PROTECTING RIGHTS IN COMMON LAW CONSTITUTIONAL SYSTEMS: A FRAMEWORK FOR A COMPARATIVE STUDY

Cheryl Saunders*

I INTRODUCTION

It is a privilege to have been invited to contribute to this collection of essays to honour the work of Sir Ivor Richardson, on his retirement as President of the Court of Appeal. I propose to use the opportunity to explore one particular aspect of the divergent approaches of New Zealand and Australia to constitutional government. Despite the similarities in their histories and systems of law, and in the constitutional principles that both espouse, the actual constitutional arrangements of the two countries have always been surprisingly different. As time has gone on, the differences have increased, making Australasia an interesting laboratory for comparative constitutional lawyers.

It is also a small laboratory, however unless, as in this case, comparison can be extended to include other jurisdictions. My subject matter is the changes that have taken place in common law constitutionalism over the last twenty years in relation to the protection of rights, broadly defined. Specifically, the essay compares the approaches of four common law countries in which substantial legal and institutional change has occurred with Australia, where it has not. One of the four countries is, of course, New Zealand. The others are Canada, South Africa, and the United Kingdom.

For the purposes of my argument, I have assumed that all five of these countries share broadly similar constitutional goals. One is to protect the rights of people within their jurisdiction from inappropriate encroachment by the State. A second is to foster and develop other key principles of common law constitutionalism including representative

---

* Associate Dean (Graduate Studies), and Director of the Institute for Comparative and International Law and of the Centre for Comparative Constitutional Studies, University of Melbourne. I am grateful for Charles Parkinson's research assistance for the purposes of preparation of this article.

democracy, the rule of law and an independent judiciary. If this assumption is correct, the challenge is to reconcile or balance the two, in order to achieve them both. One point on which the five countries part company with each other, and on which Australia in particular differs from the rest, is the way in which the reconciliation is achieved. It may be that the assumption is incorrect, and that the real difference between the approaches chosen is a more profound philosophical one. It would be possible to argue this as well. On balance I do not think that this explanation is correct, however, and I do not seek to do so.

As might be expected in the circumstances, there is considerable difference of view within Australia about whether it would be desirable to adopt more specific rights protection and, if so, the form it should take.[1] Diverse views on the issue can be found in the other jurisdictions as well, although tempered by actual experience with specific rights protection. These differing perspectives focus on two questions in particular. The first is the effect of specific constitutional or quasi-constitutional instruments for the protection of rights on public institutions. Specifically, it is asked whether such instruments unduly inhibit the ability of governments and Parliaments to act in the public interest; or cause democratic institutions to atrophy; or put at risk the independence of the courts. The second question is whether, in the absence of such instruments, it is realistic to expect that democratic institutions can and will protect rights to an appropriate extent.

Given the range of different approaches to the protection of rights in common law countries, it would be possible now to approach the answer to both questions through comparative study. One aim of the essay is to suggest the directions that such study might take. To that end, it is divided into three substantive parts. The first explores more fully the nature of the concerns about bills of rights in common law systems in the British tradition. The second identifies the ways in which the policy makers have sought to meet these concerns in the four countries in which change has occurred: Canada, New Zealand, South Africa, and the United Kingdom. The third examines the ways in which distributions of power and the political process operate to protect rights in Australia.

II TRADITION, TRENDS, AND TENSIONS

The United Kingdom and the broad network of countries that once formed part of its first and second empires, share similar broad assumptions about legal principle and the structure and operation of the institutions of government. For present purposes, these include the following. Courts are independent and must be perceived as independent.

---

1 See for example, the range of witnesses before the most recent Australian inquiry into a bill of rights: New South Wales Parliament, Standing Committee on Law and Justice, *A New South Wales Bill of Rights* (2001).

The reasons for judicial decisions are binding on inferior courts in the same hierarchy, and thus, constitute law. The scope of executive power and the lawfulness of executive action may be determined by the ordinary courts, in litigation properly brought before them. Some important civil and political rights, identified over the long course of development of the common law, are acknowledged by precedent and protected against encroachment by the State, at least without clear legislative authority.[2]

Despite these underlying similarities, however, there are two distinct traditions within common law constitutionalism, associated respectively with the United Kingdom and the United States of America. Originally, the divergence was stark, stemming from the introduction into a common law setting of a single written constitutional document representing fundamental law, following the successful American War of Independence. At least by the time of *Marbury v Madison*,[3] in 1803, it became clear that one consequence of such an arrangement was judicial review of the legal validity of legislation, as well as executive action, by reference to consistency with the Constitution. By contrast, at least until recently, the orthodox view of the British common law tradition recognised no such possibility, the contested implications of *Dr Bonham's* case aside.[4]

From the standpoint of a system of government and relations between institutions, the practical significance of these different approaches depends on the content and scope of the written Constitution. In the case of the United States, the difference was magnified by the addition of a Bill of Rights almost immediately after the introduction of the original Constitution,[5] and by further amendments after the civil war, which proved the vehicle for the extension of the Bill of Rights to the States.[6] These developments provided the basis for judicial review of both federal and state legislation and executive action, by reference to a broad range of constitutional rights, expressed in largely unqualified terms.

The early constitutional history of the countries that are the focus of this paper was different. Some of them were constituted as federations, which necessitated written constitutions, with courts as independent umpires. In any event, all were familiar with the notion that laws of their legislatures might be invalid, on the grounds of inconsistency

---

2 For a collection of Australian authority to this effect, which also identifies some of the common law "rights", see Denis C Pearce and Robert S Geddes *Statutory Interpretation in Australia* (3 ed, Butterworths, Sydney, 1988) 106-107.

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

4 *Dr Bonham's Case* (1610) 8 Co Rep 121 (CP). The orthodox view is now itself contested: see generally, Paul Craig "Public Law, Political Theory and Legal Theory" [2000] PL 211.

5 US Constitution, amendments I-X.

6 US Constitution, amendments XIII, XIV, XV.

with higher law, in the form of Acts of the then sovereign Imperial Parliament.[7] On balance, however, all remained broadly within the British constitutional tradition in the sense that they resisted the constitutionalisation of rights. With hindsight, it is possible to see that they shared the assumptions articulated by Dicey with such lasting effect. For present purposes, these may be summarized as follows. Courts cannot set aside an Act of Parliament. While this rule necessarily was modified outside Britain itself, its spirit affected the attitudes of Parliaments, governments, and courts and the content of written Constitutions. Despite their legal sovereignty, Parliaments nevertheless are constrained in practice, and will not abuse their power. These practical constraints are external, resulting from the threat of civil disobedience and internal, drawing on the character of Parliament itself. The effect of representation is to align these limits more closely.[8] The sovereignty of Parliament, thus conceived, both underpins and is consistent with the rule of law and the protection of rights.[9] Law is general and must be made by statute. Statute in turn paves the way for the involvement of the courts, both in review of the lawfulness of executive action and in the interpretation of legislation. Parliament can be trusted not to interfere with the "course of law", the "jurisdiction of the ordinary courts", or the "independence of judges".[10]

In the wake of World War II, worldwide concern about the abuse of human rights by or despite elected legislatures led many more countries to provide constitutional protection for rights, in a manner enforceable through judicial review,[11] albeit in many cases, in the "dignitarian", rather than "individualistic" tradition.[12] Some of these were common law jurisdictions emerging from colonial status, including, most notably, India. The old dominions and the United Kingdom itself withstood the trend, however, for a range of reasons.

In the first place, there was no pressing need to change or, at least, no perception of need. Leaving aside, for obvious reasons, the particular circumstances of South Africa, each of the countries concerned prided itself on democracy, the rule of law, and a high level of respect for rights that was assumed to be a concomitant of their common law heritage.

---

7 Alfred Venn Dicey *Introduction to the Study of the Law of the Constitution* (8 ed, 1915 repr, Liberty Classics, Indianapolis, 1982) 92.

8 Dicey, above, 30.

9 Dicey, above, chapter 13.

10 Dicey, above, 270.

11 Mary Ann Glendon *A World Made New* (Random House, New York, 2001) 217-8, 228.

12 Glendon, above, 227.

Equally influential, however, were objections drawn from constitutional principle. Overwhelmingly, the most important was the tension, aggravated in a common law setting, between the democratic credentials of Parliaments and the governments that drew authority from them, on the one hand, and the alteration of constitutional ground rules so as to expand the jurisdiction of the courts, on the other. Drawing loosely on Dicey's justifications, opponents of change assumed that Parliaments would adequately defend and, if necessary, extend rights, if only out of a sense of self-preservation. If they did not, regular, fair, and free elections offered an adequate sanction.

This approach had other potential advantages as well. It enabled elected institutions to strike a balance between the public good and individual interests and to determine priorities between rights in cases of conflict. It avoided the perceived extremes of United States of America judicial decision-making and preserved the independence of courts. It did not privilege particular rights; it enabled recognition of newly acknowledged rights on a par with the old; it enabled those that became outmoded to be modified or removed altogether. It preserved the flexibility of public institutions to deal with excesses of private power, in the interests of individuals, as well as of the public at large. In the case of the two federations, Canada and Australia, it avoided the jurisdictional sensitivities associated with national bills of rights.

By the end of the twentieth century, however, the tenor of the debate began to shift. In part, this was due to uneasiness about the assumptions on which legally unfettered parliamentary authority rested. Whatever the innate character of Parliament in Dicey's day, its operation in practice was affected by the increasing influence of a small number of tightly organized and highly adversarial political parties on the composition and operation of chambers from which governments were formed, in relation not only to legislation, but also to scrutiny of executive action. In any event, the manner in which proposals were prepared for introduction into the Parliament and handled by it offered little opportunity systematically to consider human rights standards. In the circumstances, there were no necessary guarantees of the generality of law, or of restraint in relation to the jurisdiction or independence of courts. Civil disobedience was possible, and rejection at election a fact of life. Realistically, however, neither was a likely response to abuse of individual rights, unless the abuse was extraordinarily serious.

In part the shift in attitude was due also to changes in the context in which national constitutional systems operate and to which they must respond. To the extent that confidence in elected institutions rested on perceptions of shared interests and understandings, it was undermined by the increasing heterogeneity of all communities, coupled with a new willingness to acknowledge, respond to and in some cases value difference. The emergence of international human rights standards also contributed to the

changed dynamics, particularly in the face of the traditional common law rule that international commitments do not themselves alter domestic law.[13]

The tension between established constitutional principles and practices and arguments in favour of more effective protection for rights fuelled a variety of different developments. The principles of judicial review of executive action and the willingness of courts to apply them were strengthened across the common law world.[14] Scholars trawled the origins of parliamentary sovereignty and criticised its continuing relevance to find some evidence or argument that might persuade a court that there were, after all, limits to what Parliaments could legally do.[15] The development of interest for present purposes, however, was the successive introduction of instruments with legal force to give protection to a broad range of specified rights. This is the subject of the next part.

III BALANCING RIGHTS AND REPRESENTATION

The challenge for constitutional policy-makers in Canada, New Zealand, South Africa, and the United Kingdom was to design a regime that would provide systematic protection for rights without sacrificing core advantages, or perceived advantages, of traditional common law constitutionalism. In a common law system, incorporation of rights in a Constitution or a statute is readily assumed to create positive law, attracting judicial review.[16] These initiatives therefore required a balance to be struck between the scope and effect of the judicial review and the capacity of governments, through Parliaments, to effectuate their policies, in the public interest.

The response to this challenge differs between jurisdictions, in some significant respects. The most significant concerns the status of the protected rights. In Canada and South Africa, rights and freedoms are incorporated in entrenched constitutional form.[17] In New Zealand and the United Kingdom, protection takes place through legislation without

---

13 *Attorney-General for Canada v Attorney-General for Ontario* [1937] AC 326, 347 (PC).

14 See, for example, the development of the concept of unreasonable exercise of power described in Stanley De Smith, Sir Harry Woolf, and Jeffrey Jowell *Judicial Review of Administrative Action* (5 ed, Sweet and Maxwell, London, 1995) chapter 13.

15 See, for example, Christopher Forsyth (ed) *Judicial Review and the Constitution* (Hart Publishing, London, 2000).

16 Compare systems in which Constitutions do not constitute positive law: Eivind Smith "On the Formation and Development of Constitutional Jurisdiction" in *Festskrift Till Fredrik Sterzel*, (Iustus Forlag 1999) 289, 294-5.

17 Canadian Charter of Rights and Freedoms, 1982 [Canadian Charter]; Constitution of the Republic of South Africa, chapter 2 [South African Constitution].

formal constitutional status.[18] The difference was not simply a reaction to the circumstance that the latter two countries lacked an entrenched Constitution in which rights might be reposed. Canada had experimented earlier with a legislative Bill of Rights.[19] New Zealand had debated entrenchment before settling on a Bill of Rights in legislative form.[20] Of course, entrenchment presented technical difficulties in both New Zealand and the United Kingdom. The model that each eventually adopted, however, also reflected the prevailing view of where the balance between courts and legislatures should lie, as a matter of principle.

Even between the jurisdictions that chose, respectively, a constitutional or a legislative model, there are significant differences in design. In part, these are the result of attempts on the part of jurisdictions that moved to rights protection later to improve on the experience of those that had acted earlier. Thus, the South African Bill of Rights and the rights instruments of both New Zealand and the United Kingdom were drafted in the light of experience with the Canadian Charter, which in turn was in part a reaction to the history of the interpretation of the United States Bill of Rights.[21] Similarly, the framers of the Human Rights Act 1998 (UK) consciously added features that were not present in the New Zealand Bill of Rights Act 1990.[22]

Other differences represented a response to different local circumstances. South Africa conferred constitutional jurisdiction on a specialist Constitutional Court, for reasons that did not exist elsewhere.[23] The United Kingdom necessarily drew its list of protected rights from the European Convention on Human Rights, which the Human Rights Act is designed to incorporate. Other jurisdictions also adjusted the familiar core of widely recognised rights to reflect perceived local needs. Most notably, the South African

---

18 Human Rights Act 1998 (UK); New Zealand Bill of Rights Act 1990. Sir Kenneth Keith has referred to the New Zealand "interpretive" Bill as a "half-way" Bill: Sir Kenneth Keith "A Bill of Rights: Does it Matter? A Comment" (1997) 32 Texas International LJ 393, 395.

19 Canadian Bill of Rights 1960; Lorraine E Weinrib "Canada's Charter of Rights: Paradigm Lost?" (2002) 6 Review of Constitutional Studies 119, 132-3.

20 Keith, above, 395.

21 Joanna Harrington "Rights Brought Home: The United Kingdom adopts a 'Charter of Rights'" (2000) 11 Constitutional Forum 105, 107; Weinrib, above, 133,145; Keith, above, 397; David M Davis "Constitutional Borrowing: The South African Case" (forthcoming 2003).

22 Harrington, above, 107.

23 South African Constitution, s 167.

Constitution identifies a range of social and economic rights[24] and the Canadian Charter protects the language rights of its French and English communities.[25]

Common to all four instruments, however, is the goal of balancing a rights regime, coupled with judicial review, against the decision-making capacity of elected representatives. Three broad techniques are used for the purpose.

First, each instrument expressly recognises broad circumstances in which rights may be limited. In other words, for the most part, rights in these instruments are not expressed in absolute terms. This technique can be traced to international human rights conventions.[26] Peter Hogg has identified it as one of two[27] distinct differences between the Canadian approach to rights protection (shared with other countries in the British common law tradition) and United States constitutionalism.[28] To give effect to this technique, section 1 of the Canadian Charter subjects the rights and freedoms guaranteed by it "only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". The corresponding formulation in section 5 of the New Zealand Bill of Rights Act is identical. The South African Constitution, on the other hand, is more nuanced. Pursuant to section 36, a law limiting rights must be general in its application and any limitation must be "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom". The validity of a limitation also will depend on a range of factors, chosen to give greater precision to the nature of the judgment to be made, including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and the existence of less restrictive means to achieve the purpose.[29] Comparable prescriptions under the United Kingdom legislation are drawn from the articles of the European Convention, which variously authorise limitation of particular rights to the extent "necessary in a democratic society" to preserve specified public

---

24 South African Constitution, ss 22, 26, 27, and 29 in particular.

25 Canadian Charter, ss 16-23.

26 Mary Ann Glendon *A World Made New* (Random House, New York, 2001) 228.

27 The other is the override provision, discussed below.

28 Peter W Hogg "The Charter Revolution: Is it Undemocratic?" (2002) 12 Constitutional Forum 1, 5-6.

29 South African Constitution, s 36(1)(a)-(e).

interests, which typically include national security, public order, and the rights and freedoms of others.[30]

Inevitably, express authorisation of limitations of this kind has attracted litigation and has become the subject of an extensive jurisprudence. Inevitably also, individual judicial decisions about whether or not particular measures can be justified as a "reasonable" limitation in a "democratic" society within the terms prescribed by the relevant Constitution have been criticised. Sometimes, criticism is directed to the very engagement of courts in an inquiry into whether the goal of a law is "pressing and substantial, and the law enacted to achieve that goal ... proportional in the sense of furthering the goal, being carefully tailored to avoid excessive impairment of the right, and productive of benefits that outweigh the detriment" to the right.[31] The significance of these objections must be weighed against the effect of a technique that encourages public reflection on the nature and meaning of a democratic society at the turn of the twentieth century, and on the extent of the limitations on a wide range of rights and freedoms that can properly be imposed in its name.

Secondly, each instrument provides some direction to the courts in the exercise of judicial review in ways that affect the impact of judicial review on public policy and to that extent contribute to the balance between courts and elected institutions. In some cases, this is achieved through the terms in which particular rights provisions are drafted, so as to anticipate difficulties in their interpretation, generally in the light of previous experience elsewhere. Thus most instruments make some provision for affirmative action as a precaution against an interpretation of equality or anti-discrimination rights that would preclude it;[32] the Canadian and South African instruments expressly quarantine indigenous and cultural rights from the effect of some general rights provisions;[33] the Canadian Charter preserves existing rights and privileges of denominational schools;[34] and the South African Constitution exempts forms of hate speech from the right to freedom of expression.[35] Anticipating sensitive issues from the perspective of the

30 See, for example, the European Convention on Human Rights, article 8 (respect for private and family life); article 9 (freedom of thought conscience and religion); article 10 (freedom of expression); article 11 (freedom of assembly and association).

31 Encapsulation of the current lines of judicial inquiry attracted by the Canadian Charter, s 1, see Chief Justice McLachlin in *R v Sharpe* [2001] 1 SCR 45, 78.

32 Canadian Charter, ss 6(4), 15(2); New Zealand Bill of Rights Act 1990, s 19(2); South African Constitution, s 9(2); Human Rights Act 1998 (UK), s 14.

33 Canadian Charter, s 25; South Africa Constitution, s 15(3).

34 Canadian Charter, s 29.

35 South African Constitution, s 16(2)(c).

Canadian provinces, the Canadian Charter protects provincial power from an absolute interpretation of interprovincial mobility rights[36] and specifically provides that the Charter does not extend the "legislative authority" of any jurisdiction.[37] The South African Constitution confronts the vexed question of priority between rights, in a context in which the potential for competition is obvious, by subordinating language, religious, and cultural rights to other civil, political, and economic rights, themselves defined in some detail.[38] All instruments refute any intention to deny the existence of rights not expressly included,[39] thus attempting to counter the concern that to articulate particular rights is to alter the common law presumption of freedom subject to law.

Three of the instruments also provide general guidance on the interpretative approach that a court should take. The South African Constitution is most prescriptive, directing courts to interpret the Bill of Rights in a way that promotes "the values that underlie an open and democratic society based on human dignity, equality and freedom" and to "consider international law".[40] The Canadian Charter directs courts to interpret its provisions "in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians".[41] Consistently, with its character as an instrument incorporating an international convention, the United Kingdom Human Rights Act requires courts to take into account judgments of the European Court of Human Rights and decisions of other, key European bodies.[42]

The final and most important feature of these instruments, given the emphasis on Parliament in the British common law tradition, is the manner in which each preserves, to some degree, a capacity for action by a legislature that wishes to derogate from, override, or simply fail to comply with the specified rights and is prepared to take responsibility for it. In South Africa, this possibility is narrowly confined to derogation from certain rights during a state of emergency, itself invoked in accordance with a procedure carefully prescribed by the Constitution.[43] The difference between the South African Constitution

---

36 Canadian Charter, s 6(3).

37 Canadian Charter, s 31.

38 Sections 30-31.

39 Canadian Charter, s 26, New Zealand Bill of Rights Act 1990, s 28; South African Constitution, s 39(3); Human Rights Act 1998 (UK), s 11.

40 South African Constitution, s 39(1).

41 Canadian Charter, s 27.

42 Human Rights Act 1998 (UK), s 2.

43 South African Constitution, s 37; also specifying a table of "non-derogable" rights.

and the other instruments in this regard is attributable to South Africa's own history, which (unsurprisingly) tends to detract from the veneration which a full-blown doctrine of parliamentary sovereignty traditionally has attracted elsewhere. For present purposes, therefore, the techniques adopted by the other three jurisdictions are of greater interest.

New Zealand and the United Kingdom preserve the authority of Parliament[44] by giving legal effect to rights through legislation, rather than in constitutional form. In the case of the United Kingdom, the capacity of the State to take action irrespective of the Human Rights Act is extended further by the Government's power to derogate from the Convention and by order to designate derogation for the purposes of the Act.[45] In turn, however, the resulting imbalance in favour of the power of the elected branches, and away from the protection of rights, is partially redressed in three ways.

First, both Acts encourage courts to attribute to legislation a meaning that complies with protected rights. The United Kingdom Act goes further than the New Zealand measure in this regard. It exhorts the courts to read legislation in a way that is "compatible" with the Convention rights "so far as it is possible to do so",[46] apparently in deliberate preference[47] to the New Zealand requirement for the courts to adopt a meaning "consistent" with the protected rights "wherever an enactment can be given" such a meaning.[48] The difference is now reflected in the operation of the two measures in practice. United Kingdom Judges can apply section 3, even in the absence of ambiguity,[49] whereas the New Zealand provision depends on an "ambiguity or uncertainty";[50] admittedly readily enough found in many cases.

---

44 But not the Scottish Parliament, in relation to which the Human Rights Act has constitutional status, to all intents and purposes: Scotland Act 1998, s 29(2)(d). See also Northern Ireland Act 1998, s 6.

45 Human Rights Act 1998 (UK), s 14. This procedure was used to ensure compatibility of the proposed Anti-terrorism, Crime and Security Act 2001 with the Human Rights Act: Human Rights Act 1998 (Designated Derogation) Order 2001; Human Rights Act (Amendment No.2) Order 2001.

46 Human Rights Act 1998 (UK), s 3(1).

47 *R v A* [2001] 3 All ER 1, 44 (HL) Lord Steyn "The draftsman of the Act had before him the slightly weaker model in section 6 of the New Zealand Bill of Rights Act 1990 but preferred stronger language".

48 New Zealand Bill of Rights Act 1990, s 6.

49 *R v A*, above. For a similar approach, even before the introduction of the Human Rights Act, see *R v Secretary of State for the Home Department; ex parte Simms* [2000] 2 AC 115 (HL).

50 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington, 2001) 1046, referring to the observations of Hardie Boys J in *Knight v Commissioner of Inland Revenue* [1991] 2 NZLR 30, 43 (CA).

Secondly, both Acts seek to hold governments to account for compliance with the protected rights and freedoms at the time proposed legislation is passing through the Parliament. Again, the United Kingdom procedure is more stringent than that of New Zealand. The latter requires only that the Attorney-General bring any provision that "appears to be inconsistent" with protected rights and freedoms to the attention of the House of Representatives when a bill is introduced.[51] In the United Kingdom, on the other hand, the Minister in charge of a bill must either make, in writing, a statement of compatibility or state that he or she is unable to do so, but that the government wishes to proceed, nevertheless.[52] Most obviously, such a procedure provides a means of government accountability to Parliament and the public for significant constitutional decisions of this kind. More effectively, in all probability, it also focuses attention within the executive branch on the pending conflict. At the very least, this makes it likely that rights standards will be taken into account during policy formulation.[53] In some cases, it may minimise the impact of particular policies on rights. It is difficult to gauge the effectiveness of these procedures without understanding the nature and extent of their impact at this formative stage.[54] Logically, however, the greater regularity and precision of the statement required under the United Kingdom legislation should ensure that it is more effective than its New Zealand counterpart generally is reputed to be.

Finally, the United Kingdom Human Rights Act also prescribes a procedure whereby a court may make a "declaration of incompatibility" between primary legislation and a Convention right,[55] leaving it to government and Parliament to amend the statute if there are "compelling reasons" for so doing.[56] There is no equivalent procedure in the New Zealand Bill of Rights Act, although a declaration of inconsistency is now available in cases

---

51 New Zealand Bill of Rights Act 1990, s 7.

52 Human Rights Act 1998 (UK), s 19.

53 See the description of the Cabinet and associated procedures in New Zealand, in Joseph, above, 1050.

54 See generally the advice of Daintith and Page not to overlook the significance of executive rules and procedures: Terence Daintith and Alan Page *The Executive in the Constitution* (Oxford University Press, Oxford, 1998).

55 Human Rights Act 1998 (UK), s 4.

56 Human Rights Act 1998 (UK), s 10, and Schedule 2. Amendments may be made by a Minister, by remedial order, a draft of which is supposed to be approved by the Parliament, except for urgent cases, when the order may subsequently be approved.

of breach of the right to freedom from discrimination in section 19, pursuant to section 92J of the Human Rights Act 1993.[57]

After an experiment with legislative protection of rights, widely regarded as ineffective, Canada entrenched a range of selected rights and freedoms through a Charter with constitutional status. Even in this case, however, the potential for either the national Parliament or provincial legislatures to have the last word is preserved by the innovative procedure pursuant to which an Act may be declared to operate "notwithstanding" most Charter rights for a (renewable) period of five years.[58] The procedure is available in relation to the "fundamental freedoms" of conscience, religion, thought, expression, assembly, and association, "legal rights" including life, liberty, and security, and a range of criminal justice rights and equality rights. In practice, it has rarely been used, but its existence assists to meet the point of principle. In Canada's case, the procedure has the additional advantage of helping further to defuse objections to the Charter from the standpoint of the federal balance of power.

Over the past twenty years, the initiatives taken by each of these countries has made a new contribution to the old problem of balancing the power of the State to act effectively in the public interest, with systematic protection of individual rights. From the standpoint of rights, the advances appear to include, at least, the following. Each jurisdiction has publicly articulated human rights standards, broadly adapted to its circumstances, which also reflect international rights regimes. These instruments establish rights as a priority and provide a starting point of reference in relation to them. They also have legal status, with all the implications that follow from this in a common law system. Both the executive and the legislature are likely to systematically take rights into account in carrying out their functions. The results can be measured against rights standards by an independent court, in an open forum. The rights instruments and the debate associated with their operation in practice, including debate on the meaning of democracy itself, have a potential educative effect for the community as a whole, and thus, may contribute to the development of civil society.

At the same time, the changes also have some positive implications for the design and operation of the institutions of government. Most obviously, they increase the likelihood that public action complies with national and international human rights norms. In all jurisdictions, with the possible exception of South Africa,[59] this is achieved in a way that

---

57 This section and supporting provisions were introduced by the Human Rights Amendment Act 2001.

58 Canadian Charter, s 33.

59 Where, however, the Constitution is relatively easily amended.

leaves with representative institutions the capacity to make the final decision, even where legislation fails the judicially applied test of being reasonable in a democratic society. Although the detail varies between jurisdictions, each approach also tends to encourage and reinforce the need for dialogue between institutions,[60] implicitly recognising the different skills that courts and elected branches bring to issues of this kind. In the end, this new and rather more constructive form of checks and balances, bearing with it potential for greater inter-branch respect, may be the most enduring legacy of these developments.

It would be surprising if a balancing approach of this kind met all objections. It is vulnerable to criticism by those who favour more effective rights protection as well as by those who prefer the government in Parliament to have essentially untrammeled authority, either because they are sceptical of the effectiveness or bona fides of courts, or for some other reason. To the extent that these differences reflect divergent philosophical views on the organisation and role of government including the significance of rights, they are beyond the scope of the present exercise. On the other hand, if they are attributable to uncertainty about whether specific rights instruments, subject to judicial review, are necessary or desirable for the protection of rights in a common law constitutional system, the Australian experience may be instructive. The nature and significance of this experience is the subject of the next part.

IV AUSTRALIA

A Introduction

Australia has a written Constitution, representing fundamental law, in the sense that all public action must comply with it.[61] It was designed at the end of the nineteenth century for the purpose of establishing a federal system in a form that would persuade the six self-governing Australian colonies to unite. This involved dividing powers between the spheres of government and creating a Senate in which all original States would be represented equally. Necessarily, the Constitution also provided a framework for the institutions of national government. The manner in which this was accomplished subsequently was found to have established a constitutional separation of powers.[62] The original rationale for this doctrine, which places particular emphasis on the separation of judicial power, derived from the role of the judiciary as the final arbiter of constitutional

---

60 Janet Hiebert "Why must a Bill of Rights be a Contest of Political Wills? The Canadian Alternative" (1999) 10 Public LR 22.

61 Commonwealth of Australia Constitution Act (Imp) 1900, covering clause 5.

62 *R v Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; and *Attorney-General v The Queen* (1957) 95 CLR 529.

disputes in a federation.[63] In all these respects, the Australian Constitution drew heavily on both the concepts and the text of the United States Constitution.

The scope of the Australian Constitution was and remains, however, limited. And despite the evident American influence, Australia remains a constitutional system in the British common law tradition. At both levels of government, Commonwealth and State, the institutions of legislative and executive government operate broadly on Westminster lines. The Constitution tends to be interpreted strictly, by comparison with those of other countries.[64] American precedents are frequently cited, but almost as frequently distinguished, on the grounds of difference in institutional structure[65] or constitutional tradition.[66] There is widespread acceptance of the view that the will of the government in Parliament is entitled to prevail, subject, necessarily, to the limits of the sparse written Constitution. Sanctions against abuse of power lie with the electorate at regular (and relatively frequent) general elections.

Consistently with this approach, Australia has so far rejected implementation of a Bill of Rights, whether in constitutional or legislative form. The absence of rights from the original Constitution is not surprising, given the assumptions of the time and the circumstances in which it was written and brought into effect. In fact, even at that time a modest proposal for a truncated version of the fourteenth amendment to the Constitution of the United States was made, as a concomitant of federalism, but effectively was rejected.[67] More notably, although debate on more effective rights protection took place in Australia, as elsewhere, in the last quarter of the twentieth century, it led to no significant change. Sir Robert Menzies suggested that responsible government made bills of rights unnecessary, in his lectures at the University of Virginia in the 1960s.[68] This remains the prevalent view. Attempts to implement a legislative bill of rights failed in 1973, and again

---

63 *Attorney-General v The Queen* (1957) 95 CLR 529, 540.

64 The highwater mark of this mode of interpretation was *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129. Interpretative method has since changed substantially, but its influence remains.

65 As in the *Engineers* case itself: (1920) 28 CLR 129, 146, 147, Knox CJ, Isaacs, Rich and Starke JJ.

66 For example, *McGinty v Western Australia* (1996) 186 CLR 140, 187, Dawson J; 203, Toohey J; 247, McHugh J; 267, Gummow J.

67 Sir John Quick and Sir Robert R Garran *Annotated Constitution of the Australian Commonwealth* (1901 repr, Legal Books, Sydney, 1976), 953-954.

68 Rt Hon Sir Robert Menzies *Central Power in the Australian Commonwealth: An Examination of the Growth of Commonwealth Power in the Australian Federation* (Cassell Australia, Sydney, 1967) 54.

in 1983 and 1985.[69] A small shadow of a rights proposal was put to referendum in 1988[70] but was rejected by large national majorities, although for reasons that probably have little bearing on the general question.[71] One incidental consequence is that, unlike other federal systems, the Australian Constitution does not seek to ensure commonality of standards for governance and rights amongst its component jurisdictions. Individual States have from time to time considered unilateral action to provide more effective protection for rights.[72] With one partial exception,[73] the idea has always been rejected. Most recently, the New South Wales Parliamentary Standing Committee on Law and Justice recommended against a statutory bill of rights on the general ground that it was "ultimately against the public interest for Parliament to hand over primary responsibility for the protection of human rights to an unelected judiciary".[74]

On the assumption that respect for the rights of people is no less a goal in Australia than elsewhere, its interest for comparative purposes lies in the operation and effect of the alternative mechanisms on which it relies. Essentially there are two. First, the Australian experience demonstrates the impact of constitutionally diffusing power on the protection of rights. Secondly, once allowance is made for the effects of the written Constitution, rights protection in Australia depends on the interplay of political forces in majoritarian parliamentary systems and, to a lesser extent, on common law principles applied by independent courts. Individually or collectively, these are the two traditional constitutional design alternatives to protecting rights through specific rights instruments in a common law system. The Australian example is useful for this reason.

B Dividing Power

The Australian Constitution divides power in two ways: between spheres of government, for the purposes of federalism, and between the institutions of federal government, to entrench a three-way separation of powers. In both cases, compliance is

---

69 Constitutional Commission, *Final Report* (1988) 9.54-9.62. George Williams *Human Rights Under the Australian Constitution* (Oxford University Press, Melbourne, 1999) 253-254.

70 Constitution Alteration (Rights and Freedoms) 1988.

71 Cheryl Saunders "The Parliament as Partner; A Century of Constitutional Review" in Geoffrey Lindell and Raymond Bennett (eds) *Parliament; The Vision in Hindsight* (Federation Press, Sydney, 2001) 454, 474-475.

72 Constitutional Commission *Final Report* (1988) 9.65-9.72 sets out the principal attempts, up to the date of publication of the Report.

73 Legislative Standards Act 1992 (Qld).

74 New South Wales Parliament, Standing Committee on Law and Justice, *A New South Wales Bill of Rights* (2001).

subject to judicial review. Both mechanisms for the division of power have some impact on protection of rights in the Commonwealth sphere. The federal division of powers also can assist to preserve rights against action by State governments and Parliaments. There is no normative separation of powers at the State level, although State courts are incidentally affected by the separation of federal judicial power.

1 Federalism

The Australian approach to the federal division of power limits the matters on which the Australian Parliament may make laws. Necessarily, it thus limits the Parliament's power to make laws that detrimentally affect rights. Famously, the federal division of power was a key element in the invalidation of the legislation that disbanded the communist party and prohibited its re-establishment in the 1950s.[75] Similarly, the federal division of powers was held to invalidate Commonwealth incursions into freedom of political speech in two early cases,[76] before the notion of implied constitutional limits on power took hold.[77] The most recent and topical example, however, concerns deportation. Commonwealth legislation authorising deportation relies principally on its legislative power with respect to "aliens", in section 51(xix) of the Constitution. By this circuitous route, at least one citizenship right is established, namely the right of citizens to remain in their own country. In a recent decision, a majority of the High Court of Australia extended the protection further, by concluding that the constitutional term "alien" was not necessarily co-extensive with the statutory concept of "non-citizen".[78] On that occasion, the beneficiary was a British national, the beginning of whose life in Australia pre-dated the final severance between the status of British subject and Australian citizen. Similar reasoning might preclude deportation of other categories of people; for example, deportation of former citizens, were the ground rules of citizenship to be altered.

This feature of the Australian Constitution provides, at best, patchy protection for rights, however. Absence of Commonwealth power generally indicates the presence of State power. In any event, the degree of protection even at the Commonwealth level is dependent on the substance of the heads of power, certainly not written with rights in mind. The power to legislate with respect to "aliens" may preclude legislation with respect to citizens and a diminishing group of British subjects, but it confers apparently plenary power on the Commonwealth Parliament to make laws with respect to other people not within those categories. Some citizenship rights may be derived by chance from the

---

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

76 *Davis v Commonwealth* (1988) 166 CLR 79; *Nationwide News v Wills* (1992) 177 CLR 1.

77 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 [*Lange v ABC*].

78 *Re Patterson; ex parte Taylor* (2001) 182 ALR 657 (HCA).

constitutional framework but others are denied; notably, the right of some categories of Australian citizen to stand for elected office.[79] Similarly, the power to make laws with respect to the "people of any race, for whom it is deemed necessary to make special laws" in section 51 (xxvi) of the Constitution is not confined to benevolent laws, although it may be that limitations would be found in the event of "manifest abuse".[80]

The federal limitations on Commonwealth power are a mixed blessing for rights from another perspective as well. Effective rights protection cannot be secured by limits on power alone. Sometimes, for example, positive action is needed to protect rights from incursion by civil society or, in a federal system, by other spheres of government. Reliance on a list of designated powers necessarily constrains the Commonwealth Parliament in this regard. The point can be illustrated by another topical example. If the Parliament were inclined to make laws to authorise legal union between same sex couples, one potential impediment would be the meaning of its own legislative power with respect to "marriage" in section 51(xxi) of the Constitution.[81] Similarly, attempts to protect privacy by controlling the use of personal information have been complicated by questions about the scope of Commonwealth power.[82] Thanks to an interpretation of the external affairs power that enables the Commonwealth to make laws to incorporate all international treaties to which Australia is a party,[83] including human rights treaties, the impact of the federal division of powers on positive legislation is less than it might have been. It remains a consideration, nevertheless.

The federal division of power must also be taken into account in any consideration of the protection of rights at the State level. Most obviously, valid Commonwealth law overrides inconsistent State law and, generally, can bind State governments. Thus, to take a notable example, the Racial Discrimination Act 1975 (Cth) has precluded discrimination against indigenous Australians by the States or under State law in a variety of contexts ranging from the transfer of a lease,[84] to retrospective deprivation of title to land.[85] In

---

79 Australian Constitution, s 44 disqualifies people who hold dual citizenship or an "office of profit under the Crown" from nominating for election to Parliament: Sy*kes v Cleary* (1992) 176 CLR 77.

80 *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 378, Gummow and Hayne JJ, speculating on an observation in *Western Australia v The Commonwealth* (1995) 183 CLR 373, 460.

81 This issue has been explored by several justices, by way of obiter: *Re Wakim; ex parte McNally* (1999) 198 CLR 511 McHugh J; *The Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, Kirby J.

82 Privacy Act 1988 (Cth), as amended by the Privacy Amendment (Private Sector) Act 2000 (Cth).

83 *Commonwealth v Tasmania* (1983) 158 CLR 1.

84 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

85 *Mabo v Queensland* (1989) 166 CLR 186.

another recent instance, Commonwealth legislation was enacted to override a State law criminalising homosexual activity between consenting adults, following an unfavourable determination by the United Nations Human Rights Committee.[86] Less obviously, the federal division of judicial power affects the operation of State government, generally, and in relation to rights as well. In a departure from the United States federal model, the High Court hears appeals in State as well as federal jurisdiction, and thus, in effect, determines the common law of Australia.[87] By this means, High Court decisions establishing principles relevant to rights become law throughout Australia. Relatively recent examples include a statement of the principles on which a Judge should stay a trial that is unfair, when the accused is not represented,[88] and some modification of the common law of defamation, in the interests of freedom of political communication.[89]

Naturally, however, the effectiveness of the exercise of federal power to protect rights in the State sphere depends on the preferences and capacities of the institutions concerned. Thus, it is possible to cite other instances of State departure from broadly accepted rights standards, in matters ranging from the mandatory sentencing of juveniles,[90] to gross disparities in the distribution of electorates, in which no federal intervention occurred.[91]

2 Separation of powers

The separation of powers between federal institutions, which is a feature of the Australian Constitution, also has evolved in a way that is relevant to rights. The rule on which the fabric of common law protection of rights originally rested, that the executive cannot change rights without the authority of Parliament, is not stated in the Constitution, but is assumed and given effect through the judicial definition of legislative and executive power and understandings about the relationship between them. The strict Australian version of separation of judicial power tends to protect the independence of courts, with consequential advantages for the fairness of judicial proceedings. It also precludes other branches from exercising power that is characterised as judicial or from unduly interfering with courts in the exercise of their powers, so as to influence the outcome. In consequence, it is established that the Commonwealth Parliament could not validly enact a Bill of

---

86 Human Rights (Sexual Conduct) Act 1994 (Cth).

87 Australian Constitution, s 73.

88 *Dietrich v Queen* (1992) 177 CLR 292.

89 *Lange v ABC* (1997) 189 CLR 520.

90 Juvenile Justice Act 1995 (NT); Young Offenders Act 1994 (WA).

91 See the Western Australian electoral boundaries, the validity of which was unsuccessfully challenged in *McGinty v Western Australia* (1996) 186 CLR 140.

attainder (even if a head of power to do so could be found),[92] nor prohibit a court from ordering the release of someone unlawfully incarcerated.[93] The effects of the doctrine reach even into the State judicature, not directly subject to a constitutional separation of powers. Thus, in *Kable*, the High Court held that a State court (capable of) exercising federal jurisdiction cannot be given authority by the State that is incompatible with federal standards; in that case, a role in the continuing incarceration of a person on the ground that he was dangerous, rather than that he had committed an offence.[94]

The further significance of the separation of judicial power for rights is still being explored. Some limits are clear, however. It does not preclude retrospective criminal legislation,[95] and it does not sustain a principle of legal equality in the substance or operation of the law that a court is required to apply.[96]

Separation of powers involves a constitutional description of institutions, however brief. In Australia, one consequence has been the implication of some limits on the power of Australian Parliaments to abrogate what elsewhere might be called political rights. Both the description of the Houses of Parliament as "directly chosen by the people",[97] and the admittedly meagre provision for the executive government to be chosen from and responsible to Parliament,[98] are capable of raising rights-type questions, once a matter is properly before a court. Thus, it appears that there are limits on the variation permissible in the size of electorates and on departures from universal adult franchise given the constitutional requirement of a Parliament "directly chosen by the people".[99] Similarly, the entire framework of representative government, in chapters 1 and 2 of the Constitution, assumes some freedom of political communication, which it would be beyond the power of either the Commonwealth or, probably, the State Parliaments to limit.[100] The freedom is not absolute. In the landmark case of *Lange v ABC*,[101] through which one famous New Zealander, at least, is assured of a place in Australian constitutional history, the High

---

92 *Polyukhovich v Commonwealth* (1991) 172 CLR 501.

93 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1.

94 *Kable v Director of Public Prosecutions for New South Wales* (1996) 189 CLR 51.

95 *Polyukhovich v Commonwealth* (1991) 172 CLR 501.

96 *Kruger v Commonwealth* (1997) 190 CLR 1.

97 Australian Constitution, ss 7 and 24.

98 Principally in Australian Constitution, s 64.

99 *McGinty v Western Australia* (1996) 186 CLR 140.

100 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106.

101 *Lange v ABC* (1997) 189 CLR 520.

Court prescribed a two-fold test for the validity of a law enacted to serve a "legitimate end" that burdens political communication. The first inquiry is whether the law is "compatible with the maintenance of the *constitutionally* prescribed system of representative and responsible government".[102] The second is whether the law is "reasonably appropriate and adapted to achieving that ... end".

3 Taking stock

It is convenient to take stock at this point of the extent to which the Australian Constitution in fact protects rights. For the sake of completeness, however, reference should first be made to the few scattered sections in the Constitution that suggest a connection with rights. These are, in particular, the requirement for trial by jury in section 80; the guarantee of just terms for acquisition of property in section 51(xxxi); the protections for religious freedom in section 116; the prohibition against discrimination on grounds of State residence in section 117; and the entrenched jurisdiction of the High Court to grant specified remedies against "officers of the Commonwealth" in section 75(v). In fact, with the possible exception of section 117, all are expressed or interpreted as limits on power rather than rights. As with the implied freedoms, the rationale for all of them, not excepting section 117, is attributable to the demands of federalism or the integrity of the institutions of national government, rather than to protection of the rights of individuals. Nevertheless, systems exist for people and these provisions benefit individuals and groups in various ways. The "just terms" requirement inhibits the rolling back of native title, for example, following its recognition in *Mabo v Queensland (No 2)*.[103] Section 75 (v) provides some protection of an avenue to the High Court to seek redress against unlawful executive action, the precise scope of which presently is unclear.

It is apparent that the Australian Constitution protects rights to a degree, albeit in the guise of limits on power. At least some of the interests that in other jurisdictions are categorised as due process rights, political rights, citizenship, or mobility rights are protected in this way. Additional rights against discrimination on the grounds of race,[104] sex,[105] and disability[106] have been provided by Commonwealth legislation. To the extent that these norms have the status of fundamental law, they override inconsistent legislation.

---

102 Emphasis added; this is a significant qualification.

103 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

104 Racial Discrimination Act 1975 (Cth).

105 Sex Discrimination Act 1984 (Cth).

106 Disability Discrimination Act 1992 (Cth).

In this sense, they reach further than the New Zealand and United Kingdom rights instruments, in the areas in which they apply.

The limitations of this approach from the perspective of rights are obvious, however. The protection offered by the Australian Constitution is arbitrary and patchy. The scope of rights protection is unclear and its rationale is complex. The interpretation of the somewhat flimsy constitutional framework by which Australian jurisprudence has reached its current point has been controversial. Perhaps for that reason, the protections are minimised in ways that would not be likely to be acceptable in a specific rights instrument. Some of the benefits of constitutional rights protection, enjoyed by other jurisdictions are missed. The Australian Constitution does not play an educative role, about rights or constitutional democracy. It provides no incentive to institutional dialogue; on the contrary, in recent years it has been a source of institutional hostility. The association of the Australian guarantees with "limits on power" may encourage attempts to avoid them in ways that would be less politically acceptable were the limits to be identified with rights. A current and topical example is the tortuous attempts by the Australian government and Parliament to hollow out the entrenched public law jurisdiction of the High Court.[107]

C Parliamentary Government

The constraints of the limited, written Constitutions aside, protection of rights in Australia depends on the traditional features of a common law parliamentary system, with some characteristic Australian embellishments that include, in particular, the role of Upper Houses of Parliament. Four features in particular are important. The first is the effect of common law principles and procedures, as applied and followed by independent courts. The second is parliamentary restraint from interference with rights, either directly or through the conferral of power on the executive. The third is the willingness of parliaments to legislate to protect established rights and others that emerge in response to new conditions. The last is the capacity of voters to recognise failure to comply with rights standards and their readiness to respond to it by voting against incumbent Members at elections. The greater the reliance on such institutional mechanisms for protection of rights, the more critical is their effective operation.

Evaluating the effectiveness of such a diffuse system, interdependent with its social, economic and cultural context, is notoriously difficult, however. General observations about process or outcomes are more easily made, but are inconclusive. Judged by outcomes, the Australian approach appears to work relatively well. On the other hand, sometimes it fails. More significantly still, perhaps, the absence of a rights perspective

---

107 Migration Legislation Amendment (Judicial Review) Act 2001 (Cth).

may critically affect the decisions that are made, or obscure the existence of a problem altogether.

A superficial analysis of process does not yield much greater insight. Australian courts take rights into account in developing the common law, interpreting statutes, and refining their own procedures. For reasons that are familiar, however, the effectiveness of courts in this regard relies on parliamentary support, or at least parliamentary restraint. Australian Parliaments have enacted legislation to protect particular rights as evidenced by, for example, the establishment of a national Human Rights and Equal Opportunity Commission (HREOC), albeit with restricted powers and the prevalence of Commonwealth, State, and territory anti-discrimination or equal opportunity legislation. There is no general legislation protecting rights, however, and HREOC has restricted powers,[108] and limited influence. It is possible to identify circumstances where the voters have rejected governments that have presided over significant violations of accepted rights standards, installing new governments that are willing and able to secure change,[109] but it is less easy to determine cause and effect.

For the future, moreover, there are grounds for concern about the efficacy of this aspect of the system, in consistent reports about low levels of civic awareness. One recent such report was prompted by the IEA Civic Education Study, testing the civic understanding of students in 28 countries, including Australia. In an interpretation of the Australian data, the Australian Council for Education Research concluded that:[110]

> Only half of the Australian students have a grasp of the essential pre-conditions for a properly working democracy. The Civic Knowledge items with which Australian students had the greatest difficulty were those asking about the forms and purposes of democracy …

It also concluded that: "Australian student scores revealed a low level of support for civic engagement, compared to their international peers".[111]

At the heart of the Australian approach to the protection of rights, lie the decision-making processes of governments and parliaments. Sometimes a high profile issue

---

108 Human Rights and Equal Opportunity Commission Act 1986 (Cth), ss 11(1)(f) and 20.

109 Examples include the infringements of civil liberties in Queensland in the 1970s and early 1980s, which culminated in the Fitzgerald Commission of Inquiry and a range of reforms to Queensland law and concern about mandatory sentencing in the Northern Territory in the 1990s which was partly overcome following a change of government.

110 Australian Council for Education Research *Citizenship and Democracy: Students' Knowledge and Beliefs, Australian Fourteen-Year Olds and the IEA Civic Education Study* (ACER, Canberra, 2002).

111 Australian Council for Education Research *Citizenship and Democracy: Students' Knowledge and Beliefs, Australian Fourteen-Year Olds and the IEA Civic Education Study* (ACER, Canberra, 2002).

spontaneously attracts attention and criticism, forcing questions of rights to be taken into account at either or both of these stages. The design of Australia's anti-terrorism legislation is a recent example, in which the original proposals were altered in response to concern about rights.[112] The conditions of detention of asylum seekers is another example of a high profile issue with rights implications in relation to which other considerations have so far, however, prevailed. The potential for such issues to be raised and resolved through public debate, albeit not to the satisfaction of all, is a strength of Australian law and political culture. The extent of the reliance on the political process for the protection of rights in Australia, however, suggests the need for systematic procedures to require rights to be taken into account, when issues have less media appeal or interest groups are less forceful.

Review of the information that is publicly available reveals minimal express references to the significance of rights in the decision-making processes of executive government in Australia. By contrast, some Australian Parliaments have established committees specifically charged with the scrutiny of proposed laws by reference to prescribed criteria, some of which concern rights. The existence of such committees inevitably has an impact on the decisions of executive government as well. For reasons outlined below, however, there are limits to the effectiveness of these committees, as they presently function

Two key points at which decisions affecting rights are made by executive government in Australia are the Cabinet process and during the drafting of new legislation. The Commonwealth, and several Australian States and Territories, have published Cabinet and Legislation Handbooks; some of the drafting offices publish information about their procedures as well. These provide some guide to the existence of systems to ensure that the impact of proposals on rights is taken into account.

The current Commonwealth Cabinet Handbook[113] makes no specific reference to rights, although rights-related issues may well arise in Cabinet as a result of other, more general prescriptions in the Handbook.[114] The Legislation Handbook[115] is a little more fulsome. It requires rules with a "significant impact on individual rights and liberties" to

---

112 Australian Senate *Procedural Information Bulletin*, (8 July 2002) No 161, 3.

113 Commonwealth Cabinet Handbook (5 ed, 2000) <http://www.dpmc.gov.au/pdfs/cabineted5.pdf>.

114 For example, para 4.4 lists (a) new policy proposals and (d) proposals requiring legislation, as matters that should be brought to Cabinet. Potentially, rights issues might also arise as a "key issue" or a "critical matter for decision" pursuant to the requirements for the cover sheet for Cabinet submissions: para 4.6. Commonwealth Cabinet Handbook (5 ed, 2000) < http://www.dpmc.gov.au/pdfs/cabineted5.pdf>.

115 Legislation Handbook (1999, updated 2000) <http://www.dpmc.gov.au/pdfs/cabineted5.pdf>.

be enacted in primary rather than delegated legislation.[116] It lists a few specific rights-related issues as matters that require attention; in particular retrospective legislation adversely affecting rights[117] and reversal of the onus of proof in criminal proceedings.[118] A more general requirement, with potentially greater effect, refers to the need to consult with the Attorney-General, in relation to proposed legislation that might be inconsistent with international human rights instruments to which Australia is a party.[119] The organisation and objectives of the Attorney-General's Department, however, make no reference to this as a significant role.[120] The Handbook also draws attention to the terms of reference of the Senate Standing Committee on the Scrutiny of Bills as a feature of the legislative process in the Senate, without drawing conclusions from it for executive action, and without elaborating on the implications of the committee's criteria for the substance of legislation.[121]

It would be difficult to extract from the Handbook any evidence that impact on rights is a priority in the executive decision-making process. By contrast, a distinct section of it requires a Regulation Impact Statement to accompany any proposal for legislation that would have a direct or significant indirect effect on business and the standard format for a bid for a place in the legislative program also lists impact on business as a matter for particular note.[122] Nor is there specific reference to rights in the documents about procedure publicly released by the Commonwealth's Office of Parliamentary Counsel,

---

116 Legislation Handbook (1999, updated 2000) <http://www.dpmc.gov.au/pdfs/cabineted5.pdf>, para 1.12.

117 Which is to be limited to exceptional circumstances: see, Legislation Handbook (1999, updated 2000) <http://www.dpmc.gov.au/pdfs/cabineted5.pdf>, para 6.18.

118 Legislation Handbook (1999, updated 2000) <http://www.dpmc.gov.au/pdfs/cabineted5.pdf>, para 6.26. The paragraph notes that reversal should be limited to matters "within the exclusive knowledge of the defendant" or where "proof of the matters by the Crown would be difficult".

119 Legislation Handbook (1999, updated 2000) <http://www.dpmc.gov.au/pdfs/cabineted5.pdf>, para 6.34.

120 The relevant section would appear to be the Office of International Law, but its objectives include no reference to monitoring Australian law for compliance.

121 Legislation Handbook (1999, updated 2000) <http://www.dpmc.gov.au/pdfs/cabineted5.pdf>, para 14.53.

122 Legislation Handbook (1999, updated 2000) <http://www.dpmc.gov.au/pdfs/cabineted5.pdf>, paras 2.9-2.14; Appendix D. See also Australian Capital Territory *Cabinet Handbook* (2002), 7.45-7.46.

although other examples of "legal policy issues" are listed, as examples of matters to which the Attorney-General's attention should be drawn.[123]

The encouragement for regular consideration of rights within the Parliament comes from two Senate Scrutiny Committees: Regulations and Ordinances,[124] and Scrutiny of Bills.[125] Their function is to scrutinise delegated legislative instruments and bills, respectively and to draw to the attention of the Senate any issues that they raise under the committee's terms of reference. The terms of reference of both committees include a requirement to report on whether measures "trespass unduly on personal rights and liberties". The *modus operandi* of each committee is to identify problems and to draw them to the attention of the Senate and of the relevant Minister, reporting to the Senate on the government's response. In quantitative terms, the results are impressive. In 2001, for example, the Scrutiny of Bills Committee reported that it considered 202 bills, commented on 86 of them, tabled 17 "Digests" containing an analysis of bills, and a further 13 "Reports" on ministerial responses.[126] In addition to this regular work, in the previous year, the Committee conducted a special inquiry into Commonwealth laws authorising entry into premises for the purposes of search and seizure.[127]

Logically, the existence of such procedures at the point of parliamentary enactment must have some effect, not only on the laws that are made, but also on the measures that are introduced into the Parliament by the executive branch.[128] The nature and extent of this effect, however, is constrained by at least two factors.

One is the generality of the reference to "rights and liberties" in the committees' terms of reference. Resistance to specification of particular rights and freedoms draws some support from common law tradition. More practically, in this context, it gives the committees considerable flexibility in the "rights" on which they focus if they are able and

---

123 Working with the Office of Parliamentary Counsel (1999) 28 <http://www.opc.gov.au/about/documents.htm>. Compare the Manual for the Preparation of Legislation of the New South Wales Office of Parliamentary Counsel, which suggests that certain legislation affecting rights should be referred to the Attorney-General's Department: paras 2.22-2.25 < http://www.pco.nsw.gov.au/>.

124 Senate Standing Order 23.

125 Senate Standing Order 24. Information about both is available on the Senate website: < http://www.aph.gov.au/senate/>.

126 Senate Standing Committee for the Scrutiny of Bills "The Work of the Committee during the 39th Parliament, November 1998- October 2001" (2001) para 1.30.

127 Senate Standing Committee for the Scrutiny of Bills, above, chapter 7.

128 For anecdotal confirmation, see the comments attributed to former Minister Ray in Senate Standing Committee for the Scrutiny of Bills, above, para 1.34.

willing to take advantage of it.[129] But therein lies the rub, in a constitutional culture that is not accustomed to analysing issues by reference to rights. In the absence of a rights framework of some kind, the danger is that the committees' attention will focus on a relatively narrow range of procedural issues. Any tendency of this kind is likely to be reinforced by the resolve of the Committee on Regulations and Ordinances not to involve itself in policy questions. There is no matching prohibition on the Scrutiny of Bills committee; this Committee does not, however, make recommendations to the Senate, but merely draws issues to its attention.

The second factor constraining the effectiveness of the committees is lack of a significant sanction. By contrast, comparable committees in jurisdictions with rights instruments have greater institutional leverage.[130] Inevitably, they have some influence as long, at least, as the government of the day lacks a majority in the Senate. If and when a government gains a Senate majority, that influence is likely to diminish sharply although not, perhaps, to disappear altogether. Even as things stand, however, the effect of the Senate committee process on protection of rights is limited. The Senate stage in the policy-making process in a Westminster-style parliamentary system comes too late to affect the outcome except in the most exceptional, or most minor, cases. Opposition to a government measure by a majority in the Senate in the name of protection of rights is easily portrayed as anti-democratic and inconsistent with the principles of responsible government. For whatever reason, this aspect of the deliberations of the Senate committees does not appear to have led to the development of procedures to ensure that rights are systematically taken into account by the executive government when policies are being made. Possible explanations include the vagueness of the rights criteria in the terms of reference of the Senate committees and the readiness with which Senate opposition to particular measures can be overborne by political considerations.

Procedures for the consideration of rights by the political process in the States and territories is even more diffuse, with the notable exception of Queensland. All State Parliaments have committees to review delegated legislation, in most cases using criteria broadly similar to those of the Senate Committee. Only Victoria,[131] Queensland,[132] the

---

129 New South Wales Parliament, Standing Committee on Law and Justice, *A New South Wales Bill of Rights* (2001) paras 8.51, 8.52.

130 In the case of the United Kingdom Joint Parliamentary committee on Human Rights, for example, the committee considers from the role of both the courts and executive government under the Human Rights Act: David Feldman "Parliamentary Scrutiny of Legislation and Human Rights" [2000] PL 323.

131 Scrutiny of Acts and Regulations Committee: <http://www.parliament.vic.gov.au/sarc/>.

132 Scrutiny of Legislation Committee: <http://www.parliament.qld.gov.au/Committees/scrutiny.htm>.

Australian Capital Territories (ACT),[133] South Australia[134] and Western Australia[135] have parliamentary committees to scrutinise bills, however,[136] and neither of the last two make any reference to rights in the committee's terms of reference. With two exceptions, documents detailing State executive procedures also are silent on the matter of rights. Apart from the case of Queensland, which is considered below, the other exception is the Parliamentary Counsel's Office of New South Wales, which advises that certain legislation affecting rights should be referred to the Attorney-General's Department.[137]

The procedures in Queensland are distinctive.[138] The Legislative Standards Act 1992 invokes the notion of "fundamental legislative principles ... that underlie a parliamentary democracy based on the rule of law".[139] These principles include having "sufficient regard" for "the rights and liberties of individuals".[140] A non-exhaustive list of examples of relevant rights and liberties is given.[141] Failure to meet the standards has no effect on the validity of legislation; rather, the standards are given effect through an obligation for ministers to explain any departure from fundamental legislative principles in introducing legislation into the Parliament,[142] coupled with a parliamentary committee process.[143] Superficially, at least, the Queensland approach appears more effective in the sense that Cabinet[144] and parliamentary counsel,[145] as well as the Parliament itself, have established procedures for taking compliance with "fundamental legislative principles" into account.

---

133 Standing Committee on Justice and Community Safety: <http://www.legassembly.act.gov.au/committees/>.

134 Legislative Review Committee: <http://www.parliament.sa.gov.au/committees/>.

135 Legislation Committee: <http://www.parliament.wa.gov.au/parliament/>.

136 New South Wales Parliament, Standing Committee on Law and Justice, *A New South Wales Bill of Rights* (2001), recommends the establishment of a Scrutiny of Legislation Committee for that State.

137 Manual for the Preparation of Legislation: <http://www.pco.nsw.gov.au/>.

138 Christine Parker "Legislation of the Highest Standard? Fundamental Legislative Principles in the Queensland Legislative Standards Act 1992" (1993) 2 Griffith LR 123.

139 Legislative Standards Act 1992 (QLD), s 4(1).

140 Legislative Standards Act 1992 (QLD), s 4(2).

141 Legislative Standards Act 1992 (QLD), s 4(3).

142 Legislative Standards Act 1992 (QLD), s 23(1)(f).

143 The relevant committee is the Scrutiny of Legislation Committee, with responsibilities as set out in the Parliament of Queensland Act 2001, sec 103.

144 The Queensland Cabinet Handbook, para 7.2.6: <http://www.premiers.qld.gov.au/governingqld/cabinethandbook/foreword.htm>.

145 Legislative Standards Act 1992, Part 3.

If this is correct, the points of difference with the rest of Australia lie both in the greater (although still limited) specificity of the statement of rights and the planned integration of the executive and parliamentary decision-making stages. In the circumstances, the rejection of the Queensland model by the New South Wales Law and Justice Committee is questionable. The Committee reached the conclusion that the Queensland approach "could not be successfully replicated in New South Wales" and that it was "difficult to see any popular or government support for a similar Act".[146]

Again, it is appropriate to take stock. The effectiveness of the parliamentary process to protect rights in Australia is widely assumed, but more difficult to verify by reference to actual practice. In fact, some improvements in effectiveness have taken place over the same period of time during which charters of rights were being explored and then given effect in other common law systems. These include, in particular, the growing use of parliamentary committees to scrutinise legislation, albeit in most cases by reference to overly general rights standards. Where these parliamentary processes work best, in the Commonwealth and Queensland, they have the potential to be more effective than judicial review in systematically arresting a range of relatively minor defects in legislation, which nevertheless are important in principle. The Australian experience offers a model that is likely to be of interest elsewhere, for this reason. The Australian approach has its own shortcomings, however, as the principal mechanism for rights protection. The concept of rights is too vague to be useful and the protection presently on offer is unreliable. If, as seems likely, Australia continues to rely on the political process, rather than judicial review for the protection of rights, it should follow through the logic of this choice, by making the political process more effective. One step that might be taken immediately, for example, would be to introduce procedures in all jurisdictions to require the scrutiny of legislation by reference to the rights in human rights instruments to which Australia is a party.

V CONCLUSION

All five of the common law countries that are the subject of this paper express high levels of support for individual rights and take pride in the manner in which rights are respected. Despite similar origins, however, all take a different approach to the task. For the purposes of this paper, these approaches are divided into two categories. One comprises the four countries that, over the last twenty years, have moved to provide explicit protection for a wide range of rights. The second is Australia, which has not, and where reliance is placed instead on other processes.

---

146 New South Wales Parliament, Standing Committee on Law and Justice, *A New South Wales Bill of Rights* (2001) paras 8.51.

The extension of the influence of courts, in countries that have introduced charters of rights of various kinds, inevitably has been controversial, in some cases, and in some quarters. There may be a tendency in these circumstances to bemoan the change and to hanker for earlier, supposedly halcyon times. For the purpose of any such debate, Australia offers an interesting study, both in the effects of dividing power in order to control it, and in the manner of the operation of majoritarian electoral democracy in the absence of explicit rights protection. In some respects, it appears to be a positive example. In others, it seems that it is not. These are issues on which further empirical research should be productive.

Australia also has much to learn from the experience of the other four countries. In particular, it is now evident that the standard concerns about constitutional or legislative charters of rights can be met or ameliorated in a variety of ways. The techniques presently in use do not exhaust the possibilities. In particular, there is obvious merit in further experimentation with pre-enactment scrutiny, to enhance its consistency and effectiveness, in combination with post-enactment review. The experience of countries with charters of rights suggests that they have other advantages as well, in terms of the clarity, transparency, and rationality of governance and of the relations between governing institutions. Unexpectedly, they may also have potential to stimulate debate on the nature of democracy and to increase levels of civic awareness at a time when concern about both are real and growing; in Australia at least as fast as in comparable countries elsewhere. On these various matters as well, detailed research should yield instructive answers.