquisition of public or private property by the federal government or the state without ‘just compensation’.⁴³ Other powers are only forbidden to either the federal or state governments. For example, the federal government is prohibited from giving ‘commercial preference’ to one state over another⁴⁴ and is constrained by ‘personal freedoms’ when enacting legislation such as freedom of religion, speech, public assembly and the right to bear arms.⁴⁵

3 *Sovereignty of the States*

As part of the federal and state governments operating independently of one another, their powers are mostly⁴⁶ exercised without reference to, or interference with, one another:

The authority of the National government over the citizens of every State is direct and immediate, not exerted through the State organization, and not requiring the co-operation of the State government. For most purposes the national government ignores the States; and it treats the citizens of different States as being simply its own citizens, equally bound by its laws ...

³⁸ Ibid 308-309.

³⁹ Ibid 309.

⁴⁰ Ibid 311.

⁴¹ Ibid.

⁴² Ibid 307; Art i. § 9; Art i. § 10.

⁴³ Ibid 307; Amendment v and Amendment xiv.

⁴⁴ Ibid 309; Art. i. § 9.

⁴⁵ Ibid 309-10; Art i. § 9; Amendment i and ii.

⁴⁶ Bryce details exceptions where there is some co-operation between the federal and State governments: see Bryce, above n 27, 312-313. For example, States choose two Senators to represent the State at a federal level.

On the other hand, the State in no wise depends on the National government for its organization or its effective working. It is the creation of its own inhabitants. They have given it its constitution. They administer its government. It goes on its own way, touching the national government at but few points. That the two should touch at the fewest possible points was the intent of those who framed the Constitution.⁴⁷

Bryce emphasised the central nature of the States in the American federal system. For example, the States were concerned that they should not hand over too much power to the new central government. Specifically, Bryce noted ‘the anxiety of the States to fetter the master they were giving themselves...’⁴⁸ and explained that one of the objects of the founders ‘was to restrict the functions of the National government to the irreducible minimum of functions absolutely needed for the national welfare, so that everything else should be left to the States’.⁴⁹ This resulted in the States retaining their ‘original and inherent’⁵⁰ powers which are ‘prima facie unlimited’⁵¹ except to the extent that the Federal Constitution has removed, restricted or re-allocated them to the National government. In fact, Bryce described the legislative powers of the States as being more extensive than those of the National government: ‘Prima facie, every State law, every order of a competent State authority, binds the citizen, whereas the National government has but a limited power: it can legislate or command only for certain purposes or on certain subjects’.⁵²

Consequently, when the American Constitution was drafted, the founders ensured that the continued existence of the States was guaranteed. In the words of Bryce, the Constitution:

... presupposes the State governments. It assumes their existence, their wide and constant activity. It is a scheme designed to provide for the discharge of such and so many functions of government as the States do not already possess and discharge. It is therefore, so to speak the complement and crown of the State Constitutions, which must be read along with it and into it in order to make it cover the whole field of civil government ...⁵³

The States were seen by Bryce as critical in the American federal system. They have their own separate and extensive powers that are uncompromised by those of the National government. The States work independently, and at the same time side by side with the Federal government, with each complimenting the existence of the other. The continued existence of the States is so imperative to the Federal system of government that it must be guaranteed by the Constitution:

A State is, within its proper sphere, just as legally supreme, just as well entitled to give effect to its own will, as is the National government within its sphere; and for the same reason. All authority flows from the people. The people have given part of their supreme authority to the Central, part to the State governments. Both hold by the same

⁴⁷ Bryce, above n 27, 312.

⁴⁸ Ibid 306.

⁴⁹ Ibid 318.

⁵⁰ Ibid 311.

⁵¹ Ibid.

⁵² Ibid 324.

⁵³ Ibid 29-30.

title, and therefore the National government, although superior wherever there is a concurrence of powers, has no more right to trespass upon the domain of a State than a State has upon the domain of Federal action. "When a particular power," says Judge Cooley, "is found to belong to the States, they are entitled to the same complete independence in its exercise as is the National government in wielding its own authority."⁵⁴

This raises the question of who will enforce this guarantee that the States will remain sovereign, independent, and retain the bulk of their powers after federation. This leads to a discussion of Bryce's commentary on the role of the courts to protect the federal balance mandated by a federal Constitution.

4 *Independent Judicial Guardian of the Constitution*

Bryce stated that it is the role of the Courts to determine whether a statute passed by Congress exceeds the power granted to it by the Constitution.⁵⁵ Bryce noted that the courts are essentially the only body who can objectively determine whether constitutional powers have been transgressed because they are impartial.⁵⁶ Bryce stated:

It is therefore obvious that the question, whether a congressional statute offends against the Constitution, must be determined by the courts, not merely because it is a question of legal construction, but because there is no one else to determine it. Congress cannot do so, because Congress is a party interested. If such a body as Congress were permitted to decide whether the acts it had passed were constitutional, it would of course decide in its own favour, and to allow it to decide would be to put the Constitution at its mercy. The President cannot, because he is not a lawyer, and he also may be personally interested. There remain only the courts, and these must be the National or Federal courts, because no other courts can be relied on in such cases.⁵⁷

In addition, Bryce noted that when an issue of inconsistency arises between a Federal and State law, the Constitution must provide for a means of resolution by specifying that the Federal law will prevail so far as it is inconsistent with the State law.⁵⁸ However, as indicated in the penultimate quotation, this rule regarding inconsistency is not an indication of central government supremacy, but instead, the most logical means of resolving conflict between the two levels of government.

In summary, an examination of Bryce's *The American Commonwealth* highlights the theory behind, and the central characteristics of a federal system of government. His commentary highlights the importance of the States in a federal system of government. The States' sovereignty, equality and continued existence are a critical, and fundamental part of federal theory.

⁵⁴ Ibid 314. The concept of the autonomy of the State and Federal governments from interference with one another was recognised by the early High Court of Australia in the form of the doctrine of implied intergovernmental immunities: See above n 6.

⁵⁵ Bryce, above n 27, 242.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid 242-243.

The characteristics of a federal system of government identified by Bryce, and the necessary pre-eminence of the States in a federal system of government, have also been highlighted in the work of other theorists referred to, and relied upon by the founders of the Australian Constitution. These are discussed below, and include Edward A Freeman's work: *History of Federal Government in Greece and Italy*.

B *Edward A Freeman: History of Federal Government in Greece and Italy*

As noted by Harvey,⁵⁹ the second most quoted text relied upon by the framers of the Australian Constitution was Edward A Freeman's *History of Federal Government in Greece and Italy*.⁶⁰ Freeman was an historian who described himself as 'a [sic] historian of Federalism'.⁶¹ Before detailing the history and workings of the federal systems of government in ancient Greece and Rome,⁶² Freeman discussed the concept of federalism generally. This discussion will now be outlined.

1 *A written constitution that is difficult to alter*

As noted above, Freeman's primary focus was the federal systems of government in ancient Greece and Rome. This was preceded by a discussion of the general characteristics of a federation, with a primary focus on federalism's division of power between two sovereign levels of government. His acceptance of a constitution being in a written, or at the very least in a form that is difficult to change, is evident from his evaluation of the United States as an example of a 'most perfect' example of a federation.⁶³

2 *Division of power between Federal and State governments*

Freeman noted that 'federalism' is difficult to define. He stated, 'The exact definition, both of a Federation in general and of the particular forms of Federations, has often taxed the ingenuity both of political philosophers and of international lawyers.'⁶⁴ And further: 'Controversies may thus easily be raised both as to the correct definition of a Federal Government and also whether this or that particular government comes within the definition'.⁶⁵ Freeman stated that the nature of federalism is that it is essentially a 'compromise ... between two extremes'⁶⁶ and that:

A Federal Government is most likely to be formed when the question arises whether several small states shall remain perfectly independent, or shall be consolidated into a

⁵⁹ Matthew N C Harvey, 'James Bryce, "The American Commonwealth", and the Australian Constitution' (2002) 76 *The Australian Law Journal* 362.

⁶⁰ Edward A Freeman, *History of Federal Government in Greece and Italy* (MacMillan and Co, 1893).

⁶¹ *Ibid* xiii.

⁶² It is beyond the scope of this paper to summarise the history and workings of federalism in ancient Greece and Rome, as outlined by Freeman. Instead, this paper is concerned with defining federalism and the key characteristics of a federal government.

⁶³ Freeman, above n 60, 5.

⁶⁴ *Ibid* 1.

⁶⁵ *Ibid*.

⁶⁶ *Ibid* 13.

single great state. A Federal tie harmonizes the two contending principles by reconciling a certain amount of union with a certain amount of independence.

Despite the difficulty in defining a federal system of government, Freeman provided a basic definition of a 'Federal Government' as follows:

The name of Federal Government may ... be applied to any union of component members, where the degree of union between the members surpasses that of mere alliance, however intimate, and where the degree of independence possessed by each member surpasses anything which can fairly come under the head of merely municipal freedom.⁶⁷

Freeman argued that there is a 'Federal ideal' where it is possible for federal government to work almost flawlessly: 'There is what may be called a certain Federal ideal, which has sometimes been realized in its full, or nearly its full, perfection...'⁶⁸ The conditions that Freeman said are necessary to achieve this Federal ideal provide some insight into defining the concept of federalism. These conditions are described in the following passage:

Two requisites seem necessary to constitute a Federal Government in its most perfect form. On the one hand, each of the members of the Union must be wholly independent in those matters which concern each member only. On the other hand, all must be subject to a common power in those matters which concern the whole body of members collectively. Thus each member will fix for itself the laws of its criminal jurisprudence, and even the details of its political constitution. And it will do this, not as a matter of privilege or concession from any higher power, but as a matter of absolute right, by virtue of its inherent powers as an independent commonwealth. But in all matters which concern the general body, the sovereignty of the several members will cease...A Federal Union, in short, will form one State in relation to other powers, but many States as regards its internal administration. This complete division of sovereignty we may look upon as essential to the absolute perfection of the Federal ideal.⁶⁹

Later, Freeman summarises the definition: 'A Federal Commonwealth, then, in its perfect form, is one which forms a single state in its relations to other nations, but which consists of many states with regard to its internal government'.⁷⁰

3 *Sovereignty of the States*

Freeman also emphasised the independence and sovereignty of both levels of government (state and federal) in a federation. He stated: 'We may then recognize as a true and perfect Federal Commonwealth any collection of states in which it is equally unlawful for the Central Power to interfere with the purely internal legislation of the several members, and for the several members to enter into any diplomatic relations with other powers.'⁷¹

⁶⁷ Ibid 2.

⁶⁸ Ibid.

⁶⁹ Ibid 2-3.

⁷⁰ Ibid 7.

⁷¹ Ibid 8.

Freeman expanded on the requirement of State sovereignty by identifying two classes of Federal Governments. Firstly, a Federal Government can be a 'System of Confederated States'.⁷² This means that the central government can issue directions to the State Governments as to how they must govern. Hence, the central government does not directly govern the people. Rather, it directs the States as to how to do this. The result is a lesser degree of state independence and equality.

The second class of Federal Government is a 'Composite State'⁷³, in which the central government directly governs the people in specified areas of responsibility, with the States having the sovereignty to deal with their own areas of responsibility. In summary, the State and Federal governments are 'co-ordinate' and at the same time 'sovereign'.⁷⁴ Freeman advocated that this second class was the preferable form of federal government:

It is enough to enable a commonwealth to rank, for our present purpose, as a true Federation, that the Union is one which preserves to the several members their full internal independence, while it denies to them all separate action in relation to foreign powers. The sovereignty is, in fact, divided; the Government of the Federation and the Government of the State have a co-ordinate authority, each equally claiming allegiance within its own range.⁷⁵

An obvious example of this is the Australian Federal system of government.

4 *Independent Judicial Guardian of the Constitution*

As noted above, Freeman's primary concern was with the division of powers and sovereignty of the two respective spheres of government by way of introduction to federalism in ancient Greece and Rome. However, there is reference in Freeman's work, as noted in the quotation above, of both spheres of government being 'subject to a common power in those matters which concern the whole body of members collectively'.⁷⁶ This could be interpreted as referring to the Constitution itself, but undoubtedly, an independent body must exist in order to enforce and interpret this 'common power' and any disputes between the two spheres of government.

It is evident from the above examination that the key characteristics of federalism, identified by Freeman, and premised upon the rights and sovereignty of the States, mirror those identified by Bryce in *The American Commonwealth*. Once again, these characteristics can be seen in another text relied upon by the framers of the Australian Constitution, Alexander Hamilton, James Madison and John Jay's *The Federalist Papers*.

C *Alexander Hamilton, James Madison and John Jay: The Federalist Papers*

⁷² Ibid 8-9.

⁷³ Ibid 9.

⁷⁴ Ibid .

⁷⁵ Ibid 11-12.

⁷⁶ Ibid 2.

The concept behind *The Federalist*, commonly referred to as *The Federalist Papers*, was formulated by Hamilton who 'had in mind a long series of letters or essays defending the proposed Constitution.'⁷⁷ The Constitution in question was the first draft of the American Constitution agreed upon by 40 delegates from 12 States at the Federal Convention held between 25 May 1787 and 17 September 1787. *The Federalist Papers* were intended to answer criticisms of the proposed new Constitution, including a discussion of the 'dangers of disunion and the advantages of a stronger union',⁷⁸ the powers of the federal government, its relationship with the states, and the checks and balances on the new federal government's powers set out in the Constitution.⁷⁹ The aim of *The Federalist Papers* was to 'aid in securing the ratification of the Constitution'⁸⁰ by the states.

There has been considerable debate as to who of Hamilton, Madison and Jay wrote the specific papers that comprise *The Federalist Papers*.⁸¹ However, each was adequately qualified to write on the merits of the new federal system of government. Hamilton was the third member of the New York delegation to the Federal Convention in Philadelphia in 1787. He enlisted John Jay, a lawyer in New York who had held the position of Secretary of Foreign Affairs, and later first Chief Justice of the United States, before eventually becoming Governor of New York.⁸² Hamilton also enlisted Madison, who had held public office in Virginia for 11 years, together with being one of the most outspoken members at the Federal Convention.⁸³

The main focus of *The Federalist Papers* was on the advantages of a federal system of government, as opposed to the characteristics of one. However, some of the key characteristics of a federal system of government are identified in *The Federalist Papers* in the course of this discussion.

1 *A written constitution that is difficult to alter*

Federalist Paper 53 noted the importance of having a constitution that is difficult to alter, particularly by the central government. Although, Madison, who is attributed as its author,⁸⁴ did not expressly state the need for a written constitution in a federal system, it is evident from his comments about the unwritten British Constitution being subject to Parliament, rather than the people through a process of amendment that is difficult to achieve:

⁷⁷ Benjamin Fletcher Wright, 'Introduction' in Howard Mumford Jones (ed), Alexander Hamilton, James Madison and John Jay, *The Federalist* (The Belknap Press of Harvard University Press, 1972), 7. This text is also commonly known as *The Federalist Papers*.

⁷⁸ Ibid 7.

⁷⁹ Ibid.

⁸⁰ Ibid 11.

⁸¹ Ibid 8-9. Specifically, the authorship of 49-58 and 62-63 is unknown. Also Hamilton claimed he wrote 18-20 jointly with Madison, yet Madison claimed sole authorship of these: see page 9.

⁸² Ibid 7.

⁸³ Ibid 7-8.

⁸⁴ Ibid 67.

The important distinction so well understood in America, between a Constitution established by the people and unalterable by the government, and a law established by the government and alterable by the government, seems to have been little understood and less observed in any other country. Wherever the supreme power of legislation has resided, has been supposed to reside also a full power to change the form of the government. Even in Great Britain, where the principles of political and civil liberty have been most discussed, and where we hear most of the rights of the Constitution, it is maintained that the authority of the Parliament is transcendent and uncontrollable, as well with regard to the Constitution, as the ordinary objects of legislative provision.⁸⁵

Hence, as this quotation illustrates, constitutional powers that are difficult to alter ensure that the balance of power between the Federal and State governments is protected, in particular from the Federal Parliament, who may be tempted to centralise power allocated to the States.

2 *Division of power between Federal and State governments*

Federalist Paper 39, ‘Republicanism, Nationalism, Federalism,’ attributed to the authorship of Madison, also outlined some foundations and characteristics of a federal system of government. It described how, in a federal system, there are two levels of government, State and Federal, that co-exist, but have distinct areas of responsibility:

... the local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority, than the general authority is subject to them, within its own sphere. In this relation, then, the proposed government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other subjects.⁸⁶

This point was re-iterated again by Madison in Federalist Paper 51 when he said of the division of powers between the state and federal governments:

In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.⁸⁷

Madison’s comments that the two spheres of government ‘control each other’ refers to the checks and balances created by a federal system in which distinct (and thereby limited) powers are allocated to the Federal government. This is enhanced by the sovereignty of each sphere, and the existence of an independent judicial umpire to police alleged transgressions between the two levels of government. These are discussed in the following sections.

3 *Sovereignty of the States*

⁸⁵ Alexander Hamilton, James Madison and John Jay, *The Federalist* (The Belknap Press of Harvard University Press, 1972), 365. This quotation is discussed in Fletcher Wright, above n 78, 7-8.

⁸⁶ Hamilton, above n 85, 285.

⁸⁷ Ibid 357.

In Federalist Paper 39, Madison also identified the necessary sovereignty and equality of the States, and their importance in agreeing to the creation of a federal government in the first place:

Each State, in ratifying the Constitution, is considered as a sovereign body, independent of all others, and only to be bound by its own voluntary act. In this relation, then, the new Constitution will, if established, be a *federal* and not a *national* constitution.⁸⁸

Hence, the Federal government is not allocated to a status that is superior to that of the States. In agreeing to federate, the States have agreed to be constitutional equals with the federal government, with both levels having sovereignty over their own allocated powers.

4 *Independent Judicial Guardian of the Constitution*

Madison also noted, in Federalist Paper 39, that in a federal system, it is necessary to have an impartial ‘tribunal’, established by the federal constitution, to determine disputes between the central and regional governments:

It is true that in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide, is to be established under the general government. But this does not change the principle of the case. The decision is to be impartially made, according to the rules of the Constitution; and all the usual and most effectual precautions are taken to secure this impartiality.⁸⁹

In summary, although *The Federalist Papers* sought to espouse the merits of the new draft United States Constitution, they outline some of the key aspects of federalism: a rigid Constitution that delineates power between two levels of government (State and Federal) that co-exist and yet have sovereign areas of responsibility, and the need for a tribunal to resolve disputes and ensure that the balance of power is maintained between the two jurisdictions, as opposed to a central Parliament being the final arbiter.

IV DEFINING FEDERALISM: ADDITIONAL THEORETICAL COMMENTARY

A *A Written Constitution That Is Difficult To Alter*

A key feature of a federal system of government is that governmental institutions and powers are set out in a written constitution that is difficult to alter, and impossible for the Federal Government to alter alone. The use of a written constitution to define and maintain the federal balance in a federation has been identified by many key theorists. Dicey, for example, wrote of ‘the supremacy of the Constitution’.⁹⁰ He wrote that a ‘leading characteristic’ of federalism is the existence of a written constitution⁹¹ that is

⁸⁸ Ibid 283.

⁸⁹ Ibid 285.

⁹⁰ A V Dicey, *Introduction to the Study of the Law of the Constitution* 8th ed (MacMillan and Co, 1926), 140.

⁹¹ Ibid 142.

the ‘supreme law of the land’⁹² where ‘every power, executive, legislative, or judicial, whether it belong to the nation or to the individual States, is subordinate to and controlled by the constitution’.⁹³ Cramp also observed this supremacy, noting that for a federal system to work properly, it is necessary to have a written constitution that sets out the allocation of these powers, and which is ‘supreme’, rendering any legislation or action outside these set powers constitutionally invalid.⁹⁴

This written constitution should also be ‘rigid’ or ‘inexpansive’⁹⁵ so that it can only be altered by a supreme authority ‘above and beyond’ the legislature,⁹⁶ or in other words, in a ‘body outside the Constitution.’⁹⁷ Dicey noted that the Federal Parliament cannot alter the Constitution, but the Constitution can limit the powers of the Federal Parliament:

A federal constitution is capable of change, but for all that a federal constitution is apt to be unchangeable. Every legislative assembly existing under a federal constitution is merely a subordinate law-making body, whose laws are of the nature of by-laws, valid whilst within the authority conferred upon it by the constitution, but invalid or unconstitutional if they go beyond the limits of such authority.⁹⁸

Sawer’s definition of federalism (as a series of ‘basic federal principles’) was noted at the beginning of this paper. In this definition, Sawer noted that a key ‘federal principle’ was that the division of state and federal powers should be set out in a constitution.⁹⁹ This is taken up by other commentators, such as Singleton et al who state that ‘federalism’ is ‘...a division of powers between the national (federal) government and the states Such a division had to be recorded in a detailed, written constitution.’¹⁰⁰

In summary, a written constitution, in which the parameters of State and Federal powers are rigidly set out and difficult to alter, ensures that the balance of power between the two levels of government is maintained, so that the States are protected from any Federal attempts to usurp their power or make them in any way subordinate.

B *Division of Power Between Federal and State Governments*

A discussion of federalism’s requirement of a written constitution leads us to a discussion of what must be contained within it. Federal theory specifies that a written

⁹² Ibid 140.

⁹³ Ibid.

⁹⁴ KR Cramp, *State and Federal Constitutions of Australia* (Angus & Robertson Ltd, 1913), 116-117.

⁹⁵ Dicey, above n 90, 142-143.

⁹⁶ Ibid 142-143.

⁹⁷ Ibid 145.

⁹⁸ Ibid 145-146.

⁹⁹ Geoffrey Sawer, *Modern Federalism* (Pitman Australia, 1976), 1.

¹⁰⁰ Gwynneth Singleton, Don Aitkin, Brian Jinks & John Warhurst, *Australian Political Institutions* (Pearson Longman, 8th ed, 2006), 31.

federal constitution distributes power between the central and regional governments. In doing so, it will frequently list, and thereby limit, the powers allocated to the central government. Hence, in delineating these powers, the written constitution provides for a federal balance of power that must be maintained between the two levels of government.

This balance of power has been identified by numerous theorists, such as Dicey, who noted that a key characteristic of federalism was ‘the distribution among bodies with limited and co-ordinate authority of the different powers of government.’¹⁰¹ Dicey said of this distribution of powers between the federal and state governments:

The distribution of powers is an essential feature of federalism. The object for which a federal state is formed involves a division of authority between the national government and the separate States. The powers given to the nation form in effect so many limitations upon the authority of the separate States, and as it is not intended that the central government should have the opportunity of encroaching upon the rights retained by the States, its sphere of action necessarily becomes the object of rigorous definition.¹⁰²

Dicey also noted that federalism balances the interests of the nation as a whole with the rights of the states by dividing power between the two levels of government in accordance with local and national issues:

... the method by which Federalism attempts to reconcile the apparently inconsistent claims of national sovereignty and of state sovereignty consists of the formation of a constitution under which the ordinary powers of sovereignty are elaborately divided between the common or national government and the separate states. The details of this division vary under every different federal constitution, but the general principle on which it should rest is obvious. Whatever concerns the nation as a whole should be placed under the control of the national government. All matters which are not primarily of common interest should remain in the hands of the several States.¹⁰³

LaNauze also acknowledged the division of powers between the central and regional governments in his text *The Making of the Australian Constitution*. LaNauze outlined an early definition of a federal system of government, or ‘federation’, as those debating whether Australia should federate in the 1840’s would have understood it. He stated that a ‘federation’ was: ‘... a system of government in which a central or ‘general’ legislature made laws on matters of common interest, while the legislatures of the member states made laws on matters of local interest’.¹⁰⁴ Wheare also noted that federalism allows the states to deal with local issues that are relevant to them, whilst leaving national issues to the central government:

Federal government exists, it was suggested, when the powers of government for a community are divided substantially according to the principle that there is a single independent authority for the whole area in respect of some matters and that there are

¹⁰¹ Dicey, above n 90, 140.

¹⁰² Ibid 147.

¹⁰³ Ibid 139.

¹⁰⁴ La Nauze, above n 28, 4.

independent regional authorities for other matters, each set of authorities being co-ordinate with and not subordinate to the others within its own prescribed sphere.¹⁰⁵

Further to powers being allocated between the two spheres of government in terms of local and national importance, federalism also limits the centralisation of power. Proudhon¹⁰⁶ wrote of how federalism serves to limit central powers: ‘... in a federation, the powers of central authority are specialized and limited and diminish in number, in directness, and in what I may call intensity as the confederation grows by the adhesion of new states’.¹⁰⁷ In fact, Proudhon described the federal government as ‘subordinate to the states’,¹⁰⁸ and notes that the ‘essence’ of a federal system of government ‘... is always to reserve more powers for the citizen than for the state, and for municipal and provincial authorities than for central power ...’¹⁰⁹

The observation that federalism limits the power of the central government so as not to detract from that of the states was also noted by Dicey who described, ‘The tendency of federalism to limit on every side the action of government and to split up the strength of the state among co-ordinate and independent authorities ...’¹¹⁰

In summary, federal theory dictates that centralised power is defined and limited. This means that the central government can only act within the constraints of the power

¹⁰⁵ KC Wheare, *Federal Government* (Oxford University Press, 1967), 35.

¹⁰⁶ Proudhon was a French political theorist, most often described as an ‘anarchist’ due to his socialist views with respect to economics and property. He fled to Belgium in 1858 after writing *De la Justice* for which a French Court handed him a prison sentence. During this exile Proudhon became concerned about the Italian Nationalist Movement and began to write about the evils of centralisation and the benefits of federalism to protect individual liberty. For further background to Proudhon, see Richard Vernon, ‘Introduction’ in P-J Proudhon, *The Principle of Federation* (University of Toronto Press, 1979).

¹⁰⁷ P-J Proudhon, *The Principle of Federation* (University of Toronto Press, 1979), 41. Proudhon has used the term ‘confederation’ in this quotation. It should be noted that he does not distinguish the terms ‘federation’ and ‘confederation’. That is, he is using the terms interchangeably here.

¹⁰⁸ Ibid 61.

¹⁰⁹ Ibid 45. A parallel can be drawn here with the ‘principle of subsidiarity in European Union law. If a matter does not fall within the exclusive competence of the community and can be better resolved by the individual countries that comprise the European Union (Member States), the central authority (Community) should *not* intervene, so that these matters can be resolved at a local level.

Consequently, there is a correlation between the principle of subsidiarity and definitions of federalism. Both are premised upon notions of ‘states rights’. Specifically, both are concerned with retaining state power and control over local issues. In fact, the principle is reproduced in the Australian Constitution in section 107 which ‘reserves’ state powers after federation: ‘Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be’. Similarly, the 10th amendment to the United States Constitution provides, ‘The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.’

For a discussion of the principle of subsidiarity, together with further scholarly references, see Gabriël Moens and John Trone, *Commercial Law of the European Union* (Springer, 2010), 27-28.

¹¹⁰ Dicey, above n 90, 151.

allocated to it by the constitution, with all remaining residual power being left to the States. It can therefore be said that the States retain the bulk of the powers they possessed prior to federation, and that their powers are more numerous than those of the central government.

C Sovereignty of the States

As this paper has outlined so far, federalism allocates powers between two separate spheres of government, federal and state. Crommelin noted: 'Federalism required two levels of government, each complete in itself, operating directly upon the people, with limited powers, without the capacity alone to alter the allocation of powers.'¹¹¹

This distinct allocation of powers requires each level of government to operate autonomously - free from interference from the other. Hence, each level of government is intended to be sovereign in their own sphere. This sovereignty and importance of the states was noted by Galligan who acknowledged: '... the essence of federalism is the division of political power and government institutions between two levels of government, both of which are sovereign in limited fields and neither of which is subject to the other in certain core areas.'¹¹²

The intention of the States to retain their powers and sovereignty after federation and to remain on an equal footing with each other and the central government was also explained by Proudhon:¹¹³

Federation, from the latin *foedus*, genitive *foederis*, which means pact, contract, treaty, agreement, alliance, and so on, is an agreement by which one or more heads of family, one or more towns, one or more groups of towns or states, assume **reciprocal and equal commitments** to perform one or more specific tasks, the responsibility for which rests exclusively with the officers of the federation.¹¹⁴

It is submitted that the key descriptor of Commonwealth-State relations in a federal system of government is 'reciprocal and equal'. Hence, one of the central features of federalism is the striking of a balance between state and central power whilst protecting the sovereignty of each. In the words of Proudhon:

... the contract of federation has the purpose, in general terms, of guaranteeing to the federated states their sovereignty, their territory, the liberty of their subjects; of settling their disputes; of providing by common means for all matters of security and mutual prosperity; thus, despite the scale of the interests involved, it is essentially limited. The authority responsible for its execution can never overwhelm the constituent members; that is, the federal powers can never exceed in number and significance those of local or provincial authorities, just as the latter can never outweigh the rights and prerogatives of man and citizen.¹¹⁵

¹¹¹ Michael Crommelin, 'The Federal Model' in Gregory Craven (ed), *Australian Federation Towards the Second Century* (Melbourne University Press, 1992), 33, 36.

¹¹² Brian Galligan, 'Australian Federalism: Perceptions and Issues' in Brian Galligan (ed), *Australian Federalism* (1989), 2, 3.

¹¹³ See generally Proudhon, above n 107.

¹¹⁴ Ibid 38. My emphasis is in bold.

¹¹⁵ Proudhon, above n 107, 39-40.

In fact, Craven argued that the ‘crucial importance’ of the States as constitutional equals with the central government is often overlooked by academic commentators. He argues:

To discuss the federal system as if it consists merely of a series of disparate impediments to the exercise of general power by the Commonwealth, rather than as involving the complex interaction between two essentially complete governmental structures is a mistake that is too often made. Australian federalism is comprised of the operations of and relationships between two systems of government: its study necessarily involves a consideration of the place of each of these systems in their own right, and not merely as an adjunct to the other.¹¹⁶

Wheare, who wrote about the nature of American federalism, discussed the division of powers between the central government and the states, and their respective equality and sovereignty: ‘By the federal principle I mean the method of dividing powers so that the general and regional government are each, within a sphere, co-ordinate and independent.’¹¹⁷ Cramp also noted this division: ‘it [federalism] seeks to retain the sovereignty for the States in matters of provincial interest, and establish a national sovereignty in matters of a national significance’.¹¹⁸ Further, Cramp emphasised that, in a federation, State sovereignty is retained:

It differs from other systems of government in attempting to bring together under a political bond a number of States without sacrificing their individuality. The States still retain their separate existence and independence in some particulars, though they surrender their powers to a central government in matters that affect the Federated States in common. Thus we have sovereign powers existing within a sovereign power, and neither can encroach on the sovereignty of the other.¹¹⁹

In a similar vein, Elazar defined federalism as ‘a comprehensive system of political relationships which has to do with the combination of self-rule and shared rule within a matrix of constitutionally dispersed powers’¹²⁰ in which power is ‘non-centralised’ with the power to govern ‘diffused among many centres’.¹²¹ This sharing of power, according to Elazar, is premised upon mutual respect and understanding between the two levels:

The term ‘federal’ is derived from the latin *foedus*, which, like the Hebrew term *brit*, means covenant. In essence, a federal arrangement is one of partnership, established and regulated by a covenant, whose internal relationships reflect the special kind of sharing that must prevail among the partners, based on a mutual recognition of the integrity of each partner and the attempt to foster a special unity among them.¹²²

Elazar expanded on this notion of sharing of power whilst maintaining sovereignty that is central to defining federalism:

¹¹⁶ Gregory Craven, ‘The States – Decline, Fall, or What?’ in Gregory Craven (ed), *Australian Federation: Toward the Second Century* (Melbourne University Press, 1992), 49, 49.

¹¹⁷ KC Wheare, *Federal Government* (Oxford University Press, 1967), 10.

¹¹⁸ Cramp, above n 94, 115.

¹¹⁹ Ibid 105-106.

¹²⁰ Daniel J Elazar, ‘Viewing Federalism as Grand Design’ in Daniel J Elazar (ed), *Federalism as Grand Design: Political Philosophers and the Federal Principle* (University Press of America, 1987), 1.

¹²¹ Daniel J Elazar, *Exploring Federalism* (The University of Alabama Press, 1991), 34.

¹²² Ibid 5.

Federal principles are concerned with the combination of self rule and shared rule. In the broadest sense, federalism involves the linking of individuals, groups and polities in lasting but limited union in such a way as to provide for the energetic pursuit of common ends while maintaining the respective integrities of all parties. As a political principle, federalism has to do with the constitutional diffusion of power so that the constituting elements in a federal arrangement share in the processes of common policy making and administration by right, while the activities of the common government are conducted in such a way as to maintain their respective integrities. Federal systems do this by constitutionally distributing power among general and constituent governing bodies in a manner designed to protect the existence and authority of all.¹²³

In summary, even basic definitions of federalism are premised upon the independence, sovereignty and importance of the states as constitutional equals to each other, and more significantly, to the central government. In these definitions, the states occupy a place of equality, and are by no means subordinate to the central government. Hence, the balance between the two levels of government must be maintained in a true federation.

D *Independent Judicial Guardian of the Constitution*

This raises the question of how the federal balance must be maintained, or rather, who is responsible for doing so. Federal theory requires the existence of an independent judicial body to ensure that the sovereignty of each level of government (that is, the federal balance) is maintained and not transgressed by either level of government. Hence, as noted by Dicey, a key characteristic of a federal system of government is ‘the authority of the Courts to act as interpreters of the Constitution.’¹²⁴ To be more specific, federalism requires a judicial body to determine disputes about the demarcation of powers.¹²⁵ Consequently, this judicial body acts as ‘a guardian of the Constitution’¹²⁶ in ensuring that the federal balance is not transgressed.

John Stuart Mill commented on the role of the courts in maintaining this federal balance:

... the more perfect mode of federation, where every citizen of each particular state owes obedience to two governments, that of his own state and that of the federation, it is evidently necessary not only that the constitutional limits of the authority of each should be precisely and clearly defined, but that the power to decide between them in any case of dispute should not reside in any of the governments, or in any functionary subject to it, but in an umpire independent of both ...¹²⁷

¹²³ Ibid 5-6.

¹²⁴ Dicey, above n 90, 140.

¹²⁵ Cramp, above n 94, 116.

¹²⁶ Ibid 117-118.

¹²⁷ John Stuart Mill, ‘Of Federal Representative Governments’ in Dimitrios Karmis and Wayne Norman (eds), *Theories of Federalism: A Reader* (Palgrave MacMillan, 2005), 165, 167. This ‘umpire’ is a supreme court, empowered by the constitution to make final decisions about the powers of the state and federal governments, including disputes between them, or between these governments and citizens (at 168-169).

According to Dicey this federal supreme court must have the authority to interpret the constitution, and to hand down independent judgments.¹²⁸ Dicey noted that an independent federal court would prevent bias in favour of either level of government. For example, the independence of the constitutional court would prevent state judges from interpreting the constitution with a view to preserving the rights of the states, and would also prevent ‘judges depending on the federal government’ from interpreting the constitution in favour of the federal government.¹²⁹ This ‘guardianship’ role is therefore fundamentally important and when the High Court adopts a centralist agenda, contrary to the text, structure and provisions of the constitution, (that is, when the High Court fails to interpret Federal powers with a view to maintaining the federal balance), the power and sovereignty of the States is significantly compromised.

V THE FEDERAL NATURE OF THE COMMONWEALTH CONSTITUTION

The fundamental and pivotal role of the States in the Australian federation is evident from an examination of the structure and provisions of the Commonwealth Constitution. As noted by Kirby J in his dissenting judgment in *Work Choices*:

It is impossible to ignore the place envisaged for the States in the *Constitution*. Reference is made to that role throughout the constitutional document. It is the people of the several states who ‘agreed to unite in one indissoluble Federal Commonwealth’. Both in the covering clauses and in the text of the *Constitution* itself, the federal character of the polity thereby created is announced, and provided for, in great detail.¹³⁰

The provisions and structural aspects that provide for a federal balance are discussed below, starting with the preamble. However, prior to this discussion, it should be noted that there was much commentary about ‘States Rights’ from the Convention debates, in particular the Sydney session of the Australasian Federal Convention in 1891, which supports the prevailing view of the centrality of the States. Before noting some of the specific commentary in this regard, it is important not to overlook the diversity of views of the delegates who attended the Constitutional Conventions. This is summarised by Sawyer as follows, writing of the Constitutional Conventions generally:

The main political divisions at the Conventions were between liberals and conservatives, between State-righters and centralisers, and between ‘small-Staters’ and ‘big-Staters’. However ... to an important degree an overwhelming majority of the delegates at all stages were State-righters. It was federation they aimed at, and furthermore, a federation in which there was a strong emphasis on preserving the structure and powers of the States so far as consistent with union for specific and limited purposes. Few consistently advocated outright unification.¹³¹

Despite this diversity, an examination of the debates illustrates the sentiment amongst the delegates that the federated States should retain their powers unless it was absolutely necessary to transfer them to the Commonwealth, and that the States would have a

¹²⁸ Dicey, above n 90, 140, 155.

¹²⁹ Ibid 155.

¹³⁰ *Work Choices Case* (2006) 229 CLR 1, 226.

¹³¹ Geoffrey Sawyer, *The Australian Constitution* (Australian Government Publishing Service, 1975), 23.

central role in the new Commonwealth. This sentiment is also summarised by Craven as follows:

The central purpose of most if not all the founding fathers was the creation of a strictly limited central government subject to the absolute condition that the government so created did not unduly impinge upon the powers of the States. Given a choice between a centrally dominated federation and no federation at all, most of the founding fathers would undoubtedly have had little difficulty in accepting disunity as the lesser of two evils.¹³²

The commentary from the Sydney Session of the Australasian Federal Convention of 1891 is laden with examples of the delegates concern to protect the rights and powers of the States. For example, Sir Henry Parkes, in his discussion of his resolution ‘That the powers and privileges and territorial rights of the several existing colonies shall remain intact, except in respect to such surrenders as may be agreed upon as necessary and incidental to the power and authority of the National Federal Government’ stated:

I think it is in the highest degree desirable that we should satisfy the mind of each of the colonies that we have no intention to cripple their powers, to invade their rights, to diminish their authority, except so far as is absolutely necessary in view of the great end to be accomplished, which, in point of fact, will not be material as diminishing the powers and privileges and rights of the existing colonies. It is therefore proposed by this first condition of mine to satisfy them that neither their territorial rights nor their powers of legislation for the well being of their own country will be interfered with in any way that can impair the security of those rights, and the efficiency of their legislative powers.¹³³

These views were also reiterated by Mr Thomas Playford (of South Australia), who has also attended the Australasian Federal Conference of 1890, later in the debates who said, ‘... we should most strictly define and limit the powers of the central government, and leave all other powers not so defined to the local legislatures.’ He continued on to say that it was necessary to ‘... lay down all such powers as are necessary for the proper conduct of the federal government, and not interfere with the slightest degree with any other power of the local legislatures.’¹³⁴ This sentiment was also expressed by Mr Philip Oakley Fysh, of Tasmania, who expressed the importance of State Parliaments retaining their legislative powers over local issues in a discussion of the word ‘surrender’ in Parkes’ resolution:

... it will be absolutely unnecessary to ask the people of these colonies to surrender to the dominion parliament anything which can best be legislated for locally – anything which cannot be best legislated for by a central executive. Now, these may be far embracing words, but every man who runs may read in connection with an opinion of this kind, because he himself will be able as well as any of us to detect what it is that is best discharged locally...He must know that, in connection with the various developments of his own province, there can be no interference by an executive which will sit 1,000 miles away, and which cannot, except in regard to some individual members thereof, have so close an identity with the work in which he is engaged, or

¹³² Craven, above n 116, 49, 51.

¹³³ Sir Henry Parkes, *Official Record of the Debates of the Australasian Federal Convention, Sydney, 1891*, 4 March 1891, 1:24.

¹³⁴ Mr Thomas Playford, *Official Record of the Debates of the Australasian Federal Convention, Sydney, 1891*, 13 March 1891, 1:328.

such a knowledge of the necessities which surround the country in which he is living, as those who represent him in the local parliaments. I believe, therefore, that we may limit our explanation of the term 'surrender' to these very few words, and that the people may at once feel sure that this Convention is unlikely to ask them to give up any important right; but that its purpose will be to continue in all its harmony, in all its prestige, the position of the local parliaments, and that the dominion parliament, the great executive of the higher national sphere at which we are to arrive, will not in any way detract from it.¹³⁵

Alfred Deakin, of Victoria, also a veteran of the Australasian Federation Conference of 1890, speaking of this same resolution by Parkes' also noted that State powers should be interfered with as little as possible, and that Federal Parliament's legislative powers should be defined:

The first of these establishes beyond doubt the sovereignty proposed to be conserved to the several colonies of Australasia, subject to the limitations and surrenders which will appear set out in detail in the constitution proposed to be adopted for the federal parliament. Subject to the express terms of that constitution, every liberty at present enjoyed by the peoples of the several colonies, and every power of their legislatures, and every potentiality which is within their constitutions remains with them and belongs to them for all time ... This is the postulate that to the several colonies should be left all possible powers and prerogatives, defined and undefined, while the federal government itself, however largely endowed should have a certain fixed and definite endowment within which its powers may be circumscribed.¹³⁶

Deakin expanded on this later on in the debate, by clarifying the fact that the Federal Parliament's legislative authority should be restricted to limited subjects:

It is not a question of establishing a federal legislature, which is to have unlimited authority. The federal government is to have a strictly limited power; it is not to range at will over the whole field of legislation; it is not to legislate for all conceivable circumstances of national life. On the contrary, its legislation is to be strictly limited to certain definite subjects. The states are to retain almost all their present powers, and should be quite able to protect their own rights.¹³⁷

And later still, Deakin reiterated the point again that a system of federal government would, by its nature, intrinsically protect States' rights, whilst at the same time providing for the best interests of the Australian nation as a whole:

The argument which I have endeavoured to maintain from the beginning of this debate has been that, while there are certain state rights to be guarded, most of those rights, if not all of them, can be guarded by the division of powers between the central government and the local governments. The states will retain full powers over the greater part of the domain in which they at present enjoy those powers, and will retain them intact for all time. But in national issues, on the subject of defence, as people who desire to have their shores defended, and to see their resources developed by means of a customs tariff and a customs union – on these questions there are no longer state rights

¹³⁵ Mr Philip Oakley Fysh, *Official Record of the Debates of the Australasian Federal Convention, Sydney, 1891*, 4 March 1891, 1:42.

¹³⁶ Mr Alfred Deakin, *Official Record of the Debates of the Australasian Federal Convention, Sydney, 1891*, 5 March 1891, 1:70.

¹³⁷ *Ibid* 1:79-80.

and state interests to be guarded in the constitution, but the people's interests are one, and they call upon us to deal with them as one.¹³⁸

The view that State powers should be retained as much as possible after federation, and the acknowledgment that this would be necessary to secure the acceptance of the States to federation, was expressed by Mr Richard Chaffey Baker, of South Australia:

... I am sure we must all agree that there can be no union of these colonies unless upon such terms as there are set forth – that there shall be no surrender of any right, or power, or privilege, except such as is admitted to be absolutely necessary for the good government of the union as a whole. And if we should formulate any scheme which would invade the rights and privileges of the several states, I am sure it will be in vain that we shall go back to our respective colonies and ask them to accept the scheme and join the union.¹³⁹

This view was also taken up later in the debates by Mr Charles Cameron Kingston, of South Australia, who stated:

... I think we shall do well to emphasise the fact that we are dealing with autonomous states, who have long enjoyed the blessing of self government, and who should not be asked – and who, if asked, would not be likely to accede to the request – to sacrifice any of their existing powers other than those which it is absolutely necessary should be surrendered in the national interest. I hope we shall set clearly before us the fact that a national government should be strictly limited to dealing with subjects in which the interests of the community as a nation are involved. I hope that in our proceedings we shall feel that it is our duty, in approaching the several colonies, as we shall require to approach them at the conclusion of the deliberations of this convention, to state in precise language that which we desire they should surrender for the benefit of the nation. I hope, also, that we shall make no request for a surrender which cannot be justified on the score of the requirements of the national interest.¹⁴⁰

Later, Mr Duncan Gillies of Victoria, made similar comments. Specifically, he noted that federation should be brought about through minimal interference with the existing powers of the States:

... we must bear this in mind, that the powers that it is proposed should be given to the federal parliament are reduced to the smallest possible compass, with the object of not disturbing in the slightest degree the right to legislate on all subjects which has been granted to the several parliaments throughout this continent. We disturb that power as little as possible; and the range of the subjects which the states will have to discuss and determine is scarcely interfered with, and not interfered with in any degree that will affect their legal rights and interests.¹⁴¹

The role of the Senate in the protection of States Rights, and as a means by which the States would be directly involved and represented in the Federal Parliament, was discussed by Mr Arthur Rutledge of Queensland:

¹³⁸ Ibid 1:383.

¹³⁹ Mr Richard Chaffey Baker, *Official Record of the Debates of the Australasian Federal Convention, Sydney, 1891*, 6 March 1891, 1:117.

¹⁴⁰ Mr Charles Cameron Kingston, *Official Record of the Debates of the Australasian Federal Convention, Sydney, 1891*, 9 March 1891, 1:153.

¹⁴¹ Mr Duncan Gillies, *Official Record of the Debates of the Australasian Federal Convention, Sydney, 1891*, 11 March 1891, 1:231.

... the voice of the States, as distinct states, with separate claims and separate interests, shall be heard with equal emphasis and with equal effect in a second chamber, which may be called the senate or the council of states, or by whatever other name it may be designated. I do not think that we ought for a single moment to attempt in what we do here to obliterate in any degree the individuality of the States which, taken as a whole, are to form the great federation of Australasia. To endeavour to do that – to destroy the individuality of the States – seems to me to strike at the very root of the leading principle of federation, and if we are to have a federation that shall be something of which we could be proud – if we are to have a federation that shall satisfy the aspirations of the people of the several colonies whom we are here to represent – we must have a federation that will recognise that principle in the fullest and most marked degree.¹⁴²

The Senate was also acknowledged, by Dr John Alexander Cockburn, of South Australia, to protect against centralisation, this protecting the States' interests, and of upholding democracy:

... the principle of federation is that there should be houses with co-ordinate powers – one to represent the population, and the other to represent the states. We know the tendency is always towards the central authority, that the central authority constitutes a sort of vortex to which power gradually attaches itself. Therefore, all the buttresses and all the ties should be the other way, to assist those who uphold the rights of the states from being drawn into this central authority, and from having their powers finally destroyed...it is only when you have state rights properly guarded, and safeguard local government, that you can have government by the people. Government at a central and distant part is never government by the people, and may be just as crushing a tyranny under republican or commonwealth forms as under the most absolute monarchy...I maintain that unless the state rights are in every way maintained – unless buttresses are placed to enable them to stand up against the constant drawing toward centralisation – no federation can ever take root in Australia. It will not be a federation at all. It will be from the very start a centralisation, a unification, which, instead of being a guardian of liberty of the people, will be its most distinct tyrant, and eventually will overcome it.¹⁴³

The concern of the delegates overall to retain States' rights and sovereignty is consequently reflected in the structure, form and provisions of the Federal Constitution which took effect on 1 January 1901. The following part of this paper illustrates how the federal system established by the Commonwealth Constitution is premised upon the equality of the Federal and State governments.

A *The Preamble*

The federal nature of the Commonwealth Constitution is at first evident in the preamble to the Constitution which declares that the *States* have agreed to the formation of a central government:

Whereas the *people of New South Wales, Victoria, South Australia, Queensland; and Tasmania*, humbly relying on the blessing of Almighty God, have agreed to unite in

¹⁴² Mr Arthur Rutledge, *Official Record of the Debates of the Australasian Federal Convention, Sydney, 1891*, 9 March 1891, 1:145.

¹⁴³ Dr John Alexander Cockburn, *Official Record of the Debates of the Australasian Federal Convention, Sydney, 1891*, 3 April 1891, 1:707-708.

one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and *under the Constitution* hereby established ...¹⁴⁴

The desire and consent of the States to form a federation, whilst maintaining their independence was also noted by Dicey:

The Commonwealth is in the strictest sense a federal government. It owes its birth to the desire for national unity which pervades the whole of Australia, combined with the determination on the part of the several colonies to retain as States of the Commonwealth as large a measure of independence as may be found compatible with the recognition of Australian nationality.¹⁴⁵

Hence, in the words of Sawyer: ‘The Constitution is on its face federal and is so described in the Covering Clauses’.¹⁴⁶

Upon reading further, clause 9, which contains the Constitution in full, commences by setting out the paper division of the Constitution. Of significance is ‘Chapter V’ entitled ‘The States’. An examination of Chapter V shows that the States continued to play a vital role in governance post-Federation. Chapter V, and its key federal provisions will now be discussed.

B *Saving of State Constitutions and State Powers*

Chapter V commences with section 106 which provides that after Federation, State constitutions will continue to have force. Hence, the Constitutions of the States, being their fundamental and ultimate source of power are protected. In their discussion of this provision, Quick & Garran cite Sir Henry Parkes from the Sydney Convention in 1891 whose comments on section 106 emphasise the sentiment of the States that their constitutional and legislative powers should be retained as fully as possible after federation:

I, therefore, lay down certain conditions which seem to me imperative as a ground work of anything we have to do, and I prefer stating that these first four resolutions simply lay down what appear to me the four most important conditions on which we must proceed. First: ‘That the powers and privileges and territorial rights of the several existing colonies shall remain intact, except in respect to such surrenders as may be agreed upon as necessary and incidental to the power and authority of the National Federal Government’. I think that it is in the highest degree desirable that we should satisfy the mind of each of the colonies that we have no intention to cripple their powers, to invade their rights, to diminish their authority, except so far as it is absolutely necessary in view of the great end to be accomplished, which, in point of fact, will not be material as diminishing the powers and privileges and rights of the existing colonies. It is therefore proposed by this first condition of mine to satisfy them that *neither their territorial rights nor their powers of legislation for the well being of*

¹⁴⁴ Preamble, Constitution. Emphasis added. Western Australia is absent because it delayed in passing an enabling Act and Referendum to approve the final draft of the Constitution Bill. However, it did so prior to Proclamation of the new Commonwealth by the Queen, hence Western Australia was able to be admitted as an original State of the new Federation. This is discussed later in this paper.

¹⁴⁵ Dicey, above n 90, 529-530.

¹⁴⁶ Geoffrey Sawyer, *Australian Federalism in the Courts* (Melbourne University Press, 1967) 121.

*their own country will be interfered with in any way that can impair the security of those rights, and the efficiency of their legislative powers.*¹⁴⁷

Parke's comments reveal his strong conviction that the impact of Federation on the States and their constitutional and legislative powers should be minimal. This is also evident from section 107 which provides that the powers of State Parliaments shall remain, except for those that have been reallocated to the Commonwealth Parliament by the Commonwealth Constitution on federation. Quick and Garran's comments on this provision are also indicative of the centrality of the States under the new Federal Constitution:

The Parliament of each State is a creation of the Constitution of the State. The Constitution of each State is preserved, and the parliamentary institutions of each State are maintained without any structural alteration, but deprived of power to the extent which their original legislative authority and jurisdiction has been transferred to the Federal Parliament.¹⁴⁸

Section 108 in Chapter V, further provides that State laws existing at the time of federation, will continue to have force after federation, and can even be amended or repealed by a State, if they have not been made exclusive to the Commonwealth, and if the Commonwealth has not enacted the same law. It is evident from these provisions that great care was taken by the framers to make interference with State constitutions, State law making powers, and State executive powers as minimal as possible. Hence, it could be said with a strong degree of certainty that: 'The Constitution was intended to preserve a wide area of governmental authority for the States ...'¹⁴⁹

As indicated by Quick and Garran in the preceding quotation, and by Sawyer in his basic federal principles (discussed above), it is essential for the efficient working of the federal system that there is a provision in the Constitution outlining a procedure to determine any conflict that may arise between State and Federal laws.¹⁵⁰ This is dealt with by section 109, also in Chapter V, which provides that if there is inconsistency between a Commonwealth and State law, the Commonwealth law will prevail to the extent of the inconsistency. Whilst the *Engineers* majority pointed to this as evidence of Federal supremacy over the States,¹⁵¹ it is submitted that this is the most logical way of resolving the inconsistency between these conflicting laws, and is not in itself an indication of federal supremacy. This view is also supported by the fact that if the inconsistent Commonwealth legislation is repealed or amended so that it is no longer

¹⁴⁷ Sir Henry Parkes, Convention Debates, Sydney, 1891, 24 cited in John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (1901), 930. My emphasis added.

¹⁴⁸ John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, 1901), 933. Quick and Garran continue on to comment that State powers will be lessened as the Federal Parliament enacts more and more legislation. They note (at 933) that these powers can be classified as 'exclusive' or 'concurrent'. These classes will be discussed later in this paper.

¹⁴⁹ Sawyer, above n 131, 87.

¹⁵⁰ Sawyer, above n 99, 1.

¹⁵¹ *Engineers* (1920) 28 CLR 129, 155, per Knox CJ, Isaacs, Higgins, Rich and Starke.

inconsistent, the State law will ‘revive’ if it has not been repealed.¹⁵² Hence, section 109 does not operate to completely invalidate the State law.

C *Limiting the number of federal legislative powers and the residual powers of the States*

In addition to the provisions of Chapter V which provides for the continuance of State Constitutions, legislative powers and laws, the framers of the Constitution limited the powers of the Federal Parliament by specifically listing them. Section 51 sets out a list of matters that the Federal Parliament can legislate with respect to.¹⁵³ If the Federal Parliament legislates on any matter not listed in section 51, or otherwise authorised by the Commonwealth Constitution, it will be beyond the legislative power of the Commonwealth Parliament, and unconstitutional. By listing, and thereby limiting, the Federal Parliament’s legislative powers, the framers left the power to legislate on all other topics to the States, thus giving the States a far greater scope of legislative power. Dicey noted how the Constitution delineates the division of power between the Commonwealth and the States, with the States having ‘indefinite’ powers:

... the Constitution itself...fixes and limits the spheres of the federal or national government and of the States respectively, and moreover defines these spheres in accordance with the principle that, while the powers of the national or federal government, including in the term government both the Executive and the Parliament of the Commonwealth, are, though wide, definite and limited, the powers of the separate States are indefinite, so that any power not assigned by the Constitution to the federal government remains vested in each of the several States, or, more accurately, in the Parliament of each State.¹⁵⁴

In addition, upon reviewing the matters listed in section 51, it is evident that many of the matters concern subjects that pertain to, or affect, the nation as a whole, and are therefore best left to the Federal Parliament as a matter of consistency and practicality. In the words of Quick and Garran, these powers ‘are of such a character that they could only be vested in and effectually exercised by the Federal Parliament’.¹⁵⁵ These subjects include trade and commerce with other countries¹⁵⁶, borrowing money on the public credit of the Commonwealth,¹⁵⁷ defence,¹⁵⁸ currency,¹⁵⁹ immigration and emigration¹⁶⁰ and external affairs,¹⁶¹ to name a few. The listing, and therefore limiting of, Federal Parliament’s legislative power is indicative of the framer’s intention that the bulk of legislative power would remain with the States after federation.

¹⁵² Sawyer, above n 146, 142.

¹⁵³ There were originally 39 matters that the Federal Parliament could legislate with respect to. This was increased to 40 in 1946 with the insertion of 51(xxiiiA).

¹⁵⁴ Dicey, above n 90, 530.

¹⁵⁵ John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, 1901), 934.

¹⁵⁶ S51(i).

¹⁵⁷ S51(iv).

¹⁵⁸ S51(vi).

¹⁵⁹ S51(xii).

¹⁶⁰ S51(xxvii).

¹⁶¹ S51(xxix).

Some of these enumerated powers appear quite broad in scope, for example, ‘external affairs’ in section 51(xxix). However, some powers are expressly limited to ensure that the States retain sovereignty over their internal affairs. Quick and Garran provide the example of the trade and commerce power in section 51(i). They state that although the power allows the Parliament to legislate with respect to ‘trade and commerce’, the power contains ‘words of limitation’, namely, ‘with other countries, and among the States’ so that the Federal Parliament cannot legislate with respect to a State’s internal trade and commerce (that is, intra-state trade and commerce).¹⁶² Such words of limitation protect the sovereignty of the States from interference from the Federal Parliament in their internal operations, or in this case, intra-state commerce. Quick and Garran also give the example of the taxation power in section 51(ii) with words of limitation ‘so as not to discriminate between States or parts of States’, noting its importance in a federal system:

So the condition annexed to the grant of taxing power is, that there must be no discrimination between States in the exercise of that power. This, again, is not a limitation for the protection of private citizens of the Commonwealth against the unequal use of the taxing power; it is founded on federal considerations; it is a part of the federal bargain, in which the States and the people thereof have acquiesced, making it one of the articles of the political partnership, as effectually as other leading principles of the Constitution.¹⁶³

Other examples of words of limitation to prevent interference by the Federal Parliament in the internal affairs of the States include: ‘Banking, other than State Banking’ in section 51(xiii); ‘Insurance, other than State insurance’ in section 51(xiv); and ‘Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State’ in section 51(xxxv).

D *Exclusive and Concurrent Powers*

A discussion of exclusive and concurrent powers is necessary to explain how the Constitution contemplates the reallocation of federal and State powers to operate after federation in order for the State and Federal governments to successfully co-exist. When federation occurred on 1 January 1901, the powers of the federal and State governments could be classified as ‘exclusive’ or ‘concurrent’. Quick and Garran explain the distinction:

In the early history of the Commonwealth the States will not seriously feel the deprivation of legislative power intended by the Constitution, but as Federal legislation becomes more active and extensive the powers contemplated by the Constitution will be gradually withdrawn from the States Parliaments and absorbed by the Federal Parliament. The powers to be so withdrawn may be divided into two classes – “exclusive” and “concurrent”. Exclusive powers are those absolutely withdrawn from the State Parliaments and placed solely within the jurisdiction of the Federal Parliament. Concurrent powers are those which may be exercised by the State Parliaments simultaneously with the Federal Parliament, subject to the condition that, if there is any conflict or repugnancy between the Federal law and the State law relating

¹⁶² Quick and Garran, above n 155, 510.

¹⁶³ Ibid.

to the subject, the federal law prevails, and the State law to the extent of its inconsistency is invalid.¹⁶⁴

The language used by Quick and Garran in this quotation may appear to some to suggest that a gradual ‘deprivation’ of State power was contemplated as acceptable and inevitable. However, it is submitted that Quick and Garran are merely describing the reallocation of powers that must necessarily occur after Federation in order for the federal system to work. The analysis below seeks to explain and expand on this further.

As Quick and Garran explain in the quotation above, 13 of the 39 powers in section 51 were specifically created by the Constitution and were exclusively vested in the Commonwealth Parliament.¹⁶⁵ Section 52 also gives exclusive powers to the Commonwealth Parliament. Hence, the Constitution specifically provides that the States cannot legislate on these topics from the time of federation. The 23 remaining powers, which, prior to federation were in the domain of the State Parliaments were ‘concurrent’ as at the time of federation. In other words, State legislation on these matters would continue to be valid until the federal Parliament enacted inconsistent legislation which would trigger the operation of section 109.¹⁶⁶ The operation of exclusive powers, and concurrent powers that became exclusive to the Federal Parliament by virtue of the enactment of inconsistent legislation, left a balance of powers, which Quick and Garran describe as ‘residuary legislative powers’ to the States, which they define as follows:

¹⁶⁴ Ibid 933.

¹⁶⁵ Quick and Garran note that these powers include:

- (iv) Borrowing money on the public credit of the Commonwealth;
- (x) Fisheries in Australian waters beyond territorial limits;
- (xxiv) The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States;
- (xxv) The recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States;
- (xxix) External affairs;
- (xxx) The relations of the Commonwealth with the islands of the pacific;
- (xxxi) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws;
- (xxxiii) The acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State;
- (xxxv) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State;
- (xxxvi) Matters in respect of which this Constitution makes provision until the Parliament otherwise provides;
- (xxxvii) Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law;
- (xxxviii) The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia;
- (xxxix) Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth. See John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (1901), 933.

¹⁶⁶ Quick and Garran, above n 155, 933.

The residuary authority left to the Parliament of each State, after the exclusive and concurrent grants to the Federal Parliament, embraces a large mass of constitutional, territorial, municipal and social powers ...¹⁶⁷

These residuary State powers, as described by Quick and Garran above, are ‘plenary’ and thus unlimited in scope,¹⁶⁸ and are only subject to limited restrictions.¹⁶⁹ So although the Constitution does remove some areas of power originally allocated to the States, and creates some new powers in favour of the Commonwealth, the States received a mandate, post-federation to legislate over a far wider range of topics than the Federal Parliament. Hence, the States retained the bulk of legislative power after federation.

E *State representation in Federal Parliament: the Senate as a States House*

Adequate representation for the States, and the protection of States’ Rights after federation was specifically incorporated into the composition of the Houses of Parliament by the framers by the creation of the Senate. Chapter I, Part II, entitled ‘The Senate’ the framers made specific provision for State representation in the Federal Parliament. Section 7 provides that ‘The Senate shall be composed of Senators for each State, directly chosen by the people of the State ...’ Thus, Parliament’s upper house was designed to specifically represent the people of each State, and consequently, the interests of each State. Dicey also commented that the composition of Parliament serves to protect the rights of the States, and to give the States ‘a large amount of legislative independence’:¹⁷⁰

The Parliament of the Commonwealth is so constituted as to guarantee within reasonable limits the maintenance of States rights. For whilst the House of Representatives represents numbers, the Senate represents the States of the Commonwealth, and each of the Original States is entitled, irrespective of its size and population, to an equal number of senators.¹⁷¹

¹⁶⁷ Ibid 935.

¹⁶⁸ *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1.

¹⁶⁹ Quick and Garran list examples from powers requiring consent by the Federal Parliament before a State may exercise that power. These include: section 91 provides that a State may only grant an aid or bounty on the production or export of goods with the consent of Federal Parliament. Another example can be found in section 114, which provides that a State cannot raise or maintain naval or military forces, or tax property of the Commonwealth, without the consent of the Federal Parliament. See Quick and Garran, above n 155, 936.

Quick and Garran also note examples of where the Constitution restricts State powers. These include: Section 51(xxxii), which, in providing that the Parliament can legislate with respect to the control of railways with respect to transport for the naval or military purposes of the Commonwealth, restricts State control of railways to that extent; Similarly, section 98 allows the Federal Parliament to make laws about State railways in connection with the trade and commerce power; Section 90 restricts the power of the States with respect to taxation by making the ability to levy duties of customs and excise exclusive to the Federal Parliament; and section 92 restricts the States and Commonwealth from restricting freedom of interstate trade and movement. Quick and Garran, above n 155, 936.

¹⁷⁰ Dicey, above n 90, 530-531.

¹⁷¹ Ibid 530.

Quick & Garran, in their commentary on section 7, note the Senate's central role in protecting and representing State interests:

The Senate is one of the most conspicuous, and unquestionably the most important, of all the federal features of the Constitution ... It is the chamber in which the States, considered as separate entities, and corporate parts of the Commonwealth, are represented. They are so represented for the purpose of enabling them to maintain and protect their constitutional rights against attempted invasions, and to give them every facility for the advocacy of their peculiar and special interests, as well as for the ventilation and consideration of their grievances. It is not sufficient that they should have a Federal High Court to appeal to for the review of federal legislation which they may consider to be in excess of the jurisdiction of Federal Parliament. In addition to the legal remedy it was deemed advisable that Original States at least should be endowed with a parity of representation in one chamber of the Parliament for the purpose of enabling them effectively to resist, in the legislative stage, proposals threatening to invade and violate the domain of rights reserved to the States.¹⁷²

In fact, Dicey takes this further, emphasising the paramountcy of the Senate over the House of Representatives. His description below could arguably be said to endorse a view of the Senate as superior, and hence the interests of the individual States that make up the federation as preferential to, any notion of centralised power:

The Constitution, further, is so framed as to secure respect for the Senate; the longer term for which the Senators are elected and the scheme of retirement by rotation, which will, in general, protect the Senate from a dissolution, are intended to make the Senate a more permanent, and therefore a more experienced, body than the House of Representatives, which can under no circumstances exist for more than three years, and may very well be dissolved before that period has elapsed; then too the senators will, as the Constitution now stands, represent the whole of the State for which they sit.¹⁷³

Hence, the Federal Constitution contemplates that the Senate is a 'States House'.¹⁷⁴ The Senate was not only designed to ensure adequate representation for the States in the Federal Parliament, but was also seen as an essential requirement for the Australian federal system to function effectively in order to prevent encroachment by the Commonwealth on the powers of the States. Barton noted the importance of the Senate in protecting the interests of the States at the Adelaide Convention Debates:

The individualism of the States after Federation is of as much interest to each colony as the free exercise of national powers is essential to that aggregation of colonies which we express in the term Federation. If the one trenches upon the other, then, so far as the provinces assert their individuality overmuch, the fear is an approach to a mere loose confederation, not a true Federation. The fear on the other hand is, if we give the power to encroach – that is if we represent the federated people only, and not the States in their entities, in our Federation – then day by day you will find the power to make this encroachment will be so gladly availed of that, day by day and year by year, the body

¹⁷² Quick and Garran, above n 155, 414.

¹⁷³ Dicey, above n 90, 530.

¹⁷⁴ The operation of the Senate has become dominated by party politics so that Senators vote in accordance with party politics, rather than in the interests of their States. See Sawyer, above n 146, 150. It is submitted that the actuality of the Senate becoming less of a 'States House' in modern politics does not detract from the intention of the framers, and the provision in the Constitution, that the Senate should be fundamental in ensuring State approval to federal legislation and the protection of State interests against encroachment by the central government.

called the Federation will more nearly approach the unified or 'unitarian' system of government. We cannot adopt any form of government the tendency of which will be, as time goes on, to turn the constitution toward unification on the one hand, and towards a loose confederacy on the other. We must observe that principle, or else we do not observe the charge laid upon us by the enabling Act, which lays on us the duty to frame a 'Federal' Constitution under the Crown. So, therefore, I take it there must be two Houses of Parliament, and in one of these Houses the principle of nationhood, and the power and scope of the nation, as constituted and welded together into one by the act of Federation, will be expressed in the National Assembly, or House of Representatives, and in the other Chamber, whether it is called the Council of the States, the States Assembly, or the Senate, must be found not the ordinary checks of an Upper House, because such a Chamber will not be constituted for the purposes of an Upper House; but you must take all pains, not only to have a Parliament consisting of two Chambers, but to have it constituted in those two Chambers in such a way as *to have the basic principle of Federation conserved in that Chamber which is representative of the rights of the States; that is that each law of the Federation should have the assent of the States as well as of the federated people.* If you must have two Chambers in your Federation, it is one consequence of the Federation that *the Chamber that has in its charge the defence of State interests will also have in its hands powers in most matters coordinate with the other House.*¹⁷⁵

Barton's concluding statements are informative. They emphasise that the central role of the Senate is to ensure that every Commonwealth law must be approved by the States. This means that the States would play a central role in approving the enactment of legislation for the nation, and in doing so, would be able to protect their own interests.

F *The High Court of Australia*

The Commonwealth Constitution establishes the High Court of Australia in section 71, whose Justices are, in the words of Dicey, 'intended to be the interpreters, and in this sense the protectors of the Constitution.' The High Court is, in this sense, a Constitutional referee empowered to strike down any law that transgresses the authority conferred on both the Federal and State Parliaments by the Constitution. This point is noted by Quick and Garran:

The High Court, like the Supreme Court of the United States, is the 'guardian of the Federal Constitution;' that is to say, it has the duty of interpreting the Constitution, in cases that come before it, and of preventing its violation. But the High Court is also – unlike the Supreme Court of the United States – the guardian of the Constitutions of the several States; it is as much concerned to prevent encroachments by the Federal Government upon the domain of the States as to prevent encroachments by the State Governments upon the domain of the Federal Government.¹⁷⁶

Thus the Constitution provides that the High Court is pivotal in maintaining the federal balance of power between the Commonwealth and the States in the Australian federal system of government. Its existence is a further acknowledgment by the framers that State powers must not be diminished after federation and that the federal balance must be preserved and maintained so as to avoid centralisation of government power.

¹⁷⁵ Mr Edmund Barton, Adelaide Convention Debates, 21-23, cited in Quick and Garran, above n 155, 417. My emphasis added.

¹⁷⁶ Quick and Garran, above n 155, 725.

VI DIFFERENT TYPES OF FEDERALISM: WHAT HAS THE AUSTRALIAN SYSTEM OF GOVERNMENT BECOME?

Federal theory and the Federal Constitution itself which took effect from 1 January 1901, both envisage the States as sovereign participants on an equal footing with the Federal Government. However, the result of the High Court's decision in *Engineers* was to reject this premise of the equality of the States and to interpret the Constitution in a manner that has resulted in increased centralisation of powers. Thus, Australia is no longer the Federation that it once was. The question then becomes, what type of federation does Australia now have?

It is necessary to examine the various types of federalism, or rather variations on the federal model to assess how the High Court's interpretation of the Constitution post-*Engineers*, has displaced the federal balance and Australia's position as a true federation. This section will commence by distinguishing a federal system of government from a unitary one, and from a 'confederation'. This will be followed by a discussion of Sawyer's 'stages of federalism', namely co-ordinate, co-operative and organic federalism. As well as highlighting the central role and sovereignty of the states in a true federal system, this analysis will serve to assess the type of federation (if it can be described as one at all) that the Australian system of government has become.

A Unitary government

Firstly, a 'unification of states', or in other words, a unitary system of government, differs from a federation. In his influential work *Introduction to the Study of the Law of the Constitution*, Dicey outlines the key features of a federal system, in order to contrast it with the 'unitary' system of government in Britain.¹⁷⁷ In summary, the differences between the two systems of government were described by Dicey as follows:

Unitarianism, in short, means the concentration of the strength of the state in the hands of one visible sovereign power, be that power Parliament or Czar. Federalism means the distribution of the force of the state among a number of co-ordinate bodies each originating in and controlled by the constitution.¹⁷⁸

Therefore, in a unitary system, the states have surrendered their powers to a central body and have therefore lost their sovereignty. The states can only exercise powers that the central government has delegated to them, with the corollary being that the central government can also take these powers away.¹⁷⁹

B Confederation

Cramp noted that the classification of a system of government is dependent upon the amount of power allocated to the central government.¹⁸⁰ One classification is known as a 'confederation' or 'Staatenbund' in which the federal government has limited power

¹⁷⁷ Dicey, above n 90, 134-135. The first edition of this text was published in 1885.

¹⁷⁸ Ibid 153.

¹⁷⁹ Cramp, above n 94, 110.

¹⁸⁰ Ibid 107.

and acts at the direction of the States.¹⁸¹ To put it simply, in a confederation the central government is 'weak' and has 'limited powers', and state governments have 'a high level of autonomy'.¹⁸²

In a confederation, the central government is 'selected by, and communicates with, the governments of the various provinces'.¹⁸³ It has little or no control over making the states comply with its laws, or to remain with the union if they disagree with the actions of the federal government.¹⁸⁴ An example, given by Cramp, of a confederation is that of the United States prior to 1787.¹⁸⁵ Cramp concluded that, as a result of the lack of autonomy of the central government, this can hardly be described as a proper federal system.

Mill, like Cramp, disclaimed this type of federalism as inefficient because internal conflict could result from a lack of agreement between states, with the federal government, or other authority, having no power to dictate to the states to resolve any conflict: 'A union between the governments only is a mere alliance, and subject to all the contingencies which render alliances precarious'.¹⁸⁶

C *League of States*

Cramp also discussed the concept of a 'league of states', as differing from a federal system of government. In a 'league of states' there is no central government. Instead, the states act by collective agreement, with the consequence that any state can withdraw from the league at any time if they disagree with the majority of states.¹⁸⁷

D *Stages of Federalism*

Three 'stages of federalism' were identified by Sawyer and assist in determining the current placement of the Australian system of government within the federal spectrum. These 'stages' are 'co-ordinate federalism' (also known as 'dual federalism'¹⁸⁸), 'co-operative federalism' and 'organic federalism'.¹⁸⁹ It is submitted that the Australian Constitution establishes a system of co-ordinate federalism, in which the central and state governments are equal. In practice, the Australian federal system also contains aspects of co-operative federalism in terms of mutual co-operation between the two levels of government. However, Australia has moved towards a system of organic federalism (that is, centralisation) in which the federal balance has been distorted by the

¹⁸¹ Ibid 108.

¹⁸² Gwynneth Singleton, Don Aitkin, Brian Jinks & John Warhurst, *Australian Political Institutions* (Pearson Longman, 2006), 31.

¹⁸³ Cramp, above n 94, 107.

¹⁸⁴ Ibid 108.

¹⁸⁵ Ibid.

¹⁸⁶ John Stuart Mill, 'Of Federal Representative Governments' in Dimitrios Karmis and Wayne Norman (eds), *Theories of Federalism: A Reader* (Palgrave MacMillan, 2005), 165, 166-167.

¹⁸⁷ Cramp, above n 94, 110.

¹⁸⁸ Sawyer, above n 99, 51.

¹⁸⁹ Ibid 98.

High Court's failure to fulfil its obligation to maintain the federal balance, as mandated by the Constitution and the federal theory it is premised upon.

1 *Co-ordinate federalism*

'Co-ordinate federalism' involves each of the states and central government being equal to one another. That is, there is an 'absence of *formal subordination* of the units to one another.'¹⁹⁰ However, Sawyer pointed out that most often it will be the states that are equal to one another, with the central government occupying a more influential position because of its 'actual wealth, military strength, prestige, [and] influence'.¹⁹¹ More specifically, Sawyer defined 'co-ordinate federalism', which was the model preferred by the founders of the Australian Constitution, and requires the:

... centre and regions respectively to be completely equipped for the business of government, without part in each other's affairs, and engaging in areas of activity so defined that while conflict might occur – to be judicially resolved – there could be no question of the policy of one being guided by reference to the policy of the other.¹⁹²

In other words, co-ordinate federalism is premised upon the independence and sovereignty of the states and central government from one another:

The Australian Founders intended to create what has come to be called a "co-ordinate" federal system, in which the two sets of authorities – central and regional – would act independently of each other, in relation to topics so defined as to reduce to a minimum the possibility of overlap or collision. On such assumptions, the necessity and opportunity for co-operation between centre and regions would be small.¹⁹³

Thus, both the central and regional governments are independent and sovereign in their respective areas – the states do not dictate to the central government, and vice versa. A consequence of this is that citizens are subject to both laws of the central government, and their state.¹⁹⁴

2 *Co-operative federalism*

'Co-operative federalism' occurs when the various governments in a federal system co-operate with one another on joint projects or issues.¹⁹⁵ However, Sawyer noted the correlation between co-ordinate federalism and co-operative federalism. Specifically, if there is not equality of 'bargaining strength' between the parties there is less 'co-operation' and more likely 'domination', often by the centre over the regions. For example, Sawyer stated, 'The situation may arise in which a region cannot say "no" to *some* sort of scheme such as the centre proposes, yet it has a good deal of bargaining capacity as to the details.'¹⁹⁶

¹⁹⁰ Ibid 98. The italics are Sawyer's.

¹⁹¹ Ibid.

¹⁹² Ibid 51-52.

¹⁹³ Sawyer, above n 131, 34.

¹⁹⁴ Cramp, above n 94, 109.

¹⁹⁵ Sawyer, above n 99, 101. See also Sawyer, above n 131, 93-95 for a discussion of co-operative federalism.

¹⁹⁶ Sawyer, above n 99, 102. The italics are Sawyer's.

3 *Organic federalism*

The final type of federal system identified by Sawyer was ‘organic federalism’¹⁹⁷ which Sawyer defined as follows:

Organic federalism is federalism in which the centre has such extensive powers, and gives such a strong lead to regions in the most important areas of their individual as well as their co-operative activities, that the political taxonomist may hesitate to describe the result as federal at all. Taking a lead from the discussion of co-operative federalism, one may say that the organic stage begins to develop as the regions lose any substantial bargaining capacity in relation to the centre.¹⁹⁸

Cramp also described this type of federal system under the name of ‘Federation’ or ‘Bundesstatt’. In such a Federation, the central government:

... may have very complete and far reaching powers, enabling it to legislate and to administer its own laws, and within certain limits to be independent of State control; whilst the States, shorn of the powers which are transferred to the Federal Government, are to that extent restricted in their sovereignty. Moreover, the Federal lawmakers and administrators receive their office, not from the State governments, but directly from the people – though, as will be shown later, a proportion of the representatives are commissioned to safeguard State interests.¹⁹⁹

Due to the High Court’s adoption of a literalist approach to constitutional interpretation, Australia has moved from a system of co-ordinate federalism, premised upon the equality of the States with the central government, to a system of ‘organic federalism’. It is submitted that ‘organic federalism’ is currently the most apt description of what the Australian federal system has now become – a system in which the central government has far reaching powers to the detriment of the States whose powers are necessarily diminished.

VII CONCLUSION

It is evident from this paper’s discussion of federal theory that a central characteristic of a federal system of government is the prominence, sovereignty and independence of the States from each other and from the central government. This sentiment, to preserve state power, sovereignty and equality, was incorporated by the framers into the Australian Constitution and is evident from the convention debates and the text and provisions of the Constitution itself. The importance of the States in a federal system was summarised by The Hon Richard Chaffey Baker, a delegate from South Australia, on the third day of the Sydney Convention in 1891:

Now, what is a federation? Does a federal system consist in delegating to the central authority certain powers and functions, and in delegating to the legislatures of the states certain other powers and functions? I think not. I think a federation consists in a great deal more than that. A federation, as it appears to me, consists in the fact that the

¹⁹⁷ Ibid 104.

¹⁹⁸ Ibid.

¹⁹⁹ Cramp, above n 94, 108-109.

compact made between the constituent states who wish to enter into that federation provides that not only shall the legislatures of the different states be supreme concerning the powers which have been delegated or left to them, but that they shall also have a voice as states concerning the powers which are delegated to the federal government.²⁰⁰

What is required is a change of perspective with respect to the Federal balance. The High Court must return to federal theory itself to restore the balance between State and Central power that a true federalism requires. Only then will the States have the chance to retain the voice and the equality that the *Engineers* High Court displaced.

²⁰⁰ *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 6 March 1891, 1:111 (Richard Chaffey Baker). This quotation refers to the representation of the States in Federal Parliament by virtue of the Senate.

CHANGES TO POLICE STOP AND SEARCH LAWS IN WESTERN AUSTRALIA: WHAT DECENT PEOPLE HAVE TO FEAR

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Abstract

The Western Australian Government has proposed new stop and search laws in what it claims is a response to increased violent crime in the State. Despite Government rhetoric, being an ordinary law abiding citizen does not afford protection against police targeting or invasive searches. Public searches of individuals by police have the potential to be invasive, embarrassing and degrading. Furthermore, dispensing with the requirement that police form a suspicion based on reasonable grounds opens the door for arbitrary and discriminatory searches. Thus, law-abiding members of minority groups and the most vulnerable in society are susceptible to disproportionate targeting based on biased judgements and stereotyping. And given that the available evidence does not support the claim that our communities will be safer as a result of these increased police powers, their introduction seems all the more repugnant.

I INTRODUCTION

‘Police officers tell me that they have a *right* to stop anyone in a public place, without having a reason, I think I have a *right* not to be stopped’.¹ This statement reveals the fundamental conflict between the need for the police to be able to stop and search to conduct criminal investigations and the right of individuals to be allowed to go about their business without interference. Of course everyone, including the police, has the right to stop a person and ask questions, but the person stopped has the right to ignore such questions and walk away. Police only need special powers where they want to go beyond asking questions or they want to encourage answers by imposing sanctions against a person for failing to respond to questions. According to current legislative provisions in Western Australia (‘WA’), police cannot stop and search an individual without their consent or without reasonably suspecting them of possessing something relating to an offence.² The requirement for consent or reasonable suspicion provides protection for the ordinary person against arbitrary interference with their right to privacy. This right to be free from arbitrary interference is under threat by a proposed amendment to s 69 of the *Criminal Investigation Act 2006* (WA). If enacted the amendment will allow police to stop and search people in designated areas without having a reasonable suspicion that they possess an item related to an offence and without requiring the consent of the person. In defence of this proposal it has glibly been claimed that people who are law-abiding have nothing to fear from extensions of

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¹ C Reich, ‘Police Questioning of Law Abiding Citizens’ (1966) 75 *Yale Law Journal* 1161, 1162.

² *Criminal Investigation Act 2006* (WA) ss 68 and 69.

police powers.³ This article sets out to show what is being proposed and why even the decent citizen has reason to fear such changes.

II THE PROPOSED CHANGES

Traditionally, police could only stop and search a person where they have a reasonable suspicion that the person has something in their possession related to an offence. However, recently in response to concerns that crime was getting out of control, especially in entertainment districts, the power for police to stop and search was extended in WA. Police may now stop and search a person without a reasonable suspicion in public areas designated by a senior police officer for not more than 48 hours.⁴ A search of the person, and any vehicle they are in charge of, can only be conducted with the consent of the person. However, if the person refuses consent they can be ordered to leave the designated area⁵ and where a person refuses to comply, the order may be physically enforced.⁶ Even though this already significant extension of police powers is rarely⁷ used there is currently a proposal in the Criminal Investigation Amendment Bill 2009 to further extend this power.

The proposal provides police with increased powers to search people and vehicles that are in public places within prescribed or declared areas, without the consent of the person and without the ordinary circumstances of reasonable suspicion.⁸ Clause 5 of the Bill, which inserts s 70B into the *Criminal Investigation Act 2006*, provides that the Commissioner of Police (or Deputy or Assistant Commissioner), with the approval of the Minister, may declare an area in which police officers can exercise the powers contained in s70A. The declaration may remain in force for no longer than a period of two months and whilst a written record of the declaration must be made and notice given to the public through publication in the Government Gazette, failure to publish does not invalidate the declaration. The fact that these powers can only be used in a public area for a limited time, designated as such by the Commissioner and approved by the Minister, is considered by the government to be sufficient safeguard in the absence of consent and reasonable suspicion.

³ R Johnson, Minister for Police: 'Decent people have nothing to fear I can assure you'. ABC News, 'Stop and Search Laws Debated', Stateline WA, November 13, 2009, <<http://www.abc.net.au/news/video/2009/11/13/2742738.htm>>.

⁴ *Criminal Investigation Act 2006* (WA), s 69.

⁵ *Criminal Investigation Act 2006* (WA), s 69(3).

⁶ *Criminal Investigation Act 2006* (WA), s 69(4).

⁷ See K O'Callaghan, Commissioner of Police, Evidence to Standing Committee on Legislation, Parliament of Western Australia, Perth (10 March 2010) 7, <[http://www.parliament.wa.gov.au/Parliament/commit.nsf/%28Evidence+Lookup+by+Com+ID%29/27557C7105D858A2482576E80027E78F/\\$file/ls.cib100310.tro.001.ko.pdf](http://www.parliament.wa.gov.au/Parliament/commit.nsf/%28Evidence+Lookup+by+Com+ID%29/27557C7105D858A2482576E80027E78F/$file/ls.cib100310.tro.001.ko.pdf)>.

⁸ Criminal Investigation Amendment Bill 2009 (WA), clause 5, ss 70A, 70B.

III WHY THE DECENT PERSON HAS NOTHING TO FEAR

A *The need for extended powers*

According to the Commissioner of WA Police, the proposed laws are a necessary response to the increased incidence of weapon seizures from people entering the entertainment precinct of Northbridge.⁹ In line with this sentiment police also made a public display of the 85 weapons seized between June 2009 and November 2009 from persons they reasonably suspected of committing an offence or acting suspiciously.¹⁰ However, rather than support the claim that police need extend powers this admission and these figures suggest that the existing laws are resulting in frequent apprehensions of persons carrying items that potentially endanger the public. It should also be noted that police are making these seizures without even needing to make extensive resort to the extended powers that were granted in 2006. In fact, between 2007 and 2009 the powers in s 69 *Criminal Investigation Act 2006* (WA) have only been used on ten occasions.¹¹

Furthermore, it is unlikely that these existing extended powers will yield significantly more weapons even if more extensively used. Research in Victoria, where police were granted similar powers,¹² shows that only 35 weapons have been seized and nine charges laid after 1,300 people were searched under the new stop and search laws.¹³ Similarly, in the UK, where such extended powers have existed since 1994 it has been found that: 'In fact, there is very little relationship between knife crime and the number of searches under section 60.'¹⁴ It seems then that police really do not need a further extension of stop and search powers. There is simply insufficient evidence that searches without reasonable suspicion will necessarily lead to an increase in weapon seizures.

Thus, rather than being based on inadequate existing police powers the call for the proposed changes appear to be embedded more in police and public frustrations in the legal process. In fact the view is commonly held that reasonable suspicion is an impediment to successful charges by the Department of Public Prosecutions. According

⁹ Karl O'Callaghan, 'Police search powers are needed' *The West Australian* (Western Australia) 16 November 2009, 21.

¹⁰ Nick Taylor, 'Weapons seized in police raids', (2009) *Perth Now*, <<http://www.perthnow.com.au/news/western-australia/weapons-seized-in-police-raids/story-e6frg143-1225796542596>>.

¹¹ O'Callaghan, above n 7. For details of use see <[http://www.parliament.wa.gov.au/Parliament/commit.nsf/%28Evidence+Lookup+by+Com+ID%29/27557C7105D858A2482576E80027E78F/\\$file/Is.cib.100310.tabled+paper.001.police.pdf](http://www.parliament.wa.gov.au/Parliament/commit.nsf/%28Evidence+Lookup+by+Com+ID%29/27557C7105D858A2482576E80027E78F/$file/Is.cib.100310.tabled+paper.001.police.pdf)>.

¹² Under s 10G *Control of Weapons Act 1990* (Vic) police may search a person without reasonable suspicion within an area which has been designated by the Chief Commissioner for not more than 12 hours (s 10D and s 10E).

¹³ C Vedelago, 'Police search powers on a knife edge', *The Age*, (Victoria) 28 July 2010, <<http://www.theage.com.au/victoria/police-search-powers-on-a-knife-edge-20100515-v5iz.html>>.

¹⁴ United Kingdom, *Parliamentary Debates*, House of Commons, 18 January 2010, col 73 (N Gerrard).

to Rob Johnson, WA Minister for Police, the proposed amendments are needed to combat smart defence lawyers from arguing against the lawfulness of stop and search based on insufficient reasonable grounds.¹⁵ The question here is whether it really is the case that lawyers are frustrating police searches by successfully challenging their lawfulness. There are no statistics available pertaining to the number of failed charges due to lack of reasonable suspicion,¹⁶ and only one case has been identified where this requirement caused difficulties.¹⁷ In the one case cited by the Minister as an example of where the current legislation is causing problems, the decision to dismiss the case due to lack of reasonable grounds was overturned by the court of appeal.¹⁸ The existing legislation therefore provides for adequate police search powers that work effectively while observing due process. More fundamentally, there is nothing wrong with the defence challenging the legality of searches where this is in doubt. It is the role of the defence to defend people with the means afforded to them by law and to uphold their client's right to freedom from unreasonable police searches.

B Promotion to the public

Draconian measures to deal with street crime may only give the appearance of decisive action¹⁹ and the illusion of greater control over criminal activity. The WA Minister for Police contends that confining stop and search powers to a declared area at designated times makes the proposed amendments less draconian than those proposed by previous governments which were not limited temporally nor to designated areas.²⁰ However, this does not detract from the fact that the proposed powers represent a significant erosion of a citizen's right to protection from arbitrary invasions of his or her privacy.

Just as proposed in previous stop and search legislation, the amendments empower police to search anyone without the protection of requiring a reasonable suspicion or, at least, consent. At present, reasonable suspicion protects citizens from being stopped based on demographics, or on previous convictions alone. Rather, there must be accurate information leading police to 'reasonably suspect' a person of an offence. Section 4 of the *Criminal Investigation Act 2006* (WA) explains that 'a person reasonably suspects something at a relevant time if he or she personally has grounds at

¹⁵ Western Australia, *Parliamentary Debates*, Legislative Council, 11 November 2009, 8867-8868 (R Johnson).

¹⁶ Giz Watson, *Submission to the Legislation Committee - Criminal Investigation Amendment Bill*, 15 January 2010, Legislation Council Parliament of Western Australia <<http://acpxp002.corpnet.customs:8080/ProgressMessages/Sub+05++Hon+Giz+Watson+MLC.pdf?proxy=10.4.9.38&action=complete&index=67&id=409784520&filename=Sub+05+Hon+Giz+Watson+MLC.pdf>>.

¹⁷ Western Australia, *Parliamentary Debates*, Legislative Assembly, 12 November 2009, 8993 (R Johnson).

¹⁸ ABC News, 'Stop and Search Laws Debated', *Stateline WA*, 13 November 2009 <<http://www.abc.net.au/news/video/2009/11/13/2742738.htm>>.

¹⁹ PAJ Waddington, 'Slippery Slopes and Civil Libertarian Pessimism' (2005) 15 *Policing and Society* 353, 363.

²⁰ ABC Radio, 'WA Government defends stop and search laws' 24 November 2009 <<http://www.abc.net.au/pm/content/2009/s2752251.htm>>.

the time for suspecting the thing and those grounds (even if they are subsequently found to be false or non-existent), when judged objectively, are reasonable.’ The element of reasonableness is designed to ensure that facts exist ‘which are sufficient to induce that state of mind [i.e. suspicion] in the reasonable person’.²¹ The codes of practice of the *Police and Criminal Evidence Act 1984* (UK) give more detailed guidance to the UK police on the meaning of reasonable suspicion:

There must be an objective basis for that suspicion based on facts, information, and/or intelligence which are relevant to the likelihood of finding an article of a certain kind ... Reasonable suspicion can never be supported on the basis of personal factors. It must rely on intelligence or information about, or some specific behaviour by, the person concerned. For example, ... a person’s race, age, appearance, or the fact that the person is known to have a previous conviction, cannot be used alone or in combination with each other, or in combination with any other factor, as the reason for searching that person. Reasonable suspicion cannot be based on generalizations or stereotypical images of certain groups or categories of people as more likely to be involved in criminal activity. A person’s religion cannot be considered as reasonable grounds for suspicion and should never be considered as a reason to stop or stop and search an individual.²²

It is clear then that the requirement of a reasonable suspicion is designed to ‘balance the need for an effective criminal justice system against the need to protect the individual from arbitrary invasions of his privacy and property’²³ by ensuring that police have an objectively justifiable reason to stop and search. This requirement should ideally reduce stops based stereotypes and generalisations or on personal factors, such as a person’s age or race, without something more to justify the suspicion.²⁴

The Western Australian Minister for Police has given assurance to the community that sufficient safeguards exist to prevent police from randomly searching ordinary citizens.²⁵ However, so called safeguards against random and undisciplined responses are not included in the legislation but are instead left to standard police procedures.²⁶ Any police contact not based on reasonable grounds paves the way for arbitrary targeting. In seeking to diminish the impact that removing reasonable suspicion will have on random searching, the community have been advised that targeting will be based on statistics and intelligence.²⁷ However, stopping and searching based purely on the fact that a person belongs to a certain demographic, even if this demographic has been associated with high crime rates, is not acceptable. If police are going to target based on statistics and intelligence then the use of stop and search powers will not be

²¹ *George v Rockett* (1990) 170 CLR 101, [1990] HCA 26, [4].

²² *Police and Criminal Evidence Act 1984*, Code A, [2.2].

²³ *George v Rockett* (1990) 170 CLR 101, [1990] HCA 26, [4]. This comment was made in relation to the conditions for granting a search warrant.

²⁴ See E Colvin, and J McKechnie, *Criminal law in Queensland and Western Australia* (Butterworths, 5th ed, 2008) [24.11].

²⁵ Western Australia, *Second Reading Speech*, Criminal Investigation Amendment Bill 2009, Legislative Assembly, 14 October 2009, 8024 (R Johnson).

²⁶ ‘Stop and Search Laws Debated’, above n 18.

²⁷ See O’Callaghan, above n 7.

random and the police will be forming a reason to stop the individual, in which case there should be objective grounds for that decision. If not we are opening the door to discriminatory policing and therefore there is every reason for decent citizens who belong to a certain group associated with a high crime rate to fear disproportionate targeting by police.

In order to allow scrutiny of the operation of such extended powers in WA and to ensure police force accountability, Janet Woollard MLA proposed that monitoring requirements be included in the WA Bill.²⁸ This proposal was, however, flat-out rejected by the Minister for Police.²⁹ Yet, to achieve the close monitoring that is necessary under stop and search legislation,³⁰ police should record full details of those searched and searches that lead to a charge. This would identify those who are searched repeatedly and identify whether there is disproportionate targeting of minority groups.

IV WHY THE DECENT PERSON HAS EVERYTHING TO FEAR

A Threat to Civil Liberties

Widening the reach of the law in order to provide police officers with increasing powers is risky and progressively erodes civil liberties.³¹ Certainly, there is a risk of setting a precedent for exclusions in other legislation. Already the requirement that police have a reasonable suspicion before they stop and search a person has been eroded by s 69 *Criminal Investigation Act 2006* (WA), which allows these powers to be used with a person's consent in designated areas. Observations are that attrition occurs in increments, and leads to fewer protections as is the experience in the United Kingdom ('UK') with anti-terrorism laws.³² Section 44 of the *Terrorism Act 2000* (UK) allows the Home Secretary to authorise stop and search without reasonable suspicion in any area of the UK for any time period.³³

Currently, the law protects against arbitrary searching by virtue of consent and reasonable suspicion whereas the proposed amendments go beyond the general liberties of the ordinary person and increase the risk of unwarranted privacy violations. Liberal backbencher Abetz, however, finds such incursion on the rights of the individual 'is a

²⁸ Western Australia, *Parliamentary Debates*, Legislative Assembly, 12 November 2009, 8956 (J Woollard).

²⁹ Western Australia, *Parliamentary Debates*, Legislative Assembly, 12 November 2009, 8956 (R Johnson).

³⁰ Alan Davenport, 'Stop and Search: Lawfulness of Extended Powers. R (on the application of Gillan and Another) v Commissioner of Police for the Metropolis and Another [2004] EWCA Civ 1067' (2005) 69 *The Journal of Criminal Law*, 25-28, 27.

³¹ Waddington, above n 19, 356.

³² *Ibid.*

³³ Although it must be noted that the European Court of Human Rights has recently found that the power given to police under that Act, which referred to the search as being "expedient" rather than necessary, were insufficiently circumscribed and lacked appropriate legal safeguards capable of protecting individuals against arbitrary interference of their right to privacy under article 8 of the European Convention on Human Rights. *Gillan and Quinton v The UK* [2009] ECHR 28, [87].

small price to pay for the safety and the security of our people.’³⁴ He comments that ‘the greatest threat to democracy is anarchy’ and in support of his point quoted his mother speaking of why there was support for Hitler in Germany:

... the streets were not safe. It was anarchy, so Hitler provided security to get people to follow him. People want security more than their liberty. That is the point.³⁵

With all due respect, this is *not* the point. Western Australia is not on the verge of anarchy and cannot in any way be compared to the situation in Germany during the Weimar Republic.³⁶ Apart from being an ill-advised, extreme and inaccurate comparison this viewpoint follows the Orwellian logic of protecting the liberties of the populous by taking them away.³⁷

With the emphasis firmly on making the community safer the potential invasiveness of these powers has also been downplayed. The WA Premier Colin Barnett has stated that police would only do a ‘very superficial’ search of people they suspected were carrying weapons or drugs.³⁸ Similarly, Rob Johnson, the Minister for Police, assures that the search will be ‘non-intrusive’ and may include having a metal detector run over a person’s body.³⁹ He notes that: ‘People tell me that they do not mind that sort of search because it is non-intrusive.’⁴⁰ Claims that the stop and search laws are invasive are swept away by the WA Minister for Police because a removal of clothing and frisk only occur once the metal detector reveals signs of a weapon.⁴¹

There are two points to be made in relation to these statements. Firstly, they diffuse attention from what is actually being changed. The power to conduct a basic search is not being altered by the proposed amendments; police remain at liberty, to search a person. What has been altered is the requirement that police have an objective reason to search the person. Secondly, marketing the search as a quick once-over with a metal detector principally serves to assuage the concerns of the general public. A public search is an invasion of privacy, and can be a humiliating and degrading experience. Even a ‘once over’ with a metal detector in the context of a night out with family and/or peers has the capacity to cause an individual a deal of embarrassment. Further, given

³⁴ Western Australia, *Parliamentary Debates*, Legislative Assembly, 10 November 2009, 8683 (P Abetz).

³⁵ Western Australia, *Parliamentary Debates*, Legislative Assembly, 10 November 2009, 8683 (P Abetz).

³⁶ Mr Abetz did later state that he was not endorsing Hitler, but was highlighting the importance people place on security. ABC ‘Hitler cited over stop and search laws’, *ABC News* (online), 11 November 2009 <<http://www.abc.net.au/news/stories/2009/11/11/2740160.htm>>.

³⁷ AC Grayling, *Liberty in the age of terror. A Defence of Civil Liberties & Enlightenment Values* (Bloomsbury Publishing, 2009) 101.

³⁸ Amanda Banks ‘Jail for refusing police search’, *The West Australian* (online), 25 November 2009 <<http://au.news.yahoo.com/thewest/a/-/breaking/6512852/jail-for-refusing-police-search/>>.

³⁹ Western Australia, *Parliamentary Debates*, Legislative Assembly, 12 November 2009, 8953 (R Johnson).

⁴⁰ Western Australia, *Parliamentary Debates*, Legislative Assembly, 12 November 2009, 8953 (R Johnson).

⁴¹ ‘Stop and Search Laws Debated’, above n 18.

that most people carry keys, wear a belt etc, a high proportion of people are likely to be subjected to further more invasive searches.

The effectiveness and success of the legislation relies on the assumption that the 'decent' person will submit to public stop and search for the greater good of the community. However, this underestimates the potential for ordinary law-abiding citizens to feel humiliated by the stop and search and thus for conflicts to arise by such persons seeking reasons for being stopped and refusing to comply. Here it must be remembered that although the analogy is often drawn to walking through a metal detector in an airport⁴² this is not an appropriate comparison to draw. At the airport everyone must walk through a metal detector and there is no reason for a person to wonder why they have been asked to do so. In contrast, these stop and search powers will be used not universally; they will be used selectively. As A MacTiernan MLA, points out:

It is quite different from what happens at the airport. If the member can imagine, a person might be walking along the street and be singled out, grabbed and pushed up against a wall and have jacket and shoes taken off and a search done in full view of potentially hundreds of people in the streets of Northbridge, Armadale or Fremantle or wherever it may be.⁴³

This selective use therefore has the potential to cause conflict where an ordinary law-abiding citizen feels unfairly targeted. As noted by the Scrutiny Panel of the Metropolitan Police in the UK, aside from the shame and humiliation associated with searches, disproportionate stop and search practices can also cause people to feel a diminished sense of belonging, fear, insecurity, disempowerment, anxiety, intimidation, helplessness.⁴⁴ Extending police powers may therefore decrease confidence in the police and have a high social cost.

B *Disproportionate targeting and its application to WA Stop and Search*

The requirement of reasonable suspicion provides police with an objective standard with which to undertake their duties fairly and without discrimination. Discrimination on the basis of a person's characteristics may be in breach of article 26 of the *United Nations International Covenant on Civil and Political Rights*. Worryingly, the Amendment Bill does not contain a requirement that regulations detail how police are to use these additional powers and what their responsibilities are.⁴⁵ Therefore, the question

⁴² See, for instance, Western Australia, *Parliamentary Debates*, Legislative Assembly, 10 November 2009, 8668 (P Abetz); see also E Ripper, referring to comments by C Barnett, the Premier of WA, *Parliamentary Debates*, Legislative Assembly, 12 November 2009, 8991.

⁴³ Western Australia, *Parliamentary Debates*, Legislative Assembly, 10 November 2009, 8668 (A MacTiernan).

⁴⁴ Metropolitan Police Authority, *Report of the MPA Scrutiny on MPS Stop and Search Practice*, 2004.

⁴⁵ In fact R Johnson, Minister for Police, stated that a proposed amendment which would require 'guidelines setting out the obligations, responsibilities and manner in which powers are to be exercised by police officers ... are to be prescribed by regulation' would not be accepted by the government. Amendment moved by M Quirk, Western Australia, *Parliamentary Debates*, Legislative Assembly, 12 November 2009, 8982 (M Quirk). Amendment rejected, 8989.

is raised: On what basis will decisions be made if there is no longer a requirement for reasonable suspicion and searches will not be universal? Research from Australia and overseas indicates that police profiling is often based on generalisations and negative stereotypes that are in part attributable to ethnic bias in police decision making.⁴⁶ Certainly this bias has been shown to influence police targeting in the UK where a correlation exists between arrest profiles and the likelihood of strip search. Demographics were found to increase a persons' vulnerability to strip searching, in particular males of ethnic origin.⁴⁷ Further a report of the UK Ministry of Justice has found that in 2008/09 a black person was 7.2% more likely and an Asian twice as likely as a white person to be stopped and searched by police.⁴⁸

It is not only those from ethnic minorities which have something to fear, children in particular are likely to find a public search humiliating and embarrassing and yet there are no special provisions such as a requirement of parental consent under the proposed amendments.⁴⁹ The lack of protection afforded by the proposed changes could contravene article 18 of the United Nations *Convention on the Rights of the Child* ('CROC') which asserts a child should not be subject to arbitrary interference with his or her privacy. The police minister may cite weapons and violence as being the reason families avoid entertainment precincts such as Northbridge, however invasive searching of adults and children is unlikely to increase the attractiveness of the area.

C *Ineffective and potentially unlawful*

Research in the UK has not shown that extended police powers are effective at combating violent crime. Indeed, it has been commented that 'such *suspicionless* searches rarely result in arrest'.⁵⁰ Furthermore, '[t]here just simply is no robust evidence showing that they have contributed in any way to the reduction of knife crime'.⁵¹ In fact rather than being simply ineffective such extra powers may actually be harmful. When laws appear not to target genuine offenders this has the strong potential to alienate and cause distrust and resentment among the public, in particular ethnic minorities. As commented by Bowling: 'Each time a person is unjustifiably stopped and searched it undermines respect for the police, drains public confidence, causes resentment, and

⁴⁶ Harry Blagg and Meredith Wilkie, 'Young People and Policing in Australia: the Relevance of the UN Convention on the Rights of the Child' (1997) 3(2) *Australian Journal of Human Rights* 134.

⁴⁷ Tim Newburn, Michael Shiner and Stephanie Hayman, 'Race, Crime and Injustice? Strip Search and the Treatment of Suspects in Custody' (2004) 44 *British Journal of Criminology* 677.

⁴⁸ Ministry of Justice, Statistics on Race and the Criminal Justice System 2008/09 (June 2010), 22. <<http://www.justice.gov.uk/publications/docs/stats-race-and-the-criminal-justice-system-2008-09c1.pdf>>.

⁴⁹ 'Stop and Search Laws Debated', above n 18. See also Western Australia, *Parliamentary Debates*, Legislative Assembly, 10 November 2009, 8664 (M Quirk).

⁵⁰ B Bowling, "Zero Policy" (2008) 71 *Criminal Justice Matters* 6. The arrest figures are worst in relation to stops under s 44 *Terrorism Act 2000* (UK) with only around 1 in 400 stops under s 44 leading to an arrest in connection with terrorism.

⁵¹ Professor B Bowling speaking on ABC, "WA set to introduce new stop and search laws", 7:30 Report, 11 June 2010, <<http://www.abc.net.au/7.30/content/2010/s2924379.htm>>.

severs the link between the citizen and the law.⁵² Similar views have been expressed in the WA Parliament: ‘A police force can operate only if it has the confidence and support of the broader community. This legislation will undermine that support.’⁵³ Findings indicate that positive experiences and satisfaction are based on being given a reason and where reasons for the stop and search are not provided, people feel unfairly targeted.⁵⁴ The UK government has had to concede that the damage caused to community relations has outweighed the benefits and as feared, the powers have been misused and ethnic minority groups disproportionately targeted.⁵⁵ Prophetically, the European Court of Human Rights recently declared the extended stop and search powers in s 44 of the *Terrorism Act 2000* (UK) to be a violation of Article 8 of the *European Convention on Human Rights*.⁵⁶ Personal autonomy was considered undermined by police powers that require submission to a coercive search in a public place. These powers were judged to be too widely drawn and lacking adequate safeguards.⁵⁷ In aspects resembling those proposed in WA, the UK law has been declared unlawful. This could lead to the expectation that the WA laws would be considered to breach Article 17 of *International Covenant on Civil and Political Rights* (‘ICCPR’), to which Australia is a signatory.

V CONCLUSION

The weight of evidence indicates that there is little, if any, need to alter existing laws in relation to police powers to stop and search in WA. Figures relating to weapon seizures indicate that current laws based on reasonable suspicion are working well. There is no clear evidence that police need extra powers in WA, nor is there evidence that such powers have led to reduced crime levels in those jurisdictions which have extended police powers.

More fundamentally, the suggestion that decent people have nothing to fear is a misrepresentation. Being an ordinary law abiding citizen does not afford protection against police targeting or invasive searching. Public searching has the potential to be invasive, embarrassing and degrading. Furthermore, dispensing with the requirement that police form a suspicion based on reasonable grounds opens the door for arbitrary and discriminatory searches. Thus, law-abiding members of minority groups and the most vulnerable in society are susceptible to disproportionate targeting based on biased judgements and stereotyping.

⁵² B Bowling, “Zero Policy”, (2008) 71 *Criminal Justice Matters* 7.

⁵³ Western Australia, *Parliamentary Debates*, Legislative Assembly, 11 November 2009, 8837 (B Wyatt).

⁵⁴ Joel Miller, Paul Quinton and Nick Bland, ‘Police Stops And Searches: Lessons From A Programme Of Research’ (2000) Police Research Series Papers 127, *Home Office Policing and Reducing Crime Unit*, 1-6.

⁵⁵ Vikram Dodd, ‘Police to severely curtail use of stop and search powers’ *The Guardian* (online), 6 May 2009 <<http://www.guardian.co.uk/uk/2009/may/06/police-stop-and-search-reform>>.

⁵⁶ *Gillan and Quinton v The UK* [2009] ECHR 28.

⁵⁷ *Gillan and Quinton v The UK* [2009] ECHR 28 [87].

The legality of the proposed laws is also debateable. Although not applicable in Australia the ruling by the European Court highlights the unacceptable nature of laws that strip away the freedoms of the ordinary person. Removing reasonable suspicion and consent is tantamount to removing all legal protections afforded to a person under stop and search laws and cannot be substituted by limitations relating to designated areas and time restrictions. These additional safeguards do nothing to protect the individual from unfair targeting, or arbitrary searching. Rather the proposed changes open the door to intrusive, coercive searches that impinge on civil liberties in ways that are unacceptable and ultimately, unnecessary.

FREEDOM ON THE WALLABY: A COMPARISON OF ARGUMENTS IN THE AUSTRALIAN BILL OF RIGHTS DEBATE

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Abstract

Proponents of a bill of rights identify groups of people in Australia whose liberties have not been respected in the recent past and argue that this shows the need for a bill of rights. Critics dispute this, and point to Australia's constitutional and electoral systems, as ones that are capable of protecting liberties. In response, proponents argue that constitutional rights are too narrow, treaties are not widely implemented, and statutes offer only piecemeal protection.

Critics argue that democracy would be negatively impacted by a bill of rights because judges would decide political questions, judicial activism would be encouraged and people would become complacent. Proponents argue that, at present, democracy does not protect minorities and a more holistic concept of democracy is needed.

The legal system would be impacted by a bill of rights, according to proponents, through increased access to justice and improved education of judges. Critics argue that the judiciary would be politicised, litigiousness increased and respect for the courts reduced. It is also unclear whether a statutory bill of rights at the federal level would be constitutionally valid. Finally, critics and proponents disagree about the effect that a bill of rights would have on Australian culture and the overall level of freedom within the nation.

It is concluded that a constitutional bill of rights would address an inherent weakness in democracy but at the risk of significant adverse consequences, which at present outweigh the value of any gain. A statutory bill of rights would carry risks for the quality of democracy and the legal system, and its protection would be illusory. All benefits that may be obtained from a statutory bill of rights can also be achieved through other measures.

I INTRODUCTION

In 1891 when Henry Lawson penned his famous poem, 'Freedom on the Wallaby'¹ in response to a shearer's strike, members of the Queensland Legislative Council called for his arrest for sedition. Nearly 120 years later, sedition laws have been revived and Australia has been condemned by the International Labour Organisation for denying

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¹ Originally published in *The Worker* (Brisbane), 16 May 1891.

workers' right to form collectives.² For these and other reasons, many are now calling for Australia to join other Western democracies and enact a bill of rights.

This paper compares the arguments for and against a federal bill of rights in Australia. Firstly, some background is provided on international human rights and the development of the domestic bill of rights debate, followed by a brief outline of current human rights protections in Australia. Arguments concerning the effectiveness of those protections are examined, including the claim by proponents of a bill of rights that liberties are insufficiently protected in practice, and critics' responses to that claim. Arguments from both sides concerning whether the system, as it stands, is capable of protecting liberties, are also discussed. The fifth section looks at arguments concerning the impact a bill of rights might have on the quality of Australia's democracy. The likely effect on the legal system is examined, followed by a brief explanation of some doubts that have been raised concerning the constitutionality of a statutory bill of rights. Arguments regarding the potential consequences for Australian culture and society, as well as the level of freedom enjoyed in Australia are also outlined. Finally, some conclusions are drawn and suggestions put forward. It is argued that a constitutional bill of rights would address an inherent weakness in democracy but at the risk of significant adverse consequences, which at present outweigh the value of any gain. A statutory bill of rights, on the other hand, would also carry significant risks for the quality of democracy and integrity of the legal system while only providing illusory protection from oppressive governance or legislation.

II BACKGROUND

A *International Human Rights*

The modern concept of human rights is similar in some respects to ideas that were held in many ancient societies.³ It was also heavily influenced by developments in Western Europe during the Reformation and Enlightenment, and the English, American and French Revolutions.⁴ However, human rights have, only recently, gained popularity. Thus, although human rights ideas formed part of the international campaigns to abolish slavery in the 19th century, they were not included in the *Covenant of the League of Nations* in 1919.⁵ They only received international status with the adoption of the *Charter of the United Nations* in 1945. At that time, the atrocities that were committed in Nazi Germany during World War II, mostly under validly enacted laws, provided a stimulus for the international community to impose standards on governments and hold them accountable for the way that they treat their citizens.⁶ Since then, the international

² George Williams, *A Charter of Rights for Australia* (3rd ed, Sydney: University of NSW Press, 2007) 27-30; Geoffrey Robertson, *The Statute of Liberty: How Australians Can Take Back Their Rights* (North Sydney: Vintage, 2009) 67.

³ Hilary Charlesworth, Andrew Byrnes and Gabrielle McKinnon, *Bills of Rights in Australia* (University of New South Wales Press, 2009) 2-7.

⁴ Charlesworth, Byrnes and McKinnon, above n 3.

⁵ Covenant of the League of Nations formed Part 1 of the *Treaty of Versailles*, opened for signature 28 June 1919, [1919] UKTS 4, [1920] ATS 1 (entered into force 10 January 1920); Charlesworth, Byrnes and McKinnon, above n 3, 8.

⁶ Charlesworth, Byrnes and McKinnon, above n 3, 15-6.

community, through the United Nations, has produced treaties that set out civil and political rights, economic, social and cultural rights, and most recently, collective rights.⁷ Treaties are legally binding on the states that sign and ratify them but in many states, including Australia, they do not form part of domestic law until incorporated into it through normal legislative processes.⁸ Australia is a signatory to most human rights treaties and has sought to promote human rights in other countries, but has not systematically incorporated its treaty obligations into domestic law.⁹

B *The History of the Bill of Rights Debate in Australia*

The drafters of the Australian Constitution, influenced by the Constitution of the United States, considered whether to include a bill of rights in it. Some, such as the Tasmanian Attorney-General, Andrew Inglis Clark, and Richard O'Connor, who became an early High Court judge, argued for its inclusion, but on the whole the framers believed that the common law, responsible government and parliamentary sovereignty were sufficient.¹⁰ Indeed, Dawson J has observed that the framers 'saw constitutional guarantees of freedoms as exhibiting a distrust of the democratic process' preferring to trust Parliament to maintain individual freedoms.¹¹

Since Federation, there have been several attempts to add a constitutional or statutory bill of rights to Australian law. In 1944, a proposal to amend the Constitution to include guarantees of freedom of speech and freedom of expression, and to extend freedom of religion, was rejected at a referendum.¹² In 1973, Senator Lionel Murphy introduced the Human Rights Bill 1973 (Cth) which would have incorporated the *International Covenant on Civil and Political Rights* (ICCPR) into domestic law, but the Bill was heavily opposed and lapsed with the prorogation of Parliament in 1974.¹³ A decade later a weaker Bill that nevertheless would have implemented the ICCPR, the Australian Human Rights Bill 1985 (Cth), failed to pass the Senate and was withdrawn in November 1986.¹⁴ Finally, in 1988, four proposals were put to a referendum including a proposal to insert a right to vote and a guarantee of 'one vote, one value', and a proposal to extend the right to trial by jury, the 'just terms' guarantee, and religious freedom guarantee to State and Territory laws.¹⁵ All these proposals were resoundingly defeated.¹⁶

⁷ Ibid 17.

⁸ Ibid 18-19.

⁹ Ibid 20-1.

¹⁰ Nicholas Aroney, 'A Seductive Plausibility: Freedom of Speech in the Constitution' (1995) 18 *University of Queensland Law Journal* 249, 261; George Williams, *Parliamentary Library Research Paper 20: The Federal Parliament and the Protection of Human Rights* (11 May 1999) Law and Bills Digest Group <<http://www.aph.gov.au/library/pubs/RP/1998-99/99rp20.htm>>.

¹¹ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 186 (Dawson J).

¹² Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (The Federation Press, 4th ed, 2006) 1449.

¹³ Williams, above n 10.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

Meanwhile, jurisdictions throughout the common law world enacted bills of rights which partially or wholly incorporated United Nations treaties and catered for perceived domestic needs. The *Canadian Charter of Rights and Freedoms*¹⁷ (*Canadian Charter*) was adopted in 1982 as a constitutional bill of rights, after initially being enacted as a statute. South Africa included a bill of rights in the constitution it adopted in 1996.¹⁸ New Zealand enacted a statutory bill of rights in the form of the *New Zealand Bill of Rights Act 1990* (NZ) (*the NZ Act*) based mainly on the ICCPR. The United Kingdom then enacted a similar statutory bill of rights, the *Human Rights Act 1998* (UK) (*the UK Act*) based on the *European Convention on Human Rights 1950*, which largely mirrors the ICCPR. As a result, Australia is now the only Western democracy without a bill of rights.¹⁹

At the same time as these bills of rights were being enacted, most Australian States held inquiries into the advisability of adopting similar legislation. The Queensland Parliament's Legal, Constitutional and Administrative Review Committee and the NSW Parliament's Standing Committee on Law and Justice recommended against doing so in 1998 and 2001 respectively.²⁰ In WA, the Consultation Committee for a Proposed Human Rights Act recommended that a statutory bill of rights be adopted in 2007, but it has not yet occurred.²¹ Inquiries in the ACT and Victoria²² led to those States enacting the *Human Rights Act 2004* (ACT) (*the ACT Act*) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (*the Victorian Act*).

In spite of the successive failures at achieving law reform of this type at a federal level, the idea continues to be supported by a considerable number of politicians, lawyers, academics and many in the community at large. In recent years advocates have supported a gradual transition, beginning with so-called core rights protected through a statute that can be amended in the normal fashion, before moving to constitutional entrenchment when community support grows, and fears abate.²³ Consistent with this, in 2008 the federal government launched the National Human Rights Consultation to take submissions from the community on the questions of: (1) which human rights should be protected and promoted; (2) whether those rights are sufficiently protected and promoted at present; and (3) how Australia could better protect and promote human rights.²⁴ A large number of submissions (35 014) were received and the overwhelming

¹⁷ *Constitution Act 1982* (Canada) enacted as Schedule B to the *Canada Act 1982* (UK).

¹⁸ *Constitution of the Republic of South Africa 1996* (South Africa).

¹⁹ Robertson, Geoffery, *The Statute of Liberty: How Australians Can Take Back Their Rights* (Vintage, 2009) 43.

²⁰ Legal, Constitutional and Administrative Review Committee, Parliament of Queensland, *The Preservation and Enhancement of Individual's Rights and Freedoms in Queensland: Should Queensland Adopt a Bill of Rights?* (1998); Standing Committee on Law and Justice, Parliament of New South Wales, *A NSW Bill of Rights* (2001).

²¹ Consultation Committee for a Proposed Human Rights Act, *A WA Human Rights Act* (2007).

²² Human Rights Consultation Committee, *Rights, Responsibilities and Respect* (2005).

²³ Williams, above n 10.

²⁴ National Human Rights Consultation Committee, *National Human Rights Consultation Report* (September 2009) 3-4.

majority were in favour of Australia adopting a statutory bill of rights.²⁵ The Committee noted, however, that ‘a substantial number’ of these ‘appeared to have been facilitated by campaigns run by lobby groups’.²⁶ The Committee recommended a number of measures to improve the protection of liberties in Australia, including, most contentiously, ‘that Australia adopt a federal Human Rights Act’.²⁷ In doing so, the Committee noted that ‘there is no community consensus on the matter, and there is strong disagreement in the parliament’.²⁸ Community reaction to the Report in the weeks following its release demonstrates the accuracy of this observation. Disputes immediately arose over how representative the submissions were.²⁹ Representatives of most major Christian denominations united against the proposal but one endorsed it.³⁰ The Law Council of Australia,³¹ the Australian Human Rights Commission³² and Amnesty International³³ supported it and politicians of all colours spoke varyingly for and against it.³⁴ The Government has not yet indicated how it will respond.³⁵

C Defining Human Rights

The term ‘human rights’ is widely used in a variety of legal and social contexts, and can signify more than one idea. Campbell identifies three broad ways that the term is understood. Firstly, there is a moral element to the concept of human rights, and an array of philosophical literature has been written in an attempt to identify a conceptual basis for these moral rights.³⁶ Secondly, some people understand human rights in an

²⁵ Of the 35 014 submissions received, 32 091 addressed the question of a bill of rights and 27 888 of those were in favour with only 4 203 opposed to it: National Human Rights Consultation Committee, above n 24, 5-6.

²⁶ National Human Rights Consultation Committee, above n 24, 6.

²⁷ National Human Rights Consultation Committee, above n 24, Recommendation 18, xxxiv.

²⁸ National Human Rights Consultation Committee, above n 24, 361.

²⁹ For example: James Madden, ‘Disputes Ahead Over Human Rights Charter’ *The Australian* (Sydney), 9 October 2009 <<http://www.theaustralian.news.com.au>>; Jim Wallace, ‘Rights Overkill isn’t Majority View’ *The Australian* (Sydney), 13 October 2009 <<http://www.theaustralian.news.com.au>>; Ed Coper, ‘Power to the Hi-Tech’ *The Australian* (Sydney), 14 October 2009 <<http://www.theaustralian.news.com.au>> .

³⁰ Nicola Berkovic, ‘Clergy Unite Over Human Rights Charter’ *The Australian* (Sydney), 23 October 2009 <<http://www.theaustralian.news.com.au>> .

³¹ Jonathon Pearlman, ‘Call for Rights Act Sparks Fierce Debate’ *Sydney Morning Herald* (Sydney), 9 October 2009 <<http://www.smh.com.au>> .

³² Australian Government, *Australian Human Rights Commission says Action Needed on Report Recommendations* (8 October 2009) the Gov Monitor: Public Sector News and Information <<http://thegovmonitor.com>>.

³³ Claire Mallinson, *Opinion: Human Rights Act* (16 October 2009) Amnesty International <<http://www.amnesty.org.au/news/comments/21890/>>.

³⁴ See for example: Paul Kelly and Chris Merrit, ‘Human Rights Charter a Recipe for Chaos as Frank Brennan Cites “Enormous Problems”’ *The Australian* (Sydney), 10 October 2009 <<http://www.theaustralian.news.com.au>>; Paul Kelly, ‘Human Rights Report Poisoned Chalice’ *The Australian* (Sydney), 10 October 2009 <<http://www.theaustralian.news.com.au>>.

³⁵ Australian Government, *National Human Rights Consultation Report* (30 September 2009) Australian Government: Attorney-General’s Department <<http://www.ag.gov.au>>.

³⁶ Tom Campbell, ‘Human Rights: The Shifting Boundaries’ in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Human Rights: Instruments and Institutions* (Oxford University Press, 2003) 17.

intuitive way as a reaction to the wrongs they perceive in society.³⁷ Thirdly, there is the positivist approach that perceives a right as something granted by the law, so that only legal rights are truly human rights.³⁸ Confusion sometimes arises in the bill of rights debate when people speak of 'human rights' without making clear the sense in which they are using the term. All sides claim to be supportive of human rights in some sense, so it is important to be clear about what is in dispute and what is not. In this paper, the term 'human rights' is only used to refer to rights that are enforceable by law. When referring to 'rights' in a more general sense, or to moral rights that are not legally enforceable, the term, 'liberties' is used.

III HUMAN RIGHTS IN AUSTRALIA

A *Rights in the Australian Constitution*

The Constitution contains some guarantees, expressed as limitations on government power. They are characterised as a shield and not a sword because when they are contravened the offending provision is struck down, but they cannot be used to force the legislature to act in any particular way.³⁹ This is different to the contemporary international conception of human rights, which includes not just immunities but also 'positive claims of what society is deemed required to do for the individual' such as, for example, to grant protection from torture, ensure freedom to assemble and provide for basic needs.⁴⁰

Section 80 of the Constitution guarantees trial by jury for indictable Commonwealth offences. However, the High Court has repeatedly held that whether a particular offence is triable summarily or by indictment is a matter for Parliament to decide.⁴¹ Consequently, the provision is said to, in effect, 'offer no guarantee at all'.⁴²

A limited freedom of religion is provided by s 116 of the Constitution.⁴³ This provision has been narrowly interpreted both in relation to the meaning of 'free exercise of any religion' and of 'establishing any religion'. For example, it does not prevent a person from being legally obliged to perform an action that his or her religion forbids⁴⁴ and it does not prohibit government funding of church schools.⁴⁵ In addition, the freedom it grants is 'subject to powers and restrictions of government essential to the preservation

³⁷ Campbell, above n 36, 21-3.

³⁸ Ibid 24.

³⁹ George Williams, *Human Rights under the Australian Constitution* (Oxford University Press, 1999) 62.

⁴⁰ Louis Henkin, *The Age of Rights* (1990) excerpt in: Blackshield and Williams, above n 12.

⁴¹ *R v Bernasconi* (1915) 19 CLR 629; *R v Archdall & Roskrige; Ex parte Carrigan and Brown* (1928) 41 CLR 128; *Zarb v Kennedy* (1968) 121 CLR 283; *Li Chia Hsing v Rankin* (1978) 141 CLR 182; *Kingswell v The Queen* (1985) 159 CLR 264.

⁴² Blackshield and Williams, above n 12, 1196.

⁴³ Section 116 reads: 'The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth'.

⁴⁴ *Krygger v Williams* (1912) 15 CLR 366.

⁴⁵ *Attorney-General (Vic); Ex rel Black v Commonwealth* (1981) 146 CLR 559.

of the community'.⁴⁶ In spite of this narrow interpretation, a referendum in 1988 which sought to extend the protection so that the States and Territories would also be prevented from inhibiting religious freedom, failed in all States.⁴⁷

Section 117 of the Constitution provides a limited protection against discrimination on the basis of State residence.⁴⁸ A narrow construction of this provision was unanimously overruled in *Street v Queensland Bar Association*.⁴⁹ According to Mason CJ and Brennan J, and consistently with the High Court's order, s 117 confers personal immunity on an individual against impermissible discrimination but does not render the law invalid.⁵⁰ The right was also said to be subject to limitations or exceptions, but the range and rationale for them varied among the judges.⁵¹

Section 51(xxxi) provides that Parliament has power to make laws with respect to 'the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws'. The other grants of power in s 51 are construed in such a way that they do not circumvent this limitation.⁵² The High Court has interpreted the word 'property' broadly.⁵³ However, the acquisition must be 'for a Commonwealth purpose',⁵⁴ so some forms of acquisition fall outside the scope of the guarantee.⁵⁵ Furthermore, 'just terms' do not always require that compensation be paid, but only that the acquisition is made on terms that a legislature could reasonably regard as fair.⁵⁶

Finally, the separation of judicial power provided for in Chapter III of the Constitution has been said to constitute 'general guarantee of due process'.⁵⁷ According to former Chief Justice of the High Court, Murray Gleeson, this is because vesting judicial power in the courts, together with the separation of powers and independence of the judiciary prevents Parliament and the executive from administering justice, which effectively assures due process.⁵⁸

In addition to these express guarantees, the High Court held in *Australian Capital Television Pty Ltd v Commonwealth of Australia (No.2)*⁵⁹ and *Nationwide News Pty Ltd*

⁴⁶ *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116 [149].

⁴⁷ Blackshield and Williams, above n 12, 1217.

⁴⁸ Section 117 reads: 'A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.'

⁴⁹ *Street v Queensland Bar Association* (1989) 168 CLR 461 ('Street').

⁵⁰ *Street* (1989) 168 CLR 461, 486, 502, 592.

⁵¹ *Street* (1989) 168 CLR 461, 491 (Mason CJ), 512 (Brennan J), 528 (Deane J), 571 (Gaudron J), 583 (McHugh J).

⁵² Blackshield and Williams, above n 12, 1274.

⁵³ See *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 284; *Bank of NSW v Commonwealth (Bank Nationalisation Case)* (1948) 76 CLR 1, 349.

⁵⁴ Blackshield and Williams, above n 12, 1276.

⁵⁵ *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134, 160; *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155, 184-9.

⁵⁶ *Nelungaloo Pty Ltd v Commonwealth* (1947) 75 CLR 495.

⁵⁷ *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 580.

⁵⁸ Murray Gleeson, *The Rule of Law and the Constitution* (ABC Books, 2000) 63.

⁵⁹ (1992) 177 CLR 106.

*v Wills*⁶⁰ that a guarantee of freedom of political communication was necessarily implied in ss 7 and 24 of the Constitution.⁶¹ The Court found that in order for ‘real’ or ‘substantial’, as opposed to ‘illusory’ representative government to exist, as provided for by the Constitution, there must be freedom of political communication.⁶² Thus, there is a constitutional right to freedom of political communication, which includes political discourse, and discussion of governmental and political matters and the performance of politicians.⁶³ It may also extend to discussion of local and state politics.⁶⁴ Like the other constitutional guarantees, it can only be used as a shield where pre-existing rights are threatened by legislation, and not as a sword to generate rights or freedoms not otherwise recognised at law.⁶⁵

B Human Rights in Australian Statute Law

In the absence of extensive constitutional rights, State and Commonwealth statutes directly provide some human rights, and establish processes, procedures and bodies that contribute to the realisation of others. Administrative law plays an important role in safeguarding people’s rights and interests in their dealings with government agencies.⁶⁶ Government decision-making can be reviewed by bodies such as the Administrative Appeals Tribunal, a range of specialist tribunals,⁶⁷ and the Commonwealth Ombudsman, as well as through judicial review.⁶⁸ Information rights are protected through the *Freedom of Information Act 1982* (Cth), the *Administrative Decisions (Judicial Review) Act 1977* (Cth) which confers a right to receive written reasons for a decision, and whistleblower protection legislation.⁶⁹ In addition, the Administrative Review Council oversees the administrative review system and makes reform recommendations.⁷⁰

The Australian Human Rights Commission was established pursuant to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth). It conducts research and

⁶⁰ (1992) 177 CLR 1.

⁶¹ Aroney, above n 10, 255.

⁶² Ibid 259.

⁶³ *Theophanus v Herald & Weekly Times* (1994) 182 CLR 104; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 142 (Mason CJ), 168-169 (Deane and Toohey JJ), 216 (Gaudron J).

⁶⁴ See *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 75 (Deane and Toohey JJ).

⁶⁵ *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181.

⁶⁶ Robin Creyke and John McMillan, *Control of Government Action: Text, Cases and Commentary* (LexisNexis Butterworths, 2005) 13; Julian Leaser, ‘Responding to Some Arguments in Favour of the Bill of Rights’ in Julian Leaser and Ryan Haddrick (eds), *Don't Leave Us with the Bill: The Case Against an Australian Bill of Rights* (Menzies Research Centre, 2009) 55; Williams, above n 10.

⁶⁷ Including the Migration Review Tribunal, Native Title Tribunal, Privacy Commission, Refugee Review Tribunal, Social Security Appeals Tribunal and Veterans Review Board.

⁶⁸ Creyke and McMillan, above n 66, 13; Leaser, above n 66, 55.

⁶⁹ Creyke and McMillan, above n 66, 13; Leaser, above n 66, 55. Whistleblower protections are found in a range of statutes, most notably: *Crimes Act 1914* (Cth), *Criminal Code Act 1995* (Cth), *Public Service Act 1999* (Cth), *Privacy Act 1988* (Cth) and *Freedom of Information Act 1982* (Cth). In 2009 the House of Representatives Legal and Constitutional Affairs Committee recommended strengthening whistleblower protections and the Government has announced it will act on the Report later this year.

⁷⁰ Creyke and McMillan, above n 66, 13.

education, hears discrimination and human rights complaints, examines practices of Commonwealth authorities and reports to Parliament on law reform issues.⁷¹

In addition, the Commonwealth Parliament has enacted legislation that prohibits discrimination on the basis of:

- age, in employment, education, accommodation and the provision of goods and services;⁷²
- disability, in employment, education and access to premises, including indirect discrimination;⁷³
- race, colour, descent, national or ethnic origin, including the prohibition of racial vilification;⁷⁴ and
- sex, marital status or pregnancy, in relation to employment and family responsibilities, including the prohibition of sexual harassment.⁷⁵

The Commonwealth enacted this legislation through its external affairs power⁷⁶ to give effect to international human rights treaties that it had ratified.⁷⁷ The legislation overrode any inconsistent State laws,⁷⁸ and was therefore an effective means of protecting individuals from discrimination in the specified circumstances.⁷⁹ Complaints about discrimination arising under Commonwealth law are heard by the Australian Human Rights Commission.⁸⁰ Each State also has agencies that hear complaints arising under State anti-discrimination legislation.⁸¹

The *Privacy Act 1988* (Cth) establishes principles that govern how government agencies and private sector organisations should handle the collection, use, disclosure, accuracy, storage and accessing of personal information.⁸² It grants individuals rights to:

- know how their personal information is being collected and how it will be used;
- ask for access to their records;
- stop receiving unwanted direct marketing material;

⁷¹ *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 11; Williams, above n 10.

⁷² *Age Discrimination Act 2004* (Cth).

⁷³ *Disability Discrimination Act 1992* (Cth).

⁷⁴ *Racial Discrimination Act 1975* (Cth).

⁷⁵ *Sex Discrimination Act 1984* (Cth).

⁷⁶ *Australian Constitution* s 51(xxix).

⁷⁷ This is a valid exercise of the external affairs power: *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1; *Richardson v Forestry Commission* (1988) 164 CLR 261; *Queensland v Commonwealth (Tropical Rainforests Case)* (1989) 167 CLR 232; *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416.

⁷⁸ Pursuant to *Australian Constitution* s 109.

⁷⁹ Leeser, above n 66, 56; Williams, above n 10.

⁸⁰ *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 11.

⁸¹ Including: ACT Human Rights Commission, Anti-Discrimination Board of New South Wales, Anti-Discrimination Commission of Queensland, Anti-Discrimination Commission Tasmania, Victorian Equal Opportunity and Human Rights Commission, Northern Territory Anti-Discrimination Commission, South Australian Equal Opportunity Commission and Western Australian Equal Opportunity Commission.

⁸² *Privacy Act 1988* (Cth) ss 14, 16.

- correct inaccurate personal information; and
- ensure their information is only used for the purposes stipulated.⁸³

The *Privacy Act 1988* (Cth) also established the Office of the Privacy Commissioner,⁸⁴ granting it powers to investigate breaches, undertake research, conduct education within organisations and the community,⁸⁵ and to make enforceable determinations.⁸⁶ Recently, the *Act* has been criticised as outdated and overly complex, and for providing inadequate protection for the information age. As part of this, the Australian Law Reform Commission conducted an inquiry into privacy laws, handing down its final report in 2008 with 295 proposed changes.⁸⁷ The Government has said it is considering its response.⁸⁸

Finally, criminal procedure and evidence law confer certain rights on people who are suspected or accused of crimes. They include, for example: restrictions on the use of entrapment and controlled operations; laws relating to searches, seizures, surveillance, identification and warrants; requirements relating to arrests, bail, questioning and confessions; and provisions that supplement the common law concerning the conduct of committals, trials and appeals.⁸⁹

In addition to these statutory protections, the common law protects human rights though its principles of statutory interpretation.⁹⁰ The basic principle is that Parliament does not intend to invade fundamental rights, freedoms and immunities and that unless the intention to do so is clearly conveyed in the legislation in ‘unmistakable and unambiguous language’, courts should not impute such an intention upon Parliament.⁹¹ In this way, ‘Parliament must squarely confront what it is doing and accept the political costs’⁹² and courts will seek, if possible, to shield the community from the risk that a potential meaning that offends individual rights has passed unnoticed into a statute.⁹³ Where meaning is ambiguous, courts may be guided in their interpretation by

⁸³ *Privacy Act* s 14.

⁸⁴ *Privacy Act* s 19.

⁸⁵ *Privacy Act* s 27.

⁸⁶ *Privacy Act* s 52, Division 3.

⁸⁷ Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report/Discussion 108 (2008).

⁸⁸ Australian Government, *ALRC Privacy Report* (2008) Department of the Prime Minister and Cabinet <<http://www.pmc.gov.au/privacy/alrc.cfm>> at 7 October 2009.

⁸⁹ For Commonwealth matters see: *Criminal Code Act 1995* (Cth), *Crimes Act 1914* (Cth), *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) *Evidence Act 1995* (Cth). For WA see: *Criminal Code*, *Police Act 1892* (WA), *Misuse of Drugs Act 1981* (WA), *Criminal Procedure Act 2004* (WA), *Criminal Investigation Act 2006* (WA), *Evidence Act 1906* (WA).

⁹⁰ James Spigelman, *Statutory Interpretation and Human Rights* (University of Queensland Press, 2008) 12, 23.

⁹¹ *Potter v Minahan* (1908) 7 CLR 277 at 304; *Coco v The Queen* (1994) 179 CLR 427, 437; Spigelman, above n 90, 25-6.

⁹² *R v Secretary for Home Department; Ex parte Simms* [2000] 2 AC 115, 131 quoted with approval in: *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 (Gleeson CJ) and *Daniels Corp v ACCC* (2002) 213 CLR 543, 582 (Kirby J).

⁹³ Paul de Jersey, ‘A Reflection on a Bill of Rights’ in Julian Leaser and Ryan Haddrick (eds), *Don't Leave Us with the Bill: The Case Against an Australian Bill of Rights* (Menzies Research Centre, 2009) 11.

international human rights treaties⁹⁴ because ratification is considered to be a signal from the executive to the world at large, that it intends to act on the treaty.⁹⁵

The general principle is reflected in presumptions that, in the absence of express words to the contrary, Parliament does not intend to:

- retrospectively change rights and obligations;⁹⁶
- infringe personal liberty;⁹⁷
- interfere with freedom of movement;⁹⁸
- restrict access to courts;⁹⁹
- remove the right against self-incrimination;¹⁰⁰
- allow a court to extend the scope of a penal statute;¹⁰¹
- alter criminal law practices based on the principle of a fair trial;¹⁰²
- remove the right to procedural fairness in administrative law;¹⁰³
- interfere with previously granted property rights;¹⁰⁴
- interfere with freedom of speech;¹⁰⁵ and
- interfere with equality of religion.¹⁰⁶

In addition, according to NSW Chief Justice, James Spigelman, ‘the legislative proscription of discrimination on the internationally recognised list of grounds [] could well lead to a presumption that Parliament did not intend to legislate with such an effect’.¹⁰⁷ This demonstrates the way that common law presumptions evolve and are responsive to legislative activity, and thereby indirectly responsive to community expectations.

⁹⁴ *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 42.

⁹⁵ *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 288, 291; de Jersey, above n 93, 10.

⁹⁶ *Newell v The King* (1936) 55 CLR 707, 711; *Maxwell v Murphy* (1957) 96 CLR 261, 267; *Rodway v The Queen* (1990) 169 CLR 515, 518; *Esher v Commonwealth* (1992) 174 CLR 430, 440-1.

⁹⁷ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 493; *Bropho v Western Australia* (1990) 171 CLR 1; *R v Bolton*; *Ex parte Beane* (1987) 162 CLR 514, 523, 532.

⁹⁸ *Commonwealth v Progress Advertising & Press Agency Co Pty Ltd* (1910) 10 CLR 457, 464; *Potter v Minahan* (1908) 7 CLR 277, 305-6; *Melbourne Corporation v Barry* (1922) 31 CLR 174, 206.

⁹⁹ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492; *Magrath v Goldsborough Mort & Co Ltd* (1932) 47 CLR 121, 134.

¹⁰⁰ *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328; *Hamilton v Oades* (1989) 166 CLR 486, 495; *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129.

¹⁰¹ *Krakouer v The Queen* (1998) 194 CLR 202, 223.

¹⁰² *Bishop v Chung Bros* (1907) 4 CLR 1262, 1273-4; *Tassell v Hayes* (1987) 163 CLR 34, 41; *Environmental Protection Authority v Caltex Refinery Co Pty Ltd* (1993) 178 CLR 477.

¹⁰³ *Commissioner of Police v Tanos* (1958) 98 CLR 363 at 395-396; *Annetts v McCann* (1990) 170 CLR 596, 598; *Ainsworth v Criminal Justice Commission* (1992) 199 CLR 564, 575-6.

¹⁰⁴ *Clunies Ross v Commonwealth* (1984) 155 CLR 193, 199-200; *Commonwealth v Haseldell Ltd* (1918) 25 CLR 552, 563.

¹⁰⁵ *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 31; *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 125-7, 130.

¹⁰⁶ *Canterbury Municipal Council v Muslim Alawy Society Ltd* (1985) 1 NSWLR 525, 544.

¹⁰⁷ Spigelman, above n 90, 29.

IV ARGUMENTS ABOUT THE EFFECTIVENESS OF HUMAN RIGHTS PROTECTIONS

A *Experience Shows That Liberties Are Not Sufficiently Protected in Australia*

The starting point for many proponents of a bill of rights is the claim that human rights protections in Australia are currently inadequate. To illustrate the inadequacy, advocates point to recent examples of individuals and classes of people whose rights would have been better protected, either in other countries, or under international treaties if Australia had fully implemented them.

1 *The Liberties of Refugees*

Australia's policy of mandatory detention of asylum-seekers has been criticised both in Australia and overseas. Robertson writes, for example, that Australia's treatment of asylum seekers has 'disgusted the world'.¹⁰⁸

In 1992 the Keating government introduced mandatory detention for asylum-seekers while their right to asylum under the *Refugee Convention*¹⁰⁹ was determined.¹¹⁰ In 1999, the Howard government introduced temporary protection visas that meant that refugees would only be granted protection in Australia for three years at a time.¹¹¹ The Rudd government abolished temporary protection visas in 2008¹¹² but mandatory detention continues, in spite of the fact that it is not an offence to be in Australia without a visa, or to request asylum as a refugee.¹¹³

After inspecting Australia's immigration detention system, the United Nations Working Group on Arbitrary Detention reported that 'a system of mandatory, automatic, indiscriminate and indefinite detention without real access to court challenge is not practiced by any other country in the world'.¹¹⁴ The United Nations Human Rights Committee (UNHRC) has found that Australia's detention of asylum-seekers who arrive by boat breaches arts 9(1) and 9(4) of the ICCPR.¹¹⁵ According to Robertson, the UNHRC has upheld fourteen complaints against Australia, which is the third-largest number of any state.¹¹⁶

¹⁰⁸ Robertson, above n 19, 15.

¹⁰⁹ *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150, (entered into force 22 April 1954).

¹¹⁰ Julian Burnside, 'Foreword' in Linda Briskman, Susie Latham and Chris Goddard, *Human Rights Overboard: Seeking Asylum in Australia* (Scribe, 2008) 11.

¹¹¹ Burnside, above n 110, 11.

¹¹² Chris Evans, *Budget 2008-2009: Rudd Government Scraps Temporary Protection Visas* (13 May 2008) Senator Chris Evans: Minister for Immigration and Citizenship <<http://www.minister.immi.gov.au/media/media-releases/2008/ce05-buget-08.htm>>.

¹¹³ *Migration Act 1958* (Cth) s 196; Burnside, above n 110, 13.

¹¹⁴ Working Group on Arbitrary Detention, no 85 quoted in: Linda Briskman, Susie Latham and Chris Goddard, *Human Rights Overboard: Seeking Asylum in Australia* (Scribe, 2008) 58.

¹¹⁵ Frank Brennan, 'The Law and Politics of Human Rights in an Isolated Country without a Bill of Rights: 2003 Sir Ronald Wilson Lecture' (2003) 30 (5) *Brief* 9, 10.

¹¹⁶ Robertson, above n 19, 39.

In 2001, the Howard government, with Opposition support, excised 4,000 islands from Australia's migration zone in order to prevent asylum-seekers who reached them from accessing Australia's judicial system or benefiting from Australia's obligations under the *Refugee Convention*. Those who arrived by boat and were intercepted by the Coastguard or Navy were sent to Christmas Island or Nauru. The detention centre at Nauru was closed by the Rudd government in February 2008, but the islands remain excised and Christmas Island continues to be used for detention.¹¹⁷ Asylum-seekers who are taken there are deliberately and purposefully denied the rights that are afforded to those who reach the mainland.¹¹⁸

The Australian Council of Heads of Social Work conducted the People's Inquiry into Detention after the government refused to hold an official inquiry. It travelled around Australia, hearing almost 200 verbal accounts and receiving around 200 written submissions from a range of people with experience of immigration detention including former detainees, supporters, medical professionals, former Department of Immigration officials, detention centre employees, migration agents and lawyers.¹¹⁹ The report of the Inquiry makes for harrowing reading. It tells of deaths occurring after boats sank while being intercepted by the Navy,¹²⁰ conditions in detention centres that forced people to steal food to feed their children,¹²¹ assaults,¹²² seriously inadequate physical¹²³ and mental¹²⁴ health care leading to long-term health problems, deaths, violence and widespread self-harm.¹²⁵ The effects of these conditions on children, towards which Australia has obligations not only under the *Refugee Convention*¹²⁶ but also the *Convention on the Rights of the Child*,¹²⁷ were devastating.¹²⁸ The Inquiry also heard evidence concerning ten people who died after their refugee claims were rejected and they were deported back to their home countries.¹²⁹

The High Court has not found any constitutional basis on which to impugn Commonwealth laws providing for the mandatory detention of asylum-seekers in Australia.¹³⁰ This is even the case if conditions of detention are not humane,¹³¹ and the

¹¹⁷ *Detention on Christmas Island* (2009) Amnesty International Australia
<<http://www.amnesty.org.au/refugees/comments/20442/>> at 23 July 2009.

¹¹⁸ *Detention on Christmas Island* above n 117.

¹¹⁹ Briskman, Latham and Goddard, above n 114, 19.

¹²⁰ *Ibid* 23.

¹²¹ *Ibid* 118-120.

¹²² *Ibid* 171-184.

¹²³ *Ibid* 122-132.

¹²⁴ *Ibid* 132-157.

¹²⁵ *Ibid* 158-161, 167-171.

¹²⁶ *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150, (entered into force 22 April 1954).

¹²⁷ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, (entered into force 2 September 1990).

¹²⁸ Briskman, Latham and Goddard, above n 114, 164-215.

¹²⁹ *Ibid* 233-253.

¹³⁰ *Re Woolley & Anor; Ex parte Applicants M276/2003 (by their next friend GS)* (2004) 225 CLR 1.

¹³¹ *Behrooz v Secretary Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486.

length of detention is indefinite.¹³² Yet while the High Court has repeatedly upheld provisions of the *Migration Act 1958* (Cth), successive governments have sought to restrict asylum-seekers' access to courts. For example, in 1992, fifteen asylum seekers who had been in detention for three years applied to the Federal Court to be released. Two days before their case was to be heard, the government introduced legislation taking away the Court's power to order their release.¹³³

In spite of the high level of media and political interest that this issue generates, neither mainstream political party as indicated an intention to restore the rights of people who seek asylum in Australia, and the High Court has proved unable to do so. As a result, proponents of a bill of rights claim that current protections are inadequate.

2 The Liberties of Terrorism Suspects

Another example of legislation that is inconsistent with international human rights standards is Australia's anti-terrorism laws. These comprise a series of measures, the first of which were introduced by the federal government in 2002.¹³⁴ They were supplemented by the *Anti-Terrorism Act (No.2) 2005* (Cth) and similar State legislation.¹³⁵ The measures have been criticised because they 'directly and explicitly remove or interfere with a number of individual rights'.¹³⁶ The concern is that by enacting these laws the government has given away too many of the very liberties it is seeking to protect.

Some of the provisions that have attracted particular concern include: changes to the onus of proof,¹³⁷ the banning of organisations and the extension of the definition of 'terrorist organisation',¹³⁸ the revival of sedition laws,¹³⁹ the requirement for lawyers to obtain security clearances before representing clients,¹⁴⁰ restrictions on the right of suspects to consult lawyers,¹⁴¹ the extension of inchoate liability to a variety of preparatory offences,¹⁴² expanding the definition of a terrorist act to one that relies heavily on intention,¹⁴³ provision of different rules for trials involving security issues,¹⁴⁴

¹³² *Al-Kateb v Godwin and Others* (2004) 219 CLR 562.

¹³³ Briskman, Latham and Goddard, above n 114, 60.

¹³⁴ *Security Legislation Amendment (Terrorism) Act 2002* (Cth); *Suppression of the Financing of Terrorism Act 2002* (Cth).

¹³⁵ *Terrorism (Police Powers) Act 2002* (NSW); *Preventative Detention Act 2005* (Qld); *Terrorism (Preventative Detention) Act* (SA); *Terrorism (Preventative Detention) Act 2005* (Tas); *Terrorism (Community Protection) Act 2003* (Vic); *Terrorism (Preventative Detention) Act 2006* (WA); *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT).

¹³⁶ Paul Fairall and Wendy Lacey, 'Preventative Detention and Control Orders Under Federal Law: The Case for a Bill of Rights' (2007) 31 *Monash University Law Review* 1072, 1072.

¹³⁷ Williams, above n 2, 27-30.

¹³⁸ *Criminal Code Act 1995* (Cth) s 102.1(1); Williams, above n 2, 27-30.

¹³⁹ *Criminal Code Act* s 80.2; Williams, above n 2, 27-30.

¹⁴⁰ *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ss 39,46; Wendy Lacey, 'Restoring the Rule of Law Through a National Bill of Rights' (2008) 84 *Precedent* 28, 28.

¹⁴¹ *Criminal Code Act* s 105.37; Lacey, above n 140, 28.

¹⁴² *Criminal Code Act* s 100.4; Fairall and Lacey, above n 136, 1075.

¹⁴³ *Criminal Code Act* s 100.1; Fairall and Lacey, above n 136, 1075.

¹⁴⁴ Fairall and Lacey, above n 136, 1075.

changes to discovery rules that erode a person's right to see the evidence against them,¹⁴⁵ and restrictions on the availability of bail.¹⁴⁶

The two measures that have perhaps attracted the greatest criticisms are preventative detention orders (PDOs) and control orders. PDOs allow a person who is suspected of involvement with terrorism to be detained for up to 48 hours under a Commonwealth law or 14 days under a State law.¹⁴⁷ When an order is made, the detained person is not permitted to disclose that fact to others, or to disclose the period for which they have been detained, and if they do so, it is an offence for the person who receives the information, to pass it on.¹⁴⁸ Furthermore, proceedings in relation to a PDO, or to the treatment of a person in relation to a PDO, cannot be brought in a State court or the Administrative Appeals Tribunal while the Order is in force.¹⁴⁹ Fairall and Lacey describe PDOs as an 'anathema to liberal democracy' because they allow for the detention of individuals by executive order without there necessarily being an allegation of criminality.¹⁵⁰ They maintain that the government's claim that PDOs are necessary to prevent harm to the public represents a slippery slope if accepted, because most forms of criminal behaviour are harmful to the public.¹⁵¹

Control orders can be made where a court is satisfied, on the balance of probabilities, that making an Order would 'substantially assist in preventing a terrorist act', or that the subject 'has provided training to, or received training from, a listed terrorist organisation'.¹⁵² They may be imposed for up to 12 months and may require a person to comply with a range of conditions such as staying at or away from a place, wearing a tracking device, not communicating with certain people and not using communications technology.¹⁵³

The constitutionality of the Control Order provisions was challenged in *Thomas v Mowbray*¹⁵⁴ where the plaintiff argued that the power to restrain liberty on the basis of possible future conduct was an exercise of non-judicial power and therefore could not be made by a Chapter III court.¹⁵⁵ The majority held, however, that the relevant provisions were supported by the defence power and did not breach Chapter III of the

¹⁴⁵ Ibid 1075.

¹⁴⁶ Ibid 1075.

¹⁴⁷ *Criminal Code Act* s 105.9; *Terrorism (Police Powers) Act 2002* (NSW) s 11(3)(a); *Preventative Detention Act 2005* (Qld) s 12(2); *Terrorism (Preventative Detention) Act* (SA) s 10(5)(b); *Terrorism (Preventative Detention) Act 2005* (Tas) s 9(2); *Terrorism (Community Protection) Act 2003* (Vic) s 13G(1); *Terrorism (Preventative Detention) Act 2006* (WA) s 3(3); *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) s 8.

¹⁴⁸ *Criminal Code Act* ss 105.41(1), 105.41(6).

¹⁴⁹ *Criminal Code Act* ss 105.51.

¹⁵⁰ Fairall and Lacey, above n 136, 1075.

¹⁵¹ Ibid 1075.

¹⁵² *Criminal Code Act* s 104.4(1)(c).

¹⁵³ *Criminal Code Act* Division 4, s 104.5(3).

¹⁵⁴ (2007) 237 ALR 194

¹⁵⁵ *Australian Constitution*, Chapter III; *R v Kirby & Others; Ex parte Boilermakers' Society of Australia* (*Boilermakers' Case*) (1956) 94 CLR 254; *Thomas v Mowbray* (2007) 237 ALR 194, 204-5.

Constitution.¹⁵⁶ Fairall and Lacey claim that control orders cannot be reconciled with international human rights such as rights to personal liberty and security, freedom of movement, privacy, and freedom of assembly and association.¹⁵⁷ They further claim that in cases such as *Thomas v Mowbray* the High Court has relaxed the standard concerning what is deemed compatible with Chapter III, and in so doing is altering the nature of the separation of powers, which has historically been a ‘vital constitutional safeguard’.¹⁵⁸ Consequently, they maintain that the legislative and judicial arms are both contributing to the erosion of liberties in Australia.

3 The Liberties of Indigenous Australians

According to the *Bringing Them Home Report*, ‘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’ and ‘[i]n that time not one Indigenous family has escaped the effects of forcible removal’.¹⁵⁹ The vast majority of people who were removed as children have been unable to obtain redress through the courts, however in *Trevorrow v State of South Australia*,¹⁶⁰ the South Australian Supreme Court awarded damages to an Aboriginal man who was taken unlawfully from his parents when he was 13 months old. His mother had taken him to Adelaide Children’s Hospital with gastroenteritis, and when he recovered he was given to a white family. First the Hospital and then the Aborigines Protection Board actively prevented her from finding him. The Court heard that he had displayed signs of emotional distress including anxiety and depression throughout his childhood and into adulthood. He died less than year after the judgment, at the age of 51.¹⁶¹

Just as in the case of refugees and terrorism suspects, the Stolen Generations have found no assistance in the Constitution. In 1997 the High Court held that a law which enabled Aboriginal children to be forcibly removed from their communities was not unconstitutional.¹⁶²

¹⁵⁶ *Thomas v Mowbray* (2007) 237 ALR 194 at 203 (Gleeson CJ, 236 (Gummow, Crennan JJ), 316 (Hayne J), 352 (Callinan J), 371 (Heydon J).

¹⁵⁷ Fairall and Lacey, above n 136, 1087.

¹⁵⁸ *Ibid* 1087. Kirby J would appear to agree. In a strong dissent in *Thomas v Mowbray* (2007) 237 ALR 194, 293 he stated:

To allow judges to be involved in making such orders, and particularly in the one-sided procedure contemplated by Div 104, involves a serious and wholly exceptional departure from basic constitutional doctrine unchallenged during the entire history of the Commonwealth. It goes far beyond the burdens on the civil liberties of alleged communists enacted, but struck down by this court, in the Communist Party case. Unless this court calls a halt, as it did in that case, the damage to our constitutional arrangements could be profound.

¹⁵⁹ 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* (April 1997), Chapter 2.

¹⁶⁰ *Trevorrow v State of South Australia (No.5)* (2007) 98 SASR 285.

¹⁶¹ Julian Burnside, *On Privilege* (Melbourne University Press, 2009) 32.

¹⁶² *Kruger v The Commonwealth* (1997) 190 CLR 1 cited in: Williams, above n 39, 61.

Today Indigenous Australians have higher imprisonment rates, lower life expectancy and higher suicide rates than the general population.¹⁶³ The Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse reported in 2007 that 'poor health, alcohol and drug abuse, unemployment, gambling, pornography, poor education and housing, and a general loss of identity and control have contributed to violence and to sexual abuse' in Aboriginal communities which is 'serious, widespread and often unreported'.¹⁶⁴ In addition, Williams claims that mandatory sentencing in the Northern Territory discriminates against Indigenous people because it disproportionately affects them and leads to harsh sentences being imposed for minor offences.¹⁶⁵ Proponents maintain that all these inequalities and injustices could be relieved by a bill of rights.¹⁶⁶

4 *Problems Dealing with Government Departments and Agencies*

The Consultation Committee for a Proposed WA Human Rights Act reported that a large number of people believe government departments and agencies demonstrate a lack of respect for their rights and liberties.¹⁶⁷ Some of these complaints involved treatment during the delivery of services to, for example, family members of hospital patients, elderly people in nursing homes, families involved in the child protection system, land owners and people who had had land resumed, public service employees, ratepayers, mental health care consumers, and users of the criminal justice system.¹⁶⁸ Other people said that they had difficulty accessing services due to language difficulties, dyslexia or intellectual disability.¹⁶⁹ The Committee heard that Aboriginal Australians, disabled people and Muslims suffer discrimination from government and the broader community.¹⁷⁰ Poor availability of services, especially in regional areas, was also considered by many to prevent them from enjoying their rights. Of particular concern was the lack of mental health services, and impeded access to the justice system due to a lack of lawyers in country areas, and the practice of sentencing being carried out by Justices of the Peace rather than magistrates.¹⁷¹ As previously mentioned, the Committee recommended that a statutory bill of rights be enacted in response to these concerns.¹⁷²

B *Critics' Responses*

The claim that experience reveals inadequacies in Australia's protection of liberties is disputed by most critics of a bill of rights. Some argue that a bill of rights is

¹⁶³ Robertson, above n 19, 15.

¹⁶⁴ Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, NT, *Ampe Akelyernemane Meke Mekarle 'Little Children are Sacred'* (2007) <http://www.inquirysaac.nt.gov.au/report_summary.html>

¹⁶⁵ Williams, above n 2, 20-21.

¹⁶⁶ Robertson, above n 19, 15; Williams, above n 2, 20-21.

¹⁶⁷ Consultation Committee for a Proposed Human Rights Act, above n 21.

¹⁶⁸ Ibid 23-26.

¹⁶⁹ Ibid 24-25.

¹⁷⁰ Ibid 24-5.

¹⁷¹ Ibid 25-6.

¹⁷² Ibid Recommendation 1.

unnecessary because there are no major problems of this type in Australia. For example, Moens concedes that if Parliament regularly and seriously ‘violated rights and freedoms’ through the laws it passed then a bill of rights ‘would presumably become necessary or justifiable’ but he asserts that in fact, ‘severe abuses of human rights by the legislature are few’.¹⁷³ There is obviously some validity to this argument inasmuch as the world’s most serious human rights abuses have not occurred in Australia. However, there is no clear line between a severe and a moderate abuse, or regular abuses as opposed to occasional abuses. Furthermore, the predicament of refugees and Indigenous Australians demonstrate that international human rights standards are not always met in Australia. It is no doubt little consolation for a person who happens to be Aboriginal, or an asylum seeker, for example, to know that the oppression they are suffering from, is not widespread.

Other critics appear to find it acceptable that liberties are imperfectly respected. For example, Anderson claims that cases such as Cornelia Rau’s and Vivian Alvarez’s¹⁷⁴ should not be taken to indicate a ‘structural flaw’ because a perfect system will never exist and isolated cases of administrative failure are inevitable.¹⁷⁵ The problems with Australia’s treatment of refugees extend far beyond these two cases, however, as the discussion in the previous section demonstrates. Furthermore, Burnside points out that it is far easier to believe that the liberties of our family and friends should be respected, than the liberties of those we fear, hate or simply do not relate to.¹⁷⁶ As a result, the claim that liberties are adequately respected may simply reveal the location of our blind spots.¹⁷⁷

1 *Past Mistakes Are Being Remedied Through the Present System*

Other critics point out that some of the deficiencies identified by proponents have been rectified by democratic means, or via the common law. For example, Carr maintains that Mohamed Haneef, who was detained under anti-terrorism laws, was vindicated by courts in the common law tradition, and that the Coalition lost government partly because of its treatment of refugees.¹⁷⁸ Similarly, Leeson points out that the potentially indefinite detention of unlawful non-citizen, Al-Kateb, was ended by the government as a result of political pressure.¹⁷⁹ It might also be argued that the federal government is now making a concerted effort to improve conditions in remote Aboriginal communities, and reduce the life expectancy gap between black and white Australians as a result of political, and not legal, pressures.

¹⁷³ Gabriel A Moens, ‘The Wrongs of a Constitutionally Entrenched Bill of Rights’ in MA Stephenson and Clive Turner (eds), *Australia: Republic or Monarch? Legal and Constitutional Issues* (University of Queensland Press, 1994) 247.

¹⁷⁴ Australian citizens who were detained in immigration detention centres and in the case of Alvarez, deported. After these cases came to light the government investigated and referred 248 cases of wrongful detention to the Ombudsman, according Briskman, Latham and Goddard, above n 114, 305.

¹⁷⁵ Alan Anderson, ‘The Rule of Lawyers’ (2005) 21 (4) *Policy* 34, 36.

¹⁷⁶ Burnside, above n 161, 25.

¹⁷⁷ Ibid 25-6.

¹⁷⁸ Bob Carr, ‘Bill of Rights is the Wrong Call’ *The Australian* (Sydney), 9 May 2009.

¹⁷⁹ Leeson, above n 66, 38.

However, according to Burnside, improvements in refugee policy, which have in any case, not alleviated all the concerns, came too late for many: 19 people have died in immigration detention centres in the past 10 years and many more have developed physical and mental illnesses from which they will never fully recover.¹⁸⁰ In addition, although Parliament has apologised to the Stolen Generations the government has refused to provide compensation. Therefore it appears that citing individual cases, such as Haneef's and Al-Kateb's, where the political system has ultimately brought about a resolution, does not answer the whole of the argument. Furthermore, proponents are justified in asking whether a bill of rights could have caused the government to respond sooner and how many lives could have been saved if it had.

2 A Bill of Rights May Not Have Prevented the Identified Injustices

Some critics acknowledge that international human rights standards are sometimes infringed in Australia, but argue that a statutory bill of rights would not prevent this from occurring. In a statutory model, the Parliament determines the provisions of the bill of rights, and also has the ability to determine that a given piece of legislation should operate notwithstanding its inconsistency with the bill of rights.¹⁸¹ This means that where legislation that infringes rights is nevertheless popular, or at least not unpopular, with the electorate, the presence of the bill of rights has no effect on its passing.

Former Justice of the High Court, Michael McHugh has said that a statutory bill of rights such as the *ACT Act* would probably not have been sufficient to enable the High Court to find that the indefinite detention of Al-Kateb was unlawful.¹⁸² The *ACT Act* provides that '[s]o far as it is possible to do so consistently with its purpose, a Territory law must be interpreted in a way that is compatible with human rights'.¹⁸³ According to McHugh, Al-Kateb's right to freedom from arbitrary detention would have been inconsistent with the purpose of the *Migration Act 1958* (Cth), which was to detain irregular entrants until they were deported or given a visa.¹⁸⁴ The immigration reforms of the last decade have been undertaken largely with public support, so this would have greatly limited the effect that a statutory bill of rights could have had on them.

In a similar way, Anderson argues that although Australia's terrorism legislation is 'legislative error' in the eyes of civil libertarians, it has the support of the majority of the community, so a statutory bill of rights would not have prevented it being passed.¹⁸⁵ The *ACT Act* prohibits arbitrary detention¹⁸⁶ and provides for prompt judicial review of detention,¹⁸⁷ subject 'only to such reasonable limits set by Territory laws that can be

¹⁸⁰ Burnside, above n 110, 21.

¹⁸¹ See for example *Human Rights Act 2004* (ACT) s 40B(2), Part 5; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 31; *Human Rights Act 1998* (UK) s 19(1).

¹⁸² Michael McHugh, 'A Human Rights Act, the Courts and the Constitution' (Speech delivered at the Human Rights Commission, Location, 5 March 2009) 30-3.

¹⁸³ *Human Rights Act 2004* (ACT) s 30.

¹⁸⁴ McHugh, above n 182, 30-3.

¹⁸⁵ Anderson, above n 175, 36.

¹⁸⁶ *Human Rights Act 2004* (ACT) s 18(1).

¹⁸⁷ *Human Rights Act 2004* (ACT) s 18(4)(a), (6).

demonstrably justified in a free and democratic society'.¹⁸⁸ In spite of this, Brennan writes that the terrorism legislation is only 'a little more protective of civil liberties' than the legislation of States that lack a bill of rights.¹⁸⁹ When the federal government sought the States' co-operation for uniform terrorism legislation, the ACT Human Rights and Discrimination Commissioner advised the Chief Minister that the proposed legislation was inconsistent with the *ACT Act* and that she was unable to assess the reasonableness of that inconsistency because she did not have access to national security briefings. The ACT Parliament went on to pass the *Terrorism (Extraordinary Powers) Act 2006* (ACT), in the same form as the other States, with the sole exception of precluding the preventative detention of people aged 16-18 years.¹⁹⁰ Brennan concedes that this variation may have been due to the influence of the *ACT Act*, but if so, it is a very minor effect given the extent of the inconsistency between the two Acts.¹⁹¹

Critics have also questioned the effectiveness of the *Victorian Act*. Leaser examined how the issues that were presented to the Victorian Human Rights Consultation¹⁹² have been affected by the passage of the *Victorian Act*. He found that the *Victorian Act* addressed concerns about: retrospective criminal legislation; torture and cruel, inhuman or degrading treatment; freedom of speech; and humane treatment in detention.¹⁹³ In regards to this last issue, however, there is documented evidence that the standard is still being transgressed.¹⁹⁴ Of the other concerns put to the Committee, the gaps identified in discrimination and privacy laws remain, due process and family rights remain unprotected, and procedures concerning the presence of male officers during female prisoners' medical appointments have not changed.¹⁹⁵ Several other concerns were dealt with by legal and regulatory changes prior to the enactment of the *Victorian Act*, including changes to regulations governing searches of female prisoners, and to the accessibility of Electoral Commission services for people with disabilities and homeless people.¹⁹⁶ Overall, Leaser maintains that the *Victorian Act* has so far, not made a discernible difference to most of the problems the Committee identified.¹⁹⁷

The argument that a bill of rights will not prevent governments from restricting liberties is less relevant to an entrenched bill of rights. Although the Constitution can be amended with public support, Australians are notoriously reluctant to authorise changes. A constitutional bill of rights may, therefore, have prevented successive governments from introducing mandatory detention for asylum seekers, even if the community was generally supportive of mandatory detention. This cannot be stated with certainty however, because constitutional provisions require judicial interpretation, and the judiciary is not immune to changes in cultural attitudes and beliefs. Historically, judges

¹⁸⁸ *Human Rights Act 2004* (ACT) s 28.

¹⁸⁹ Frank Brennan, *Getting the Balance Right After the 2020 Summit* (26 May 2008) Eureka Street <<http://www.eurekastreet.com.au/article.aspx?aeid=7284>>.

¹⁹⁰ Brennan, above n 189.

¹⁹¹ Brennan, above n 189.

¹⁹² See Human Rights Consultation Committee, above n 22.

¹⁹³ Leaser, above n 66, 57-8.

¹⁹⁴ *Ibid* 58.

¹⁹⁵ *Ibid* 58-9.

¹⁹⁶ *Ibid* 58-60.

¹⁹⁷ *Ibid* 32.

in countries with constitutional bills of rights have sometimes interpreted them in a way that allowed the oppression of minorities, when the dominant culture was supportive of that oppression.¹⁹⁸

C *The Political and Legal Systems Are Capable of Protecting Liberties*

Critics of a bill of rights maintain that Australia's current political and constitutional system is capable of protecting liberties.

1 *Australia Has a Unique Historical and Political Context*

Although Australia shares many characteristics with other Western and common law countries, critics of a bill of rights point out that there is much about Australia's socio-legal environment that is unique. For example, rights were entrenched in the constitutions of the United States, France and South Africa following political upheaval which required the restoration of trust and the rule of law.¹⁹⁹ A bill of rights was desirable for Hong Kong because it is a relatively recently formed democracy where the risk of judges abusing their power is of less concern than fear of the executive will.²⁰⁰ Meanwhile, the *UK Act* arose, in part, from a desire that the remedies citizens could obtain from British courts would be as adequate as those they could receive from the European Human Rights Commission.²⁰¹ Australia, on the other hand, is not linked to international regimes in the way that the United Kingdom is linked to the European Union, and it has a history and tradition of stable, democratic governance and adherence to the rule of law, so the concerns that applied to the United States, South Africa and Hong Kong when their bills of rights were adopted, are not relevant here.

2 *Australia's Constitutional System Contains Checks and Balances*

Australia's Constitution does not guarantee a wide array of personal rights, but critics point out that Australian constitutional law does provide important checks on executive and legislative power. As in other common law countries, the Australian Constitution and common law are understood to be the source of the state's power.²⁰² This means that constitutional guarantees restrict the Commonwealth's power, rather than being subject to it.²⁰³ This is a fundamental difference between constitutional rights and international human rights.²⁰⁴ The latter are frequently expressed as being subject to limits imposed by the law of State parties.²⁰⁵ For example, in the ICCPR the 'inherent

¹⁹⁸ James Allan, 'A Defence of the Status Quo' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Human Rights: Instruments and Institutions* (Oxford University Press, 2003) 183.

¹⁹⁹ John Hatzistergos, 'A Charter of Rights or a Charter of Wrongs?' (Speech delivered at the Sydney Institute, Parliament House Theatre, 10 April 2008).

²⁰⁰ Allan, above n 198, 176.

²⁰¹ Hatzistergos, above n 199, 123-4.

²⁰² Zimmermann, Augusto, 'Eight Reasons Why Australia Should Not Have a Federal Charter of Rights' (2008/09) 79 *National Observer* 34, 35-6.

²⁰³ *Australian Capital Television v Commonwealth* (1992) 177 CLR 106 cited in: Moens, above n 173, 252.

²⁰⁴ Moens, above n 173, 253.

²⁰⁵ *Ibid* 253.

right to life', the 'right to liberty and security of the person', the 'right to liberty of movement', 'freedom to manifest one's religion or beliefs', the 'right to freedom of expression', the 'right of peaceful assembly', and the 'right to freedom of association' are all subject to the domestic law of State parties.²⁰⁶ The primacy of constitutional law in Australia, on the other hand, means that the checks and balances established by the Constitution are powerful.

The federal system established by the Constitution is, in theory, one such check.²⁰⁷ By restricting the legislative powers of the federal government and submitting oversight of the division of powers to the High Court, the Constitution reduces the capacity of either level of government to exercise power arbitrarily.²⁰⁸ However, this check is now limited due to the extent to which the High Court has allowed the Commonwealth to accumulate legislative power at the expense of the States. The High Court's method of characterising the s 51 heads of powers and its reluctance to find mutual exclusiveness in them has destroyed the States' financial independence and aggregated financial and political power in the federal government.²⁰⁹ In addition, under the external affairs power²¹⁰ the Commonwealth can legislate in any area in which it has ratified an international treaty, regardless of whether it concerns a matter that falls within s 51 or not.²¹¹ This has given the Commonwealth sole legislative power over increasingly large areas.²¹² As a result, the argument that federalism limits arbitrary government is no longer as strong as it once was.

Another relevant feature of Australia's constitutional system is responsible government. This requires that ministers be Members of Parliament and therefore be accountable to Parliament, and ultimately to the electorate.²¹³ Sir Owen Dixon called responsible government the 'ultimate guarantee of justice and individual rights',²¹⁴ and the framers of the Constitution believed that, together with the common law, it was sufficient to guarantee individual liberty.²¹⁵ Some modern critics of bills of rights maintain that this is still the case today.²¹⁶

It is widely recognised, however, that responsible government now operates in a diluted form. There are two reasons for this, which are relevant to the bill of rights debate. Firstly, the chain of accountability from government departments to Parliament, via ministers, is questionable because departments are now vast bureaucracies employing

²⁰⁶ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, (entered into force 23 March 1976) arts 6,9,12,18,19,21, 22.

²⁰⁷ This is acknowledged by proponents. See for example: Williams, above n 39, 52.

²⁰⁸ Allan, above n 198, 180; Moens, above n 173, 248.

²⁰⁹ Robert Menzies, *Central Power in the Australian Commonwealth: An Examination of the Growth of Commonwealth Power in the Australian Federation* (Cassell, 1967) 3; Aroney, above n 10, 252.

²¹⁰ *Australian Constitution* s 51(xxix).

²¹¹ *Commonwealth v Tasmania* (1983) 158 CLR 1; Sir Harry Gibbs, 'Decline of Federalism' (1994) 18 *University of Queensland Law Journal* 1, 5.

²¹² Gibbs, above n 211, 5.

²¹³ Blackshield and Williams, above n 12, 563.

²¹⁴ Sir Owen Dixon in speech to American Bar Association, 'Jesting Pilate' in August 1942, cited in: Menzies, above n 209, 220.

²¹⁵ Williams, above n 10.

²¹⁶ Moens, above n 173, 248.

many thousands of people, for whose actions a minister cannot be responsible in any meaningful way.²¹⁷ There are also a growing number of statutory corporations that carry out various public functions and are not under the control of ministers.²¹⁸ Secondly, the House of Representatives, and sometimes the Senate as well, is so completely controlled by the party that forms the Executive that Parliament is increasingly seen as the agent of the Executive, rather than a check on it.²¹⁹ As a result, ministers now rarely resign when called upon to do so by the Parliament, and it is no longer feasible for Parliament to dismiss the Executive.²²⁰ As a result, the public is increasingly forced to trust the judgment and processes of the party room, rather than Parliament.²²¹ Responsible government is, in reality, far from the limiting force that the Constitutional framers believed it would be.

Allan identifies the strict requirements that must be met before the Constitution can be altered, as another check on government.²²² Section 128 of the Constitution ensures that a proposal must pass through one or both Houses of Parliament and then be put to electors in a referendum, where it must achieve the assent of the majority of voters in the majority of States, as well as of the overall majority. Since Federation, only 8 out of 44 proposals that have been put to the Australian people have been passed.²²³ Allan claims that the high hurdle is a valuable protection and a significant difference between Australia on the one hand and the United States and Canada on the other.²²⁴

While it is certainly true that the Constitution is hard to change, the value of that is limited because, as discussed earlier, the Constitution contains very few explicit guarantees of liberties. Highly oppressive laws could therefore, be passed by Parliament without any constitutional change. The value in the strict requirements for constitutional alteration would therefore appear to be largely limited to extreme situations, such as for example, where a government sought to change the structure or system of government.

3 *Australia's Bicameral System Is a Protection against Arbitrary Governance*

The single transferable vote system used to elect candidates to the Senate means that it is unusual for the government to also hold a majority in the Senate. This can be beneficial because it makes the passage of bills more difficult and strengthens the control of the legislature over the executive.²²⁵ For Allan, it is therefore an important means of limiting executive power and a safeguard against arbitrary governance. Brennan points out that the presence of minor parties in the Senate also helps to protect

²¹⁷ Blackshield and Williams, above n 12; Geoffrey Robertson, *Freedom, the Individual and the Law* (Penguin, 6th ed, 1989) 388.

²¹⁸ JR Archer, 'The Theory of Responsible Government in Australia' in Alastair Davidson and Roger D Spegele (eds), *Rights, Justice and Democracy in Australia* (Longman Cheshire, 1991) 228.

²¹⁹ Blackshield and Williams above n 12, 564; John Toohey, 'A Government of Laws and Not of Men?' (1993) 4 *Public Law Review* 158, 163; Brennan, above n 189.

²²⁰ Blackshield and Williams above n 12, 564; Archer, above n 218, 226.

²²¹ Brennan, above n 189.

²²² Allan, above n 198, 180.

²²³ Ibid.

²²⁴ Ibid.

²²⁵ Ibid 178.

minorities from the will of the majority, because the ‘political niche’ of minor parties is often linked to individual and minority rights.²²⁶ Furthermore, the bicameral system itself plays a part in diffusing political power and maximising opportunities for democratic input.²²⁷

D *Australia’s Political and Legal Systems Are Flawed or Inadequate*

In reply to the above arguments, proponents of a bill of rights claim that the reason that international human rights have been able to be infringed in Australia is that its constitutional and legal arrangements are inadequate.

1 *Immunities Do Not Reach Far Enough*

Firstly, as discussed earlier, Australia’s constitutional guarantees place limits on what the government may do, but do not require it to act or to refrain from inaction.²²⁸ For some advocates this is insufficient, particularly because many economic, social and cultural rights in international law require positive interventions by government in order for them to be realised.²²⁹

2 *International Human Rights Treaties Are Not Widely Implemented*

Although Australia has ratified most of the major United Nations human rights treaties and a number of the optional protocols, successive governments have failed to systematically implement the treaties they have signed.²³⁰ Some proponents claim that a bill of rights would be beneficial because it would implement the remainder of Australia’s treaty obligations.²³¹

For critics, however, implementing human rights treaties on a mass-scale through a bill of rights would not be a positive development. The international human rights system seeks to hold governments accountable to external, internationally agreed-upon standards.²³² Some critics have argued that rather than looking to external standards, Australia’s law should be focussed on its own unique circumstances and needs.²³³ In 2000 and 2009 the UNHRC recommended that Australia adopt a more ‘comprehensive legal framework for the protection of Covenant rights at the Federal level’, including provisions for remedies to be awarded for breaches and training programs for the judiciary.²³⁴ Shearer claims that the UNHRC’s desire for Australian courts to submit to its own authority has caused it to ignore Australia’s needs and circumstances in favour

²²⁶ Brennan, above n 189.

²²⁷ Hatzistergos, above n 199.

²²⁸ Williams, above n 39, 64.

²²⁹ Ibid 64.

²³⁰ Charlesworth, Byrnes and McKinnon, above n 3, 20-21.

²³¹ Fairall and Lacey, above n 136, 1094; Williams, above n 10.

²³² Charlesworth, Byrnes and McKinnon, above n 3, 15-6.

²³³ Ivan Shearer, ‘The Australian Bill of Rights Debate: the International Law Dimension’ (Paper presented at The Samuel Griffith Society: Twenty-first Conference, North Adelaide, 28 August 2009).

²³⁴ Review of Australia’s Fifth Periodic Report cited in: Shearer, above n 233.

of a standardised approach, namely a bill of rights.²³⁵ Thus Shearer reminds proponents that a bill of rights is not the only means by which international treaties can be implemented.

3 *There Are Weaknesses in Statute and Common Law*

Proponents claim that the common law cannot securely protect rights because all common law principles and presumptions can be overridden by Parliament. Some scholars claim that there is a convention based on constitutionalism and the rule of law that Parliament 'does not use its unlimited sovereign power of legislation in an oppressive or tyrannical way'.²³⁶ However, there is still a great deal of legislative freedom that falls short of what may be characterised as tyrannical but is nevertheless oppressive enough that it would be prevented by an entrenched bill of rights.²³⁷

Furthermore, even when the common law is not overridden by legislation, it may be less supportive of human rights than specific statutory protections are. Robertson writes that one reason that the *UK Act* was enacted with cross-party support was that the United Kingdom was embarrassed by cases in the European Human Rights Commission that revealed gaps in United Kingdom statute and common law, as well as by Privy Council decisions for Commonwealth nations who had bills of rights, which showed that people in those former colonies had more rights than people in the United Kingdom.²³⁸

4 *Constitutional and Statutory Rights Are Not Universal*

An addition problem identified by proponents is that neither the constitutional guarantees, nor the rights provided by statutes, apply universally to residents of Australia. Some constitutional rights do not extend to those in the Territories, including the guarantee of a trial by jury and possibly the guarantee of religious freedom.²³⁹ In addition, non-citizens have very limited protection under the Constitution, and this factor has been relevant to the High Court in its decisions to uphold legislation allowing for the detention of asylum seekers.²⁴⁰ Thirdly, the Constitution does not protect people from the actions of other individuals or corporations.²⁴¹ Gaps and inconsistencies also exist in legislation, with different jurisdictions providing different levels of protection in different areas. Even anti-discrimination legislation, which is widely adopted and endorsed, does not prohibit all forms of discrimination. For example, it does not deal with systemic discrimination and there are exceptions concerning the grounds upon which race or sex discrimination can be based.²⁴²

²³⁵ Shearer, above n 233.

²³⁶ Geoffery Marshall, *Constitutional Conventions* (Clarendon, 1984) 9 cited in: Toohey, above n 219, 161.

²³⁷ Toohey, above n 219, 163.

²³⁸ Robertson, above n 19, 123-5.

²³⁹ Williams, above n 39, 61.

²⁴⁰ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 cited in: Williams, above n 39, 61.

²⁴¹ Williams, above n 39, 61.

²⁴² Williams, above n 10.

5 *Guarantees without Remedies Are Insufficient*

Robertson points out that, legally speaking, a ‘right’ that cannot be enforced is not really a right.²⁴³ Enforcement requires laws that empower courts to provide remedies and injunctions.²⁴⁴ An immunity and an enforceable right may both produce the same environment when they are respected, but when a breach occurs, the results are very different because no remedy flows from the breach of an immunity.²⁴⁵ Thus, the High Court has the power to declare offending legislation *void ab initio*, and where actions conducted under the unconstitutional law are also tortious or otherwise contrary to law, damages may be obtained in common law, but for the breach of constitutional immunity, there is no remedy.²⁴⁶ Proponents find this unsatisfactory because obtaining redress through tort or contract law is frequently complicated and difficult, sometimes requiring a person to undertake more than one action.²⁴⁷ At other times there may not be a relevant common law action and the person will have no redress.²⁴⁸

6 *Dominant Methods of Constitutional Interpretation Are Not Conducive to the Fostering of Liberties*

Some scholars have criticised the High Court’s methods of constitutional interpretation, claiming that it has contributed to the erosion of human rights in Australia, and therefore to the need for a bill of rights. According to Lacey, the Court has ‘treat[ed] the text of the Constitution as the foundation of the rule of law in Australia, rather than the supreme manifestation of the rule of law that rests on a broader, but less explicit, foundation’.²⁴⁹ This has led to it to construe Commonwealth’s powers widely, and governments have taken advantage of that and used their powers to their fullest extent, legislating in a way that has eroded rights.²⁵⁰ When legislation is challenged, the majority of the High Court has compared it only to the Constitutional text, which for Lacey and Fairall has undermined the assumptions of Chapter III and the rule of law upon which the Constitution rests.²⁵¹

There is no indication that the High Court is likely to change its approach in the near future, however. Furthermore, the approach suggested by Lacey and Fairall would be strongly opposed by critics of a bill of rights who are concerned with upholding democracy, and are reluctant to hand more law-making power to the judiciary.

²⁴³ Robertson, above n 19, 41-2.

²⁴⁴ Ibid 42.

²⁴⁵ Williams, above n 2, 65.

²⁴⁶ *James v Commonwealth* (1939) 62 CLR 339, 362 re-affirmed in: *Kruger v Commonwealth* (1997) 146 ALR 126; Williams, above n 39, 65.

²⁴⁷ Williams, above n 39, 66.

²⁴⁸ Ibid.

²⁴⁹ Lacey, above n 140, 29.

²⁵⁰ Ibid 29-30.

²⁵¹ Ibid 30; Fairall and Lacey, above n 136, 1094.

V ARGUMENTS ABOUT THE IMPACT OF A BILL OF RIGHTS ON DEMOCRACY

Critics and most proponents of a bill of rights agree that the enactment of a bill of rights would be likely to have implications for the nature of democracy in Australia. They disagree, however, on whether those implications would be beneficial or harmful.

A *Bills of Rights Require a High Degree of Judicial Interpretation*

Typically, bills of rights are framed by way of broad principles rather than precisely formulated provisions, with exceptions, and exceptions to those exceptions, as is the case with other legislation.²⁵² This is necessary in order for their provisions to cater for the range of situations to which they are applied, however it also means that they are vague and open to various interpretations.²⁵³ It inevitably falls to judges to interpret them and determine their application to particular situations. Controversy arises because although virtually everyone agrees that the principles contained in bills of rights are good principles, there is far less agreement over how they should be applied, and determining their application often requires political and ethical judgments to be made.²⁵⁴

Some proponents have responded by pointing out that the common law and some statutes are also written in general terms and that, in such cases, judges narrow the language in a way that is appropriate to the circumstances before them.²⁵⁵ In doing so, judges are restrained by the prospects of appeal and the need to publicise their reasoning, which ensures that their work is highly scrutinised.²⁵⁶ In the case of a statutory bill of rights, it is unclear how much room there would be for appeal. The National Human Rights Consultation Report recommended that only the High Court be given jurisdiction to issue declarations of incompatibility.²⁵⁷ It did not address the question of which court would have jurisdiction for actions arising from breaches. If the Federal Court was given jurisdiction, appeal could be made to the Full Federal Court and the High Court with leave. Given the status that a statutory bill of rights would have, however, it is also possible that only the High Court would have jurisdiction to interpret it. From the High Court, there would, of course, be no further appeal, and the High Court does not readily overturn its own decisions.²⁵⁸ Judgments would certainly be subjected to scrutiny, particularly when controversial issues were involved, and at times there would be a strong belief within the community, legislature or legal profession that

²⁵² David Bennett, 'Principles and Exceptions: Problems for Bills of Rights' in Julian Leaser and Ryan Haddrick (ed), *Don't Leave Us with the Bill: The Case Against an Australian Bill of Rights* (Menzies Research Centre, 2009) 120.

²⁵³ Moens, above n 173, 234.

²⁵⁴ James Allan, 'Bills of Rights as Centralising Instruments' (2006) 27 *Adelaide Law Review* 183, 183; James Allan, 'Oh That I Were Made Judge in the Land' (2002) 30 *Federal Law Review* 561, 573; Zimmermann, above n 202, 37.

²⁵⁵ Robertson, above n 19, 174.

²⁵⁶ *Ibid* 175.

²⁵⁷ National Human Rights Consultation Committee, above n 24, Recommendation 29.

²⁵⁸ *Queensland v Commonwealth (Territory Representation Case No 2)* (1977) 139 CLR 585, 599.

a particular interpretation was unfortunate.²⁵⁹ However, if the prospects for appeal were limited, it is unclear how much of a restraint scrutiny alone would provide.

B *Parliament is the Proper Forum for Political Decisions*

Experience overseas has shown that it is the politically and ethically contentious provisions in bills of rights that most frequently come before courts for interpretation.²⁶⁰ Typically, the court itself cannot agree on these matters and they are decided by the majority of a divided bench.²⁶¹ For some critics, the fact that judges are not directly responsible to the electorate suggests that they are not the best people to be making these contentious ethical judgments for the nation. For example, Carr maintains that in a democracy only a directly-elected body is qualified to make political decisions.²⁶²

This argument is less strong when applied to an entrenched bill of rights because such a text could only be adopted if the majority of people in Australia supported it. It would therefore represent the will of the people and when invoked, it would be mainly the will of the legislature that was being frustrated.²⁶³ However, an entrenched bill would still require significant judicial interpretation and there is no guarantee that courts would interpret it consistently with popular opinion. Given that judges have no way to reliably assess the community's values or will, their judgments inevitably rely to a large degree on their own values.²⁶⁴ In any case, proponents, in Australia, are no longer openly supporting a constitutional model. A statutory bill of rights, enacted without a referendum, would more directly reflect the government's will than the people's, and would still give the judiciary greater responsibility for making political and ethical decisions than they currently have.

In addition to concerns about representation, some critics point out that the legislature and judiciary are designed for and suited to different activities. Courts are limited by the facts, issues and arguments in the matters that come before them and cannot take into account as many factors as Parliament can.²⁶⁵ They are designed to resolve private conflicts²⁶⁶ and to use reasoned decision-making.²⁶⁷ On the other hand, Parliament is designed and equipped for consultation, discussion and compromise.²⁶⁸ Interpreting a bill of rights requires the interests of different individuals and sections of society to be balanced against each other because rights aren't absolute, and they sometimes conflict

²⁵⁹ Hatzistergos, above n 199.

²⁶⁰ James Allan, 'Siren Songs and Myths in the Bill of Rights Debate' (Senate Occasional Lecture, 4 April 2008) 3; Zimmermann, above n 202, 39.

²⁶¹ Allan, above n 260, 3.

²⁶² Bob Carr, 'The Rights Trap: How a Bill of Rights Could Undermine Freedom' (2001) 17(2) *Policy* 19, 19.

²⁶³ Toohey, above n 219, 172.

²⁶⁴ Harry Gibbs, *Chapter 7: Does Australia Need a Bill of Rights?* (1996) Samuel Griffiths Society <<http://www.samuelgriffith.org.au/papers/html/volume6/v6chap7.htm>>.

²⁶⁵ Carr, above n 262, 19.

²⁶⁶ Hatzistergos, above n 199.

²⁶⁷ Sir Anthony Mason, 'A Bill of Rights for Australia?' (1989) 5 *Australian Bar Review* 79, 83.

²⁶⁸ Hatzistergos, above n 199; Mason, above n 267, 83.

with each other.²⁶⁹ Thus critics argue that the large-scale allocation of rights and responsibilities to individuals and groups should be done by the legislature and not the courts.

C Bills of Rights Encourage Judicial Activism

The blurring of lines between the political and legal spheres is seen by some writers as part of a wider movement towards using the law to achieve social goals. Gava writes that at the time of the United States Constitution being drafted, the law was seen as a check on government and individual behaviour, but now it is increasingly seen as an instrument through which to achieve political, economic and social goals.²⁷⁰ Judges are not immune to this trend, and therefore Gava claims they are now more inclined to judicial activism than in previous times.²⁷¹ According to Moens, bills of rights such as the *Canadian Charter*, that provide that rights are subject to ‘such reasonable limits as can be demonstrably justified in a free and democratic society’ expressly sanction judicial activism because there is no legal meaning that can be given to such a clause, only a personal assessment of what those values might be.²⁷² This has been borne out in New Zealand where a similar provision in the *NZ Act*²⁷³ has been held to require the Court of Appeal to weigh the value to society of the particular right in question against the value to society of the legislation’s objective.²⁷⁴ Judicial activism has been said to exist in the eye of the beholder.²⁷⁵ However, Moens’ insight suggests that the form in which a law is drafted can make it harder for judges to escape the charge of activism, even when their desire is to avoid it.

As well as this, bills of rights are often interpreted in light of contemporary values, using a ‘living tree’ approach.²⁷⁶ According to Brennan, the use of a ‘living tree’ approach in Canada has shifted power from the legislature to the judiciary.²⁷⁷ As an example, he cites the clause, ‘in accordance with the principles of fundamental justice’, in s 7 of the *Canadian Charter*. It was inserted in order to afford individuals natural justice, while avoiding United States-style substantive due process, but its meaning has already been extended a long way towards just that end.²⁷⁸ Consequently, Brennan

²⁶⁹ Anderson, above n 175, 35-6.

²⁷⁰ John Gava, ‘We Can’t Trust Judges Not to Impose Their Own Ideology’ *The Australian* (Sydney) 29 December 2008.

²⁷¹ Gava, above n 270.

²⁷² Moens, above n 173, 236.

²⁷³ *Human Rights Act 1993* (NZ) s 5 reads: ‘Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society’.

²⁷⁴ *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 16-7.

²⁷⁵ WW Justice, ‘Two Faces of Judicial Activism’ in DM O’Brien (ed) *Judges on Judging: Views from the Bench* (Chatham House, 1997) 304 cited in: Michael Kirby, ‘Judicial Activism? A Riposte to the Counter-Reformation’ (2005) 11 *Otago Law Review* 1.

²⁷⁶ Allan, ‘Oh That I Were Made Judge in the Land’ above n 254, 574.

²⁷⁷ Brennan, above n 189.

²⁷⁸ *Ibid.*

writes that the only effective constraints upon judges who use a living tree approach are ‘the judge’s own comfort zone, self-perception of her role, and inherent humility’.²⁷⁹

On the other hand, however, courts in Australia have not endorsed a living tree approach and they overwhelmingly seek to discern and honour the intention of Parliament as expressed in the texts before them.²⁸⁰ There is, as Lavarch writes, ‘no reason to believe that a Charter of Rights will inspire judges to suddenly become social engineers on a “wild activist” journey’.²⁸¹ Secondly, proponents point out that judges in the common law tradition have been making law for centuries and that the idea that the law exists somewhere out there, and judges simply declare it, is no longer credible.²⁸² Stanton writes that laws, such as negligence, are based on concepts that are every bit as abstract as ‘fair trial’ or ‘free expression’ and that in both cases judges can ‘determine the boundaries of these legal concepts by considering the political context of societies’.²⁸³ Similarly, Fairall and Lacey write that interpreting a bill of rights would be essentially the same process as the one the High Court uses to interpret the Constitution, so it is well equipped for doing so.²⁸⁴ Anderson counters these points, however, by claiming that although there is a ‘small zone of ambiguity’ between making and interpreting law, in most cases the distinction is clear and maintaining the idea that a distinction always exists is a ‘useful myth’ because it keeps the law-making activities of judges to a minimum.²⁸⁵ Finally, some commentators have suggested that far from encouraging judicial activism, a statutory bill of rights could actually give Parliament more control over the common law than it has now, because courts would be obliged to develop the common law consistently with the Parliamentary-enacted charter.²⁸⁶

D *Override Provisions Induce Complacency*

Statutory bills of rights can be amended by Parliament and typically Parliament can also choose to enact statutes that are inconsistent with the bill of rights, provided that a certain procedure is followed.²⁸⁷ Some constitutional bills such as the *Canadian Charter* also allow this through clauses that permit the legislature to expressly declare that a statute ‘shall operate notwithstanding’ rights in the *Charter*.²⁸⁸ Some critics see this situation as dangerous because it can induce false sense of complacency in the

²⁷⁹ Ibid.

²⁸⁰ Spigelman, above n 90, 96.

²⁸¹ Michael Lavarch, ‘Towards an Australian Bill of Rights: The Affirmative Case’ (2008) June *Proctor* 17.

²⁸² Sir Owen Dixon, ‘Concerning Judicial Method’ (1956) 29 *Australian Law Journal* 468, 472, 476; Lord James Reid, ‘The Judge as Law Maker’ (1972) 12 *Journal of the Society of Public Teachers of Law* 22, 22; Kenneth Hayne, ‘Concerning Judicial Method - 50 Years On’ (Speech delivered at the Monash University, 17 October 2006); Michael Kirby, ‘Judicial Activism: Power without Responsibility? No, Appropriate Activism Conforming to Duty’ (2006) 30 (2) *Monash University Law Review* 576.

²⁸³ Michael Stanton, ‘Fighting Phantoms: A Democratic Defence of Human Rights Legislation’ (2007) 32 (3) *Alternative Law Journal* 138, 139.

²⁸⁴ Fairall and Lacey, above n 136, 1096.

²⁸⁵ Anderson, above n 175, 35.

²⁸⁶ Brennan, above n 115, 12.

²⁸⁷ For example *Human Rights Act 2004* (ACT) ss 37-9; *Human Rights Act 1998* (UK) s 19.

²⁸⁸ *Constitution Act 1982* (Canada) Part 1, s 33(1).

population.²⁸⁹ The protection that the bill of rights offers is illusory because Parliament can simply disregard it when it chooses. Individuals who do not fully appreciate this may believe that their liberties are better protected than they actually are, and cease to be vigilant as a result, potentially leading to a greater likelihood of oppressive legislation.²⁹⁰

E Democracy Does Not Protect Minorities

One powerful argument in support of a bill of rights concerns an inherent weakness in democracy, as explained by former Chief Justice of the High Court, Murray Gleeson:

A democratic government seeks to represent the will of the majority... The electoral process is designed to ensure that governments are responsive to the wishes of the majority; but majorities cannot always be relied upon to be sensitive to the interests and the legitimate concerns of minorities. The problem is compounded because society is not neatly divided into one majority and a number of minorities. The attribute that makes a person a member of some minority group does not define that person for all purposes. In reality, most of us belong to some kind of minority. How then does a democracy, which functions on the basis of majority rule, institutionalise protection of legitimate minority interests? This is the essential problem underlying debate about human rights.²⁹¹

According to this argument, democracy protects people whose interests coincide with the majority because if governments do not respect those interests, they are voted out, but minorities lack the power to vote governments out, and so are inherently vulnerable.²⁹² Robertson considers the vulnerable groups to be those who are 'insufficiently numerous to wield electoral power but large enough to attract obloquy or resentment'.²⁹³ Many of the groups identified earlier in this paper as having been deprived of the liberties that others in Australia enjoy, fit this description.

The argument about minorities turns one of critics' concerns about a bill of rights – that the judiciary are not directly responsible to the electorate – into an argument in support of a bill of rights. It is the very fact that judges are not elected that allows them to make rulings based on principle, in favour of individuals who are unpopular with the majority of citizens. They are able to protect those that democracy does not.

Some critics do not accept that minorities need special protection, maintaining that the political system is responsive to their needs, as well as those in majority groups.²⁹⁴ Others respond by pointing out that historically, courts interpreting bills of rights in other jurisdictions have not always been protective of minorities. Some examples include the 1896 interpretation of the Fourteenth Amendment to the United States Constitution which allowed racial segregation, and the United States Supreme Court

²⁸⁹ Moens, above n 173, 251.

²⁹⁰ Ibid.

²⁹¹ Murray Gleeson, *The Rule of Law and the Constitution* (ABC Books, 2000) 68-9.

²⁹² Mason, above n 267.

²⁹³ Geoffrey Robertson, *Freedom, the Individual and the Law* (6th, London: Penguin, 1989) 388.

²⁹⁴ Ian Callinan, 'In Whom We Should Trust' in Julian Leaser and Ryan Haddrick (ed), *Don't Leave Us with the Bill: The Case Against an Australian Bill of Rights* (Canberra Menzies Research Centre, 2009) 75; Gibbs, above n 264.

ruling on the internment of Japanese-Americans during World War II.²⁹⁵ In a similar argument, Brennan notes that in Australia there are significant barriers preventing disadvantaged groups from accessing justice and the legal system, and he therefore questions how much benefit disadvantaged minorities would actually receive from a bill of rights.²⁹⁶

F *A Bill of Rights Need Not Be Seen as Undemocratic*

Some advocates of a bill of rights respond to critics' assertions that bills of rights are inherently undemocratic by pointing out that democratic governance has not always, and should not still, mean absolute supremacy of the majority through Parliament.²⁹⁷ As the doctrine of parliamentary sovereignty developed, the independent judiciary and separation of powers also came to be seen as vitally important.²⁹⁸ Therefore the judiciary's power to interpret and apply law, including common law rights, is granted to enable it to serve and protect the interests of the community.²⁹⁹ Some proponents therefore contend that merely equating democracy with electoral power robs it of much of its meaning.

Ballot-box democracy is also a poor alternative to an understanding that recognises the interrelated roles of the various arms of government in serving and protecting the community's interests.³⁰⁰ As discussed above, the dominance of party discipline in modern Parliaments, the vast bureaucracies for which Ministers are responsible, and the sheer volume of bills put before Parliament each year have undermined traditional notions of responsible government. One consequence of this is that quite apart from concerns about minorities, 'parliamentary decisions often fail to coincide with majority opinions' as well, according to proponents.³⁰¹ It is overly simplistic, they point out, to claim that governments who disregard public opinion suffer at the ballot box because elections are only held every three years, and people determine their votes on a range of issues that usually have more to do with the economy than human rights and liberties.³⁰² To illustrate this point, former High Court Justice, John Toohey reminds readers that after the *Communist Party Case*³⁰³ the Menzies government sought to amend the Constitution through a referendum but was unsuccessful. The government was, nevertheless, re-elected soon after, demonstrating that the electorate may prefer a particular government over the available alternatives without necessarily endorsing all its legislative goals.³⁰⁴

As a result, proponents claim that a concept of democracy that is both better, and truer to its origins, is one where the population legitimately looks to all arms of government

²⁹⁵ Moens, above n 173, 246.

²⁹⁶ Brennan, above n 115, 11.

²⁹⁷ Fairall and Lacey, above n 136, 1090; Robertson, above n 19, 20.

²⁹⁸ Robertson, above n 19, 21.

²⁹⁹ Fairall and Lacey, above n 136, 1090-1; Robertson, above n 19, 21.

³⁰⁰ Robertson, above n 19, 172.

³⁰¹ Mason, above n 267, 81.

³⁰² Robertson, above n 19, 172.

³⁰³ *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.

³⁰⁴ Toohey, above n 219, 173.

to protect their rights and interests. In this way, rather than handing power to the judiciary, a bill of rights would give individuals greater power to challenge the government.³⁰⁵ At the same time, it would make the values and principles underlying statutes³⁰⁶ and case law³⁰⁷ clearly visible. This argument, however, begs the question of whose values law should be based upon. Furthermore, all the reasons that proponents give to support their contention that ‘ballot-box democracy’ is insufficient to protect liberties can also be used to demonstrate why a statutory bill of rights will not prevent liberties from being infringed with majority and/or bipartisan political support. Finally, the claim that sharing responsibility between the judicial and legislative arms of government can result in a more transparent and holistic regime of protection fails to recognise that it does so by moving control of the law further away from the people.

G *Incompatibility Models and Democracy*

Proponents of statutory bills of rights argue that models that only permit courts to make declarations of incompatibility do not, in fact, pass legislative power from the Parliament to the judiciary.³⁰⁸ The *UK Act* is an example of such a model. Section 4 provides that:

... (2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility. ... (6) A declaration under this section ... (a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and (b) is not binding on the parties to the proceedings in which it is made’.³⁰⁹

The *ACT* and *Victorian Acts* have similar provisions.³¹⁰ In each case, when a declaration is made, the government is able to decide whether to remove the incompatibility by seeking to amend the legislation or to allow it to stand. Alternatively, Parliament may, of course, repeal the entire Act.³¹¹

These provisions are obviously designed to preserve the legislative sovereignty of Parliament but critics claim that, in practice, this has not occurred because the political cost of ignoring an incompatibility provision forces Parliaments to always defer to judges’ views and amend or repeal offending legislation.³¹² This claim is disputed by Robertson who writes that British parliamentarians are not ‘intimidated’ by declarations, however he is only able to cite one case where a declaration has not led to the legislation being amended or repealed.³¹³ If the critics are correct then, in practice, judges under a statutory model have as much power that they would under a

³⁰⁵ Robertson, above n 19, 179.

³⁰⁶ Williams, above n 10.

³⁰⁷ Stanton, above n 283, 139.

³⁰⁸ Robertson, above n 19, 170; Stanton, above n 283, 141; George Williams and Dominique Dalla-Pozza, ‘The Constitutional Validity of Declarations of Incompatibility in Australian Charters of Rights’ (2007) 12 *Deakin Law Review* 1, 13-4.

³⁰⁹ *Human Rights Act 1998* (UK) s 4(2), (6).

³¹⁰ *Human Rights Act 2004* (ACT) s 32; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 36.

³¹¹ Robertson, above n 19, 170.

³¹² Allan, above n 260, 12-13; Zimmermann, above n 202, 38.

³¹³ Robertson, above n 19, 131-133 esp. 133.

constitutional model. Moens believes that if the legislature loses responsibility over certain areas of law to the courts, then over time it may ‘acquiesce in this transfer of power’, effectively removing decisions about controversial matters from the democratic sphere.³¹⁴ Stanton, on the other hand, has pointed out that if it is difficult, politically, for governments to ignore declarations of incompatibility, that means that judicial pronouncements on human rights have legitimacy in the eyes of the public and Parliament is therefore merely being indirectly influenced by public opinion.³¹⁵

H Interpretation Provisions and Democracy

The dominant statutory model contains provisions that instruct courts to take the bill of rights into account when interpreting other legislation. For example, the *UK Act* provides that ‘[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights’.³¹⁶ The *Victorian Act* is similar, providing that, ‘[s]o far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights’.³¹⁷

Allan has criticised interpretation provisions such as these because of the level of discretion they grant to judges, particularly when, as has occurred in the United Kingdom, the clause, ‘as far as it is possible to do so’ is interpreted broadly. In *Ghaidan v Godin-Mendoza*, the Court said,

Even if, construed according to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt, section 3 may nonetheless require the legislation to be given a different meaning. Section 3 may require the court to depart from the intention of the Parliament which enacted the legislation. It is also apt to require a court to read in words which change the meaning of the enacted legislation.³¹⁸

This development in methods of statutory interpretation is so significant that Lord Steyn has referred to it as creating ‘a new legal order’.³¹⁹ It allows judges to effectively ‘rewrite laws’ to make them fit with what they believe the bill of rights means.³²⁰ In Brennan’s words, ‘the law is no longer what it says it is’.³²¹

Former Justice of the High Court, Michael McHugh has argued that if a federal bill of rights contained the same provision as s 3 of the *UK Act* it would be inconsistent with the doctrine of separation of powers in the Constitution.³²² The High Court would therefore be likely to interpret the clause, ‘as far as it is possible to do so’ in a way that limits possible interpretations to those that are consistent with the purpose of the

³¹⁴ Moens, above n 173, 240.

³¹⁵ Stanton, above n 283, 142.

³¹⁶ *Human Rights Act 1998* (UK) s 3(1).

³¹⁷ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(1).

³¹⁸ *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, 571-572; cited in James Allan, ‘All Bets Are Off When a Bill of Rights Comes In’ *Sydney Morning Herald* (Sydney), 18 April 2006.

³¹⁹ *Jackson v Attorney General* [2006] 1 AC 262 [102].

³²⁰ Allan, above n 260, 4.

³²¹ Brennan, above n 189.

³²² McHugh, above n 182, 27.

relevant legislation.³²³ In other words, the provision would be given the same meaning as it has in the *Victorian and ACT Acts*. For McHugh, the legislative sovereignty of Parliament would therefore be preserved, but human rights would be better protected because courts could take account of them when interpreting a statute even when there was no ambiguity in it.³²⁴

For Allan, however, the need to refer to a statute's purpose is not much consolation. He points out that most statutes have more than one purpose, so that if a judge is so inclined, he or she can 'discern a purpose' that suits the result she seeks.³²⁵ It should be remembered however, that judges in Australia do not tend to be prone to 'wild activist journeys',³²⁶ and generally appear to be very reluctant to infringe on the role of Parliament. For example, the High Court chose to implement the common law right to a fair trial by staying proceedings in serious criminal cases where the accused is unrepresented, rather than forcing the legislature to provide legal representation, so as to avoid infringing on the legislative role of Parliament.³²⁷

VI ARGUMENTS CONCERNING THE EFFECT OF A BILL OF RIGHTS ON THE LEGAL SYSTEM

A *A Bill of Rights Would Increase Access to Justice*

Robertson claims that a bill of rights would have profound positive consequences for people's ability to access the legal system, allowing them to 'reclaim their law from judges'.³²⁸ This is firstly because he believes that the entire basis of law will shift from precedents to first principles, and as this happens, decisions will become logical, commonsensical and comprehensible to people who do not have legal training.³²⁹ He claims that many people in the United Kingdom have benefited from the *UK Act* without going to court because the mere presence of the *Act* has caused public servants to change their practices. He provides examples of nursing home residents, prisoners, and mentally ill parents who have benefited from improved practices brought about by the *UK Act*, without having to enforce their rights through the legal system.³³⁰ In addition, contrary to the claims of some commentators in the Australian media that a bill of rights would only benefit lawyers,³³¹ Robertson claims that reliance on principles rather than precedents actually reduces people's need for a lawyer.³³² He cites the

³²³ Ibid 29.

³²⁴ McHugh, above n 182, 29-30.

³²⁵ Allan, above n 260, 9-11.

³²⁶ Lavarch, above n 281.

³²⁷ *Dietrich v R* (1992) 177 CLR 292, cited in Lacey, above n 140, 29.

³²⁸ Robertson, above n 19, 105.

³²⁹ Ibid 103-5.

³³⁰ Robertson, above n 19, 139-40.

³³¹ For example, Carr has claimed: 'The main beneficiaries of a bill of rights are the lawyers who profit from the legal fees it generates and the criminals who manage to escape imprisonment on the grounds of a technicality'. Carr, above n 262, 21.

³³² Robertson, above n 19, 141.

example of a resident who was able to enforce his right to privacy against the local council and obtain a remedy without legal representation.³³³

In 2003, an extensive survey of Australian social attitudes found that 71% of Australians had little or no confidence in the courts or legal system and only 4% reported having a great deal of confidence in them.³³⁴ If Robertson is correct that a bill of rights would increase access to and understanding of the legal system then this would clearly be a strong point in favour of adopting one. However, not all proponents seem to agree with Robertson about how profound the impact on the law would be. Williams, for example, seems at pains to play down the impact, writing that any effects will be 'gradual and incremental'.³³⁵ It is difficult to reconcile these two positions.

B *A Bill of Rights Would Prevent our Judges from Becoming Isolated*

Australia is now the only advanced democracy without a bill of rights.³³⁶ Some proponents fear that, as a result, its judiciary will increasingly become isolated from judges overseas, unable to benefit from the pooling of knowledge, insights and resources.³³⁷ Robertson writes that 'the most important and far-reaching debates and developments in the highest courts of all advanced countries except Australia concern[] the application of human rights principles' into diverse areas of law.³³⁸ He further maintains that in order for judges to be responsive to the community, they must be able to exchange concepts, theories and methods with others internationally.³³⁹ This latter claim appears to over-reach somewhat, however, because if the judiciary needs to be responsive to any community it is the Australian, and not the Canadian, United Kingdom or New Zealand communities, that is important.

C *A Bill of Rights Will Politicise the Judiciary*

One of the reasons that the NSW Parliamentary Standing Committee on Law and Justice recommended against NSW enacting a bill of rights was that it believed that if it did so, courts would frequently be required to make controversial decisions on political issues, and that this would have the effect of politicising the judiciary.³⁴⁰ Governments would inevitably seek to appoint judges whose opinions on human rights coincided with their own, and as the line between the judiciary and legislature blurred, the public's expectations of the judiciary would change.³⁴¹ Hatzistergos claims that this effect is now being seen in Canada, where the bill of rights has encouraged people to look to the

³³³ *Amin v Secretary of State for the Home Department* (2004) 1 AC 653; cited in Robertson, above n 19, 140-141.

³³⁴ Clive Bean, 'Is There a Crisis of Trust in Australia?' in Shaun Wilson et al (eds), *Australian Social Attitudes: The First Report* (University of New South Wales Press, 2003).

³³⁵ Williams, above n 10.

³³⁶ Brennan, above n 115, 11; Robertson, above n 19, 43; Williams, above n 10.

³³⁷ Brennan, above n 115, 12; Mason, above n 267, 80.

³³⁸ Robertson, above n 19, 103.

³³⁹ *Ibid* 102.

³⁴⁰ Hatzistergos, above n 199.

³⁴¹ Anderson, above n 175, 38.

Supreme Court to 'to guarantee good government and correct all bad legislating'.³⁴² It is also said to have occurred in the United States where public anger is frequently directed at the Supreme Court over their rulings on issues such as abortion.³⁴³ The American situation is complex, however, because public expectations of the judiciary may also be shaped by lower court judges being directly elected.

Former Chief Justice of the High Court, Sir Anthony Mason identifies the central concern underlying this argument as being a 'fear that Australian courts will come under political pressure... and judges will begin to think politically' and that public confidence in the impartiality of the legal system will be undermined as a result.³⁴⁴ Given the present low levels of public confidence in the legal system, this concern has resonance. The media is not slow to criticise courts' decisions and this would surely increase if matters, and therefore decisions, became more controversial.

Some proponents have responded to these concerns by advocating an independent commission to appoint judges.³⁴⁵ However, Anderson dismisses this suggestion on democratic grounds, pointing out that at present, judges are appointed by elected representatives, but under a commission system they would be appointed by commission members who were appointed by elected representatives.³⁴⁶ Judges would therefore be a step further removed from democratic accountability.

A related concern has been expressed by former Justice of the High Court, Ian Callinan.³⁴⁷ He believes that 'constant exposure to the political and social questions thrown up for decision under the United States' Bill of Rights may have infected the decision making processes of the courts in that country'.³⁴⁸ He identifies American judges' practice of making deals and trade-offs with each other as a consequence of this exposure. At present, Australian courts do not engage in such activities and have a 'genuine commitment to apolitical decision making', which Callinan fears could be in jeopardy if a bill of rights was enacted.³⁴⁹

D *A Bill Of Rights Will Create a Litigious Culture and Overload the Courts*

Other critics claim that a bill of rights would make Australian society more litigious, increasing the load on courts and reducing access to justice.³⁵⁰ Moens writes that the *Canadian Charter* has had this effect and that the backlog of cases that has resulted,

³⁴² Hatzistergos, above n 199.

³⁴³ Moens, above n 173, 241.

³⁴⁴ Mason, above n 267, 84.

³⁴⁵ George Williams, 'Judicial Appointments are Political Appointments' *Australian* (Sydney) 16 November 2004.

³⁴⁶ Anderson, above n 175, 38.

³⁴⁷ Callinan, above n 294, 81.

³⁴⁸ Ibid.

³⁴⁹ Ibid 81-82.

³⁵⁰ Carr, above n 262, 20; Zimmermann, above n 202, 42.

together with the right conferred by the *Charter*, to be tried within a reasonable time,³⁵¹ has led to prosecutions being abandoned.³⁵²

VII DOUBTS ABOUT THE CONSTITUTIONALITY OF STATUTORY MODELS

Some scholars have warned that incompatibility declarations in the proposed statutory models may be unconstitutional at the Commonwealth level.³⁵³ Section 71 of the Constitution vests judicial power in the High Court and other federal courts that Parliament creates. The High Court has interpreted this to mean that only courts created under s 71 can exercise Commonwealth judicial power and that judicial power cannot be conferred on other bodies, unless it is ancillary or incidental.³⁵⁴ If the power to make a declaration of incompatibility was found to be an exercise of non-judicial power, then a provision in a statutory bill of rights that purported to confer that power on the Federal or High Court would be invalid.³⁵⁵ A related question is whether cases concerning the potential incompatibility of statutes with the bill of rights would constitute 'matters' within the meaning of ss 75-77 of the Constitution.³⁵⁶

Proponents of a statutory model obviously believe that incompatibility provisions are likely to be constitutionally valid, but serious doubts have been raised. There is agreement from both sides that judicial power is 'difficult if not impossible' to define³⁵⁷ and that, ultimately, it requires a judgment to be made after weighing indicators and contra-indicators.³⁵⁸ One strong indicator of judicial power is the capacity of a body to give a 'binding and authoritative decision'.³⁵⁹ Absence of this capacity is an even stronger indication of non-judicial power.³⁶⁰ Statutory models expressly state that declarations of incompatibility do not affect the rights or obligations of the parties.³⁶¹ Former Justice of the High Court, Michael McHugh believes that there is therefore a strong likelihood that they would be unconstitutional.³⁶²

However, the model does impose certain obligations on the government when a declaration is made. For example, under the *ACT Act* the Registrar must give a copy of the declaration to the Attorney-General³⁶³ who must present it to the Legislative

³⁵¹ *Constitution Act 1982*, Part 1 Canadian Charter of Rights and Freedoms, s 11(b).

³⁵² Moens, above n 173, 242.

³⁵³ McHugh, above n 182.

³⁵⁴ *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v (1931) 46 CLR 73, 98; R v Kirby; Ex parte Boilermakers Society of Australia (Boilermakers' Case) (1956) 94 CLR 254.*

³⁵⁵ McHugh, above n 182, 13.

³⁵⁶ McHugh, above n 182, 13.

³⁵⁷ *Ibid* 39, citing *Precision Data Holdings v Wills* (1991) 173 CLR 167, 188; Williams and Dalla-Pozza, above n 308, 9, citing *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 394 and *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 188.

³⁵⁸ McHugh, above n 182, 40, Williams and Dalla-Pozza, above n 308, 10.

³⁵⁹ McHugh, above n 182, 16, citing *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330.

³⁶⁰ McHugh, above n 182, 16.

³⁶¹ See *Human Rights Act 2004 (ACT)* Act s 32(3)(b); *Charter of Human Rights and Responsibilities 2006 (Vic)* s 36(5)(b); *Human Rights Act 1998 (UK)* s 4(5)(b).

³⁶² McHugh, above n 182, 16.

³⁶³ *Human Rights Act 2004 (ACT)* s 32(4).

Assembly within six sitting days of receiving it³⁶⁴ and prepare and present a written response to the Legislative Assembly within six months.³⁶⁵ Williams and Dalla-Pozza claim that these obligations placed on the Attorney-General, 'seen in the light of the responsibility of ministers to Parliament' are binding obligations.³⁶⁶ However, McHugh points out that the Attorney-General is not a party to the initial dispute that gives rise to the declaration, and therefore imposing an obligation on the Attorney General through the declaration does not determine the controversy between the parties, and neither does it bind them.³⁶⁷ Furthermore, the obligations imposed on the Attorney-General are imposed by the bill of rights, not by the court making the declaration.³⁶⁸

McHugh acknowledges that parties might be entitled to enforce the prescribed process if the Attorney-General failed to comply with it and that if so, there is an argument that those secondary proceedings would be 'sufficiently connected' to the original proceeding as to be incidental or ancillary to them, allowing the first to be considered binding.³⁶⁹ However, in his opinion, this would not be enough to persuade the High Court.³⁷⁰ He writes that if the High Court continues to interpret 'judicial power' and 'matter' the way it has done in the past, then declarations of incompatibility would be deemed invalid.³⁷¹

Williams and Dalla-Pozza point to Parliamentary statements relating to the *Victorian Act* and the fact that human rights in statutes of these types are intended to be applied through a dialogue between Parliament and the judiciary, in order to show that declarations of incompatibility are a new type of legal remedy in Australia.³⁷² They disagree with McHugh on the question of whether declarations resolve a controversy between the parties³⁷³ but acknowledge that they are not binding on them.³⁷⁴

There is further disagreement over the degree of importance that the High Court will attach to the fact that declarations are not binding on the parties. Williams and Dalla-Pozza see it as negative factor that is ultimately outweighed by favourable factors,³⁷⁵ whereas McHugh contends that 'more often than not [it] is decisive of the presence or absence of judicial power'.³⁷⁶

Both sides agree that it is impossible to predict with certainty whether the High Court would uphold such provisions. The concepts are complex and judicial opinion is divided

³⁶⁴ *Human Rights Act 2004* (ACT) s 33(2).

³⁶⁵ *Human Rights Act 2004* (ACT) s 33(3).

³⁶⁶ Williams and Dalla-Pozza, above n 308, 14.

³⁶⁷ McHugh, above n 182, 16, 44.

³⁶⁸ McHugh, above n 182, 16, 44.

³⁶⁹ McHugh, above n 182, 14, 18, citing similarity with *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; *Abebe v Commonwealth* (1999) 162 ALR 1; *Croome v Tasmania* (1997) 191 CLR 119.

³⁷⁰ McHugh, above n 182, 14, 18.

³⁷¹ McHugh, above n 182, 14-15.

³⁷² Williams and Dalla-Pozza, above n 308, 16

³⁷³ *Ibid* 13.

³⁷⁴ *Ibid* 17.

³⁷⁵ *Ibid* 16.

³⁷⁶ McHugh, above n 182, 14, 43.

in much of the relevant case law.³⁷⁷ This uncertainty weighs heavily against a statutory model that involves declarations of incompatibility. Furthermore, because declarations are such a prominent part of the proposed statutory models, ultimately the uncertainty weighs against the adoption of a statutory bill of rights.

VIII ARGUMENTS ABOUT THE EFFECT OF A BILL OF RIGHTS ON AUSTRALIAN CULTURE AND SOCIETY

Critics and proponents agree that, on its own, a bill of rights cannot create a culture that respects and supports liberty.³⁷⁸ Proponents argue, however, that a bill of rights would be a means through which the community could be educated about international human rights, and awareness and appreciation of liberty could be increased.³⁷⁹ Robertson acknowledges that this effect would not be automatic, but maintains that if Australians see that a bill of rights reflects their own values, they will take ownership of it and the impact on society will be positive.³⁸⁰ Other proponents consider that the process of community discussion, about what the nation's values are, may itself help to foster an appreciation of human liberties.³⁸¹

On the other hand, critics maintain that a bill of rights would make the law uncertain because the meaning of each provision would not be known until it was determined by judges in incremental steps, according to the cases that came before them.³⁸² They claim that this uncertainty will make it difficult for people to know what their rights and responsibilities are, which would be 'destabilising' for society.³⁸³

In addition, as mentioned earlier, some critics maintain that a bill of rights would make Australia a more litigious society.³⁸⁴ Robertson refutes this claim saying that the bill of rights he proposes would only provide modest compensation for 'real pain that has been carelessly or callously inflicted in breach of a civil right', and that less serious cases may be screened out before reaching court.³⁸⁵ It is difficult to evaluate who is correct in this regard. Robertson claims that most problems in the United Kingdom are resolved without court hearings, as often merely reminding a government authority of the existence of the *UK Act* is enough to bring about a change of practice.³⁸⁶ Moens claims, however, that Canadian courts were overloaded as a result of the enactment of the *Canadian Charter*.³⁸⁷ It certainly seems likely that in criminal law cases, which are already before the courts, a bill of rights may lead to an increase in processing time as extra issues are raised. However, it is less clear that a bill of rights would lead to a

³⁷⁷ Williams and Dalla-Pozza, above n 308, 23-24.

³⁷⁸ For example: Robertson, above n 19, 153; Carr, above n 178; Williams, above n 10; Zimmermann, above n 202, 35.

³⁷⁹ Mason, above n 267, 88.

³⁸⁰ Robertson, above n 19, 149-150.

³⁸¹ Brennan, above n 189.

³⁸² Moens, above n 173, 237-238.

³⁸³ Ibid 235.

³⁸⁴ Ibid 242; Zimmermann, above n 202, 42.

³⁸⁵ Robertson, above n 19, 177.

³⁸⁶ Ibid 139-141.

³⁸⁷ Moens, above n 173, 242.

culture that is generally more litigious. The dramatic decline in personal injury actions that followed the nationwide civil liability reforms³⁸⁸ suggests that Robertson may be correct in asserting that, generally, litigiousness is linked to compensation levels rather than the availability of additional causes of action.

IX ARGUMENTS ABOUT THE IMPACT OF A BILL OF RIGHTS ON LIBERTY

Finally, some critics are concerned that enacting a bill of rights may actually reduce protection of liberties in the long term. A constitutional bill of rights would eventually become outdated and would be hard to change.³⁸⁹ This same result may occur if governments were to find that amending a statutory bill was too difficult politically, and so avoided ever doing so.³⁹⁰ It might be thought that this problem could be prevented by restricting rights to those liberties that are most fundamental and enduring. However, the former Chief Justice of the High Court, Sir Harry Gibbs pointed out that even in the case of rights that are widely endorsed, such as the right to non-discrimination, the circumstances in which they are thought to apply, change over time.³⁹¹ Thus the forms of discrimination that are prohibited have changed in the past and will likely change again in the future. If the current conception of non-discrimination was enshrined in the Constitution, it would be very difficult to change it as society's needs and beliefs about discrimination changed.³⁹²

Other critics complain that the process of defining liberties in a bill of rights inevitably limits them. Whether this is done by drafters in an attempt to allay concerns about the power that a bill of rights gives to judges, or whether it is done by judges as they apply broad principles to the individual cases that come before them, the end result is that rights are defined.³⁹³ They come to apply in some circumstances and not in others, to mean this and not that, to require these actions on the part of officials, but not those actions, and so on. While there is logic to this argument, in practical terms its force would seem to be limited because, in the alternative, if liberties are not encoded in law, they are not enforceable. A wide, open-ended concept of personal liberties may well produce a society that is a more pleasant place to live, but it cannot ensure that liberties are universally respected, and individuals who are wronged need enforceable rights. Both a liberty-respecting culture and the capacity to obtain redress when things go wrong are important.

³⁸⁸ See EW Wright, 'National Trends in Personal Injury Litigation: Before and After "Ipp"' (2006) 14 *Torts Law Journal* 233, 237, 266-7; *Civil Liability Act 2002* (NSW); *Civil Liability Act 2003* (Qld); *Law Reform (Ipp Recommendations) Act 2003* (SA); *Recreational Services (Limitation of Liability) Act 2002* (SA); *Civil Liability Act 2002* (Tas); *Wrongs and Limitation of Actions Act (Insurance Reform) Act 2003* (Vic); *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Amendment Act 2001* (WA).

³⁸⁹ Carr, above n 262, 20.

³⁹⁰ Ibid 20.

³⁹¹ Gibbs, above n 264.

³⁹² Ibid.

³⁹³ Menzies, above n 209, 219; George Brandis, 'The Debate We Didn't Have to Have: The Proposal for an Australian Bill of Rights' in Julian Leaser and Ryan Haddrick (eds), *Don't Leave Us with the Bill: The Case Against an Australian Bill of Rights* (Menzies Research Centre, 2009).

Another long term implication that critics fear may flow from a bill of rights is the further undermining of federalism. As mentioned above, federalism can be a protection against arbitrary government. According to Allan, a constitutional bill of rights would further centralise power in the Commonwealth at the expense of the States, exacerbating a process that has been occurring for some time.³⁹⁴ He believes that the first place centralisation would manifest would be in criminal law, where at the moment there is considerable diversity between States.³⁹⁵ A particular right at the federal level would be interpreted to impact on the criminal law of one State and then the laws of all other States may need change in order to comply with the right. For example, laws on racial vilification, abortion, euthanasia, suicide and prostitution which currently vary from State to State, could be affected by a right to freedom of speech or a right to life, and would then become uniform throughout the country.³⁹⁶ In addition, Allan believes that just as in the United States, the right to a fair trial and right not to be subjected to unreasonable searches have led to a uniform judge-created 'code of criminal procedure', an Australian bill of rights would also remove the ability of States to control their own procedure laws.³⁹⁷

Allan acknowledges that, in the case of a statutory bill of rights, this centralising effect would depend on the Act being used to expand the reach of Commonwealth legislation and override State laws.³⁹⁸ However, Sir Harry Gibbs has pointed out that it is not difficult to see this occurring.³⁹⁹ The Commonwealth government has ratified a large number of international treaties and a Commonwealth statutory bill of rights could implement the rights contained in those treaties under the external affairs power of the Constitution.⁴⁰⁰ State legislation that was inconsistent with the bill of rights would then be invalid to the extent of that inconsistency and the States would have been restricted in the exercise of their powers.⁴⁰¹ Finally, Allan also maintains that a centralising effect would flow from the requirement for legislation to be interpreted consistently with the bill of rights and this would apply to both constitutional and statutory bills.⁴⁰²

X CONCLUSIONS

The campaign for a federal bill of rights has no doubt been impacted by other Western democracies, particularly the United Kingdom and New Zealand, adopting human rights statutes, but the argument that international pressures are the whole force behind the movement cannot be supported. Australia has fallen short of international human rights standards in a number of areas in the recent past, particularly in its treatment of refugees, Indigenous people and minorities who are feared or disliked by the community. New anti-terrorism laws seriously curtail freedoms and while this may be

³⁹⁴ Allan, above n 254 'Bills of Rights as Centralising Instruments', 187-8.

³⁹⁵ Ibid, 189.

³⁹⁶ Ibid 190-192.

³⁹⁷ Ibid 190.

³⁹⁸ Allan, above n 254 'Bills of Rights as Centralising Instruments', 194.

³⁹⁹ Gibbs, above n 264.

⁴⁰⁰ *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168; Gibbs, above n 264.

⁴⁰¹ Gibbs, above n 264.

⁴⁰² Allan, above n 254 'Bills of Rights as Centralising Instruments', 193.

justified in the circumstances, at present there is no reviewable procedure for assessing whether that is the case. Furthermore, inquiries in several States have heard from a diverse range of people who feel that their liberties are routinely disrespected. These people and their concerns should not be ignored, or dismissed as insignificant in light of Australia's generally good human rights record.

A *A Constitutional Bill of Rights?*

The strongest argument in favour of a bill of rights is the inherent weakness in democracy that means that the interests of minorities are not as well protected by the electoral system, than those of the majority. Indeed, when the will of the majority is to restrict the liberties of a particular minority, democracy can actually be damaging to that minority's interests. A constitutional bill of rights would be effective in addressing this problem because it would permanently and powerfully prevent the legislature from acting in certain ways that are oppressive. Judges, by virtue of their unelected status, are in the best position to enforce a constitutional bill of rights in favour of unpopular minorities, because they can better afford to be unpopular with the majority than politicians can. A statutory bill of rights, on the other hand, provides only illusory protection for unpopular minorities because the Government is free to exclude legislation from the requirement to be consistent with it, or indeed to amend the bill of rights itself. For this reason, it is highly unlikely that a statutory bill of rights would have prevented the mandatory detention of asylum seekers, or the removal of the rights of terrorism suspects.

However, this very real power behind a constitutional bill of rights means that any negative consequences can also be significant. Sometimes unpopular minorities are unpopular for a reason, and while their most basic freedoms should, arguably, always be respected, society is entirely justified in limiting their liberties in order to prevent them from causing harm. To the extent that a constitutional bill of rights would prevent such limits being imposed, it would be detrimental to overall liberty in Australia. There are also serious concerns regarding the difficulty of amending a constitutional bill of rights, and of changing judicial interpretations of it as societal needs change. It is unlikely that a constitutional bill of rights could ever be drafted in way that ensured it would remain relevant and useful well into the future so this lack of flexibility weighs heavily against it as an option.

Thus, a constitutional bill of rights may become a more attractive option in the future if the political and cultural circumstances of Australia change, but presently the need for a shield between the population on the one hand, and the legislature and executive on the other, does not appear to be so great as to warrant the risk of adverse consequences. For this reason it is widely accepted that a constitutional bill of rights in Australia would not pass a referendum in the foreseeable future, causing even those who ultimately support one, to no longer publically call for it.⁴⁰³

⁴⁰³ For example, Williams writes that the failed referendums show that a 'gradual and incremental path' is needed, beginning with a statutory bill of rights: Williams, above n 10.

B *A Statutory Bill of Rights?*

Following the recommendation of the National Human Rights Consultation Committee that Australia adopt a statutory bill of rights, this is clearly the most likely option. However, doing so would expose Australia's political and legal systems to significant risks with few positive benefits.

Because Parliament would determine which rights were conferred by the Act and when and how it would be amended, as well as which legislation would be subject to it and which would be exempt, it would not be an effective limit on Parliament. Governments would comply with it when there was an electoral necessity for them to do so, but when it was electorally attractive for them to exempt legislation from it, then they would do that. For this reason, a statutory bill of rights will not protect minorities, just as it would not have assisted Al-Kateb⁴⁰⁴ or terrorism suspects.⁴⁰⁵

The fact that a statutory bill of rights would be ineffective would matter less if it were not for the fact that it is also likely to be detrimental to the quality of Australia's democracy and legal system. The broad principles within a bill of rights require judges to exercise a greater degree of personal judgment when interpreting them, than required for ordinary legislation.⁴⁰⁶ At the same time, the cases that end up in court tend to be those that are the most politically and ethically contentious⁴⁰⁷ and there is an explicit requirement in many bills of rights, for judges to assess community values.⁴⁰⁸ The resulting movement of law-making responsibility away from Parliament towards courts, and corresponding pressure on judges, is likely to have at least some tendency to politicise the judiciary.⁴⁰⁹ Add to this the very real risk that people will become less vigilant, falsely believing that the Act can protect them, and the impact of a statutory bill of rights becomes far from benign.⁴¹⁰

C *Alternatives to a Statutory Bill of Rights*

Many of the issues that proponents of a bill of rights have raised are legitimate areas of concern and should not be dismissed or ignored because a statutory bill of rights is not the most desirable way of addressing them. Several alternative measures have been suggested by experts that could prove worthwhile.

1 *Targeted Legislation*

At present in Australia, rights are most effectively protected by means of legislation. Rights in administrative law, rights to non-discrimination and privacy, and rights in relation to the investigation and prosecution of criminal law are protected by State and

⁴⁰⁴ McHugh, above n 182, 30-33.

⁴⁰⁵ Brennan, above n 189.

⁴⁰⁶ Allan, above n 254 'Bills of Rights as Centralising Instruments', 183; Allan, 'Oh That I Were Made Judge in the Land', 573; Zimmermann, above n 202, 37.

⁴⁰⁷ Allan, above n 260, 3; Zimmermann, above n 202, 39.

⁴⁰⁸ Moens, above n 173, 236.

⁴⁰⁹ Anderson, above n 175, 38; Callinan, above n 294, 81-82.

⁴¹⁰ Moens, above n 173, 251.

Commonwealth statutes, which also establish bodies to investigate complaints, educate the community and make recommendations to government. These statutes are worded in precise, detailed terms and apply in specific situations.

Sir Harry Gibbs recommended that rights continue to be protected through legislation, rather than through a bill of rights.⁴¹¹ Proponents criticise the current statutory protections as being alternatively too piecemeal or too complex.⁴¹² If there are gaps, then the gaps in legislation can and should be filled. For example, Leeson writes that identified gaps including: the effect of the criminal law on intellectually disabled persons, the absence of a legal prohibition on torture,⁴¹³ concerns surrounding the reversal of onus of proof in certain situations, the use of video surveillance, issues concerning juries, and racism against Muslims, Indigenous Australians, sexual minorities and the mentally ill, can all be remedied via legislation.⁴¹⁴

Unlike a bill of rights, when rights are protected in legislation and the government becomes aware of the need to extend their protection, or to focus it on a new area or in a particular way, it is a relatively simple procedure to amend the statute accordingly. Furthermore, legislation is written with the objective of making the law clear, rather than, as in the case of a bill of rights, applying to all circumstances for all time. As a result, law in statutory form is readily ascertainable and open to scrutiny. The ALRC's inquiry into the *Privacy Act 1988* (Cth) was able to make a large number of specific recommendations,⁴¹⁵ precisely because the relevant law was ascertainable and relatively static, and it was entirely within the power of the legislature to change it. If, instead, privacy law had been contained in a statutory bill of rights, a range of case law determining the meaning of that bill of rights, and a dedicated Privacy Act, this task would have been greatly more complex, and any predictions made by the ALRC about the impact of suggested changes would have been far less certain.

2 *Improve Parliamentary Accountability*

The greatest constitutionally-based protections that Australians have are not individual rights. They arise indirectly through the separation of powers that gives rise to due process, as well as through federalism and responsible government. Goldworthy points out that laws that govern how parliaments are constituted and the procedures they must follow 'exert a powerful kind of legal control'.⁴¹⁶ The flipside of this is that deficiencies in those procedures can have a profound effect on the nature of parliamentary democracy, and public confidence in it. The presence of deficiencies, however, does not mean that the entire system should be overhauled in favour of judicial supervision of

⁴¹¹ Gibbs, above n 264.

⁴¹² Williams, above n 10.

⁴¹³ Since Leeson wrote, torture has in fact been prohibited by statute, see: *Criminal Code Act 1995* (Cth) s 268.13.

⁴¹⁴ Leeson, above n 66, 34-5.

⁴¹⁵ Australian Law Reform Commission, above n 87.

⁴¹⁶ Jeffrey Goldworthy, 'Legislative Sovereignty and the Rule of Law' in KD Ewing, Tom Campbell and Adam Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford University Press, 2001) 75.

legislation, but rather that improvements should be made that address those deficiencies.⁴¹⁷

Williams wrote in 1999 that, as a first step to gaining acceptance of a constitutional bill of rights, a joint parliamentary committee could be established to scrutinise legislation and ‘publicly examine ways in which the Federal Parliament could work to enhance the level of protection afforded to fundamental freedoms in Australia’.⁴¹⁸ This would be a positive step – not as a precursor to a bill of rights but as a means of encouraging elected representatives to consider the impact of legislation on those people in the community who are less able to make their voices heard in other ways. Legislation that passed through such a process would be more likely to support liberties and far less likely to impinge upon them in unintended ways. Media reporting of the Committee’s work would also foster an understanding in the community that Australia is a place where liberties are valued.

The importance of fostering a culture of liberty cannot be overstated. Gava writes that, regardless of whether or not Australia has a bill of rights, it will not be a place of liberty unless it is also a place ‘where people argue and struggle for their rights and for the political, social and economic changes that they want’.⁴¹⁹ Thus, a robust democracy where the needs of both the majority and minority groups are noticed and respected, can foster liberty, rather than being relinquished to it, as a bill of rights is liable to do.⁴²⁰

3 *The Australian Human Rights Commission*

In 1998 and 2003 the government sought to curb the power of the AHRC.⁴²¹ Fortunately, on both occasions they were ultimately unsuccessful. The AHRC plays a vital role in handling complaints, conducting education, providing submissions and advice to Parliament and government, and undertaking research. They should continue to be supported in this and could provide valuable input to the joint parliamentary committee. In addition, Shearer suggests they could play an increased advisory role if the government committed to implementing international human rights obligations through legislation.⁴²²

4 *The Role of International Human Rights in Statutory Interpretation*

The High Court has said that where there is ambiguity a statute may be interpreted in a way that is consistent with international law, following from the presumption that Parliament intends to give effect to Australia’s international obligations.⁴²³ Shearer

⁴¹⁷ Goldsworthy, above n 416, 75-78.

⁴¹⁸ Williams, above n 10.

⁴¹⁹ Gava, above n 270.

⁴²⁰ Ibid.

⁴²¹ Human Rights Legislation Amendment Bill (No2) 1998 (Cth) and Australian Human Rights Commission Legislation Bill 2003 (Cth) cited in: Charlesworth, Byrnes and McKinnon, above n 3, 39.

⁴²² Shearer, above n 233.

⁴²³ *Minister for Foreign Affairs and Trade v Magno* (1992) 112 ALR 529; *Kioa v West* (1985) 159 CLR 550; *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

suggests that the *Acts Interpretation Act 1901* (Cth) may also be amended to direct courts to do this when the meaning of a statute is ambiguous.⁴²⁴

If these measures were adopted there would be a greater range of enforceable human rights in Australia, and Australian law and culture would afford liberty greater respect and appreciation. Furthermore, this would be achieved without the risks associated with a bill of rights.

‘Freedom on the Wallaby’ ends with a call to arms, as freedom is under threat:

So we must fly a rebel flag,
As others did before us,
And we must sing a rebel song
And join in rebel chorus.
We’ll make the tyrants feel the sting
O’ those that they would throttle;
They needn’t say the fault is ours
If blood should stain the wattle!⁴²⁵

Australian’s rights and liberties have been obtained and retained in a remarkably peaceful way from Lawson’s time until now. It cannot be said that no blood has stained our wattle, and freedom and advantages continue to be enjoyed unequally, but in our eagerness to remedy such injustices we must take care not to trade away the legal, political and cultural institutions that have given us the rights and liberties we have. If this must be our ‘rebel song’ to the international community, so be it.

⁴²⁴ Shearer, above n 233.

⁴²⁵ Lawson, above n 1.

ARISTOTLE'S INFLUENCE ON THE NATURAL LAW THEORY OF ST THOMAS AQUINAS

SIMONA VIERU*

Abstract

This paper will compare Aristotle's Natural Law theory with St Thomas Aquinas' Natural Law theory in order to examine the extent of Aristotle's influence on the Natural Law theory of Aquinas. By focusing on the context of each philosopher, the author will argue that, although Aquinas was profoundly influenced by Aristotelian ideas, he was not a 'blind worshipper' of Aristotle. Ultimately, Aquinas employed Aristotelian Natural Law philosophy only to the extent it assisted him to validate the Christian doctrine and the existence of God.

I INTRODUCTION

Philosophers often test and develop the ideas of their predecessors.¹ A famous example is that of St Thomas Aquinas (1225-1274 AD) drawing on the work of Aristotle (384-322 BC). However, did St Thomas Aquinas plunder Aristotle's ideas when writing his seminal work, the *Summa Theologiae*?

Aristotle and St Thomas Aquinas are recognised as key contributors to classical Natural Law jurisprudence.² Natural Law theory involves evaluation of the content of laws against moral, or in Aquinas' case, even spiritual principles.³ Natural Law advances a metaphysical⁴ inquiry, and is concerned with issues such as man's⁵ moral obligations as a citizen and the limits of lawful government action.⁶

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¹ Steven Cahn (ed), *Exploring Philosophy: An Introductory Anthology* (Oxford University Press, 2nd ed, 2000) 7, 13.

² Plato (c 429-347) and Cicero (106-43 BC) also made significant contributions to Natural Law theory. See Plato, *Laws* (Benjamin Jowett trans, Forgotten Books, 2008) book IV. See also Marcus Tullius Cicero, *The Republic and The Laws* (CD Yonge trans, Digireads.com, 2009).

³ Brian Bix, 'Natural Law: The Modern Tradition' in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2002) 61, 62, 66.

⁴ Brian Bix, *A Dictionary of Legal Theory* (Oxford University Press, 2004) 135. 'Metaphysics' is 'any inquiry beyond the empirical, reaching the most basic and abstract questions of thought and existence'.

⁵ In this paper, 'man' is used to refer to human beings in general, and includes both men and women.

⁶ Bix, 'Natural Law: The Modern Tradition', above n 3, 62-3.

Aristotle is credited with developing the first theory of Natural Law.⁷ Aristotle deals with Natural Law theory in book V of *Nicomachean Ethics*,⁸ and in book III and other parts of *The Politics*.⁹ Aquinas's legal theory appears in part II of his *Summa Theologiae*.¹⁰ Both Aristotle and Aquinas discussed law by reference to morality, justice and ethics, although Aquinas tailored his discussion to the Catholic doctrine.¹¹

This paper will examine the context and philosophical traditions which informed the thinking of Aristotle and Aquinas. Further, the paper will compare Aristotle and Aquinas' theories on law and justice in order to determine whether Aquinas plundered Aristotle and simply adapted Aristotelian ideas to a Christian context.

II ARISTOTLE

A Aristotle's context: Ancient Greece

Socrates (470-399 BC) and Plato (c 429-347) preceded Aristotle. As a student at Plato's Academy in Athens, Aristotle was influenced by Plato and Socrates' theories on truth and justice.¹² Aristotle also reflected on the 'Golden Age' of Ancient Greece (c 480-431BC) which consisted of a league of free cities, dominated by Athens.¹³ Although Athens was a democracy, freedom of speech and voting rights were restricted.¹⁴ Athenians sought guidance on ethical and political questions from orators like Socrates, Plato and Aristotle, who had the power to influence the masses.¹⁵

B Aristotle's theory of Natural Law

Aristotle's works, *Nicomachean Ethics* and *The Politics* illustrate the close link between legal and political philosophy.¹⁶ In *Nicomachean Ethics*, Aristotle argued that law supports a virtuous existence, advances the lives of individuals and promotes the 'perfect community'.¹⁷ He proposed people should employ practical wisdom or active

⁷ Marett Leiboff and Mark Thomas, *Legal Theories in Principle* (Lawbook, 2004) 54; Cf John Finnis, 'Natural Law: The Classical Tradition' in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2002) 1, 3.

⁸ Jonathan Barnes (ed), *The Complete Works of Aristotle* (Princeton University Press, 1984), 1790-1.

⁹ John Finnis, 'Natural Law: The Classical Tradition', above n 7, 18.

¹⁰ Ibid.

¹¹ Ralph McInerney, 'Thomistic Natural Law and Aristotelian Philosophy' in John Goyette, Mark Latkovic and Richard Myers (eds), *St Thomas Aquinas and the Natural Law Tradition: Contemporary Perspectives* (Catholic University of America Press, 2004) 25.

¹² Leiboff and Thomas, above n 7, 53-4.

¹³ Ibid.

¹⁴ Pamela Bradley, *Ancient Greece: Using Evidence* (Cambridge University Press, 2001) 202-3. For example, Socrates was executed for 'corrupting' the youth.

¹⁵ Leiboff and Thomas, above n 7, 53-4.

¹⁶ WD Ross, *Aristotle* (Methuen, 1923) 187; John Finnis, 'Natural Law: The Classical Tradition', above n 7, 18. Aristotle referred to this as the 'philosophy of human affairs'.

¹⁷ John Finnis, 'Natural Law and Legal Reasoning' in Kenneth Himma and Brian Bix (eds), *Law and Morality* (Ashgate, 2005) 3, 4.

reason in order to behave in a way that is consistent with a virtuous existence.¹⁸ Aristotle defined justice as ‘a state of mind that ... encourages man ... to perform just actions’, ‘just’ meaning ‘lawful’, ‘fair’ and ‘virtuous’.¹⁹

Aristotle divided ‘political’ justice into ‘natural’ and ‘conventional’ justice. According to Aristotle, the content of ‘natural’ justice (or ‘universal’ law) is set by nature, which renders it immutable and valid in all communities.²⁰ In contrast, ‘conventional’ justice comprises rules devised by individual communities to serve their needs.²¹ Aristotle argued ‘conventional’ justice is subject to change (depending on the form of government), and is therefore subordinate to ‘natural’ justice.²²

In *Nicomachean Ethics*, Aristotle identified a further two types of justice: distributive and corrective. For Aristotle, distributive justice involves allocating common property proportionally to individuals on the basis of merit.²³ Corrective justice serves to redress any unfairness which may result from private transactions that violate an individual’s property rights or other rights.²⁴ Whilst distributive justice promotes proportionate equality within society, corrective justice deals with the administration of the law through a judge or mediator.²⁵

In *The Politics*, Aristotle proposed the law should function to promote the ‘perfect community’. For Aristotle, the ideal political entity was a *polis* or city state ruled by a balance of tyranny and democracy, a combination which creates the most stable state.²⁶ Aristotle also suggested people are ‘political animals’ and are naturally suited for life in a city state.²⁷

In developing his theories, Aristotle employed a syllogistic method; he divided knowledge into categories, a method still employed to this day.²⁸ Aristotle made another important contribution when he developed the teleological approach. Teleology is a method of reasoning whereby a phenomenon is explained by reference to the purpose it serves.²⁹ Teleology enabled Aristotle to understand which natural human inclinations are ‘good’ and how a ‘perfect’ society may be achieved.³⁰

¹⁸ Leiboff and Thomas, above n 7, 54.

¹⁹ JAK Thomson, *The Ethics of Aristotle* (Penguin Classics, 1953) book V, 120-2.

²⁰ Ibid 137-8.

²¹ Ibid.

²² Ibid 138.

²³ Ibid 127-8.

²⁴ Ibid 125-6.

²⁵ Ibid 129-130.

²⁶ Leiboff and Thomas, above n 7, 53-4; Ross, above n 16, 264-5.

²⁷ See generally Aristotle, *Politics* (Trevor Saunders trans, Oxford University Press, 1995) book II.

²⁸ Leiboff and Thomas, above n 7, 54.

²⁹ See *Oxford English Dictionary*, <<http://dictionary.oed.com.prospero.murdoch.edu.au/cgi/entry>>.

³⁰ Leiboff and Thomas, above n 7, 54. In this context, ‘perfect’ refers to a thing that has completed its aims.

III ST THOMAS AQUINAS

A *St Thomas Aquinas' context: Medieval Western Europe*

At the age of five, Aquinas was sent to an abbey for religious schooling; at the age of 20, he became a Dominican monk.³¹ Soon after Aquinas moved to Paris, he met Albert the Great (1200-1280 AD), who recognised Aquinas' enormous potential and became his teacher.³² Albert the Great had produced an encyclopaedia of Aristotelian thought through access to Arabic and Greek translations of Arab and Jewish scholars.³³ Although Ancient Greek teachings were re-emerging in Western Europe at the time of The Crusades (c 1098-1492 AD), the Church had banned these works.³⁴

Aquinas was exposed to the texts of Christian philosophers, such as St Augustine of Hippo³⁵ (354-430 AD), as well as Ancient Greek texts.³⁶ He became fascinated by Aristotle's works, despite the fact that Aristotle had been a pagan philosopher. It was also dangerous for St Thomas Aquinas to rely on Islamic texts during The Crusades.³⁷ The Catholic Church considered Aristotle's philosophy dangerous to Christianity, and attempted to prevent its re-emergence.³⁸ Christianity is based on a monotheistic³⁹ model which assumes law and reason are derived from God. In contrast, classical Greek philosophy assumed that the source of law and reason was found in nature or things.⁴⁰ Aquinas was drawn to Aristotle's philosophy because it accepted the reality of the material world, and Aquinas deemed it useful in attempting to validate the Christian doctrine.⁴¹

Aquinas also encountered Cicero's work, which exemplified Stoic philosophy.⁴² For Cicero, Natural or True Law was based on 'right reason in agreement with nature'.⁴³ Cicero proposed that True Law applied across all communities and he identified God as both the law-maker and law-enforcer.⁴⁴ Cicero stated that justice was based on right

³¹ Frederick Copleston, *A History of Philosophy* (Burns, Oates & Washbourne, 1951) vol II, 302.

³² *Ibid.*

³³ Hans Küng, *Great Christian Thinkers* (Continuum, 1994) 104-5.

³⁴ *Ibid* 105.

³⁵ Leiboff and Thomas, above n 7, 57. St Augustine of Hippo proposed that 'good' was directed by God's eternal law.

³⁶ Küng, above n 33, 106.

³⁷ *Ibid* 104-7.

³⁸ *Ibid* 105.

³⁹ See *Oxford English Dictionary*, <<http://dictionary.oed.com.prospero.murdoch.edu.au/cgi/entry>>. 'Monotheism' is the 'doctrine or belief that there is only one God'. Cf 'Polytheism', which is 'the belief that there is more than one God'.

⁴⁰ Saint Thomas Aquinas, *On Law, Morality and Politics* (William Baumgarth and Richard Regan trans, Hackett, 1988) xiv.

⁴¹ *Ibid* xiv-xv.

⁴² Leiboff and Thomas, above n 7, 56.

⁴³ Vilho Harle, *Ideas of Social Order in the Ancient World* (Greenwood Press, 1998) 99. 'True Law' is the equivalent of Aristotle's Universal Law.

⁴⁴ *Ibid.*

reason, which encouraged people to fulfil their obligations and prohibited them from committing certain acts.⁴⁵

In analysing Aquinas' work, it is imperative to recall the context in which he wrote in order to acknowledge the value of his ideas.⁴⁶

B *St Thomas Aquinas' theory of Natural Law*

Aquinas outlined his theory of Natural Law in the *Summa Theologiae*, the first detailed and systematic discussion of Natural Law theory.⁴⁷ For Aquinas, law was 'nothing else than an ordinance of reason for the common good, promulgated by him who has care of the community'.⁴⁸ Aquinas elaborated on the concept of Human Law by reference to his understanding of Eternal Law, Natural Law and Divine Law.⁴⁹

For Aquinas, Eternal Law was the divine and rational model according to which God created the world; this model provided the foundation for Aquinas' three other types of law.⁵⁰ Aquinas opined that the world is ruled by Divine Providence or 'divine reason'.⁵¹ Divine reason is called 'eternal' because it is not temporal.⁵² The Eternal Law is not ordained to an end; that end is 'God Himself'.⁵³

The Divine Law is derived from God and guides man to perform acts in order to reach his or her end, which is 'eternal happiness'.⁵⁴ Divine Law consists of the Scriptures, which reveal elements of the Eternal Law to man.⁵⁵ Aquinas argued that man's natural inclination is towards virtue or goodness,⁵⁶ and that by acting according to reason, man acts in accordance with virtue.⁵⁷ Aquinas wrote that man's 'good' tendencies are to preserve human life, to have children, to live in society, and to know God.⁵⁸ For Aquinas, the purpose of law was to promote the 'common good', which leads to the 'perfect community'.⁵⁹

⁴⁵ Ibid.

⁴⁶ Aquinas, above n 40, xxi.

⁴⁷ Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory* (Oxford University Press, 2005) 22.

⁴⁸ Aquinas, above n 40, 17 (Question 90, Art 4).

⁴⁹ Bix, 'Natural Law: The Modern Tradition', above n 3, 71.

⁵⁰ Anthony Lisska, *Aquinas's Theory of Natural Law* (Clarendon Press, 1996) 95.

⁵¹ Aquinas, above n 40, 18 (Question 91, Art 1).

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Ibid (Question 91, Art 2; Question 90, Art 4).

⁵⁵ Wacks, above n 47, 22.

⁵⁶ Aquinas, above n 40, 12 (Question 92, Art 1; Question 93, Art 6).

⁵⁷ Ibid 14 (Question 94, Art 2).

⁵⁸ Lisska, above n 50, 100. Aquinas and Aristotle were concerned with man's 'moral' (rather than non-moral) end purpose. See especially Question 94, Art 2.

⁵⁹ Aquinas, above n 40, 16 (Question 90, Art 3).

On the other hand, Natural Law is the process whereby man, as a rational being, participates in the Eternal Law.⁶⁰ Aquinas argued that Natural Law is called ‘law’ *only* because of man’s participation.⁶¹ Whilst irrational beings are subject to the Eternal Law,⁶² they cannot participate in a rational manner.⁶³

Human Law emerges when a public person entrusted with ‘care of the community’⁶⁴ exercises human reason in order to interpret the Eternal Law and create laws.⁶⁵ A private person cannot make laws because he or she does not have coercive power, or the power to ‘inflict penalties’.⁶⁶ A Human Law creates a moral obligation if it has been promulgated to men by the law-maker,⁶⁷ and if it is just or consistent with ‘divine’ reason (ie promotes the common good, does not exceed law-maker’s authority and does not impose a disproportionate burden on individuals).⁶⁸ Aquinas acknowledged man-made laws may be morally fallible and therefore unjust.⁶⁹

On account of his comments, Aquinas has been said to endorse the maxim *lex injusta non est lex*,⁷⁰ which suggests that an unjust law lacks legal validity.⁷¹ However, Aquinas accepted that even an unjust law should be followed if disobedience leads to ‘scandal or greater harm’.⁷² Aquinas merely stated that an unjust law does not ‘bind in conscience’;⁷³ he did not propose that every unjust law lacks legal validity.⁷⁴ In practice, man is required to make a moral judgement as to whether he should obey an unjust law.⁷⁵ Aquinas appeared most concerned with the ‘common good’ of the community, rather than with the validity of the law. On this basis, some authors argue Aquinas never

⁶⁰ Ibid 18 (Question 91, Art 2). In Question 94, Art 1 Aquinas stresses that man participates by employing reason, and not through habit.

⁶¹ Leiboff and Thomas, above n 7, 60.

⁶² Aquinas, above n 40, 12 (Question 93, Art 5).

⁶³ Ibid 18 (Question 91, Art 2).

⁶⁴ Ibid 15 (Question 90, Art 3).

⁶⁵ Ibid 18 (Question 91, Art 3). The human agent uses reason to interpret the Eternal Law and make Human Law.

⁶⁶ Ibid 16 (Question 90, Art 3).

⁶⁷ Ibid 17 (Question 90, Art 4).

⁶⁸ David Lyons, ‘Moral Aspects of Legal Theory’ in Kenneth Himma and Brian Bix (eds), *Law and Morality* (Ashgate, 2005) 109, 114; Aquinas, above n 40, 12-3 (Question 90, Art 1).

⁶⁹ Lyons, above n 68, 113.

⁷⁰ Translated as ‘an unjust law is not law’.

⁷¹ Norman Kretzmann, ‘*Lex Iniusta Non Est Lex*: Laws on Trial in Aquinas’ Court of Conscience’ (1988) 33 *American Journal of Jurisprudence* 99, 100-1.

⁷² Aquinas, above n 40, 14 (Question 96, Art 4).

⁷³ Aquinas, above n 40, 14 (Question 96, Art 4).

⁷⁴ Bix, ‘Natural Law: The Modern Tradition’, above n 3, 72-3.

⁷⁵ See Gabriël Moens, ‘The German Borderguard Cases: Natural Law and the Duty to Disobey Immoral Laws’ in Suri Ratnapala and Gabriël Moens, *Jurisprudence of Liberty* (Butterworths, 1996) 160.

endorsed a literal interpretation of the maxim *lex injusta non est lex*,⁷⁶ but merely observed that an unjust law is not a full-fledged law.⁷⁷

IV THE EXTENT OF ARISTOTLE'S INFLUENCE ON ST THOMAS AQUINAS

Undoubtedly, Aquinas was heavily influenced by Aristotle's work. Aquinas adopted Aristotle's ideas of 'universal' and 'conventional' law and further developed them.⁷⁸ Aquinas approved of Aristotle's description of man as a 'social animal'; he agreed that man may only achieve virtue when he or she is part of society.⁷⁹ Aquinas agreed with Aristotle that the purpose of law was to promote the good of the community, or the 'common good'.⁸⁰

Aquinas employed Aristotle's syllogistic method and teleological approach. One plausible explanation is that Aquinas found 'truth' in Aristotle's approach (ie Aristotle's systematic and logical approach appealed to Aquinas).⁸¹ Aquinas' *Summa Theologiae* exemplifies his preference towards a systematic, detailed and logical approach.⁸²

However, Aquinas did not adopt these ideas as a 'blind worshipper' of Aristotle.⁸³ Aquinas tested the validity of Aristotle's philosophies through extensive study and detailed commentaries,⁸⁴ and he assessed whether he could use these principles to prove God's existence. Once he was satisfied, Aquinas adapted these principles to suit his monotheistic goals.⁸⁵ On this point, Aquinas diverged from Aristotle in a significant way.

Aquinas' deeply Christian upbringing and spiritual life influenced him profoundly. Aquinas' end goal was to create a pyramid model of Natural Law, with God at the apex.⁸⁶ In contrast, Aristotle's goal was to create a 'perfect' community. Aquinas employed Aristotelian philosophy only to the extent it assisted him to validate the Christian doctrine and the existence of God.⁸⁷ Aquinas was preoccupied with showing

⁷⁶ Kretzmann, above n 71, 100-1, 115. St Augustine's original statement was: 'that which is not just does not seem to me to be a law'. Aquinas' quote omits the words 'to me' (see *Summa Theologiae*, Question 96, Art 4) and has potentially been taken out of context.

⁷⁷ Kretzmann, above n 71, 115.

⁷⁸ Küng, above n 33, 114.

⁷⁹ Immanuel Bekker (ed), *Aristotelis Opera* (Academia Regia Borussica, 1831) *Pol I*, 13.1253a31.

⁸⁰ Daniel Nelson, *The Priority of Prudence: Virtue and Natural Law in Thomas Aquinas and the Implications for Modern Ethics* (Pennsylvania State University, 1992) 32.

⁸¹ Copleston, above n 31, 423.

⁸² Küng, above n 33, 108.

⁸³ Copleston, above n 31, 323.

⁸⁴ McInerney, above n 11, 26.

⁸⁵ Küng, above n 33, 106-7; Copleston, above n 31, 323.

⁸⁶ Michael Freeman, *Lloyd's Introduction to Jurisprudence* (Sweet & Maxwell, 7th ed, 2001) 105.

⁸⁷ Küng, above n 33, 106-7.

faith as consistent with and supported by reason, though he admitted some aspects of faith could only be known through revelation.⁸⁸

Some scholars have argued that Aquinas' appropriation of Aristotle constitutes a 'distortion of genuine Aristotelianism'.⁸⁹ Other scholars have proposed that Aquinas' 'blind' following of Aristotle and his linking of Natural Law to Catholic doctrine served to discredit Aristotle's contribution to Natural Law jurisprudence.⁹⁰ Neither claim has been convincingly supported.

V CONCLUSION

Although condemned by some of his contemporaries for embracing the work of a pagan philosopher,⁹¹ St Thomas Aquinas succeeded in making his works acceptable to Christians. Based on his life and works, he was canonised in 1323,⁹² and in 1917 his philosophy became part of the official teachings in the seminaries of the Catholic Church.⁹³

Contemporary Natural Law philosopher, John Finnis (1940-), proposed that Aquinas' work, when taken out of context, may be misinterpreted.⁹⁴ This observation may be crucial in explaining why Aquinas has been accused of 'stealing' from Aristotle. To claim that Aquinas plundered Aristotle's ideas is to discredit Aquinas's significant contribution to classical Natural Law theory and Christian philosophy as we know it today.

⁸⁸ Aquinas, above n 40, xviii.

⁸⁹ Nelson, above n 80, 5.

⁹⁰ Copleston, above n 31, 322.

⁹¹ Küng, above n 33, 113. In 1277, the Bishop of Paris condemned Aquinas' theses.

⁹² Aquinas, above n 40, xiii.

⁹³ Küng, above n 33, 114.

⁹⁴ John Finnis, *Natural Law and Natural Rights* (Clarendon Press, 1980) 23-4; Aquinas, above n 40, xxi.

COMPARING THE SOCIAL CONTRACTS OF HOBBS AND LOCKE

THOMAS MOURITZ*

Abstract

Locke and Hobbes both share a vision of the social contract as instrumental in a state's political stability. However, their respective philosophies were informed by a starkly contrasting vision of human nature. This essay explores the historical context of each philosopher and considers the differences in the social contractual theory that emerged from their distinct perspectives on the state of nature.

I THE STATE OF NATURE AND THE SOCIAL CONTRACT

The notion of the social contract has been, quite simply, one of the most important paradigms of Western philosophical and legal theory in helping to shape our understanding of justice and social structure.¹ Sharing some elements of thought, though differing in many more, 17th century Englishmen Thomas Hobbes and John Locke stand out as amongst the most significant proponents of social contract theory. Held up against the light of contemporary scrutiny, analysis may expose flaws and weaknesses in their arguments. However, even more so it reveals that the sophisticated methods they employed, the scope and structure in their observations of complex, ubiquitous principles, and the depth of their impact in modern thinking ascribes them undeniable stature and demonstrates the enduring value we can still gain from reviewing and comparing their work on social contract theory.

Hobbes and Locke were not the first to use the social contract model as a tool to explain the foundations of human society; earlier exponents of the theory can be traced much further back in history. Arguably, elements of the social contract have existed as long as ethical theories have been publicly espoused and recorded in writing.² For example, in Ancient Greece we find Plato's *Republic* describing a friendly communal debate about the meaning of justice in which Thrasymachus and Glaucon introduce principles of social contract theory,³ and conceptions of human nature,⁴ that have been elaborated upon by countless thinkers since, not least among them Hobbes and Locke. While the

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¹ Robert C Solomon, *Introducing Philosophy: A Text with Integrated Readings* (Oxford University Press, 9th ed, 2008) 566.

² Montague Brown, *The Quest for Moral Foundations: An Introduction to Ethics* (Georgetown University Press, 1996) 36.

³ Plato, *Plato's Republic* (Dent, 1969) 12-46.

⁴ J W Gough, *The Social Contract Theory: A Critical Study of its Development* (Oxford University Press, 1936) 100.

‘mechanical principles of materialism’⁵ are generally emphasised as the shaping foundations of both humanity’s social contracts, it also has to be recognised that Hobbes and Locke shared a grounding in the classics that was similarly influential in forming their views on political philosophy and human behaviour.⁶

The links between the pair, both regarded for their social contract theory and with a common debt to classical philosophy and to the influence of materialist thought, begin to wane when the substance of their work is analysed more closely. Vastly different individual circumstances helped define striking distinctions in personal outlook. Hobbes’ notably grim social contract theory, at its core reflecting what he believed was the brutal, nefarious reality of instinctive human behaviour, was surely a product of a worldview that could not overlook the troubled time he lived in. For much of his life, Hobbes’ world was one of political upheaval and war; the Thirty Years War was taking place in Europe, and a Civil War drastically transformed political dimensions in England. These extended periods of tumult fashioned a pessimistic outlook on human nature, and instilled in Hobbes a strong conviction for an absolute monarchy, believing that ultimately the only capable form of social governance was a sovereign with ‘unrestricted ruling power’.⁷

Locke reached his intellectual maturity in the more settled years after the English Civil War, and was politically associated with the Whigs, who pushed for a limited monarchy.⁸ He felt that an effective sovereign did not require absolute rule and, rather, pushed for more individual freedoms. In fact, if we accept that the aim of Hobbes’ social contract was to establish the necessary conditions for an all-powerful sovereign, we find in turn that Locke’s social contract had an altogether antipodean argument. Partly as a result of his involvement in an attempt to prevent Charles II’s royal absolutist younger brother James from succeeding the throne, Locke’s intention was to justify the peoples’ ability to resist absolute monarchy through rights granted in a mixed constitution.⁹

Aware of the moulding contexts from which Hobbes and Locke arose, and the ultimate conclusions that they were trying to reach and justify with their respective versions of the social contract, we may then retreat to the essence of their theory and observe the different ways in which they developed their arguments to achieve their goals, which in turn provides ample opportunity for critical analysis.

One of Hobbes’ defining features is the method in which he chooses to relate his social contract. Hobbes was adamant that a rigorous, rational argument was necessary to cure the ills of an ailing state political structure based on ‘bad reasoning’.¹⁰ As a materialist

⁵ John Rawls, *Lectures on the History of Political Philosophy* (Harvard University Press, 2007) 29.

⁶ Rawls, above n 5, 29.

⁷ Dora Kostakopoulou, ‘Floating Sovereignty: A Pathology or a Necessary Means of State Evolution?’ (2002) 22(1) *Oxford Journal of Legal Studies* 135, 141.

⁸ Gough, above n 4, 127.

⁹ Rawls, above n 5, 105.

¹⁰ Jean Hampton, *Hobbes and the Social Contract Theory* (Cambridge University Press, 1988) 1.

he was convinced that sound reason must possess geometric precision,¹¹ and therefore opted to enhance the scientific certainty of his thesis with the formal legality of contract theory.¹² While the integration of legal theory into his political philosophy lent support to Hobbes' 'individualistic metaphysics',¹³ ultimately the contractual premise that Hobbes sets forth has come to be questioned in its final conclusion as unconvincing in a strict legal sense.

Calculatedly removing any sentimental notions about humanity's inherent virtue, Hobbes' theory began with a belief that people in an original state of nature are primarily interested in preserving their own lives, even if that meant destroying the life of another. This proliferation of self-interested individuals creates a state of perpetual conflict with each other, or universal war.¹⁴ Humanity's self-interest in turn obliges him to seek a path out of this violent state towards peace and freedom from pain and anxiety, where he can pursue pleasure.¹⁵ This leads to the first step in Hobbes' social contract. To avoid war, all individuals must enter into a covenant with every other person, agreeing not to harm one another. This agreement alone, however, is not sufficient to maintain peace.¹⁶ Compliance with this social contract requires the coercive power which Hobbes believed only a powerful sovereign could provide. Merely placing trust in an unadorned, non-binding agreement between individuals is not just imprudent, but unlawful according to Hobbes.¹⁷ The social contract's success depends on the immediate institution of a sovereign upon whom individuals have surrendered all liberty,¹⁸ and who is able to ensure obedience both to natural law and whichever commands he delivers.¹⁹ Hobbes' sovereign power is not a party to the social contract, but instead a recipient of the powers conferred upon him when all under the sovereign enter the universal compact and sacrifice their liberty in the process.²⁰

Many commentators believe that by placing all faith in the sovereign to enforce the social contract, Hobbes' theory fails to reach the standard of ultimate and convincing proof in a strictly legal sense. Hobbes' main weakness is that he is never able to explain why one should not break the social contract and disobey the sovereign, which seems to be little more than a moral responsibility.²¹ The typical legal answer to the question of enforcing a contract would be that the courts will uphold the law; in the state of nature, without an established system of jurisprudence, Hobbes has difficulty in responding to

¹¹ Thomas Hobbes, *Leviathan* (Dent, 1937) ch 5 part 1.

¹² Gough, above n 4, 107.

¹³ R A Grover, 'The Legal Origins of Thomas Hobbes' Doctrine of Contract' in Preston King (ed) *Thomas Hobbes: Critical Assessments* (Routledge, 1993) vol 3, 543.

¹⁴ Hobbes, above n 11, ch 13 part 1.

¹⁵ Brown, above n 2, 39; Hobbes, above n 11, ch 14 part 1.

¹⁶ David Gauthier, 'Hobbes's Social Contract' in G A J Rogers and Alan Ryan (eds) *Perspectives on Thomas Hobbes* (Oxford University Press, 1988) 134-137.

¹⁷ Brown, above n 2, 39.

¹⁸ Gough, above n 4, 103.

¹⁹ Gauthier, above n 16, 137.

²⁰ Gough, above n 4, 103.

²¹ Brown, above n 2, 41.

the problem of enforcing and upholding the contract.²² Further undermining the persuasion of Hobbes' argument is that his social contract is essentially hypothetical, and seems to have no obvious parallel in history. In the end, Hobbes must admit that it is fear alone that keeps humanity complying in subjection.²³

Locke's theory is similarly compromised by the "historical objections to the social contract", however, he intended to demonstrate a rational argument rather than relate a practical example.²⁴ In reality though, his more digestible argument founded on notions of equality and rights to property would find itself powerfully expressed in the constitutional foundations of the United States of America, where the Declaration of Independence is closely modelled on elements of Locke's *Second Treatise of Government*.²⁵

Locke's state of nature is free of Hobbes' 'force and fraud', with men instead 'living together according to reason' but without a guiding authority to follow. Naturally, individuals are inclined to avoid a solitary life, and inevitably start a family, which eventually leads to the formation of political society.²⁶ The social contract has a two-step progression: firstly from individuals to collective society, and secondly a 'vesting of power in the legislature as a trust.'²⁷ Contrary to Hobbes' society, where rights are sacrificed entirely in fear, the power placed in the legislature is in Locke's opinion 'a positive, voluntary grant and institution.'²⁸ The obligation is for the government to serve the people, and the right of the public to resist authority is fundamentally inherent and unable to be compromised.²⁹

Locke's strong assertion of the natural right to property further sets his doctrine apart from Hobbes. Locke expanded the conventionally accepted notion that humanity possesses a private property right over their own body, elaborating further that the property one's body cultivates is also an integral component of the basic freedom and dignity which all are equally owed.³⁰ He considered that this right existed, but was not sufficiently protected, in a state governed by natural law, and thus it was necessary to integrate the right to property as a fundamental element of his social contract.³¹

Locke's doctrine of 'government by consent of the governed',³² with its palatable and contemporarily attractive principles of limitation of government, and prevention of the

²² Grover, above n 13, 543-544.

²³ Gough, above n 4, 105.

²⁴ Ibid 128.

²⁵ John Locke, 'Second Treatise of Government' in John Locke, *Political Writings* (Penguin Books, 1993) ch 7 para 77.

²⁶ Gough, above n 4, 128.

²⁷ Donald L Doernberg, "'We the People": John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action' (1985) 73 *California Law Review* 52, 62.

²⁸ Doernberg, above n 27, 62.

²⁹ Locke, above n 25, ch 7 para 88-102.

³⁰ Solomon, above n 1, 589.

³¹ Gough, above n 4, 131.

³² Doernberg, above n 27, 59.

interference of natural rights including property, has seen his writing retain relevance and manifest with material impact in politics to this day. In reality, however, his social contract is little more than a general model or structure to contain his arguments, and amounts to little more than a one-way trust between ‘a government obligated to the people, (and) not they to it.’³³ Ultimately, the social contract is not as fundamentally essential to Locke’s theory as it is for Hobbes.

³³ Ibid 63.

ENGLISH COMMON LAW: EMBODIMENT OF THE NATURAL LAW

PAUL MCWILLIAMS*

Abstract

This essay is a brief overview of the historical role of Natural Law theory in the development of fundamental principles and practices within the Common Law of England as it emerged and developed. The discussion is focused on four of the key jurists whose combined careers span more than five hundred years of the Common Law – Henry De Bracton, Sir John Fortescue, Sir Edward Coke, and Sir William Blackstone.

I INTRODUCTION

The development of the common law was heavily influenced by the contributions of several jurists that drew on natural law theory. Key natural law theorists that affected the development of the common law were Henry De Bracton, Sir John Fortescue, Sir Edward Coke, and Sir William Blackstone.

II HENRY DE BRACTON

Henry of Bracton was an early common law writer whose work was preceded largely by customary law. He wrote *On the Laws and Customs of England* and was a ‘justice of the nascent court of King’s bench’.¹ His work ‘made use of the Roman concept of natural law [and] regarded the King as subject to law but did not suggest any effective remedy for a breach of law by the King’.² However, as a practical matter, he argued that ‘counts and barons are the King’s masters, who must restrain him if he breaks the law’.³ The supremacy of the law over the King was his main intellectual contribution to the development of the rule of law. This concept laid the foundations for Coke who later relied on his famous statement. In fact, ‘Bracton’s *Note Book* was known to Fitzherbert’ and ‘[t]hrough Fitzherbert the cases which he took from the *Note Book* were known to Coke’.⁴

Bracton’s work became a powerful compilation of case law which came ‘at the end of a period of rapid growth’ and served to sum up and pass [the law] on to future generations of lawyers’.⁵ His work was ‘genuine English law laboriously collected’ which ‘cites

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¹ Frederick Pollock and Frederic Maitland, *The History of English Law: Before the Time of Edward I* (Cambridge University Press, 2nd ed, 1923) 206.

² Charles Haines, *The Revival of Natural Law Concepts: A Study of the Establishment and of the Interpretation of Limits on Legislatures with Special Reference to the Development of Certain Phases of American Constitutional Law* (Russell & Russell, 1965) 33.

³ William Holdsworth, *Some Makers of English Law: The Tagore Lectures 1937-38* (WS Hein, 1983) 19.

⁴ Ibid 22.

⁵ Ibid 17.

some five hundred decisions' and resulted in 'forty or fifty manuscripts'.⁶ His work was also memorable because it 'display[ed] much more than the facts and the decision ... [and it] often incorporate[d] the arguments of the parties'.⁷ Furthermore, it was useful as it 'gave English law one authority upon many matters which were outside the routine of practising lawyers of the thirteenth, fourteenth, and fifteenth centuries'.⁸

Bracton had an impact on judges as well as lawyers in his time. He 'stressed the king's need to choose capable men to be judges since they were acting in his place'.⁹

III SIR JOHN FORTESCUE

Fortescue came over a hundred years after Bracton and is best known for his work, *In Praise of the Laws of England*. He was 'made Chief Justice of King's Bench in 1430, and the Lord Chief Justice of England in 1442' but was later exiled between 1464-1470.¹⁰ He wrote his work in exile 'for the instruction of the young Prince [Edward], but very likely also as an answer to an essay which advocated the adoption in England of the civil law of Rome'.¹¹ He advanced the curious argument that the English common law was left behind by the Romans because it was of excellent quality, 'otherwise [they] would have replaced English law with their own, as they had done everywhere else'.¹²

His natural law background led him to be a proponent of personal liberty. In expounding the common law he highlighted that it allowed trial by jury and was against torture.¹³ He argued that 'as a result of the wisdom and the liberality of the common law, English kings are greater and more powerful, in the liberties and properties of their people, than the arbitrary rulers of the civilian countries of their people'.¹⁴ *In Praise of the Laws of England* 'was the first important book to propound the peculiar spirit of the common law. It was the herald of the age in which the lawyers would be prepared to stand up to the King and later to Parliament in defence of the legal rights of Englishmen'.¹⁵

Also, his 'knowledge of the machinery of the English government ... led him to originate the theory of a *dominium politicum et regale* – that is the theory of constitutional or limited monarchy' which, up to that point, 'no writer on political theory had envisaged'.¹⁶

⁶ Pollock and Maitland, above n 1, 208, 209.

⁷ AKR Kiralfy, *Potter's Historical Introduction to English Law and its Institutions* (Sweet & Maxwell, 4th ed, 1958) 282.

⁸ Holdsworth, above n 3, 22.

⁹ Ralph Turner, *The English Judiciary in the Age of Glanvill and Bracton, c.1176-1239* (Cambridge University Press, 1985) 270.

¹⁰ Hastings Lyon and Herman Block, *Edward Coke: Oracle of the Law* (FB Rothman, 1992) 341.

¹¹ *Ibid.*

¹² Margaret Davies, *Asking the Law Question* (Thomson Legal & Regulatory, 3rd ed, 2008) 59.

¹³ Lyon and Block, above n 10, 342.

¹⁴ *Ibid.*

¹⁵ Kiralfy, above at 7, 285.

¹⁶ Holdsworth, above n 3, 62.

IV SIR EDWARD COKE

Coke was perhaps the most zealous of the common law lawyers. He was a chief justice and his natural law ideas came forth mainly in his *Institutes* and judgements. In *Bonham's Case*,¹⁷ he argued that 'the common law will control Acts of Parliament, and sometimes judge them to be utterly void' if they are 'against common right and reason'.

He believed that the King as well as the parliament should be subject to the common law. In his famous conflict with King James, James understood that Coke's arguments meant 'I am to be under the law-which is treason to affirm' to which Coke replied '[t]hus wrote Bracton, *Rex non debet esse sub homine, sed sub Deo et lege*'.¹⁸ In English, he literally meant that the king ought not to be under man, but under God and the law.

Coke believed that judges had God's blessing, 'the favourable kindness of the Almighty', and that 'God [would] defend [them] as with a shield'.¹⁹ It almost seems as if he believed that judges were divine revelators and their judgements were scripture.

The impact of his law reports is that they 'gathered up the past precedents, and so bound them together for the benefit of his generation, that he transformed the Common Law into a living system capable of regulating the lives and fortunes of a developed civilization'.²⁰ Finally, Coke 'cemented the old standing alliance between Parliament and the common law', 'eliminat[ed] torture from criminal procedure ... and establish[ed] the rule of law'.²¹

V SIR WILLIAM BLACKSTONE

Blackstone was the great compiler of English common law. He was a chief justice of England and believed that "if any human law should allow or enjoin us' to transgress the natural or divine law then we are *bound to transgress* the human law, or else we must offend both the natural and divine".²² These types of remarks inspired American rebellion.

His *Commentaries on the Laws of England* was a monumental work mostly because of its popularity. Indeed, '[f]or the first time the common law had been so clearly delineated and exposed to the public gaze that an irresistible pressure for reform was created'.²³ His work was likely popular because it incorporated Newton's 'science', Locke's rationalism, and emphasised 'logic and principle'.²⁴

¹⁷ (1610) 8 Co Rep 114, 118b.

¹⁸ William Seagle, *Men of Law: From Hammurabi to Holmes* (The Macmillan Company, 1948)

¹⁹ Lyon and Block, above n 10, 350.

²⁰ Earl of Birkenhead, *Fourteen English Judges* (Cassell, 1926) 43.

²¹ Holdsworth, above n 3, 131.

²² James Steintranger, *Bentham* (G Allen and Unwin Ltd, 1977) 16.

²³ Seagle, above n 18, 211.

²⁴ Ibid 210.

His *Commentaries* was also influential because it again organized the common law. He ‘rescued the law of England from chaos’ and rivalled Bracton as an ‘English judicial writer’ who ‘paid ... attention to the selection and collation of words’.²⁵

Perhaps his greatest influence was on education. Before his *Commentaries* ‘only Roman and canon law had been taught at the universities’.²⁶ Blackstone ‘liberalised and clarified the law for the purpose of instruction of students who were not necessarily intending to practise law’.²⁷

VI CONCLUSION

Bracton influenced Coke who later held the King to be under the law, enabled the lawyers of his generation, and helped establish a professional judiciary. Fortescue advanced personal liberty under the common law and the idea of limited monarchy. Coke challenged parliament and the King with the common law. Blackstone inspired rebellion, popularised and organized the law, and provided an English legal text for university students. The natural law foundation that these men drew upon began a sharp decline with the emergence of legal positivism. Natural law largely disappeared until the atrocities of Nazi Germany and the subsequent Nuremburg trials. It was then revived by American judges.

²⁵ Lewis Warden, *The Life of Blackstone* (The Michie Company, 1938).

²⁶ Kiralfy, above at 7, 290.

²⁷ Ibid.

CONVENIENT FICTIONS: A COMPARISON AND CRITICAL ANALYSIS OF HOBBS' AND LOCKE'S SOCIAL CONTRACT THEORIES

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Abstract

The social contract theory is the theoretical foundation that underlies all modern forms of government and constitutionalism. While both Thomas Hobbes and John Locke believed that people naturally form governments, their reasoning for why this occurs differs. Hobbes and Locke postulated their social contract theories on distinct theories of human nature and the essence of citizens' relationship with their governments. Hobbes built on this foundation a concept of government that was not subject to its citizens as these citizens had formed this social contract with each other out of self-interest and for protection. In contrast, Locke formed the view that people rationally formed government to protect their rights and adjudicate their disputes. However, in the end both Hobbes's and Locke's theories were convenient fictions which sought to legitimise their own political views.

I INTRODUCTION

Citizens consent to government's authority because the alternative – life without government – would be far worse.¹ This relationship between citizens and their government forms the foundation of the state. Exponents of social contract theories attempt to explain why citizens form government and are obliged to obey its law. Thomas Hobbes and John Locke were the most important proponents of social contract theories. However their theories were almost completely opposed on human nature, the nature of government power and the rights of citizens against the sovereign. Hobbes used the social contract in defence of absolutism, while Locke used it in support of limited constitutionalism.²

II THOMAS HOBBS' SOCIAL CONTRACT THEORY

Thomas Hobbes was a staunch monarchist, and his political beliefs were strongly influenced by the English Civil War. His concept of the social contract was predicated on his theory of human nature. Hobbes believed that it was human nature to be in a state of war, where every person was in a permanent state of conflict with every other person for the limited resources available.³ In this state of nature, everyone has a right to everything and therefore there can be no security for anyone to enjoy his or her life.⁴

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¹ Kent Greenwalt, *Conflicts of Law and Morality* (Oxford University Press, 1987) 62.

² MDA Freeman, *Lloyd's Introduction to Jurisprudence* (Sweet & Maxwell, 7th ed, 2001) 111.

³ Robert Samek, *The Legal Point of View* (Philosophical Library, 1974) 98.

⁴ Ibid 99.

People realise that if everyone were to exercise their right to everything, this would be self-defeating and amount to a constant state of war of everyone against everyone.⁵ The natural law dictates that everyone should seek peace, or live sociably, as much as possible, by laying 'down this right to all things; and [being] contented with so much liberty against other men as he would allow other men against himself'.⁶ In Hobbes' opinion, natural law was founded on pragmatic self-interest, rather than any innate morality. People limit their natural right to everything for the sake of obtaining peace and self-preservation.⁷ People form social covenants with each other out of pragmatic self-interest and these covenants form the basis for civil society.⁸

Hobbes' social contract entailed subjugation to the sovereign.⁹ The sovereign's power, in whatever form it takes, must be absolute and undivided.¹⁰ Hobbes's social contract is only between subjects; the sovereign itself is not a party to the contract.¹¹ Therefore the sovereign's subjects have no rights to enforce against it arising out of their contract with each other.¹² Hobbes believed that a powerful central authority, rather than one which rules by consent, was necessary to enforce this social covenant in the context of persons who naturally compete and disagree with one another. In his opinion democracies were too weak to survive war. The sovereign's vague and unenforceable duty in this relationship is protecting the citizen's safety and the internal cohesion of the state; most other forms of intervention supersede the sovereign's role.¹³ In Hobbes's social contract rebellion was not justifiable, because if citizens accept their sovereign's protection they must also accept their sovereign's law.

III JOHN LOCKE'S SOCIAL CONTRACT THEORY

John Locke proposed a very different theory of the social contract in his *Two Treatises of Government*. Locke's theory was developed as a legal philosophy to underpin the English Revolution of 1688, which put an end to the divine right of kingship and its denial of a popular base for government.¹⁴ Like Hobbes, Locke's social contract was also based upon his conception of human nature. Locke wrote in *Two Treatises of Government*:

The State of Nature has a law of Nature to govern it, which obliges every one, and reason, which is that law, teaches all mankind who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty or possession ...

⁵ Knud Haakonssen, *Natural Law and Moral Philosophy* (Cambridge University Press, 1996) 32.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid 31.

⁹ John Kelly, *A Short History of Western Legal Theory* (Oxford University Press, 1992) 212.

¹⁰ Samek, above n 3, 100.

¹¹ Ibid 101.

¹² Kelly, above n 9, 213.

¹³ Ibid.

¹⁴ Ibid 215.

Therefore man used his reason to live according to the law of nature. Under this law he was bound not to injure the life, liberty or property of others and would protect himself from the encroachment of others upon his rights.¹⁵

In Locke's opinion, people resigned their power into the hands of a government to protect their natural rights and adjudicate disputes between them. Locke stated that:

Those who are united into one body, and have established law and judicature to appeal to, with authority to decide controversies between them, and punish offenders, are in civil society with one another.¹⁶

Locke believed that people are moral beings who will generally live peacefully with each other through reason.¹⁷

According to Locke, property rights were insecure; people remedied this by giving up some of their liberty to a sovereign whose purpose was to protect its subject's entitlements.¹⁸ In Locke's social contract, the community's government is constituted for 'their good and the preservation of their property'.¹⁹ The community acts according to the will of the majority,²⁰ while the sovereign's power is 'employed for [the] good and the preservation of [citizen's] property'.²¹ The Sovereign's power is not arbitrary, but rather 'is limited to the public good of the society'.²² Should the government exceed, neglect or oppose the legitimate limits of its power it can be altered or removed by the people for a breach of its trust and replaced with another.²³

IV COMPARISON AND CRITIQUE OF HOBBS' AND LOCKE'S SOCIAL CONTRACT THEORIES

Hobbes and Locke both believed that in nature people would come together to form a state for some form of protection. However, from this point on their theories diverge. Hobbes and Locke offered different hypotheses about why people formed a state. Hobbes argued that people formed a state out of pragmatic self-interest to protect themselves from each other. Locke's theory of human nature, however, was far more optimistic. He proposed that people were fundamentally moral beings that would form a state in order to protect their inalienable natural rights of 'life, liberty and estate' and adjudicate disputes between them.²⁴

Hobbes and Locke were also divided on the nature of government. Hobbes advocated the sovereign's absolute and undivided power. In *Leviathan* Hobbes wrote: 'The only way to erect a 'Common power ... is to confer all their power and strength upon one

¹⁵ Ibid 216.

¹⁶ Peter Laslett (ed), *Locke: Two Treatise of Government* (Cambridge University Press, 1960) 7.

¹⁷ Freeman, above n 2, 112.

¹⁸ Ibid.

¹⁹ Laslett, above n 16, 15.

²⁰ Kelly, above n 9, 216.

²¹ Laslett, above n 16, 15.

²² Ibid 11.

²³ Kelly, above n 9, 218.

²⁴ Ibid.

man, or one Assembly of men, that may reduce all their wills, by plurality of voices, unto one Will ...²⁵ In contrast, Locke wrote in *Two Treatises of Government*: '[The] legislative ... though it be the supreme power in every commonwealth, yet first, it is not, nor can possibly be, absolutely arbitrary over the lives and fortunes of the people'.²⁶ The divergence between both Hobbes' and Locke's theories on the sovereign's power can also be traced back to their theories of human nature. Hobbes' pessimistic beliefs of human nature required a strong central authority in order to protect the sovereign's citizens from each other and foreign powers. In contrast, Locke's optimistic beliefs advocated that people in a state of nature would have stronger moral limits and would be able to live in relative harmony without a strong central authority.

Both Hobbes' and Locke's social contract theories share similar problems of binding the original parties' successors to duties which they had never consented to assume.²⁷ Hobbes and Locke dealt with this problem in different ways. According to Hobbes, the sovereign is not a party to the social contract and therefore citizens have no recourse against the sovereign. Hobbes believed that if the people wish for the sovereign's protection, they must abide by its law.²⁸ Alternatively Locke proposed that the sovereign rules on behalf of its citizens and these citizens have a right to dissolve or modify the government for a breach of this trust. Locke's doctrine of government as a trust, breach of which will forfeit the right to govern further paved the way for modern constitutional and responsible government.²⁹

Both Hobbes' and Locke's theories are not without their flaws. Hobbes makes no allowance for the moral side of people and society. His theory implies that people without states would have no moral limits. Whilst areas without effective government do present many issues, not all these people are the amoral sociopaths Hobbes describes. His theory disregards the natural tendency of people to associate without violence.³⁰

Locke's optimistic theory of human nature also fails to consider how an entire population, such as in Nazi Germany, can support genocide. Locke believed that remaining in a country amounted to tacit agreement to obey the laws.³¹ People stay in their homelands because of language, culture, employment, friends, and family. Their inertia does not indicate approval or acceptance of government and laws.³²

V CONCLUSION

Both Hobbes and Locke present theories of the relationship between citizens and their government premised by their theories of human nature. Hobbes's theory is built on a pessimistic foundation that focuses on the worst tendencies of people. In contrast,

²⁵ Haakonssen, above n 5, 34.

²⁶ Laslett, above n 16, 43.

²⁷ Kelly, above n 9, 218.

²⁸ Ibid 218.

²⁹ Ibid 219.

³⁰ Ibid 214.

³¹ Laslett, above n 16, 98-99.

³² Jeffrie Murphy, 'Consent, Coercion and Hard Choices' (1981) 67 *Virginia Law Review* 79, 92.

Locke's theory may be overly optimistic in its assumption that people will generally abide by moral limits in nature. The truth probably lies somewhere in between the two extremes as history has demonstrated the flaws in both arguments. In essence both Hobbes's and Locke's social contract theories were convenient fictions attempting to justify existing structures.³³ However both theories laid important foundations upon which modern constitutionalism and responsible government were founded.

³³ Kelly, above n 9, 216.



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Western Australian Legal Theory Association

The Western Australian Legal Theory Association, or WALTA, is a learned society established by Dr Augusto Zimmermann in October 2010 at Murdoch University, Western Australia. Dr Zimmermann is also a Vice-President of the Australian Society of Legal Philosophy (ASLP).

The Aims of the Association

The Western Australian Legal Theory Association is constituted as a small group of academically interested lawyers, legal scholars and law students. The aims of the Association are to promote high-level scholarly discussion on subjects related to legal theory through debates, academic publications and conferences. Further details about membership can be found on the website: <http://www.law.murdoch.edu.au/walta/>

WALTA members are strongly encouraged to join the Australian Society of Legal Philosophy (ASLP).

Contributions

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