The Common Law and the Constitution as Protectors of Rights in Australia

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Abstract: This paper considers the extent to which the common law does or should protect fundamental human rights. It begins with reference to suggestions in various jurisdictions that there are some rights that are deeply rooted in common law, and which could not be interfered with by Parliament. It considers the position of common law rights in jurisdictions such as Australia with a written Constitution, and the extent to which rights are found in the common law or the Constitution or both, and the relation between the common law and the Constitution. It considers the possible theoretical underpinning of such suggestions, from a social contract, sovereignty and rule of law perspective. In so doing, it is acknowledged that, contrary to Diceyan theory, Parliaments do in fact act to take away fundamental rights, and it is argued to be simplistic to assume that the remedy for such behaviour is to be found at the ballot box, and never in the courts. Finally, arguments against the notion of rights protected by the common law are considered, including Parliamentary supremacy, arguments about democracy, and suggestions of 'judicial activism'.

Keywords: common law, sovereignty, social contract theory, Dicey, Parliamentary supremacy, human rights, common law rights

I. Introduction

In recent years, we have seen substantial legislative incursion into the rights of individuals. This raises the issue of the extent to which, if at all, the common law and/or the Australian Constitution are or should be a brake on the ability of Parliament to curtail human rights. To what extent is a Parliament, subject to the Constitution, able to take away fundamental common law rights and liberties? The debate takes place in the context of the broader philosophical debate between natural law and legal positivism, and involves important questions of sovereignty and democracy. While the main focus of this paper is on the position in Australia, the paper draws upon, and is relevant to, perspectives on human rights in a range of jurisdictions.

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In Part II, jurisprudence from a range of jurisdictions is considered suggestive of the idea that the common law protects or is protective of rights against intrusion by Parliament. In Part III, it is considered whether, if such rights do exist, they exist at common law, pursuant to the Australian Constitution, or both, and whether this makes a difference. In doing so, the relationship between the common law and the Australian Constitution must be considered. In Part IV, it is argued that support exists for the proposition that the Constitution protects implied human rights, both textually and philosophically. The paper draws here on comments made by several members of the High Court in terms of a right to due process, Lockean theory of the social contract and the sovereignty of the people, and the rule of law.

In Part V, possible arguments against the idea that human rights should be implied from the Australian Constitution are considered, including the doctrine of Parliamentary supremacy, arguments about democracy, arguments that the founding fathers did not incorporate a bill of rights in the Australian Constitution, and questions of 'judicial activism'. Conclusions are drawn in Part VI. The paper does not consider the well-established practice of the court presuming that legislation was not intended to interfere with common law rights, or resolving any ambiguity in the interpretation of legislation in favour of the protection of common law rights and liberties.

II. Jurisprudence Suggesting that the Common Law Can be Used to Protect Rights from Parliamentary Intrusion

Of course, the orthodox Diceyan constitutional view has been that Parliament is able to enact any law it wishes, and it is not for a court to declare a law to be invalid. This doctrine of Parliamentary supremacy has been accepted, as we will see, for centuries in Great Britain, traditionally in absolute terms (though this is changing, as we will see), and also has general acceptance in Australian constitutional thought, subject to recognition of our constitutional arrangements and the existence of judicial review.[1]

Notwithstanding this, in a range of jurisdictions there has appeared a contrary suggestion, namely that the ability of Parliament to pass laws invasive of human rights might be limited by some common law constraints.[2]

i. Britain

The leading historical case supporting the proposition that there are some common law rights so fundamental that Parliament cannot

1 As Gleeson CJ recently noted in *Roach* v *Electoral Commissioner* (2007) 233 CLR 162 at 172, the framers of the Australian Constitution admired and respected British institutions, including Parliamentary supremacy, and the Constitution reflected such notions.

2 Such constraints not necessarily being limited to the rule of law, or of interpretive techniques alluded to above.

override them is the one commonly known as *Dr Bonham's Case*[3] where Coke claimed (in dicta):

> And it appears in our books that in many cases the common law will controul [*sic*] acts of parliament and sometimes adjudge them to be utterly void; for when an act of parliament is against common right or reason, or repugnant or impossible to be performed, the common law will controul it and adjudge such act to be void.[4]

Coke's views can be linked with those of Fortescue, who had earlier applied the theories of Aristotle and Aquinas in the English context, concluding that the common law was a divine and rational embodiment of the *ius naturale*.[5] Coke only partly identified the common law with natural law.[6]

Several cases prior to *Dr Bonham's Case* appeared to confirm the possibility that a statute could be declared invalid due to inconsistency with the common law,[7] or that a statute 'could not be obeyed' because

3 *The Case of the College of Physicians* (1609) 8 Co. Rep 107a; 77 ER 638; 2 Brown. 255; 123 ER 928.

4 8 Co. Rep 118a; 77 ER 652. Debate continues over whether Coke was advocating full blown judicial review or whether he meant merely an interpretation power to avoid obvious ambiguity or absurd results. Those in favour of the former view include Raoul Berger, 'Doctor Bonham's Case: Statutory Construction or Constitutional Theory?' (1969) 117 *University of Pennsylvania Law Review* 521; Edward Corwin, 'The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention' (1925) 30 *American Historical Review* 511; Allen Boyer, 'Understanding, Authority and Will: Sir Edward Coke and the Elizabethan Origins of Judicial Review' (1997) 39 *Boston College Law Review* 43; J.W. McKenna, 'The Myth of Parliamentary Sovereignty in Late-Medieval England' (1979) 94 *English Historical Review* 481; the latter view is favoured by: E.W. Thorne, 'Dr Bonham's Case' (1938) 54 *Law Quarterly Review* 543; John Gough, *Fundamental Law in English Constitutional History* (Clarendon Press: Oxford, 1955); R.A. MacKay, 'Coke—Parliamentary Supremacy or the Supremacy of the Law?' (1924) 22 *Michigan Law Review* 215; and Theodore Plunknett, 'Bonham's Case and Judicial Review' (1926) 40 *Harvard Law Review* 30.

5 Sir Edward Coke, *Le Size Part des Reports Del Sr. Edw. Coke Chivalier, Chief Justice de Common Bank* (1697); the preface quotes Sir John Fortescue's *De Laudibus Leges Anglie* (c.1470) ch. 17; see Fortescue, *De Laudibus Legum Anglie*, Stanley Chrimes (ed. and trs.) (Cambridge University Press: Cambridge, 1949) 39–41.

6 David Smallbone, 'Recent Suggestions of an Implied Bill of Rights in the Constitution, Considered as Part of a General Trend in Constitutional Interpretation' (1993) 21 *Federal Law Review* 254 at 262. Chief Justice of New South Wales James Spigelman spoke recently of a 'resurgence of the philosophy of natural law in common law systems for the first time in three centuries': *The Common Law Bill of Rights*, first lecture in the 2008 McPherson Lectures, 10 March 2008, p. 2.

7 In *Copper* v *Gederings*, YB 3 Edw II, 105, a statute provided that a right of action should descend from a lord to his heir; Chief Justice Bereford refused an action based on the statute, on the basis that if it were allowed, common law principles would be disturbed: *Fitzherbert Natura Brevium* (Hale's ed. 1755) p. 209; *Calvin's Case* (1608) 7 Co. Rep 1a; 77 ER 377, the court declared that the laws of nature could not be changed or taken away, 'we of England are united by birthright, in obedience and ligeance by the law of nature . . . the Parliament could not take away that protection which the law of nature giveth' (13b, 14a, 14b, 392–4).

of its inconsistency with church law.[8] Perhaps unfortunately, this issue sometimes arose in the context of a conflict between a royal (common law) prerogative and a statute. The word 'unfortunate' is used because questions of the royal prerogative may have inadvertently got caught up with other general common law principles, in considering the impact of the Glorious Revolution on common law rights. Smallbone writes that

> If Parliament was not, before the Bill of Rights, an absolute sovereign, there is nothing in the Bill of Rights which takes matters so far as to convert Parliament into a Hobbesian Leviathan.[9]

Where sovereignty originally resided in the monarch, the monarch appointed a number of advisers to the Parliament, and the Parliament's role was to advise the monarch on a range of issues, including laws. There was a difference of opinion as to the authority of Parliament: on the one hand, royalists believed the monarch alone made statutes and the High Court of Parliament possessed sovereignty as the monarch's highest seat of judgment; on the other hand, parliamentarians believed statutes were made by the King and members of Parliament (Lords and Commons) as three partners sharing law-making functions.[10] These differences form part of the backdrop of the great conflicts between the monarch and Parliament that preceded the Glorious Revolution.[11] There is record, at least prior to the Glorious Revolution, of statutes being interpreted not to trample over

8 *Annuitie* 41, translated in Pasch. 27 Hen VI, where a statute required that the common seal of an abbot should be under the control of the prior and four others; this conflicted with established church practice. In 1506, Chief Justice Frowicke agreed that an Act without the consent of the Pope was not enforceable: A.R. Myers, 'Parliament, 1422–1509' in Richard Davies and Jeffrey Denton (eds), *The English Parliament in the Middle Ages* (Manchester University Press: Manchester, 1981) 141–84. In 1529, Parliament's ability to legislate with respect to spiritual matters was doubted (Geoffrey Elton, *The Parliament of England 1559–1581* (Cambridge University Press: Cambridge, 1986) 34), and Jeffrey Goldsworthy notes that at a meeting of leading clergy and lawyers in 1530, a majority advised Henry VIII that Parliament could not authorize the Archbishop of Canterbury to grant Henry's divorce where the Pope objected: Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford University Press: Oxford, 1999) 50. Goldsworthy claims that Parliamentary supremacy was established after the Reformation Parliament transferred supreme authority over the English Church from the Pope to the King in the 1530s.

9 See Smallbone, above n. 6 at 267. Cf. Sir David Lindsay Keir who argues that 'sovereignty in 1688 was for practical purposes grasped by the nation . . . Thus perished, at the hands of an assembly animated by an authority which can hardly be otherwise regarded than as popular sovereignty in action, the idea of a sacred and inalienable governmental power, inherent in kings possessing a divine, indefeasible, hereditary title': *The Constitutional History of Modern Britain* (A&C Black: London, 1960) 270. Smallbone says the sovereignty grasped after 1688 was a political one rather than a legal one (267).

10 See Goldsworthy, above n. 8 at 63–75.

11 This includes the belief of James I that he was above the law, and the fatal clash between Charles I and the Parliament, leading to a lengthy proroguing of Parliament and a temporary republican form of government.

Crown prerogatives, at least where it would lead to absurdity.[12] The authority of the Crown was at that time paramount.[13]

The authority of *Dr Bonham's Case* was confirmed in subsequent cases, both before[14] and after[15] the Glorious Revolution. Again reflecting natural law theory of this time (writing in 1765), Blackstone was adamant that:

> Acts of Parliament that are impossible to be performed are of no validity, and if there arises out of them collaterally any absurd consequences, manifestly contradictory to common reason, they are, with regard to those collateral consequences, void.[16]

Wood in 1724 published a list of rules of statutory interpretation, including one that 'Acts of Parliament that are against Reason, or impossible to be performed, shall be judged void'.[17]

On the other hand, there are many authorities of ancient origin that appear to confirm a form of Parliamentary supremacy, as we would

12 3 Dyer 313 (KB 1572); Lord Bacon in his *Maxims*, regula xix (7 *Bacon Works* (James Spedding ed. 1879) 369–72), notes that 'a patent of a sheriff's office made by the king for term of life . . . will be good in law, contrary to such statute which pretendeth to exclude [it]; and the reason is, because it is an inseparable prerogative of the Crown to dispense with politic statutes'; in *The Prior of Castle Acre* v *The Dean of St Stephen's*, YB Hil, 21 Hen. VII, 1–5 Chief Justice Frowyke concluded that an Act could not bind the King without the latter's consent.

13 *Godden* v *Hales* 2 Show, *475 (KB 1686).

14 *Lord Sheffield* v *Ratcliffe*, Hobart 334a at 346 (KB 1615) ('that liberty and authority that judges have over laws, especially over statute laws, according to reason and best convenience, to mould them to the truest and best use'); *Godden* v *Hales* (1686) 2 Show 475; 89 ER 1050; Comb 21; 90 ER 318: 'no Act of Parliament could take away (the King's power of dispensation of penal laws)' (2 Show 478; 89 ER 1051; Comb 25; 90 ER 321; *Day* v *Savadge* (1614) Hobart 85 at 87; 80 ER 235 at 237, CP; *Rowles* v *Mason* (1612) 2 Brown 192 at 198; 123 ER 892 at 895, CP; *The Case of Proclamations* (1611) 12 Co Rep 74, CP).

15 *City of London* v *Wood*, 12 Mod. 669; 88 ER 1592 at 1602; more recently they were cited by Sir Robin Cooke in New Zealand to support his assertion that some common law rights were so deep that Parliament could not destroy them: *Fraser* v *State Services Commission* [1984] 1 NZLR 116 at 121; *Taylor* v *New Zealand Poultry Board* [1984] 1 NZLR 394 at 398; *New Zealand Drivers' Association* v *New Zealand Road Carriers* [1982] 1 NZLR 374 at 390. Janet Hope confirms that 'despite assertions by Street CJ and Kirby P in the *BLF* Case (*Building Construction Employees and Labourers' Federation of NSW* v *Minister for Industrial Relations* (1986) 7 NSWLR 372) to the effect that (Coke's dicta) did not survive the Glorious Revolution of 1688, it has been pointed out that the doctrine of common law rights was restated in the English courts several times in the course of the eighteenth century': 'A Constitutional Right to a Fair Trial? Implications for the Reform of the Australian Criminal Justice System' (1996) 24 *Federal Law Review* 173 at 187.

16 Sir William Blackstone, *Commentaries* (1st edn, 1765) 91; although he made it clear subsequently that the mere fact that legislation was considered 'unreasonable' was not in his view grounds to reject it.

17 Thomas Wood, *An Institute of the Laws of England: Or the Laws of England in their Natural Order, according to Common Use*, 3rd edn (W. Strahan & M. Woodfall: London, 1772) 4; see also Sir Henry Finch, *A Description of the Common Laws of England* (A. Miller: London, 1759): 'laws which do in reality contradict the law of Reason are null and void, as well as those which contradict the Laws of Nature' (53).

today understand it.[18] For example, in 1454 Chief Justice Fortescue stated that the High Court of Parliament was 'so high and so mighty in its nature' that questions concerning its privileges could not be decided by the judges.[19] St German insisted that a court could not judge a law to be void; this ability existed only in the High Court of Parliament.[20] Part of the thinking at this time was that Parliament could always be trusted to legislate for the common good, and that Parliament would not violate God's law.[21] In this we see the historical basis for Dicey's theory some centuries later.

We should also acknowledge during this period that judges did not enjoy the kind of judicial independence and security of tenure that we expect today. They could be dismissed by the King, and impeached by Parliament.[22] It is reported that six of the judges who decided the *Ship Money* case in favour of the King as opposed to the Parliament were subsequently impeached by Parliament.[23] In this context, it is perhaps not surprising that many judges were reluctant to assert their supremacy over the Parliament. As Goldsworthy notes of this time:

> When Parliament asserted its authority in novel and controversial ways, for example, to destroy papal jurisdiction in the sixteenth century, and to control the prerogatives of the Crown in the seventeenth century, the judges were virtually compelled by political circumstances to acquiesce—although in the second case, only after many of them were impeached, and their decisions overturned by statute.[24]

Of course, Parliamentary supremacy became the dominant philosophy in the nineteenth and twentieth centuries, but recently there has been some resurgence of the idea that the common law limits the authority of Parliament. A leading scholar here is Allan, who argues that the rule of law must be given due prominence, such that laws

18 In conceding this, we should acknowledge some ambiguity, since Parliament in these historical times (i.e. prior to the Glorious Revolution) was not democratically elected, and was composed of appointees of the monarch. Further, 'Parliament' during these periods performed a greater role than the mere legislative, apparently exercising a range of powers including legislative, judicial and executive powers. This makes it more difficult to state categorically that a legislative body had been recognized as the supreme law-making body, when it might in the alternative be argued that it was a judicial body that had been recognized as the supreme law-making body. This is why Parliament at that time was referred to as the 'High Court of Parliament'. Much more of this interesting history is found in, for example, Goldsworthy, above n. 10 at chs 3–7.

19 Stanley Chrimes (ed.), *Select Documents of English Constitutional History 1307–1485* (A&C Black: London, 1961) 296.

20 'A Little Treatise Concerning Writs of Subpoena' in John Guy, *Christopher St German on Chancery and Statute* (Selden Society: London, 1985) 116.

21 See Goldsworthy, above n. 10 at 73.

22 This is a key distinction. Dicey noted of the American Supreme Court that 'the Court derives its existence from the Constitution, and stands therefore on an equality with the President and with Congress; the members thereof . . . hold their places during good behaviour, at salaries which cannot be diminished during a judge's tenure of office': Albert Dicey, *An Introduction to the Study of the Law of the Constitution*, 8th edn (Macmillan: London, 1926) 155.

23 See Goldsworthy, above n. 10 at 107.

24 *Ibid.* at 243.

offending principles of equality should be struck down.[25] Allan concludes that:

> The limits on the power of a democratic majority to achieve its legislative will are ultimately to be found in the common law; and the common law is too subtle to tolerate the absurdity—even constitutional contradiction—of wholly unlimited legislative power.[26]

Most recently Lord Steyn of the House of Lords has stated, in dicta, that:

> We do not in the United Kingdom have an uncontrolled constitution as the Attorney General implausibly asserts . . . The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom.[27]

In the same case, Lord Hope claimed (again in dicta) that:

> Parliamentary sovereignty is no longer, if it ever was, absolute. It is not uncontrolled in the sense referred to by Lord Birkenhead LC in *McCawley* v *King* [1920] AC 691, 720. It is no longer right to say that its freedom to legislate admits of no qualification whatever. Step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified. For the most part these qualifications are themselves the product of measures enacted by Parliament.[28]

Lord Hope referred with apparent approval to the extra-judicial comments of Sir Owen Dixon about the 'supremacy throughout the constitution of ordinary law'.[29]

In Britain then, there has long been disagreement between the view that the law-making body is subject to some fundamental common law liberties and the ideology of legal positivism that has been pervasive in more recent times.

ii. America

The arguments of Coke and others were used by those in the American colonies resisting the Stamp Acts legislation, to assert that the legislation was contrary to the Magna Carta and natural rights, and so should not be followed. These arguments were used to seek to

25 Trevor Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Int Comm Jurists: New Delhi, 2001); 'Legislative Supremacy and Legislative Intention: Interpretation, Meaning and Authority' (2004) 63 *Cambridge Law Journal* 685.

26 Trevor Allan, 'The Common Law as Constitution: Fundamental Rights and First Principles' in Cheryl Saunders (ed.), *Courts of Final Jurisdiction: The Mason Court in Australia* (Oxford University Press: Oxford, 1996) 156.

27 *R (Jackson)* v *Attorney-General* [2006] 1 AC 262 at 302 (dicta); Lord Mance, 'Britain's Emerging Constitution?' (2008) *Oxford University Comparative Law Forum* 1.

28 *R (Jackson)* v *Attorney-General*, 303–4, referring specifically to the entry of the United Kingdom into the European Union, and the Human Rights Act 1998 (UK).

29 Sir Owen Dixon, 'The Law and the Constitution' (1935) 51 *Law Quarterly Review* 590 at 596.

strike down slavery legislation,[30] and the specific question of jury rights was considered by the Rhode Island Superior Court in 1786 (i.e. post-independence) in *Trevett* v *Weeden*. There an Act allowed trial without jury for a charge of refusing to accept the state's currency. The defendant argued that the law was contrary to the Magna Carta and sought to take away the fundamental right to trial by jury. Lord Coke was cited in support of these arguments. The Act was apparently held to be unconstitutional and void.[31] A stronger precedent is *Bowman* v *Middleton* where the court clearly expressed its decision to invalidate an Act of Parliament clarifying the boundary between two properties on the basis that it was 'against common right and Magna Carta . . . the act was therefore ipso facto void'.[32] The Supreme Court of the United States has also resorted to this reasoning to set aside legislation, quite independently of any express provisions in the Bill of Rights.[33]

Of course, one of the reasons for the growing independence movement in the United States in the 1760s and 1770s was the dissatisfaction with taxation of the colonies by the British, in particular the Sugar Act, Stamp Act and Townshend Duties of 1767. Part of the argument against these laws was that they involved 'taxation without representation', or in other words taxation levied by a Parliament not answerable to those required to pay the taxes. It was argued that this made the taxes illegal and invalid. Underpinning such arguments is the notion that some statutes passed by Parliament are not valid, and that it is proper for a court to declare them to be contrary to fundamental law and ineffective for that reason.

A leading writer at the time, Otis, condemned taxation without representation as violative of 'the law of God and nature' and the 'common law' that no person, not excepting Parliament, could take away.[34] John Dickinson wrote of rights that 'are born with us; exist with us; and cannot be taken away from us by any human power'. The Continental Congress in 1774 declared that Americans had the right 'by the immutable laws of nature, the principles of the English constitution, and the several charters or compacts . . . to life, liberty and

30 *Robin et al.* v *Hardaway et al.*, Jeff. 109 (Va. 1772).

31 Thomas Cooley, *Constitutional Limitations* (Little, Brown: Boston, 1903) 229; this finding was apparently so controversial at the time that the judges were immediately summoned to the General Assembly to explain their decision: Plunknett, above n. 4 at 67.

32 I Bay, 252 (SC 1792).

33 For example *Fletcher* v *Peck* (1810) 10 US 87 (Johnson J referred to a Georgian statute affecting land rights as violating general principles of justice (143); Marshall CJ declared the Act invalid because of general principles common to free institutions (139); refer more generally to Leslie Zines, 'A Judicially Created Bill of Rights?' (1994) 16 *Sydney Law Review* 166 and Smallbone, above n. 6.

34 James Otis, 'The Rights of the British Colonies Asserted and Proved' in 1 *Pamphlets of the American Revolution* 409 at 444; citing *Dr Bonham's Case* as supportive of his views (476); see also Daniel Dulany, 'Considerations on the Propriety of Imposing Taxes in the British Colonies' in 1 *Pamphlets of the American Revolution* 610 at 612.

property which no one had a right to dispose of without their consent'.[35] Various colonial constitutions written prior to 1776 were also premised on the fact that common law rights existed prior to, and were higher than, legislative authority. The purpose of an express bill of rights was merely to document such rights, not to introduce new rights, but to confirm what was already there.[36]

The Lockean-influenced United States Declaration of Independence reflects similar sentiments:

> All men are created equal; that they are endowed by their Creator with certain *unalienable* [emphasis added] Rights; that among these are Life, Liberty and the pursuit of Happiness.

Two of the specific grievances noted by the authors include the attempts of the English to deny the right to trial by jury to many citizens of the American colonies, and other attempts to take away 'our Charters'.

There are clear links between these assertions and the acceptance of judicial review by the United States Supreme Court in *Marbury* v *Madison*,[37] and clear links between the insistence on these common law rights and the eventual adoption in that nation of a bill of rights, obviating at least to some extent the need to argue on the basis of the common law. The link is shown pre-independence days in the Charter of Fundamental Laws of West New Jersey which began with a provision that:

> the common law or fundamental rights of the colony should be the foundation of government, which is not to be altered by the legislative authority.[38]

It is shown in post-independence days by the Northwest Ordinance of 1787, planning for the evolution of territories to statehood. It is said to be the first federal document to contain a bill of rights.[39] The document states that in order to extend 'the fundamental principles of civil and religious liberty', Congress included articles that were to remain

35 1 *Journals of the Continental Congress* 67 (Worthington Ford ed. 1904); see Thomas Grey, 'Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought' (1978) 30 *Stanford Law Review* 843.

36 For example, the Charter of Fundamental Laws of West New Jersey (1677) commences with a provision that 'the common law or fundamental rights of the colony should be the foundation of government, which is not to be altered by the legislative authority'.

37 1 Cranch, 137 (US 1803); Michael Kirby notes that the comments of Coke and others 'in the century before the Foundation of the American Republic . . . undoubtedly laid the foundation for the doctrine expressed in *Marbury* v *Madison*': *Deep Lying Rights—A Constitutional Conversation Continues*, The Robin Cooke Lecture 2004, p. 4; the *Marbury* decision was referred to with approval by the High Court of Australia in *Australian Communist Party* v *The Commonwealth* (1951) 83 CLR 1 at 262 (Fullagar J claiming that the principles from *Marbury* were 'axiomatic').

38 (1677).

39 Leonard Levy, *Origins of the Bill of Rights* (Yale University Press: New Haven, 1999) 11.

'forever unalterable', guaranteeing to citizens rights such as habeas corpus, trial by jury, representative government, judicial proceedings 'according to the course of the common law'. As Levy concludes:

> The American colonial experience, climaxed by the controversy with England leading to the Revolution, honed American sensitivity to the need for written constitutions that protected rights grounded in the 'immutable laws of nature' as well as in the British constitution and colonial charters.[40]

However, importantly in the Australian context, the common law rights were recognized prior to, and independently of, any express bills of rights.[41] Those who argued against the express bill of rights in America used the argument that there was no need because the government could not encroach on 'reserved' rights.[42] A related argument was that if some express rights were conferred, other rights might not be respected. In order to meet such objections, the Ninth Amendment to the United States Constitution expressly recognizes that although some express rights are found in the Constitution, this does not deny or disparage others retained by the people.

iii. Australia

This issue was canvassed by the High Court of Australia in *Union Steamship Co of Australia Pty Ltd* v *King*.[43] In rejecting the suggestion that the words 'peace, welfare and good government' were words of limitation,[44] the court nevertheless canvassed other possibilities:

> Whether the exercise of . . . legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system and the common law, a view which Lord Reid firmly rejected in *Pickin* v *British Railway Board*,[45] is another question which we need not explore.[46]

40 *Ibid.* at 8.

41 This is similar to the assumption within the English Bill of Rights 1689, that the document was reciting existing common law rights that were fundamental and beyond reproach: 'that all and singular the rights and liberties asserted and claimed in the said declaration, are the true, ancient, and indubitable rights and liberties of the people of this kingdom . . . and shall be firmly and strictly holden and observed . . . all officers and ministers whatsoever shall serve their Majesties and their successors according to the same in all times to come.'

42 Among others, Alexander Hamilton, James Wilson, Oliver Ellsworth and James Madison expressed these views: Levy, above n. 39 at 244.

43 (1988) 166 CLR 1.

44 Ian Killey, 'Peace, Order and Good Government: A Limitation on Legislative Competence' (1990) 17 *Melbourne University Law Review* 24.

45 [1974] AC 765 at 782.

46 This comment is similar to comments of Toohey J in *Polyukovich* v *Commonwealth* (1991) 172 CLR 501 at 687 who considered that the question whether a statute could declare a statute to be invalid because it was unjust was an open one. In *Theophanous* v *Herald and Weekly Times Pty Ltd* (1994) 182 CLR 104, Mason CJ, Toohey and Gaudron JJ noted that the framers of the Constitution considered that the ultimate protection of important rights was found in the common law (128).

In a series of decisions, Murphy J suggested several rights were implied by the Australian Constitution,[47] including freedom of speech, assembly, communication and travel throughout the Commonwealth, freedom from slavery, serfdom, civil conscription, cruel and unusual punishment, arbitrary discrimination on the grounds of sex, and self-determination.[48] These rights were said to be inherent in a free and democratic society.[49]

Deane and Toohey JJ are on record as having decided that federal (and possibly state) legislative power was subject to fundamental principles of the common law;[50] specifically in *Leeth* these judges recognized a common law doctrine of the underlying equality of all persons under the law and before the courts. This was drawn from the agreement of the people to unite in a Commonwealth.[51] Gaudron J agreed with the result but justified it on the basis of an inherent requirement of the exercise of federal judicial power,[52] and Brennan J agreed that the doctrine was an implied limitation on Commonwealth legislative power.[53] Toohey expanded on his views extra-judicially. In suggesting that the High Court could as 'guardian of a written constitution within the context of a liberal democratic society' imply limits on government power:

> It might be thought that, in construing a constitution, to deny plenary scope to heads of power where a wide reading would afford capacity to infringe fundamental liberties is an analogous approach to that which is well settled in relation to the construction of statutes . . . Where the people of Australia, in adopting a constitution, conferred power to legislate with respect to various subject matters upon a Commonwealth Parliament, it is to be presumed that they did not intend that those grants of power extend to invasion of fundamental common law

47 In similar vein, Kirby J in *Durham Holdings Pty Ltd* v *New South Wales* (2001) 205 CLR 399 suggested that the sovereignty of the Australian people might mean there are implications derived from the Constitution that limit the power of Parliaments (431).

48 *McGraw-Hinds (Aust) Pty Ltd* v *Smith* (1979) 144 CLR 633 at 670; *Ansett Transport Industries (Operations) Pty Ltd* v *Wardley* (1980) 142 CLR 237 at 267; *Uebergang* v *Australian Wheat Board* (1980) 145 CLR 266 at 312; *Sillery* v *R* (1981) 180 CLR 353 at 362; and *Miller* v *TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 581.

49 While Murphy J's views were based on implications from the Constitution, as Winterton says Murphy J did not state which sections he was referring to, and the view might be considered equally as one advocating that certain common law rights were fundamental and untouchable in a Lockean tradition of natural rights: George Winterton, 'Constitutionally Entrenched Common Law Rights: Sacrificing Means to Ends?' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (Federation Press: Sydney, 1996) 131.

50 *Leeth* v *The Commonwealth* (1992) 174 CLR 455 at 486–7; *Nationwide News Pty Ltd* v *Wills* (1992) 177 CLR 1 at 69.

51 *Ibid.* at 486.

52 *Ibid.* at 502.

53 *Ibid.* at 475.

> liberties—a presumption only rebuttable by express authorisation in the constitution document.[54]

These tantalizing comments mirror the interesting comments made about the issue by Sir Owen Dixon in his extra-judicial writings:

> The principles of the common law with respect to the interpretation and operation of a statute may be supposed to account in great measure for the form and method of modern legislation. The form and the method that are established imply real limitations. A rhetorical question may be enough to make this clear. Would it be within the capacity of a parliamentary draftsman to frame, for example, a provision replacing a deep-rooted legal doctrine with a new one?[55]

It seems clear that Dixon's answer to this question would have been 'no'. Dixon spoke of the common law as a jurisprudence 'antecedently existing into which our system came and in which it operates'.[56] He believed that the common law was the source of the authority of the British Parliament,[57] and as a result that constitutional questions had to be resolved in the context of the whole law, including the common law.[58] His thoughts are expressed further in *Australian Communist Party* v *The Commonwealth* where in discussing Australia's constitutional arrangements, he said that:

> It is government under the Constitution and that is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as for example, in separating the judicial power from other functions of government, others of which are simply assumed. Among these I think that it may fairly be said that the rule of law forms an assumption.[59]

54 John Toohey, 'A Government of Laws, and Not of Men?' (1993) 4 *Public Law Review* 158 at 170. See also Allan, above n. 26: 'there are surely some rights at common law which . . . lie too deep for constitutional amendment or repeal; freedoms so elementary . . . that it was unnecessary to mention them in the Constitution because they arise by implication from the concept of the Commonwealth itself. Could the Australian Constitution be amended to eliminate freedom of political speech, or the right to a fair trial, or the independence of the judiciary? To assume an affirmative answer to such questions is arbitrarily to privilege the principle of majority rule at the expense of other features of liberal democracy' (158).

55 Sir Owen Dixon, 'The Common Law as an Ultimate Constitutional Foundation' (1957) 31 *Australian Law Journal* 240 at 241; refer also to 'Sources of Legal Authority' in *Jesting Pilate* (Law Book Co.: Melbourne, 1965) 199: 'the anterior operation of the common law in Australia [was] not just dogma of our legal system, an abstraction of our constitutional reasoning. It is a fact of our legal history'; Michael Wait, 'The Slumbering Sovereign: Sir Owen Dixon's Common Law Constitution Revisited' (2001) 29 *Federal Law Review* 57.

56 *Ibid.* at 240.

57 *Ibid.* at 242.

58 *Ibid.* at 245. He claimed that the common law 'developed no legal doctrine that all legislatures by their very nature were supreme over the law. The doctrine of the supremacy of Parliament related to the Parliament of Westminster': Dixon, above n. 55, *Jesting Pilate* at 200.

59 (1951) 83 CLR 1 at 193; writing of these comments in *Kartinyeri* v *Commonwealth* (1998) 195 CLR 337, Gummow and Hayne JJ said that the 'occasion has yet to arise for consideration of all that may follow from the statement' ([89]); see also O'Connor J in *Potter* v *Minahan* (1907) 7 CLR 277 at 304 who referred with

Similarly, Windeyer J (writing extra-judicially) discussed the concept:

> Implicit and not analysed, but basic—of common law as the ultimate foundation of British colonial institutions, a belief that not even Parliament could properly deprive British subjects anywhere of their birthright.[60]

It is submitted that these views would mean that a statute invasive of human rights might be declared invalid because of its inconsistency with the common law. The reasoning would be that Parliaments derive their authority to pass legislation from the Commonwealth Constitution. If the Commonwealth Constitution was subject to the common law as its 'foundation', then it would follow that legislation incompatible with the common law would be invalid for that reason. In other words, though he did not expressly make the link, it might be said that Dixon's views were consistent with the pure theory of law philosophy of Hans Kelsen, who spoke of laws as a series of norms, deriving their authority from higher norms. At the top of these series of norms stood the 'grundnorm', the basic norm from which all norms within the system derived their validity.[61] Dixon was saying that the common law was the grundnorm, against which the validity of all other norms was to be tested.

iv. New Zealand

Sir Robin Cooke, former President of the New Zealand Court of Appeal, argued in a series of cases[62] that some common law rights 'presumably lie so deep that even Parliament could not override them'. He included on the list freedom from torture, the right of access to the courts, natural justice, and a prohibition on abdication of power. Writing extra-judicially, he added:

> The modern common law should be seen to have a free and democratic society as its basic tenet and, for that reason, to be built on two complementary and lawfully unalterable principles: the operation of a democratic legislature and the operation of independent courts . . . The

approval to comments by the author of *Maxwell on Statutes*, 4th edn (Sweet & Maxwell: London, 1962) 121 to the effect that 'it is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used'.

60 Sir Victor Windeyer, 'A Birthright and Inheritance—Establishment of the Rule of Law in Australia' (1962) 1 *University of Tasmania Law Review* 635 at 653.

61 Hans Kelsen, *Pure Theory of Law*, Max Knight (trs.) (University of California Press: Berkeley, 1967).

62 *Taylor* v *New Zealand Poultry Board* [1984] 1 NZLR 394 at 398; *New Zealand Drivers' Association* v *New Zealand Road Carriers* [1982] 1 NZLR 374 (Cooke, McMullin and Ongley JJ); *L* v *M* [1979] 2 NZLR 519 at 527; *Fraser* v *State Services Commission* [1984] 1 NZLR 116 at 121; *Brader* v *Ministry of Transport* [1981] 1 NZLR 73 at 78; see also *Mangawaro Enterprises Ltd* v *Attorney-General* [1994] 2 NZLR 451 at 458 (Gallen J); see also Adam Ross, 'Diluting Dicey' (1989) 6 *Auckland University Law Review* 176.

> concept of a free democracy must carry with it some limitation on legislative power . . . Working out truly fundamental rights and duties is ultimately an inescapable judicial responsibility.[63]

v. Canada

Some recent Canadian decisions appear to suggest that the common law is fundamental to that country's constitutional arrangements. For example, in *New Brunswick Broadcasting Co* v *Nova Scotia (Speaker of the House of Assembly)*,[64] the Supreme Court of Canada found that the common law of unwritten privileges of regional Houses of Assembly formed part of the supreme and entrenched fundamental law of Canada, and could not be disturbed by legislation.[65]

It is clear then that, despite the prevalence of the doctrine of Parliamentary supremacy, there have been suggestions over many years and across a range of jurisdictions to the effect that the common law could be utilized to limit the extent to which Parliament could pass laws invasive of human rights.

III. The Relationship Between the Common Law and the Constitution

We must consider whether human rights are protected by the common law, or, in countries such as Australia with a written Constitution, that document, or some combination of the two. In turn, this raises questions of the relationship between the common law and the Constitution, to which I now turn. Which is superior? Which informs the other?

As indicated, the view of Sir Owen Dixon was that the common law was the grundnorm:

> Federalism means a rigid constitution and a rigid constitution means a written instrument. It is easy to treat the written instrument as the paramount consideration, unmindful of the part played by the general law, notwithstanding that it is the source of the legal conceptions that govern us in determining the effect of the written instrument.[66]

63 Sir Robin Cooke, 'Fundamentals' [1988] *New Zealand Law Journal* 158 at 164–5.

64 [1993] 1 SCR 319.

65 *Ibid.*, McLachlin J at 378, 384; in *Manitoba Provincial Judges' Association* v *Manitoba (Minister of Justice)* [1997] 3 SCR 3, Lamer CJC for the majority found (*obiter*) that there was an unwritten principle of judicial independence binding on legislatures and justiciable in the courts (68). The implications of these decisions are shown in the judgment of dissentient LaForest J, who argued that Parliamentary sovereignty was effectively being overturned by the majority reasoning (para. 319). Refer for further discussion to Mark Walters, 'The Common Law Constitution in Canada: Return of *Lex Non Scripta* as Fundamental Law' (2001) 51 *University of Toronto Law Journal* 91.

66 Dixon, above n. 55: 'we are able to avail ourselves of the common law as a jurisprudence antecedently existing into which our system came and in which it operates'.

Suggestions that the common law forms the background to, and controls the meaning of, the Constitution also appear in several cases and extra-judicial comments by judges. For example, a unanimous High Court in *Cheatle* stated:

> It is well settled that the interpretation of a Constitution such as ours is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of the common law's history.[67]

In other cases, the High Court has found that the rules of the common law must yield to constitutional requirements. We saw this in cases such as *Theophanous* v *Herald and Weekly Times Ltd*,[68] where the court modified the common law of defamation in light of an implied freedom of political speech.[69] In *Lange* v *Australian Broadcasting Corporation*, the High Court again claimed that the Constitution overruled any inconsistent rules of the common law, including the doctrine of Parliamentary supremacy.[70] In *Commonwealth* v *Mewett*, it was established that common law Crown immunities had been effectively abolished by a provision of the Constitution.[71] In a different context in *John Pfeiffer* v *Rogerson*,[72] the High Court stated that common law rules of private international law required adaptation in light of Australia's constitutional arrangements.[73]

In the context of the human rights debate, as we have seen, some judges have preferred to base their grounding of 'fundamental human

67 *Cheatle* v *The Queen* (1993) 177 CLR 541 at 552. See also Brennan J in *Theophanous* v *Herald and Weekly Times Ltd* (1994) 182 CLR 104 at 141, stating that the common law 'informs the text of the Constitution'. Writing extra-judicially, Justice Bill Gummow acknowledges that 'undoubtedly, the Constitution itself presupposed an operation of the common law in some respects': 'The Constitution: Ultimate Foundation of Australian Law?' (2005) 79 *Australian Law Journal* 167 at 174. Deane and Toohey JJ in *Leeth* v *Commonwealth* (1992) 174 CLR 455 at 485–7 stated that the Constitution is constructed upon fundamental common law principles. Sir Owen Dixon concluded that it was easy 'to treat the written instrument as a paramount consideration, unmindful of the part played by the general law, notwithstanding that it is the source of the legal conceptions that govern us in determining the effect of the written instrument': *Jesting Pilate* above n. 55 at 17.

68 (1994) 182 CLR 104.

69 *Ibid.*; Mason CJ, Toohey and Gaudron JJ stated that if the Constitution, expressly or by implication, is at odds with the common law, common law must yield to the Constitution (126).

70 (1997) 189 CLR 520 at 567–8; see Leslie Zines, 'The Common Law in Australia: Its Nature and Constitutional Significance' (2004) 32 *Federal Law Review* 337; Gummow, above n. 67.

71 (1997) 191 CLR 471.

72 (2000) 203 CLR 503 at 534 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

73 The relationship between the Constitution and the common law has attracted the attention of many writers recently. See, for example, Kathleen Foley, 'The Australian Constitution's Influence on the Common Law' (2003) 31 *Federal Law Review* 131; Adrienne Stone, 'Freedom of Political Communication, the Constitution and the Common Law' (1998) 26 *Federal Law Review* 219; and Greg Taylor, 'The Effect of the Constitution on the Common Law as Revealed by *John Pfeiffer* v *Rogerson*' (2002) 30 *Federal Law Review* 69; 'Why the Common Law

rights' on the Constitution—for example Kirby, Deane, Toohey, Gaudron and Murphy JJ; while others, including Dixon J, Deane and Toohey JJ in Australia, Sir Robin Cooke in New Zealand and Lord Steyn in the United Kingdom, resort to the common law as the basis of fundamental rights. If it is true that the Constitution affects the common law, as the High Court has held, it is submitted that it may not matter whether such rights are grounded in the common law or the Constitution. Their content is the same, and their effect on legislation inconsistent with such rights would be the same. An argument that the rights are implicit in the Constitution would be more appealing to those who require some written text from which rights are said to flow, rather than 'the common law' which is for some too amorphous.[74] It may be that concerns about the legitimacy in a democracy of common law rights enforced by non-elected judges (which I will discuss later in the paper) can also be addressed more easily in a context whereby rights are seen to be implicit in the Constitution which members of the High Court are charged with interpreting, rather than (merely) based on common law.

As a result, it is argued that some fundamental rights (which will be articulated later) are implicitly guaranteed by the Constitution. The common law is useful as providing, in some cases, several hundred years of jurisprudence upon which we can draw to elaborate and understand these rights more fully.

IV. Support for the Implication of Rights in the Constitution

i. The Text

While Dixon J famously concluded that we should not be fearful of making implications from the text of the Constitution,[75] it has taken some time for the High Court to develop the suggestion of implications in the text of the Constitution in the area of rights, and great controversy has arisen when, in particular, the Mason Court adopted this line of reasoning. Of course, various implications have been made, initially in favour of implied immunities and reserved power reasoning,[76] later to limits on Commonwealth laws discriminating

Should Be Only Indirectly Affected by Constitutional Guarantees: A Comment on Stone' (2002) 26 *Melbourne University Law Review* 623; and Pamela Tate, 'Some Observations on the Common Law and the Constitution' (2008) 30 *Sydney Law Review* 119.

74 In dismissing the suggestion that the common law should restrain legislative power, George Winterton concluded that 'the common law is too amorphous and adaptable to constitute an effective constraint': above n. 49 at 144.

75 *ANA Pty Ltd* v *Commonwealth* (1945) 71 CLR 29 at 85; *Lamshed* v *Lake* (1945) 99 CLR 132 at 144; *West* v *Commissioner of Taxation (NSW)* (1937) 56 CLR 657 at 681.

76 Until *Amalgamated Society of Engineers* v *Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

against the states or subjecting them to special burdens or disabilities,[77] and during the 1990s the High Court recognized the implied freedom of political communication.[78] Recently, the High Court found that voting rights were implicitly protected by the structure of the Constitution.[79]

Certainly High Court sentiments regarding the separation of powers as a protector of rights find express textual support in the Constitution.[80] In *Chu Kheng Lim* v *Minister for Immigration*, three members of the Court agreed that the Constitution required that judicial power could not be exercised in a manner inconsistent with the essential character of a court, or the nature of judicial power.[81] Judges have expressly linked the separation of powers doctrine to the concept of due process,[82] including the right to a fair trial.[83] Links to the rule of law have also been noted,[84] as well as notions of equality.[85] There is support for the suggestion that the right to a fair trial would

77 *Melbourne Corporation* v *Commonwealth (State Banking Case)* (1947) 74 CLR 31.

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

79 *Roach* v *Electoral Commissioner* (2007) 233 CLR 162; I say implicitly here because the relevant sections do not on their terms state that an individual has a right to vote (ss 7 and 24). Gleeson CJ in this case stated that despite the general acceptance of Parliamentary supremacy, this did not necessarily mean that rights could not be implied in the Constitution (173).

80 *Kable* v *Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *Chu Kheng Lim* v *Minister for Immigration* (1992) 176 CLR 1; *Nicholas* v *The Queen* (1998) 193 CLR 173; Fiona Wheeler, 'The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia' (1997) 23 *Monash University Law Review* 248. Using *Kable* reasoning, any guarantee of a fair trial held to exist at federal level could be 'drawn down' to the state level where the majority of criminal matters are heard.

81 (1992) 176 CLR 1 at 26–7; see also *Polyukovich* v *The Commonwealth* (1991) 172 CLR 501 at 703.

82 *Re Tracey; Ex Parte Ryan* (1989) 166 CLR 518 at 580 (Deane J); *Re Tyler; Ex Parte Foley* (1994) 181 CLR 18 at 34 (Deane J); *Polyukovich* v *The Commonwealth* (1991) 172 CLR 501 at 612–15 (Deane J) and 706–8 (Gaudron J).

83 *Dietrich* v *R* (1992) 177 CLR 292, especially 326 (Deane J) and Gaudron J (362–3); Michael McHugh J, 'Does Chapter III of the Constitution Protect Substantive as Well as Procedural Rights?' (2001) 21 *Australian Bar Review* 235; see also *Jago* v *District Court of New South Wales* (1989) 168 CLR 23. In *Cameron* (2002) 209 CLR 339 McHugh J spoke of the requirement of 'equal justice' required by the Constitution (352–3); Fiona Wheeler, 'Due Process, Judicial Power and Chapter III in the New High Court' (2004) 32 *Federal Law Review* 205; Janet Hope, 'A Constitutional Right to a Fair Trial? Implications for the Reform of the Australian Criminal Justice System' (1996) 24 *Federal Law Review* 173.

84 *Re Nolan; Ex Parte Young* (1991) 172 CLR 460 at 496; Wheeler, above n. 80 at 254: 'The Constitution allocates federal judicial power to Chapter III courts in order to promote the supremacy of law over arbitrary power but that purpose would be defeated were those courts to proceed in other than a fair and impartial manner'; 'One of the cornerstones of the rule of law itself is the notion of a fair trial. Fair trials form an essential part of all legal systems which purport to be founded on the rule of law': Rhona Smith, *International Human Rights*, 2nd edn (Oxford University Press: Oxford, 2005) 249.

85 *Leeth* v *Commonwealth* (1992) 174 CLR 455 (Deane and Gaudron JJ); see also Gaudron J in *Nicholas* v *The Queen* (1998) 193 CLR 173 at 208–9 and *Ebner* v *Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 368.

include important criminal rights such as the presumption of innocence and right to silence,[86] both of which have been described by the High Court as fundamental to our system of criminal justice.[87] Due process has been given an extended meaning in the United States jurisprudence.[88] Justice Brandeis linked separation of power with the requirements of a democracy thus:

> The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency, but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but by means of inevitable friction incident to the distribution of governmental powers among three departments, to save the people from autocracy.[89]

There is evidence that Coke himself believed that the Magna Carta required due process of law.[90]

Thus the High Court has been prepared to make implications from the text of the Constitution, and several members of the Court have suggested that the Constitution might require due process and/or a right to a fair trial. These rights are of ancient origin and have been recognized in other jurisdictions. Due process then might include:

> The right to trial by jury for serious offences, the right to unanimous jury verdict, the right to due process/procedural fairness (including natural justice), right to legal representation in criminal matters, right

86 See Wheeler, above n. 80 at 272: 'it should be accepted that where Parliament has placed upon the defendant the persuasive burden of proof in relation to an element of a federal offence, this is (prima facie) to ask a court exercising federal jurisdiction to conduct an unfair criminal trial because of the risk that under such circumstances a defendant will be convicted despite the existence of a reasonable doubt as to his or her guilt'.

87 In *Environmental Protection Authority* v *Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 501 (Mason CJ and Toohey J), 527 (Deane, Dawson and Gaudron JJ) and 550 (McHugh J) the presumption of innocence was described as a fundamental principle of the common law and fundamental to our system of criminal justice, and in the same case Mason CJ and Toohey J (503–4), Brennan J (512), and Deane, Dawson and Gaudron JJ (533–4) confirmed that the right to silence was a basic and substantive common law right. Such rights have also been confirmed as part of 'due process' in the United States: *Malloy* v *Hogan* (1964) 378 US 1.

88 For example, double jeopardy (*Benton* v *Maryland*) (1969) 395 US 784; just compensation (*Chicago, Burlington and Quincy Railway Co* v *Chicago*) (1897) 166 US 226; speedy trial (*Klopfer* v *North Carolina*) (1967) 386 US 213; public trial and notice of charges (*In Re Oliver*) (1948) 333 US 257; impartial jury (*Irvin* v *Dowd*) (1961) 366 US 717; jury trial (*Duncan* v *Louisiana*) (1968) 391 US 145; confrontation (*Pointer* v *Texas*) (1965) 380 US 400; right to legal representation (*Gideon* v *Wainwright*) (1963) 372 US 335; cruel and unusual punishment (*Robinson* v *California*) (1962) 370 US 660.

89 *Myers* v *United States* (1926) 272 US 52 at 293; as Rostow observed, 'the separation of powers under the Constitution serves the end of democracy in society by limiting the roles of the several branches of government and protecting the citizen, and the various parts of the state itself, against encroachments from any source. The root idea of the Constitution is that man can be free because the state is not': Eugene Rostow, 'The Democratic Character of Judicial Review' (1952) 66 *Harvard Law Review* 193 at 195.

90 Steve Sheppard, *Selected Writings of Sir Edward Coke*, vol. 2 (Indianapolis: Liberty Fund, 2003) 858; James Stoner Jr, 'Natural Law, Common Law and the Constitution' in Douglas Edlin (ed.), *Common Law Theory* (Cambridge University Press: Cambridge, 2007) 176.

to presumption of innocence, right to silence, the right to vote, right to judicial review, freedom from arbitrary punishment, incarceration in prison only for past breach of the criminal law.

It will be seen that many of these rights can be deduced from the right to due process/right to a fair trial which some members of the High Court have been prepared to recognize. This can be drawn from the separation of powers the Constitution clearly expressly contemplates. Other possible implied rights include the right to freedom of thought/conscience/religion, considered implicit in the representative democracy contemplated by the Constitution.

Of course, many of these rights find written expression in human rights documents such as the Universal Declaration of Human Rights, and the European Convention on the Protection of Human Rights and Fundamental Freedoms.[91] Though the use of international materials to interpret the Constitution or the common law is of course contentious, at least some members of the High Court have used international materials as evidence of the common law[92] or to guide constitutional questions.[93]

This theory does mean the judges would have a role to play in giving precise meaning to these rights, and reviewing legislation to see whether it is consistent with these stated rights. It is suggested that, as with rights expressed in legal documents, the rights not be considered absolute, and that some kind of 'reasonable regulation' exception would operate, much as it does in respect of the First Amendment right to freedom of speech in the United States. The judges would modify and adapt the precise content of these rights over time as society developed and changed, just as the common law has always adapted.

ii. Philosophical Support

(a) Links with Social Contract Theory and Sovereignty

Leading advocates of social contract theory had views on the extent to which rights of an individual were subsumed by the 'contract' they entered into with others to form a civilized society.[94] Locke, for example, states clearly that there are limits of the authority of the

91 Universal Declaration (1948) Articles 1–21.

92 For example, Kirby J in *Al Kateb* v *Godwin* (2004) 219 CLR 562 at 624 noted the 'profound influence on the most basic statements of international law (and specifically of the law of human rights and fundamental freedoms) of Anglo-Australian lawyers and the concepts they derived from the common law'.

93 One recent example is *Roach* v *Electoral Commissioner* (2007) 233 CLR 162 at 179 (Gleeson CJ) and 203–4 (Gummow, Kirby and Crennan JJ).

94 Rousseau, for example, believed that there were natural rights which lawmakers could not rescind: Jean-Jacques Rousseau, *The Social Contract* (Cambridge University Press: Cambridge, 1920).

body delegated to make laws.[95] He claims that their powers are limited by natural rights,[96] he believed that an individual only entered into the social contract in order to preserve their liberties.[97] Locke believed that the purpose of government was to ensure the 'mutual preservation of human lives, liberties and estates, and more generally decries the idea that the legislators have absolute power.[98] As Allan says, 'in political theory, the legislative power derives from the consent of the people and is to be understood as a trust for their benefit'.[99]

Several members of the High Court have accepted the argument that sovereignty lies in the Australian people,[100] including Mason CJ, Deane J, Toohey J[101] and McHugh J.[102] Mason CJ's conclusion was clear, remarking that the Australia Act recognized that 'ultimate sovereignty resided in the Australian people'.[103] Clearly embracing Lockean theory, Deane and Toohey JJ expressed their views in terms of the original agreement of the people and subsequent maintenance and acquiescence of its provisions. They concluded that all powers of government ultimately belonged to, and were derived from, the governed.[104] Justice Toohey elaborated on these views extra-judicially:

95 A practical example is found in the Declaration of the Rights of Man and of the Citizen (1789, France): 'Men are born and remain free and equal in rights . . . The aim of all political association is the preservation of the natural and imprescriptible rights of man'.

96 'the Law of Nature stands as an Eternal Rule to all Men, Legislators as well as others': John Locke, *Second Treatise of Government* (Indianapolis: Hackett Publishing Co Ltd, 1689) Chapter 11 Of the Extent of the Legislative Power, para. 135. In this way, the views of natural lawyer Finnis are similar—Finnis describes as a 'principal component of the idea of constitutional government . . . the holding of the rulers to their side of a relationship of reciprocity, in which the claims of authority are respected on condition that authority respects the claims of the common good': *Natural Law and Natural Rights* (Oxford University Press: Oxford, 1980) 272–3.

97 Locke, above n. 96 at paras 123–30.

98 *Ibid.*, Chapter 7 Of Political and Civil Society, para. 93: 'As if when Men quitting the State of Nature entered into Society, they agreed that all of them but one, should be under the restraint of Laws, but that he should still retain all the Liberty of the State of Nature, increased with Power, and made licentious by Impunity. This is to think that Men are so foolish that they take care to avoid what Mischielfs [*sic*] may be done them, by Pole-Cats, or Foxes, but are content, nay think it Safety, to be devoured by Lions.'

99 Trevor Allan, 'Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism' (1985) 44 *Cambridge Law Journal* 111 at 129.

100 This notion is also at the heart of the United States Constitution: Alexis de Tocqueville, *Democracy in America* (Dearborn: New York, 1835) ch. 3.

101 *Nationwide News* v *Willis* (1992) 177 CLR 1 at 72.

102 *McGinty* v *Western Australia* (1996) 186 CLR 140 at 230.

103 *Australian Capital Television Pty Ltd* v *Commonwealth* (1992) 177 CLR 106 at 138. See also McHugh J in *McGinty* v *Western Australia* (1996) 186 CLR 140 at 230 who declared that the political and legal sovereignty of Australia now resided in the Australian people.

104 *Nationwide News* v *Willis* (1992) 177 CLR 1 at 72; *Theophanous* v *Herald and Weekly Times Ltd* (1994) 182 CLR 104 at 171 and 180.

> Where the people of Australia, in adopting a constitution, conferred power to legislate with respect to various subject matters upon a Commonwealth Parliament, it is to be presumed that they did not intend that those grants of power extend to invasion of fundamental common law liberties.[105]

Similar views had in a different era been expressed by Murphy J,[106] and by Inglis Clark back in 1901.[107] The implication of the suggestion that sovereignty lies in the people is that Parliament does not have the power to infringe common law rights and liberties of the sovereign body.[108] It would also reduce the importance of the intentions of the founding fathers in relation to the protection of rights.[109]

Allan relates Lockean theory with the rule of law:

> The rule of law constitutes an ideal of consent, wherein the law seeks the citizen's acceptance of its demands as morally justified: he is invited to acknowledge that obedience is the appropriate response in the light of his obligation to further the legitimate needs of the common good . . . If the law aspires to an order of governance that all can freely accept, as a necessary framework for the co-operation of autonomous and morally conscientious citizens, there are certain basic freedoms and other institutional arrangements whose constitutional status must be placed beyond serious constitutional challenge . . . If the rule of law attributes responsibility for the identification of 'valid' law . . . to the conscience of the individual citizen, acting on his understanding of the needs of the common good, purported 'laws' or policies that are gravely unjust . . . lack both legal and moral authority.[110]

105 Toohey, above n. 54 at 170.

106 *Kirmani* v *Captain Cook Cruises Pty Ltd (No 1)* (1985) 159 CLR 351 at 383 (see also Deane J, 442).

107 Inglis Clark, *Studies in Constitutional Law* (Law Booksellers: Melbourne, 1901) 21–2, where he claimed the sovereign was the body with the power to maintain and alter the Constitution, i.e. the people. See John Williams, '"With Eyes Wide Open": Andrew Inglis Clark and Our Republican Tradition' (1995) 23 *Federal Law Review* 149.

108 See, for example, Harley G.A. Wright, 'Sovereignty of the People—The New Constitutional Grundnorm' (1998) 26 *Federal Law Review* 165; George Winterton, 'Popular Sovereignty and Constitutional Continuity' (1998) 26 *Federal Law Review* 1; Andrew Fraser, 'False Hopes: Implied Rights and Popular Sovereignty in the Australian Constitution' (1994) 16 *Sydney Law Review* 213. Writing extra-judicially, Michael Kirby was prepared to consider the possibility that 'in certain truly extreme cases, it might be arguable that a purported enactment was not a "law" of the kind envisaged by the Australian Constitution. Such an approach might follow from the recognition of the fact that the foundation of Australia's Constitution lies in the will of the Australian people': *Deep Lying Rights—A Constitutional Conversation Continues*, The Robin Cooke Lecture 2004, p. 7. Kirby accepted that sovereignty lay with the people rather than the Parliament (12), and concluded that legislators were 'subject to the overriding requirements of human rights and fundamental freedoms' (13).

109 *Theophanous* v *Herald and Weekly Times Ltd* (1994) 182 CLR 104 at 127–8, noting that the founding fathers were not the source of legitimacy of the Constitution, rather living Australian citizens were.

110 Allan, above n. 25 at 6–7.

(b) The Rule of Law and Rights

Dicey's counterbalance to the absolutism involved in his doctrine of Parliamentary supremacy was the rule of law. He took the rule of law to imply that no person could be punished except for a distinct breach of law established in ordinary manner before the courts (i.e. no arbitrary exercise of power), that all were equal before the law, and that civil liberties were the result of past case law rather than formal constitutional recognition.[111]

At one point he seemed to have a broad view of the consequences of the rule of law—stating that freedom from arbitrary arrest, the right to express opinions, and the right to property were all part of the 'law of the land'. He then said:

> [W]here . . . the right to individual freedom is part of the constitution because it is inherent in the ordinary law of the land, the right is one which can hardly be destroyed without a thorough revolution in the institutions and manners of the nation . . . the constitution being based on the rule of law, the suspension of the constitution, as far as such a thing can be conceived possible, would mean with us nothing less than a revolution.[112]

However, in the end he re-asserts the dominance of Parliamentary supremacy.

Others have pointed out what they see as the conflict between the absolutism involved in Parliamentary supremacy and the rule of law.[113] Wait sees it thus:

> The limits supplied by the common law in the *Communist Party Case* were analogous to the notions of natural law so famously drawn upon by Sir Edward Coke. Dixon's commitment to fundamental common law principles demonstrated a re-alignment of Dicey's two pre-eminent

111 Dicey, above n. 22 at 183–91.

112 *Ibid.* at 196–7. On the same page he contrasted systems where the right to individual freedom is a result deduced from the principles of the Constitution; the right could be readily taken away or suspended. However, in England, because the right to individual freedom was part of the Constitution as being inherent in the law of the land, the right was one that could not be destroyed without a revolution. However, with respect he then contradicts himself (in my view) because he acknowledges that the English Habeas Corpus Act could be suspended and the English would enjoy 'almost all the rights of citizens'. He had on the same page said that the rights of English people could not be destroyed without a revolution, and contrasted England with other countries where constitutional rights could be suspended. He concedes that Parliamentary supremacy and the rule of law might appear to be contradictory—his way of reconciling them was in effect to assert the superiority of Parliamentary supremacy, but acknowledge the role of courts in interpreting such legislation consistently with the rule of law (409). In practice, this reconciliation might occur, for example, by courts presuming that statutes do not undermine common law rights, or, where there is ambiguity, reading the Act narrowly to minimize its impact on fundamental rights.

113 Geoffrey de Walker, 'Dicey's Dubious Dogma of Parliamentary Sovereignty: A Recent Fray with Freedom of Religion' (1985) 59 *Australian Law Journal* 276 at 281.

> constitutional principles, installing the rule of law over the doctrine of parliamentary sovereignty.[114]

Both Sir Owen Dixon and Victor Windeyer have in extra-judicial writing confirmed that the rule of law forms part of the common law which underlies Australia's constitutional arrangements and which informs our understanding of the Constitution in Australia.[115] The International Commission of Jurists and the Chicago Colloquium on the Rule of Law have argued that the rule of law requires legislative power to be subject to certain limits, whether by constitutional limit or by custom.[116]

An important aspect of the rule of law is that individuals are expected to know in advance what the nature of official encroachment on their liberties is to be before that power is exercised against the individual.[117] It may be argued that the Australian people were not informed in the lead up to the referendum to adopt the Constitution that the new Commonwealth Parliament, or the new state Parliaments that owe their existence to the Constitution, would have the right to alter fundamental rights and liberties that they enjoyed at that time, including the right to trial by jury and other rights in relation to criminal matters. They did not consent to such rights being taken away, and they assumed that the rights they enjoyed as citizens up until that time would continue to be enjoyed post-federation. They had no reason to think otherwise.

As a result, the principle of the rule of law could be used to justify limits on the ability of Parliament to pass legislation interfering with fundamental common law rights and liberties. Aristotle remarked that a characteristic of humans was that they shared a sense of the just and the unjust, and that their sharing of a common understanding of justice made a polis.[118] In discussing these comments, Rawls adds that a 'common understanding of justice as fairness makes a constitutional democracy'.[119] He adds that:

> We are not required to acquiesce in the denial of our own and others' basic liberties, since this requirement could not have been within the

114 See Wait, above n. 55 at 68.
115 See Dixon, *Jesting Pilate*, above n. 55 at 199 (similar comments appear in his decision in *Australian Communist Party* v *Commonwealth* (1951) 83 CLR 1 at 193); Windeyer, above n. 60. In *Kartinyeri* v *Commonwealth* (1998) 195 CLR 337, Gummow and Hayne JJ said that the occasion had yet to arise for consideration of all that may follow from Dixon's sentiments (381).
116 International Commission of Jurists, *The Rule of Law in a Free Society* (1960) 198 at 210–15; Les Colloques de Chicago (1959) 9 *Annales de la Faculté de Droit d'Istanbul* 58.
117 See Allan, above n. 99 at 117.
118 *Politics*, bk I, ch. II, 1253a15.
119 John Rawls, *A Theory of Justice* (Oxford University Press: Oxford, 1971) 243.

> meaning of the duty of justice in the original position, nor consistent with the understanding of the rights of the majority in the constitutional convention[120] . . . a just constitution is defined as a constitution that would be agreed upon by rational delegates in a constitutional convention who are guided by the [principle] that each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a system of liberty for all.[121]

There is no evidence the author has read to suggest that the founding fathers were aware that, or intended that, these Parliaments would (or had the right to) take away fundamental common law liberties. It was not, as I have indicated earlier, their experience that colonial Parliaments had interfered with common law liberties and freedoms, and they could not have anticipated that this would occur.[122]

Another way in which the rule of law may be relevant here is to see the concept as a counterbalance of Dicey's other doctrine of Parliamentary supremacy. In other words, Parliamentary supremacy does not allow infringements of the rule of law. Allan, for example, discusses different conceptions of the rule of law, including formal equality, or the sense that legal rules are applied strictly to everyone according to their tenor, and substantive equality. In favouring substantive equality, Allan was able to suggest that the rule of law requires equality of treatment of individuals, or due process,[123] to be followed. He concluded that the rule of law was to be preserved by construing statutes consistently with fundamental principles of justice embedded in the common law,[124] and he singled out freedom of thought, speech, conscience and association as examples of non-negotiable constituents of an enduring common good.[125] Rawls agreed that the rule of law required due process.[126]

This view obtains support from some members of the judiciary, for example Lord Woolf MR, who found that 'ultimately there are even limits on the supremacy of Parliament which it is the courts' inalienable responsibility to identify and uphold . . . They are no more than are necessary to enable the rule of law to be preserved',[127] and recent

120 *Ibid.* at 355.
121 *Ibid.* at 355, 250 (Rawls discussed a second principle of justice: that liberty could only be restricted for the sake of liberty).
122 Gleeson CJ in *Roche* v *Electoral Commissioner* (2007) 233 CLR 162 noted in respect of the founding fathers that 'the history of their country had not taught them the need of provisions directed to the control of the legislature itself' (172).
123 He suggests they are 'two faces of the same coin': Allan, above n. 110 at 251.
124 *Ibid.* at 20.
125 p. 23.
126 See Rawls, above n. 119 at 239.
127 Lord Woolf, 'Droit Public—English Style' [1995] *Public Law* 57 at 68–9; John Laws, 'Law and Democracy' [1995] *Public Law* 72 at 81; Lord Denning, 'Misuse of Power' (1981) 55 *Australian Law Journal* 720 at 723.

comments in the House of Lords in *R (Jackson)* v *Attorney-General*[128] where Lords Steyn[129] and Hope,[130] in obiter comments, denied that Parliamentary sovereignty was absolute. Lord Hope expressly referred, in agreeing with Sir Owen Dixon, to the 'supremacy throughout the constitution of ordinary law'.

Of course, much will depend on how the rule of law is defined, and if all that is meant is that legislative power is subject to constitutional limit, as the International Commission suggests, there is no difficulty and it supports the idea of restraint of the absolutism otherwise implied by Parliamentary supremacy.

However, is what is meant by the rule of law that there be 'equality' as Allan suggests? Is that concept the needed brake on the ability of Parliament to pass legislation? For example, take a law that abolishes jury trials for all of those accused of crimes. Now, this law would apply equally to all accused. Would this pass Allan's 'equality' test and so not infringe the rule of law? What of a law that reversed the presumption of innocence, or abolished the right to silence in all criminal trials? Again, these laws on their face and in effect would apply in a non-discriminatory way, so it may be that they would pass the 'equality' test and so not be struck out by the rule of law. However, to the author such laws would be repugnant to fundamental common law rights. To the extent that the 'equality' test would validate such laws, the author does not find the test convincing.[131]

The conception of the rule of law discussed earlier in this part is preferred, that all individuals must know in advance the nature of the encroachment on their liberties, and that the Australian people in the lead up to the adoption of the Constitution were not advised, and did not expect, that the powers of the new Commonwealth governments

128 [2006] 1 AC 262.

129 *Ibid.* at 302: 'We do not in the United Kingdom have an uncontrolled constitution as the Attorney-General implausibly asserts . . . The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the general principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.'

130 *Ibid.* at 303–4: 'Parliamentary sovereignty is no longer, if it ever was, absolute . . . Step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified.'

131 I would agree with the observation of Rawls then that 'treating similar cases similarly is not a sufficient guarantee of substantive justice': Rawls, above n. 119 at 59.

and state governments would extend to the extinguishment of fundamental common law rights.

iii. Governments do Take Away Fundamental Rights and Liberties

> The life of the law has not been logic; it has been experience.[132]

At the heart of Diceyan theory is the notion that the remedy for government law invading fundamental human rights is political only, rather than legal. The courts are apparently impotent in the face of repugnant laws. Dicey used the well-known example of the blue-eyed baby to demonstrate his absolutist position:

> If a legislature decided that all blue-eyed babies should be murdered, the preservation of blue-eyed babies would be illegal; but legislators must go mad before they could pass such a law, and the subjects be idiotic before they could submit to it.[133]

While there is some abstract logic in Dicey's model in terms of self-preservation,[134] the reality must be accepted that governments do, and have, legislated to take away fundamental common law liberties. Dixon J in the *Communist Party Case* recognized this:

> History . . . shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power.[135]

The right to trial by jury has been greatly restricted; the right to silence has in some cases been curtailed. The right of accused to cross-examine witnesses testifying against them has been limited in some cases.[136] Legislation has been passed providing for systems of preventive detention;[137] control orders have been introduced in the terrorist context;[138] legislation providing for indefinite detention based only on Ministerial direction has been validated.[139] Laws have been passed to greatly restrict the right of refugees to claim judicial review in relation to their refugee applications.[140] It was sought to introduce legislation to ban a political party in Australia, infringing the fundamental right of freedom of association.[141] When that legislation was struck down, the government sought to introduce a referendum to give it the power to directly deal with the Communist Party.

132 Oliver Wendell Holmes Jr, Lowell Lecture, 23 November 1880.
133 Dicey, above n. 22 at 79.
134 *Ibid.*: 'the permanent wishes of the representative portion of Parliament can hardly in the long run differ from the wishes of the English people' (81).
135 *Australian Communist Party* v *Commonwealth* (1951) 83 CLR 1 at 187–8.
136 National Security Information Act 2004 (Cth).
137 *Fardon* v *Attorney-General (Qld)* (2004) 223 CLR 575.
138 *Thomas* v *Mowbray* (2007) 233 CLR 307.
139 *Lloyd* v *Wallach* (1915) 20 CLR 299.
140 Emma Larking, 'Human Rights and the Principle of Sovereignty: A Dangerous Conflict at the Heart of the Nation State?' (2004) *Australian Journal of Human Rights* 15; refer for further discussion to Alice Edwards, 'Tampering With Refugee Protection: The Case of Australia' (2003) 15(2) *International Journal of Refugee Law* 192.
141 *Australian Communist Party* v *Commonwealth* (1951) 83 CLR 1.

Though the referendum was defeated, the government who had introduced the original legislation, and who subsequently pressed the issue at a referendum, was not removed from office by the people when given an opportunity. The attempted invasion of human rights was not 'remedied' by the political process, as Dicey would have believed. Of course, the truth is far more complex—people make their decision as to their government based on a range of factors. Anecdotally, it is suggested that the human rights record of a government would be well down the list of factors influencing election outcomes, and there is evidence that governments which pass laws invasive of human rights actually enjoy a payoff at the polls.[142]

This is not to argue the relative merits of any or all of the above policy decisions. It is to affirm that history is replete with examples where governments have sought to take away fundamental civil liberties. There is an inherent tension between the exercise of legislative power and the preservation of civil liberties, to make it incoherent to expect the holders of the former to always respect the latter.

One can make the same point in reverse—that there are numerous examples where it has been the courts, rather than Parliaments, that have remedied what we now consider to be gross breaches of human rights. It was the High Court of Australia, rather than the Parliament, that took the first steps to the recognition of indigenous land rights in this country.[143] It was the United States Supreme Court that took the decision that eventually ended government policies favouring segregation based on race.[144] It was that court that set out minimum requirements for the questioning of suspects.[145]

Of course, this isn't meant to imply that the common law is perfect. Justice Gummow has commented that it would be unwise to 'carry into constitutional discourse an undue romanticism about the common law'.[146] So much may be agreed. However, the above examples show that any romanticism about the role of Parliament in preserving fundamental civil liberties is also misplaced.

V. Counter-Arguments

i. Parliamentary Supremacy

It is sometimes said that the Glorious Revolution of 1688 heralded an acceptance of the doctrine of Parliamentary supremacy, in other

142 Many argue, for example, that one of the main reasons the Howard Government won re-election at the 2001 election, despite trailing at the polls for much of its second term, was the tough approach they took to the question of 'boat people'.

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

144 *Brown* v *Board of Education* (1954) 347 US 483—of course, in the context of a written Bill of Rights.

145 *Miranda* v *Arizona* (1966) 384 US 436—again with an express Bill of Rights.

146 See Gummow, above n. 67 at 176. He states that much legislative activity has been expended in varying or abrogating distasteful aspects of common law doctrine.

words, that Parliament could make or unmake any law, and it was not for a court to declare laws to be invalid.[147] The view would be that Coke's doctrines could not have survived this development, despite what Blackstone wrote above post-Revolution. An absolutist version of Parliamentary supremacy would logically not support the implication of rights from the text of the Constitution and/or the common law, since this would have the effect of reducing the power of Parliament to pass laws it deems fit.

However, others have since challenged the view that the events of 1688 established Parliamentary supremacy.[148] Marshall, for example, argued that the Revolution simply meant Parliament was supreme relative to other organs of government, rather than that it was omnicompetent;[149] Allott claimed Dicey's views flew in the face of 1000 years of talk of 'fundamental law' by kings and others;[150] and de Walker claimed conflict between the Diceyan theory of Parliamentary supremacy and the rule of law.[151] Fitzgerald spoke of the 'ignorant trust' Dicey reposed in the Parliament.[152] The doctrine of Parliamentary supremacy may be simply a common law rule, subject to change like every other principle of common law.[153] A provision of the (English) Bill of Rights might also deny the plausibility of Parliamentary

147 See Dicey, above n. 22 at 38; Goldsworthy, above n. 10, says that Parliamentary supremacy was only accepted as a maxim in the nineteenth century (164); cf. Maitland, who argues that Parliamentary supremacy was established by the reign of Elizabeth I: Frederic Maitland, *The Constitutional History of England* (Cambridge University Press: Cambridge, 1908) 254–5, 298, 301.

148 'The revolution of 1688 did not assert the supremacy of Parliament': R.A. Edwards, '*Dr Bonham's Case*: The Ghost in the Constitutional Machine' [1996] *Denning LJ* 63 at 69.

149 Geoffrey Marshall, *Parliamentary Sovereignty and the Commonwealth* (Clarendon Press: Oxford, 1957) ch. 5; Sir Matthew Hale also rejected a suggestion that Parliament had unlimited powers (*Hale's Reflections by the Lrd. Chiefe Justice Hale on Mr Hobbes his Dialogue of the Law*) referred to in de Walker, above n. 113 at 278. Walker claims Dicey's theory lacked judicial precedent.

150 Philip Allott, 'The Courts and Parliament: Who Whom?' (1979) 38 *Cambridge Law Journal* 79 at 114.

151 See de Walker, above n. 113 at 281. Wait concludes that Parliamentary sovereignty (as he calls it, rather than supremacy) is 'an affront to the rule of our law and has no place in our Constitution at all': Wait, above n. 55 at 73.

152 Brian Fitzgerald, 'Proportionality and Australian Constitutionalism' (1993) 12 *University of Tasmania Law Review* 263 at 265.

153 Trevor Allan, 'Parliamentary Sovereignty: Law, Politics, and Revolution' (1997) 113 *Law Quarterly Review* 443 at 445; Adam Tomkins, *Public Law* (Oxford University Press: Oxford, 2003) 103. Sir Owen Dixon claimed the common law contained no general doctrine in favour of Parliamentary supremacy; it applied only to the United Kingdom Parliament: *Jesting Pilate*, above n. 55 at 200. Even to that extent, it has had to be re-formulated, as Allan argues, in the context of British membership of the European Union (447), as Vick also notes: Douglas Vick, 'The Human Rights Act and the British Constitution' (2002) 37 *Texas International Law Journal* 329 at 349. Sir Owen Dixon also described Parliamentary supremacy as a doctrine of English common law: *Jesting Pilate*, above n. 55 at 199. Jeffrey Goldsworthy, a leading advocate of Parliamentary supremacy in Australia, concedes that it depends on judicial acceptance: 'The Myth of the Common Law Constitution' in Douglas Edlin (ed.), *Common Law Theory* (Cambridge University Press: Cambridge, 2007) 235.

supremacy—after enumerating various rights, Article VI of the Bill states that:

> All and singular the rights and liberties asserted and claimed in the said declaration, are the true, ancient, and indubitable rights and liberties of the people of this kingdom, and that all . . . shall be firmly and strictly holden and observed.[154]

Despite the dominance of the doctrine of Parliamentary supremacy in England, there are clear examples, for example in the context of the recognition of foreign law, where the courts have recognized limits. For example, the House of Lords refers to a foreign law as involving 'so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all'.[155] This leaves open the question of the attitude of the court if the law were instead a local one. In the case of a British statute which declared that the findings of a Commission were not to be called into question in any court of law, the British court ignored the provision. Lord Reid, for example, said that he 'expected to find something more specific than the bald statement that the determination shall not be called into question in any court of law'.[156] The notion of Parliamentary supremacy does and has changed, in light of the evolution of the European Union.[157]

The notion of Parliamentary supremacy is more difficult in a country such as Australia that accepts judicial review of the constitutionality of legislation, and the ability of a court to strike down legislation inconsistent with the Constitution.[158] The notion may be at odds with a federal state,[159] and Dicey himself would not have found the Australian Parliament to be a sovereign law-making body, according to his

154 Article VI, English Bill of Rights (1689).

155 *Oppenheimer* v *Cattermole* [1976] AC 249 at 278, HL; a more recent example is *Kuwait Airways Corporation* v *Iraqi Airways Company* [2002] UKHL 19.

156 *Anisminic Ltd* v *Foreign Compensation Commission* [1969] 2 AC 147. Equivalent examples in Australia arguably include *Chu Kheng Lim* v *Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 where a majority invalidated a provision stating that 'a court is not to order the release from custody of a designated person': Brennan, Deane, Dawson and Gaudron JJ; Mason CJ, Toohey and McHugh JJ dissenting. In *Plaintiff S157/2002* v *Commonwealth* (2003) 211 CLR 476 the High Court greatly restricted the ambit of a provision of the Migration Act denying the court the ability to hear argument 'calling into question' a privative clause decision. The court found that the provision did not apply to decisions affected by jurisdictional error—these were not decisions but 'purported decisions'. This ruling had the effect that the administrative law grounds of review of a decision under the Act were preserved, despite what appears to be a clear Parliamentary attempt to do otherwise.

157 Julie Debeljak, 'The Human Rights Act 1998 (UK): The Preservation of Parliamentary Supremacy in the Context of Rights Protection' (2003) *Australian Journal of Human Rights* 10; Allan, above n. 153; Sir William Wade, 'Sovereignty—Revolution or Evolution?' (1996) 112 *Law Quarterly Review* 568.

158 Goldsworthy claims the doctrine exists in Australia, albeit in a 'heavily modified form': above n. 10 at 279.

159 See Wait, above n. 55 at 60; Smallbone, above n. 6 at 258. In discussing another federal system, the United States, Dicey spoke of sovereignty as existing in the Supreme Court: above n. 22 at 170.

criteria.[160] Speaking of the United States Supreme Court, but in terms equally applicable to the High Court of Australia, Dicey observed that:

> Sovereignty is lodged in a body which rarely exerts its authority and has (so to speak) only a potential existence; no legislature throughout the land is more than a subordinate law-making body capable in strictness of enacting nothing but by-laws; the powers of the executive are again limited by the constitution; the interpreters of the constitution are the judges. The Bench therefore can and must determine the limits to the authority both of the government and of the legislature; its decision is without appeal; the consequence follows that the Bench of judges is not only the guardian but also at a given moment the master of the Constitution.[161]

Sir Owen Dixon said it was not a doctrine of general application to all legislatures, and its effect was confined to the United Kingdom Parliament.[162] A unanimous High Court agreed in *Lange* v *Australian Broadcasting Corporation* that: 'The Constitution displaced, or rendered inapplicable, the English common law doctrine of the general competence and unqualified supremacy of the legislature.'[163]

Further, we recognize the ability of Commonwealth and state Parliaments to enact manner and form provisions, a phenomenon clearly at odds with the Diceyan notion of Parliamentary supremacy.[164] It is also now difficult given political and legal change in the United Kingdom, alluded to recently by Lord Steyn and Lord Hope of the House of Lords.[165]

160 He gave three characteristics of a sovereign law-making body: (a) there is no law which Parliament cannot change; (b) there is no distinction between laws which are not fundamental or constitutional and laws which are fundamental or constitutional; and (c) there is no body which can pronounce void any enactment passed by the British Parliament on the ground that the enactment is contrary to the Constitution (84–7). In Australia, Parliament cannot change the Constitution. There is a distinction between constitutional laws and other laws, and the High Court of Australia does judge the compatibility of laws with the Constitution.

161 See Dicey, above n. 22 at 170–1.

162 *Jesting Pilate*, above n. 55 at 200; cf. Gleeson CJ in *Roach* v *Electoral Commissioner* (2007) 233 CLR 162 at 172 who noted that the founding fathers admired, respected and largely adopted Parliamentary supremacy (172–3).

163 (1997) 189 CLR 520 at 564 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

164 'A truly supreme and sovereign parliament would be able to make any law, including a law that binds future parliaments, without the judiciary being able to strike it down. If parliament is bound by the laws of its predecessor, it is not supreme or sovereign in this sense': Julie Taylor, 'Human Rights Protection in Australia: Interpretation Provisions and Parliamentary Supremacy' (2004) 32 *Federal Law Review* 57 at 61.

165 'The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom': *R (Jackson)* v *Attorney-General* [2006] 1 AC 262 at 302 (Lord Steyn) and 303 (Lord Hope). In *MacCormick* v *Advocate General*, Lord Cooper suggested (dicta) that Parliamentary sovereignty was a rule of English constitutional law that might not have survived the creation of the Great Britain Parliament in 1707: [1953] SC 396 at 411–12; Thomas Smith, 'The Union of 1707 as Fundamental Law' [1957] *Public Law* 99; Neil MacCormick, 'Does the United

It may be that, as Allan has advocated, the doctrine should not be seen in isolation but associated with the rule of law, and not superior to it. Legislation inconsistent with the rule of law (as defined) is not valid, despite Parliamentary supremacy. He said:

> The fundamental constraints of equality and due process are wrongly viewed as limitations on popular sovereignty. That is a false antithesis, which lends spurious plausibility to the notion of conflicting imperatives of 'popular sovereignty' and 'judicial activism'. The critical question is how the idea of popular sovereignty should be understood: in what sense is the constitution owned or fashioned by the people, and what is the basis of their loyalty to its commands? Democracy is an aspiration to self-government that is erroneously equated with majority rule; and the corresponding idea of popular sovereignty should be understood to embody the claim of every citizen to equal respect. A majority decision to remove the legal foundations of the dignity and independence of a single citizen, in violation of the principles of the rule of law, is not to be understood as an exercise of popular sovereignty, however great the majority or passionate its specious claim of legitimacy. Citizenship in a liberal democratic regime cannot be equated merely with liberty to vote, on the one hand, and subjection to whatever treatment a majority vote endorses, on the other.[166]

It was discussed in the section prior to this one that despite the faith that Diceyan Parliamentary supremacy places in the political process, there are numerous examples where Parliaments have acted to seriously erode rights. The remedy in respect of such laws is not always or often in fact at the ballot box.

For these reasons, it must be questioned whether it is correct any more to apply notions of Parliamentary supremacy to the constitutional arrangements of Australia. It has powerful detractors, most prominently a unanimous High Court in *Lange*. As a result, notions of Parliamentary supremacy should not be used to argue against the implication of rights in the Constitution.

Kingdom have a Constitution? Reflections on *MacCormick* v *Lord Advocate*' (1978) 29 *Northern Ireland Quarterly* 1. See also *R* v *Secretary of State for Transport, ex parte Factortame* [1991] 1 AC 603, HL; John Eekelaar, 'The Death of Parliamentary Sovereignty—A Comment' (1997) 113 *Law Quarterly Review* 185; Allan, above n. 153; Sir William Wade, 'What Has Happened to the Sovereignty of Parliament?' (1991) 107 *Law Quarterly Review* 1. It has sometimes been suggested that the *ultra vires* doctrine of administrative law proves that the common law retains supremacy over Parliament: see, for example, C.F. Forsyth, 'Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review' (1996) 55 *Cambridge Law Journal* 122; Paul Craig, 'Ultra Vires and the Foundations of Judicial Review' (1998) 57 *Cambridge Law Journal* 63; Mark Elliott, 'The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law' (1999) 58 *Cambridge Law Journal* 129; and M. Elliott, 'The Demise of Parliamentary Sovereignty? The Implications for Justifying Judicial Review' (1999) 115 *Law Quarterly Review* 119.

166 See Allan, above n. 110 at 261–2.

ii. Arguments About Democracy

> Judicial review of the validity of legislation is not an essential pre-requisite for the protection of human rights and democracy in every legal system committed to those ideals.[167]

It is often argued by advocates of Parliamentary supremacy that the alternative, which would give judges a role in reviewing legislation and invalidating statutes which impinged on fundamental legal rights, is anti-democratic. Typically, Ekins states that:

> The obvious, and to my mind irrefutable, objection to judicial supremacy is that elected legislators have a far greater democratic mandate than unelected judges to make the political choices that determine the content of the law, especially in respect of morally controversial issues . . . it is implausible to assert that judges will necessarily make morally sound decisions.[168]

However, with respect it may be mistaken to equate 'democracy' with majoritarian will, as the above quote implies.[169] Sir Anthony Mason concluded that 'our evolving concept of the democratic process is moving beyond an exclusive emphasis on parliamentary supremacy and majority will . . . embracing a notion of responsible government which respects the fundamental rights and dignity of the individual'.[170] Similarly, Allan spoke of 'an appropriately sophisticated conception of democracy . . . likely to recognize the existence of certain basic individual rights, whose importance to the fundamental

167 See Goldsworthy, above n. 10 at 279.

168 Richard Ekins, 'Judicial Supremacy and the Rule of Law' (2003) 119 *Law Quarterly Review* 127; James Allan, 'A Defence of the Status Quo' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Human Rights* (Oxford University Press: New York, 2003); Jeremy Waldron, 'Moral Truth and Judicial Review' (1998) 43 *American Journal of Jurisprudence* 75 at 92; *Law and Disagreement* (Clarendon Press: Oxford, 1999); Goldsworthy, above n. 10 at 257. Albert Dicey stated that 'the wishes of the representative portion of Parliament can hardly in the long run differ from the wishes of the English people': Dicey, above n. 22 at 81.

169 Ronald Dworkin, 'Equality, Democracy, and the Constitution: We the People in Court' (1990) 28 *Alberta Law Review* 324 at 337. It seems Plato and Aristotle also had a more sophisticated sense of democracy—'societies in which the winners of the competition for office reserve the conduct of public affairs wholly to themselves are no constitutional states, just as enactments, so far as they are not for the common interest of the whole community, are no true laws' (*Laws* IV: 715b) (Plato), and Aristotle: 'it would seem to be a reasonable criticism to say that such a rule-of-the-many is not a constitution at all; for where the laws do not govern there is no constitution . . . an organisation of this kind, in which all things are administered by resolutions of the assembly, is not even a democracy in the proper sense' (*Politics* III, 4:1279a17–22; 5:1280b7–9; IV, 4:1292a31–4). Citing these passages, Finnis argues that these writers believed that unjust laws were not laws: Finnis, above n. 96 at 363 (despite having been passed by a 'Parliament').

170 'Future Directions in Australian Law' (1987) 13 *Monash University Law Review* 149 at 163; and 'The Role of a Constitutional Court in a Federation' (1986) 16 *Federal Law Review* 1.

idea of citizenship in a free society . . . will properly place them beyond serious legislative encroachment'.[171] It is an error to argue that a society is not democratic unless it has a government of unlimited powers.[172]

Further, while Ekins may be right that there is no guarantee that judges will necessarily make morally sound decisions, it is suggested that legislators are likely to feel more pressure to encroach on fundamental civil liberties than are judges.[173] Parliamentarians are under pressure to react to some perceived wrong or injustice. They are influenced by lobby groups to act in particular ways that may not respect fundamental human rights.[174] The ability of a legislator to impinge on fundamental civil liberties, through the passage of legislation that applies to every member of society, is far greater than the ability of a judge to impinge on fundamental liberties. Even the frail shield of accountability to the people fails when those affected are in a minority or for some other reason are not represented in the legislature.[175] So while I agree that neither judges nor legislators have all of the 'morally sound' cards, it is submitted that the likelihood of an

171 See Allan, above n. 153 at 449; 'The Common Law as Public Reason' in Edlin (ed.), above n. 153 at 196. In New Zealand, Sir Robin Cooke accepted the proposition that legislative powers were subject to the common law: see, for example, *L* v *M* [1979] 2 NZLR 519 at 527; *Brader* v *Ministry of Transport* [1981] 1 NZLR 73 at 78; *New Zealand Drivers' Association* v *New Zealand Road Carriers* [1982] 1 NZLR 374 at 390; *Fraser* v *State Services Commission* [1984] 1 NZLR 116 at 121; *Taylor* v *New Zealand Poultry Board* [1984] 1 NZLR 394 at 398; 'Fundamentals' [1988] *New Zealand Law Journal* 158; Karen Grau, 'Parliamentary Sovereignty: New Zealand—New Millennium' (2002) 33 *Victoria University of Wellington Law Review* 351; Kirby, above n. 108.

172 See Rostow, above n. 89 at 199; B. Cardozo, *The Nature of the Judicial Process* (Yale University Press: London, 1921).

173 Rostow puts it in a different way but essentially makes a similar point: 'It is hardly characteristic of law in democratic society to encourage bills of attainder, or to allow appeals from the courts in particular cases to legislatures or to mobs': Rostow, above n. 89 at 197.

174 Judge Learned Hand noted that the founding fathers had put the adjudicators of the Constitution 'deliberately . . . beyond the reach of popular pressure': *The Contribution of an Independent Judiciary to Civilisation*, address on the 250th anniversary of the Supreme Judicial Court of Massachusetts (1942). It seems strange then to accuse a court making decisions about rights of being anti-democratic when the very fact that is not directly accountable to the people arguably puts it in the ideal position to make judgments about rights dispassionately and in a non-partisan way.

175 Dale Smith writes that 'Legislators are (typically) dependent upon the support of a majority of the electorate to retain office, and so lack sufficient motivation not to mistreat any minority that the majority wishes to oppress': 'Can Anti-Objectionists Support Judicial Review?' (2006) 31 *Australian Journal of Legal Philosophy* 50 at 54. In several decisions, Chief Justice Stone of the United States Supreme Court, in noting these limits, suggested an even stronger brand of judicial review when a court is considering legislation affecting the rights of those who are, for one reason or another, disenfranchised or 'politically impotent': *United States* v *Carolene Products Co* (1938) 304 US 144 at 152; *McGoldrick* v *Berwind-White Coal Mining Co* (1940) 309 US 33 at 46; *South Carolina State Highway Department* v *Barnwell Bros Inc* (1938) 303 US 177 at 185; Herbert Wechsler, 'Stone and the Constitution' (1946) 46 *Columbia Law Review* 764 at 785–800.

attack on civil liberties is much more likely to come from the legislator rather than the judge, and so it is justified to give judges the power to strike down legislation invasive of human rights.

As mentioned earlier, it may assist in meeting the democracy concern to recognize that the rights are implicit in the structure of the Constitution, the compact voted upon and accepted by the people as sovereign, rather than merely basing the argument on the fact that these rights exist at common law.

iii. Lack of Express Rights in the Constitution

It is sometimes said that rights should not be implied in the Constitution because the founding fathers, by and large, rejected the need for constitutional protection of rights. Of course, this raises the originalism vs progressivist constitutional debate, and much has been written about this already.

It is submitted that the lack of an express bill of rights in Australia should not (does not) preclude the continued existence of common law rights which cannot be abrogated by Parliament. Such rights existed prior to the creation of the Commonwealth Constitution, under which the federal Parliament directly, and state Parliaments indirectly, derive their power to make laws. Their law-making powers must be read in the light of that history and those prior rights.[176] As Toohey put it:

> Just as Parliament must make unambiguous the expression of its legislative will to permit executive infringement of fundamental liberties before the courts will hold that it has done so, it might be considered that the people must make unambiguous the expression of their constitutional will to permit Parliament to enact such laws before the courts will hold that those laws are valid.[177]

I would respectfully adopt comments by Deane J in *Theophanous* that the argument that the failure to include an express bill of rights in the Constitution meant there was no intention to protect such rights was

176 'There is an obvious tension between the plenary powers of parliament and the requirements of morality, justice and universal human rights. The Lockean approach resolves this tension by allowing judges to limit parliamentary sovereignty to the extent that it allows infringement of fundamental common law rights, such rights, on the delegation view of the Constitution, having never been ceded to the Parliament in the first place': Wright, above n. 108 at 188–9. See also Brian Fitzgerald, who concludes that 'for too many years Dicey's theory of legal sovereignty residing in the Parliament and political sovereignty existing in the people has been used by those in power to the disadvantage of the ultimate generators of power, the people': 'Proportionality and Australian Constitutionalism' (1993) 12 *University of Tasmania Law Review* 263 at 276.

177 See Toohey, above n. 54 at 170. See for discussion Winterton, above n. 108.

'flawed at every step'.[178] The Ninth Amendment merely makes express in the United States what should be implied in Australia.[179]

Of course, it must be conceded that the founding fathers in Australia considered the option of including an express bill of rights in the Constitution, but decided against it. The relevance of the intentions of the founding fathers to interpretation of constitutional principles today is of course a matter of conjecture.[180] In any event, to the extent that it remains relevant, the founding fathers might have avoided including an express bill of rights because they did not think that Parliament would trample on common law rights, influenced as they were by Diceyan theory. One of them, Cockburn, wondered whether any of the colonies had ever attempted to deprive a person of life, liberty or property without due process, and was concerned that comments such as 'Pretty things these states of Australia; they have to be prevented by provisions of the Constitution from doing the grossest injustice'[181] would be made by observers.

In other words, the founding fathers may not have experienced occasions where Parliament did trample on common law rights, and did not think it would do so.[182] The number of statutes was also much smaller than today.

So, to the extent that the views of the founding fathers are relevant in constitutional interpretation today, it is submitted that their decision not to include an express bill of rights should not lead to the conclusion that statutes might not be declared invalid because they invade fundamental common law liberties or are inconsistent with

178 *Theophanous* v *Herald and Weekly Times Ltd* (1994) 182 CLR 104, citing *R* v *Smithers* (1912) 16 CLR 99 where Griffith CJ and Barton, two founding fathers, held that citizens had an implied (constitutional) right to visit the seat of government and other related rights.

179 'under *Marbury* v *Madison*, as in *Dr Bonham's Case*, the common law is, in fact, controlling acts of the legislature': Edwards, above n. 148 at 86.

180 Five members of the High Court recently in *New South Wales* v *Commonwealth* (2007) 231 ALR 1 concluded that to pursue the framers' intention was, more often than not, to pursue a mirage (40) (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

181 Convention Debates, Melbourne (1898) Vol. 1, p. 688; see J.A. La Nauze, *The Making of the Australian Constitution* (Melbourne University Press: Melbourne, 1972) 231. Gleeson CJ in *Roach* v *Electoral Commissioner* (2007) 233 CLR 162 explained that the history of their country had not taught the founding fathers the need for provisions directed to the control of the legislature itself (172).

182 Deane and Toohey JJ in *Leeth* v *The Commonwealth* (1992) 174 CLR 455 at 484–5 conclude that there are 'many statements in the Convention Debates by the opponents of express guarantees of fundamental rights to the effect that such guarantees were "unnecessary"' (*Official Record of the Debates of the Australasian Federal Convention*, Melbourne (1898), Vol. 1, 667, 687–8), or were effected by the ordinary operation of the common law and embodied in the Constitution as part of the unwritten law (Vol. 2, 1776). Geoff Lindell says that the founding fathers did not think Parliament would act to trample upon rights: *Future Directions in Australian Constitutional Law* (Federation Press: Sydney, 1994) 34. Today we believe differently—as Douglas Edlin puts it: 'faith in the self-restraint and circumspection of an absolutely sovereign legislative authority seems a flimsy means by which to prevent potential abuses of legislative power': 'Rule Britannia' (2002) 52 *University of Toronto Law Journal* 313 at 319.

implied rights.[183] They assumed something that is not the reality of current governance—some of their members, as well as members of the High Court, concede that the (unexpressed) views of the founding fathers should not control interpretation of the Constitution,[184] some of them at an early stage claimed that the Constitution contained implied rights anyway,[185] and some of them may have placed their trust in the common law to protect rights from interference.[186] They presumably would have been aware of the American experience prior to 1776, where laws were struck down on the basis of inconsistency with common law rights, were aware of the contents of the English Bill of Rights, including a statement that rights within it were 'indubitable', and were aware of several precedents, including *Dr Bonham's Case*, suggesting that legislation inconsistent with the common law should not stand.

iv. Judicial Activism is Encouraged

Some upholders of Diceyan dogma might suggest that a finding that Parliamentary legislative power is subject to implied constitutional rights or fundamental common law rights is unacceptable, because it gives too much power to unelected judges, or might encourage 'judicial activism', intended by those critics in a pejorative sense. Zines, for example, claims that allowing judges to subject legislation to common law rights 'is to invite a judge to discover in the constitution his or her own broad political philosophy'.[187] Winterton suggests

183 Deane J in *Theophanous* similarly concluded that despite what the founding fathers might have thought or sometimes said, there was nothing to prevent the implication of rights from the Constitution's express terms of fundamental doctrines upon which it was structured (171).

184 *Theophanous* v *Herald and Weekly Times Ltd* (1994) 182 CLR 104, Mason CJ, Toohey, Gaudron JJ (128–9) and Deane J (171); in *New South Wales* v *Commonwealth* (2007) 231 ALR 1 at 40, several members of the current High Court spoke of the pursuit of the framers' intention as much more often than not to pursue a mirage (Gleeson CJ, Gummow, Heydon, Hayne and Crennan JJ).

185 *R* v *Smithers* (1912) 16 CLR 99 where Griffith CJ and Barton, two founding fathers, held that citizens had an implied (constitutional) right to visit the seat of government and other related rights.

186 At least Inglis Clark seemed to believe in the sovereignty of the people rather than the sovereignty of Parliament, which might suggest that laws trampling on common law liberties should not be upheld. In the 1907 *Potter* decision, O'Connor J cited with approval comments by an author of a statutory interpretation text to the effect that 'it is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual or natural sense, would be to give them a meaning in which they were not really used': *Potter* v *Minahan* (1907) 7 CLR 277 at 304. Some who argued against express inclusion of rights in the Constitution did so because the rights were already effected 'by the ordinary operation of the common law': *Official Record of the Debates of the Australasian Federal Convention*, Melbourne (1898) Vol. 2, 1776.

187 Sir Leslie Zines, *Constitutional Change in the Commonwealth* (Cambridge University Press: New York, 1991) 52.

the process will be subjective.[188] Allan refers to the need for a judge implying rights to '[try] not to look as though you are making it up as you go along, of simply reading in your own political and moral preferences'.[189]

Of course, the precise meaning of 'judicial activism' is a matter of some debate.[190] Further, one can hardly accuse of being radical a principle applied in England more than four centuries ago, and which provided the basis for American legal orthodoxy like *Marbury* more than two centuries ago. Sir Owen Dixon, who clearly supported the principle in his extra-judicial writings, can hardly be labelled a judicial activist.

Eminent jurists have for centuries recognized that the law should grow and develop through the course of decision-making,[191] to reflect changes in society. As Lord Goff noted:

> It is universally recognised that judicial development of the common law is inevitable. If it had never taken place, the common law would be the same now as it was in the reign of King Henry II; it is because of it that the common law is a living system of law, reacting to new events and new ideas, and so capable of providing the citizens of this country with a system of practical justice relevant to the times in which they live.[192]

So far from being a criticism, the flexibility of the common law is part of its genius and part of the reason it has continued to serve various societies well across several centuries. The judges have a role to play in developing and adapting common law. Labels like 'judicial activism' serve to ignore this role, or seek to downplay the important role that judges play in legal development.

VI. Summary and Conclusion

The notion that Parliament's powers are subject to common law human rights is not new. It was espoused more than four centuries

188 See Winterton, above n. 49 at 143. Winterton says that the content of the supposed fundamental principle and the degree to which it is limited by considerations of reasonableness and proportionality will differ with different judges. While this may be so, the same may be said of existing constitutional principles whereby a Commonwealth law is assessed for validity in terms of whether it is 'a law with respect to' a particular head of power, 'reasonably appropriate and adapted', 'reasonable proportionality' etc. The concept of reasonable regulation appears in the jurisprudence of s. 92 and it is at the heart of the implied free speech cases. Judges differ over the meaning of these concepts and their application in particular cases. With respect, it does not to the writer seem a convincing reason for not accepting the fundamental common law rights argument.

189 See Allan, above n. 168 at 183.

190 Justice Robert French of the Federal Court, as he then was, in *Judicial Activists—Mythical Monsters?* (2008) Constitutional Law Conference, ANU.

191 Sir Francis Bacon, *The Advancement of Learning* (Henrie Tomes: London, 1605); Henry Bracton, *de Legibus et conscientudinibus Angliae*, vols 1–4, G.E. Woodbine (ed.) (Yale University Press: New Haven, 1915–42).

192 *Kleinwort Benson Ltd* v *Lincoln County Council* [1999] 2 AC 349 at 377.

ago, both before and after the Glorious Revolution in England. It was adopted with great enthusiasm in the United States, and formed the basis of that country's acceptance of judicial review, a doctrine to which Australia subscribes. One can see in the adoption of an express bill of rights an attempt to express what was already implied—the powers of Parliament were not absolute, and subject to limits involving the rights of citizens. The doctrine of Parliamentary supremacy is a common law principle of relatively recent origin, and is difficult to reconcile with other principles to which we ascribe. It does not fit the reality of Australia's constitutional arrangements, and it is hard to reconcile with developments in the United Kingdom, as some have recognized. Numerous High Court judges have made passing comments to the effect that at least some common law rights are so fundamental that they could not be taken away, including Sir Owen Dixon. These common law rights may be seen to be implicit in the constitutional structure in Australia. It may be that the High Court in *Lange* was right to say that the doctrine of Parliamentary supremacy is no longer helpful in describing Australia's system of governance.

While it is true that the founding fathers did not include an express bill of rights in the Australian Constitution, this was because their experience had not taught them the need to do so. They assumed that Parliaments would not trample upon rights—they did not assume that the common law rights that arrived with the First Fleet were being sacrificed when colonial and then the Commonwealth Parliament was created. In other words, the failure to include express rights should not be taken to mean an intention that the Commonwealth and state Parliaments would have the legislative ability to take away common law rights. There is no evidence that the people intended to give Parliament the power to take away rights, and the rule of law requires that citizens know in advance before power is exercised what the nature and ambit of the power is. If the High Court were to test the validity of legislation against a backdrop of an implicit right to due process enshrined in the Constitution, democracy would not suffer but would be enhanced.

Support for this theory can be found in the work of theorists such as Locke, in terms of the social compact. Locke denied that Parliament would or should be omnicompetent—if citizens banded together, they did so in order to protect rights, rather than create a body with the ability to take them away. A theory that citizens enjoy rights that are above interference by the Parliament is also consistent with the idea that the people enjoy sovereignty, rather than Parliament. Given the theoretical, judicial and extra-judicial support for the idea that at least some human rights are above interference by Parliament, the High Court should now accept this position. I have suggested the kinds of rights to which I am referring. Their meaning and content would of course evolve over the years, as the common law has always done.