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CHARTER: AN AUSTRALIAN
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SCHOOL OF LAW
MANCHESTER, ENGLAND
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HUMAN RIGHTS CONFERENCE ON THE 10TH ANNIVERSARY
OF THE *HUMAN RIGHTS ACT* 1998 (UK)

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CHILDREN OF DICEY

Dicey's constitutional legacy: In the long history of Britain and its laws, there have been a number of earlier general statutes of rights¹. However, there had never been anything quite like the *Human Rights Act* 1998 (UK) ("HRA 1998")². That Act represented an important shift from what had generally been an approach of scepticism and even hostility toward the declaration of a comprehensive list of enumerated rights. Such an approach to the protection of civic legal entitlements was generally seen as incompatible with two fundamental tenets of the English legal system, as it had evolved. These were that the rights (and obligations) of individuals were such as were declared by the sovereign parliament or by judges, in ways not inconsistent with parliamentary law. And that the rights of subjects were unlimited, except to the extent that

* Justice of the High Court of Australia (1996-2009). President of the Institute of Arbitrators & Mediators Australia (2009-10).

¹ For example, *Magna Carta* 1215; *Habeas Corpus Act* 1679 (GB), the *Bill of Rights of 1689* (GB); *Parliament Act* 1911 (UK) and the *Statute of Westminster* 1931 (UK).

² *The Human Rights Act 1998* (UK) ("HRA 1998") was brought into force on 2 October 2000. See HRA 1998, s22: A. Lester, D. Pannick and J. Herberg, *Human Rights Law and Practice*, 3rd Ed., 2009 (hereafter "Lester et al"), 15 [146], 101-102 [2.22.1]-[2.22.2].

parliamentary (or judge-made) laws imposed obligations that restricted the individual's complete freedom of action.

Those brought up in this tradition evidenced great confidence in the elected parliament to uphold the traditional rights of the individual as they had been declared by independent judges over the centuries. This was so, long before parliaments were elected with a real democratic composition, i.e., well before half the adult population (women) were admitted to the franchise.

The idea of a 'sovereign' parliament – as contrasted to the idea of a sovereign monarch – won many adherents in Britain as a result of the two revolutions against the Stuart kings, Charles I³ and James II⁴. For all of its defects, even before the reforms of the nineteenth and twentieth centuries, the Parliament at Westminster was generally careful to respect the traditional rights of British subjects.

It was in this context that A.V. Dicey in 1885 wrote his influential *Introduction to the Study of the Law of the Constitution*⁵. The whole of Part I of that text was devoted to "The sovereignty of Parliament". Whilst Dicey recognised the need for modification of his theory of parliamentary sovereignty in the case of federal constitutions⁶ and for the legislatures of what he called "non-sovereign law-making bodies" (which included railways corporations, local authorities and the then dominion parliaments within the British Empire⁷), he asserted that (as he put it)

³ M.D. Kirby, "Trial of King Charles I: Defining Moment for our Constitutional Liberties" (1999) 73 *Australian Law Journal* 577.

⁴ Steve Pincus, *The First Modern Revolution*, Yale Uni, 2009.

⁵ 1885 (10th Ed.), 1959, London, Macmillan & Co. Ltd.

⁶ "Parliamentary Sovereignty and Federalism"; Part I Ch III *ibid*, 138.

⁷ *Ibid*, 104.

“Englishmen [sic] ... have been ... accustomed to live under the rule of a supreme legislature ... [T]he sovereignty of Parliament [is] a salient feature of the English constitution, [and there are] far-reaching effects of this marked peculiarity in our institutions”⁸. The “Queen in Parliament” was “absolutely sovereign”. It was this entity alone that had “the right to make or unmake any law whatever; and, further ... no person or body is recognised ... as having a right to override or set aside the legislation of Parliament”⁹.

These legal principles were taught throughout the British Empire to law students who later became advocates and judges. In this context, the notion that there were universal human rights that Parliament could not disrespect or alter was regarded as heretical. The idea that some such rights inhered in human beings simply by reason of their humanness, was considered incompatible with the sovereignty of Parliament as Dicey explained it. In fact, it was generally seen as an idea based on natural law concepts that English lawyers attributed to legal doctrines propounded by Europeans, influenced as they were by the natural law teachings of the Roman Catholic Church¹⁰. Such notions were regarded as alien to the powers and responsibilities of representative parliaments that were the special political heritage of British subjects, together with the pragmatic common law system administered in the courts by independent judges.

When I was taught constitutional law at the Sydney University Law School in 1960, Dicey’s text was an obligatory part of the curriculum. A

⁸ *Ibid*, 87.

⁹ *Ibid*, 39-40.

¹⁰ M.D. Kirby, “Law Reform, Human Rights and Modern Governance: Australia’s Debt to Lord Scarman” (2006) 80 *Australian Law Journal* 299 at 310.

few attentive students of those days might have read the interleaved editorial annotation that confessed to the embarrassment of later editors about Dicey's classification of colonial and post-colonial legislatures in the British dominions beyond the seas, including Australia¹¹:

“The reader will not be misled by the examples of non-sovereign law-making bodies which the author uses by way of contrast with a Sovereign Parliament. What he wrote originally in 1885 of the Legislative Council of British India was, of course, obsolete long before India attained independent statehood in 1947. He chose New Zealand as an example of an English colony with representative and responsible government. What follows ... is only true today of one or two colonies on their way to independence. Paradoxically, New Zealand is the best example within the Commonwealth of a state which has reproduced the purely Dicey doctrine in its entirety, for she has a Parliament which can change any and every law, albeit a uni-cameral legislature.”

Yet even Australian lawyers of those days commonly thought their own legislatures provisional. Their statutes were subject to any statutory provisions enacted by the Imperial Parliament and extended to it. This was truly the mark of its genuine sovereignty. Its laws were absolute wherever the Union Jack still flew.

The American revolution: To this day the description of parliaments in the Commonwealth of Nations as “sovereign” is common and quite popular. Yet even before the current age, there were developments that cast doubt on the accuracy of the A.V. Dicey's idea.

In their uprising against the British Crown, the American colonists asserted that they enjoyed fundamental rights to “life, liberty and the

¹¹ See editors' note in Dicey, above n5, 86.

pursuit of happiness”¹². To a large extent, the American Revolution of 1776 arose from a belief on the part of those colonists that they were being denied in the American settlements the basic rights which British subjects enjoyed at home: not to be taxed except by an elected Parliament; not to be intruded upon in their homes except by authority of a judicial warrant; and not to be subjected to military imposition alien to the fundamental rights of Englishmen. Sir William Blackstone had explained those rights at about the same time¹³. Because the American Revolution of 1776 coincided with (and was partly sustained by) the French Revolution of 1789, the infection of notions of fundamental rights spread from Europe into the Americas and later far beyond.

Even before 1776, several of the American colonial legislatures had adopted charters of rights, or had enacted legislation, which expressed the basic entitlements of the individual, as recognised by the common law. The Constitution of the United States, as originally adopted, did not contain a Bill of Rights. The proposal that one should be added proved controversial. Initially, it was most vigorously resisted by the founding fathers from Virginia. They believed that a Bill of Rights was unnecessary because the new states had their own such charters; the new Constitution created a republic founded on popular sovereignty unlikely to abuse its powers; and the federal government enjoyed only limited and enumerated rights, obviating the need for a national charter¹⁴. Reflecting these attitudes, as if part of English DNA, James Madison, asked to prepare a draft of the basic rights of Americans, demanded to know who would be so bold as to declare the rights of the

¹² The United States Declaration of Independence. See L. Pfeffer, *The Liberties of an American*, Beacon Press, Boston, 1956 (1963 reprint), 1-8.

¹³ W. Prest, *William Blackstone – Law and Letters in the 18th Century*, OUP, New York, 2008.

¹⁴ H.J. Abraham, “Bill of Rights” in K.L. Hall, *The Oxford Companion to the Supreme Court of the United States*, OUP, New York, 1993, 52.

people? Yet, his first ten amendments to the United States Constitution constituted the model that was to become highly influential in the later development both of national and international law.

That model was not at first followed by the emerging British possessions as the Empire evolved into the Commonwealth of Nations. None of the early independence constitutions of Canada (1867), Australia (1901), South Africa (1909), New Zealand (1910) or India (1935) contained an equivalent to the United States Bill of Rights. It was only in the post-Second World War constitutions of Ireland, India and then the other non-settler dominions, granted full independence after 1950, that the lawmakers began to enact entrenched human rights provisions, copying the American idea.

At the same time as this post-War legal revolution was occurring in the English-speaking nations, an even greater change was happening in the wider world. During the Second World War, when the leaders of the United States and Britain met to define the Allied war aims in relation to the Axis powers, they included a commitment to protect basic rights. Nothing less would have been appropriate, given the influence of United States thinking on the proper shape of post-War institutions and the widespread evidence of gross oppression and cruelty that emerged concerning the governmental regimes of their adversaries.

The commitment to fundamental human rights was reinforced after the War in the *Charter of the United Nations* (1945)¹⁵ and in the *Universal*

¹⁵ *Charter of the United Nations* (Preamble 2) "To re-affirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small". See also Art.1.3 and Art.55(c). The *Charter* is contained in F.F. Martin et al. (Eds), *International Human Rights Law and Practice – Cases, Treaties and Materials (Documentary Supplement)*, Kluwer, The Hague, 1997, 5.

*Declaration of Human Rights (1948)*¹⁶. The Declaration (UDHR) did much to capture the imagination of people everywhere. It propounded the novel notion that stable conditions of international peace and security could only be achieved by the adoption of universal rights that were taught, respected by the powerful and enforced, where necessary, by international law.

The Indian Constitution: One by one, the former British dominions and possessions abandoned or softened their hostility to human rights charters. The Republic of Ireland was first (1937 and 1948). The Indian Constitution (1950) followed with a substantial chapter (Part III) titled “Fundamental Rights”. That chapter was divided into sections dealing with the “right to equality” (arts.14-18); “right to freedom” (arts.19-22); “right against exploitation” (arts.23-24); “right to freedom of religion” (arts.25-28); “cultural and educational rights” (arts.29-30); and “right to constitutional remedies” (arts.32-35). In addition, the Indian Constitution contained in Part II, a substantial section dealing with “Citizenship” (arts.5-11). An important section (Part IV) contained “Directive principles of state policy”. This was copied, in part, from the Irish Constitution of 1937(arts.36-51); and later a new section (Part IVA) was added containing “fundamental duties”¹⁷. These provisions were to influence greatly the independence constitution of the many other countries within the Commonwealth of Nations that gained full freedom and self-determination in the decades that followed.

The Canadian Charter: In 1960, the Canadian Parliament enacted the Canadian *Bill of Rights Act* (Can). This was non-constitutional

¹⁶ Adopted 10 December 1948, GA Res 217A(III), UNDoc A/810 at 71 (1948). See Martin et al, 32ff.

¹⁷ H.M. Seervai, *Constitutional Law of India*, (4th Ed.), Tripathi, Bombay, 1996, ch.VII-X, Vol.1, 349ff.

legislation. It set out a list of basic rights as declared by the Canadian national legislature. The Act was narrowly interpreted by the courts, basically because it enjoyed no special constitutional provenance¹⁸. However, in 1982, the Queen, as Queen of Canada, signed into law the *Canadian Charter of Rights and Freedoms* (the Canadian Charter). This was entrenched as the first part of the *Constitution Act 1982* (Can). It provides specified political rights to Canadian citizens and civil rights to all persons in Canada in respect of the actions of government. The Canadian Charter expanded judicial review in Canada and greatly enhanced the role of the courts, especially the Supreme Court. Apart from the political rights of citizens (ss3-6), there were a number of legal rights (ss7-14) (including the right to life, liberty and security of the person etc.); equality rights (s15); and language rights (ss16-23).

An important innovation of the Canadian Charter was the “notwithstanding” clause (s33), permitting derogations from Charter rights in certain cases and by specified means. This provision has been invoked by some of the Provinces; but can then only apply to matters that fall within provincial constitutional powers¹⁹. An important contributor to the Canadian move towards the protection of universal rights was Professor John Humphrey of McGill University²⁰. In the 1980s, he was my colleague in the International Commission of Jurists. In 1948, he had led the secretariat of the United Nations working on the UDHR. The Canadian Charter gained widespread popular support. No fewer than 82% of Canadians consulted in 1987 and 1999 expressed

¹⁸ *Attorney-General of Canada v Lavell* [1974] SCR 1349; cf. *The Queen v Drybones* [1970] SCR 282.

¹⁹ Thus a law of Alberta, purporting to limit the definition of “marriage” to opposite sex couples was of no effect because the legal definition is contained in a Canadian federal law. See *Marriage Act* RSA 2000 C-M-5.

²⁰ J.P. Humphrey, *Human Rights and the United Nations – A Great Adventure*, New York, Transnational, 1984.

the view that the Charter was a beneficial development for Canadian constitutionalism²¹.

New Zealand Bill of Rights Act. In 1990, the New Zealand Parliament enacted the *New Zealand Bill of Rights Act 1990* (NZ). That law was in some ways similar in concept to the statutory enactment in Canada that had preceded the Canadian Charter. The New Zealand Act was designed to protect a number of fundamental rights and liberties from encroachment by government²². The Act subjects the three branches of national government (and bodies performing public functions) to judicial review. It obliges the courts, when interpreting and applying other laws, to do so in a way consistent with its provisions. Although it is not expressed in the form of a higher law (nor formally entrenched in the law of New Zealand), it has opened up to judicial review a wide range of public actions and the exercise of statutory discretions that were earlier effectively immune. It protects a long list of civil and political rights. It was later supplemented by the *Human Rights Act 1993* (NZ). This defines a number of grounds of discrimination that are outlawed both in the public and private sectors in New Zealand²³.

The political circumstances that led to the enactment of the New Zealand *Bill of Rights Act* reportedly included a feeling that the conservative government of Sir Robert Muldoon in the 1980s had been “constitutionally high-handed and repressive”. In particular, strong feelings were engendered in the aftermath of the South African Springbok tour of New Zealand and in the response of authority to civic

²¹ P. Saunders “The Charter at 20”, *CBC News Online*, 8 April 2002, URL.

²² G. Palmer and M. Palmer, *Bridled Power – New Zealand and Government Under MMP*, (Oxford, 3rd Ed., 1997), 264.

²³ Supplementing the earlier *Human Rights Act 1977* (NZ). See Palmer, 265.

protests that took place during that tour²⁴. As Sir Geoffrey Palmer (a Labour Prime Minister of New Zealand) observed: “Although Labour MPs showed no great enthusiasm for the concept then or later, there was a political market for it”²⁵.

Perhaps the greatest impact of the New Zealand legislation arose because s6 of the Act of 1990 provided, in terms later to prove influential upon the form of s3 of the HRA 1998. The New Zealand provision states:

“6. Whenever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.”²⁶

Led by Sir Robin Cooke (later Lord Cooke of Thorndon), the New Zealand Court of Appeal, in a series of decisions, gave effect to the *Bill of Rights Act* by interpreting statutes in ways protective of liberty. This was done, for example, in re-fashioning the previous immunity of the Crown for anything done in discharging, or executing, the judicial process²⁷.

On the other hand, the interpretative principle expressed in s6 of the 1990 Act has not always afforded relief to those claiming a breach of their fundamental rights. Thus in *Quilter v Attorney-General (NZ)*²⁸, the New Zealand Court of Appeal rejected alternative arguments advanced by a lesbian couple who submitted that the *Marriage Act* of New Zealand should be construed, in accordance with s6, so as to require a marriage registrar to record their marriage. If this argument were rejected, the

²⁴ Palmer, 267.

²⁵ *Loc cit.*

²⁶ *Ibid*, 273.

²⁷ *Simpson v Attorney-General (NZ) (Baigent's Case)* [1994] 3 NZLR 667. See Palmer, 275.

²⁸ [1998] 1 NZLR 523; [1998] 3 LRC 119 (NZCA).

applicants asked the Court to accept their argument that the law discriminated against them so that it could be re-considered by Parliament with a view to reform of the Act. Unanimously, the Court of Appeal held that the statute did not lend itself to the expansive reasoning that the applicants sought. Only one judge (Thomas J) concluded that, in denying the couple the right to marry, the legislation was discriminatory²⁹.

The South African Constitution: Following the end of the apartheid regime, the South African Parliament enacted the *Republic of South Africa Constitution Act 1993* (SAf) (the Interim Constitution)³⁰. This measure contained a Bill of Rights designed to apply until Parliament, sitting as a constituent assembly, had drafted a Final Constitution. That process was completed with the enactment of the *Constitution of the Republic of South Africa Act 1996* (SAf)³¹. That measure likewise contained a Bill of Rights. Substantially, it was the same as the rights that had been enacted in the Interim Constitution of 1993. However, there were a number of significant differences. By s8(1) of the Final Constitution, it is provided that the Bill of Rights applies to all levels of law and binds the legislature, the executive, the judiciary and all organs of state in South Africa. To the extent applicable, it also binds both natural and juristic persons.

Coming later in time, the new South African Bill of Rights contains a wider range of protected and required actions. This was itself a response to the apartheid era. Thus, specific mention is made of

²⁹ Cf. M.D. Kirby, "Same-Sex Relations" in M.D. Kirby, *Through the World's Eye*, (Fed Press, Sydney, 2000), 64 at 67. Contrast *Egan v Canada* [1995] 2 SCR 513; *M v H* [1999] SCR 23.

³⁰ Act 200 of 1993.

³¹ Act 108 of 1996.

derogations from human rights on the basis of sexual orientation. Certain economic and social rights are also expressly protected. These had earlier usually been excluded from such provisions on the basis that they were not legally justiciable.

Reading the later decisions of the South African Constitutional Court, the provisions of the Final Constitution, in particular, stand in marked contrast to the decisions of the Appellate Division in South Africa before the universal rights were protected. In *Sachs v Minister of Justice*³², the Appellate Division, then the highest court of South Africa, had said:

“Parliament may make any encroachment it chooses upon the life, liberty, or property of any individual subject to its sway ... and it is the function of the courts of law to enforce its will.”

This was the rule of law as it was then understood in South Africa. It was an understanding in line with the writings of Dicey. Yet as Arthur Chaskalson, former Chief Justice of the South African Constitutional Court, remarked³³:

“The apartheid government, its officers and agents were held accountable in accordance with the laws. But the laws were unjust. They failed to protect fundamental rights such as freedom of assembly, and freedom of speech; instead they denied the franchise to blacks, institutionalised discrimination, denied equal education and job opportunities to black persons; made provision for forced removal of black communities from land which they owned and occupied; sharply curtailed freedom of political activity; and vested broad discretionary powers in the executive to enforce these policies. ... In this setting the law served to reinforce the belief of whites in their racial superiority, and to that extent legitimised it within the white community. ...”

³² 1934 AD 11 at 37 per Stratford JA.

³³ A. Chaskalson, “How About A Bill of Rights”, unpublished paper (Fitzgerald Lecture), Griffith University, Queensland, July 2009.

United Kingdom HRA 1998: Against the background of these developments in countries whose legal systems were similar to, and largely derived from, that of Britain, the moves in the United Kingdom towards adopting statutory provisions for the general protection of fundamental human rights were not altogether surprising. More influential in this development than the steps taken in Commonwealth countries was the pressure exerted from Europe by way of the *European Convention on Human Rights*, to which the United Kingdom became a party³⁴; the increasing number of decisions of the European Court of Human Rights (several of them adverse to the United Kingdom)³⁵; the gradual use that was made by British courts of the resulting European jurisprudence³⁶; and the support that came to be voiced for “bringing rights home”, in the form of a local British statute³⁷.

It is also appropriate to acknowledge here the impetus provided by Lord Scarman’s Hamlyn Lectures: *English Law – The New Dimension*³⁸ and also the determined efforts of Anthony Lester QC (now Lord Lester of Herne Hill) in promoting legislation designed to incorporate the European Convention into the law of the United Kingdom³⁹. Within the Commonwealth of Nations, Anthony Lester was equally energetic, helping to secure the adoption of the *Bangalore Principles*. In these, he and former Chief Justice P.N. Bhagwati of India, promoted the role of judges in construing constitutional and statutory provisions and resolving ambiguities in the common law by reference to universal principles of

³⁴ Lester et al., 4-9 [1.10]-[1.28].

³⁵ *Ibid*, 9.11 [1.29]-[1.31].

³⁶ *Ibid*, 11-12 [1.32]-[1.34].

³⁷ *Ibid*, 12-14 [1.35]-[1.40].

³⁸ 1976. See Lester et al. 12-13 [1.35].

³⁹ Lord Lester, “First Steps Towards A Constitutional Bill of Rights” [1997] EHRLR 124. Cf. Lester et al. 13 [1.40].

human rights⁴⁰. These ideas were to have a considerable influence which is continuing. Yet necessarily common law techniques and individual judicial rulings were no substitute for the passage of a statute of fundamental rights enjoying democratic legitimacy.

In May 1997, the Blair Labour Government was elected to office in the United Kingdom. The new government was committed to the incorporation of the European Convention in the United Kingdom's domestic law. In pursuit of this commitment in October 1997, it published a white paper proposing a *Human Rights Act*⁴¹. The proposal gained the support in Parliament of the Liberal Democrats Party, and several distinguished Conservative backbenchers, as well as many of the Law Lords speaking from the cross benches. It was opposed at the time by the Front Bench of the Conservative Party⁴² together with sections of the media in Britain⁴³. Despite this division of opinion, the HRA 1998 secured passage through Parliament. It received the royal assent in November 1998. According to Lord Lester and his colleagues, in the third edition of their book *Human Rights Law and Practice*:

“Ten years later, the HRA 1998 is deeply embedded in the political and legal fabric of the UK. Its principles have been developed by the judiciary in a way that reflects British values. The courts and legal profession have done their best to ensure that effective legal remedies are provided for breaches of the Convention rights. ... It is now well recognised that the HRA 1998 has exercised a magnetic force over the entire political and legal system and is of fundamental constitutional importance.”

⁴⁰ The *Bangalore Principles* are set out in M.D. Kirby, “The Role of the Judge in Advancing Human Rights By Reference to International Human Rights Norms” (1988) 62 *Australian Law Journal* 514 at 531-2.

⁴¹ United Kingdom, *Rights Brought Home: The Human Rights Bill* (October 1997), Cm 3782.

⁴² House of Commons Debates (Hansard), 28 October 2002, 391 *HC Official Report*, Col.605-49.

⁴³ Lester et al., 14-15 [1.44].

Some of the uncertainty that might have attended the return of the Conservative Party to government in the British general election of May 2010 would seem to be lessened by the coalition that was then forged with the Liberal Democrats. For the time being, the central provisions of the HRA 1998 seems safe.

RESISTING THE MAGNETIC FORCE

Minding the gap: If the United Kingdom was influenced by the magnetic force of the European Convention of Human Rights and if the HRA 1998 incorporates the Convention principles in British law, the power of the same forces has yet to be felt in Australia. In some matters legal, the Australian Commonwealth has proved to be the most traditional and conventional of all the nations that were formerly part of the British Empire.

Such has been the fascination for English law and traditional English legal values that Australians, in the legal profession and more generally, have so far proved highly resistant to the siren calls for fundamental reforms or modifications⁴⁴. So it has proved in successive endeavours in Australia to introduce national human rights legislation to fill the gap felt by lawmakers in Ireland, India, Canada, New Zealand, South Africa and elsewhere during the past half-century. Australia has adopted no such national law. At a time when Britain is celebrating the first decade of the HRA 1998, Australia is coming to terms with the Government's rejection, of 21 April 2010, of a proposal that it should introduce a law similar to that now operating in New Zealand and the United Kingdom. So how has this reluctance played out? What have been the arguments that have prevailed? What are the prospects of amends?

⁴⁴ See e.g. M.D. Kirby, "Overcoming Equity's Australian Isolationism" (2009) 3 *Journal of Equity* 1.

Constitutional resistance: When the Australian Constitution was being drafted by successive Conventions comprising leading colonial citizens (mostly parliamentarians and all male), the United States Constitution was a common point of reference for their labours. In some respects, as in Chapter III of the Australian Constitution of 1901 which created the Australian Judicature, the founders substantially followed the American precedent. However, they were still influenced by the traditional scepticism that then prevailed amongst English lawyers about incorporating expressly guaranteed rights⁴⁵. Instead, the delegates preferred to reflect their British inheritance.

At the Melbourne Constitutional Convention in 1898, when A.I. Clark's proposal for a clause to protect deprivation of "life, liberty or property without due process of law" was debated, most of the delegates were dismissive:

"People would say – 'pretty things these states of Australia, they have to be prevented by a provision in the Constitution from doing the grossest injustice'."⁴⁶

Clark's proposal was eventually rejected by 23 votes to 19. So was a provision, derived from the 14th Amendment to the United States Constitution, forbidding discrimination against people on the ground of their race. This was rejected on the basis that Australians "are not going to have a civil war here over a racial question". Perhaps that was so, given the hegemony of the 'white' or settler race in Australia. Isaac Isaacs, later Justice and Chief Justice of the High Court of Australia and subsequently the first locally born Governor-General, opposed the

⁴⁵ G. Williams, *Human Rights under the Australian Constitution* (OUP, Oxford, 1999), 39 referring to the influence of A.V. Dicey (above n5) and of J. Bryce, *The American Commonwealth*.

⁴⁶ Delegate Alexander Cockburn (former Premier of South Australia) quoted in Williams, above n45, 40.

provision. He did so on the basis that it would cut down the power, which he regarded as essential, to make laws with respect to the Chinese in Australia. It would, for example, override laws forbidding “Asiatic or African alien[s] getting a miner’s right ... on a goldfield”⁴⁷. The result was that the constitutional proposal was rejected. The rejection of this type of constitutional provision was affirmed at the Adelaide session of the Convention in 1897-8⁴⁸.

For three quarters of the 20th century, this approach to basic rights in Australia remained substantially unquestioned. Dicey reigned. Imperial pride dismissed any suggested need for constitutional restrictions on the elected parliament. Lesser beings and societies might need these. But not the Australian Commonwealth.

The flavour of the Australian judicial outlook in my youth can be derived by reading some of the earlier judicial opinions. In *Skelton v Collins*⁴⁹, even so considerable a judge as Windeyer J wrote in the High Court of Australia⁵⁰:

“Our ancestors brought the common law of England to this land. Its doctrines and principles are the inheritance of the British race, and as such they have become the common law of Australia.”

Earlier, to like effect, Sir Owen Dixon asked why “should doubt be thrown on the wisdom and safety of entrusting to the chosen representatives of the people ... all legislative power, substantially without fetter or restriction?”⁵¹. This was thought to be the way British people did government. And, at that time, there was still much evidence

⁴⁷ Quoted Williams, *ibid*, 41.

⁴⁸ *Ibid*, 43.

⁴⁹ (1966) 115 CLR 94.

⁵⁰ (1966) 115 CLR 94 at 134.

⁵¹ Cited Williams, above n45, 40.

to support that belief. Looking around the world, there was much self-satisfaction over the British Empire, and just a little racial superiority, in the condemnation of alien ideas. The intellectual elite in Australia formed a bond with the political classes in dismissing the need for an Australian Bill of Rights. A very short list of fundamental rights found their way into the Australian federal Constitution⁵². But even some of these were so strictly construed by the High Court of Australia as to make their provisions potentially worthless and ineffective⁵³.

Attempts at legal protections: This attitude towards the legal protection of universal 'rights' survived in Australia for most of the 20th century. In the 1970s and 80s, two attempts were made to introduce federal legislation for a statutory statement of universal human rights, based upon the provisions of the *International Covenant on Civil and Political Rights* (ICCPR) to which Australia was to become a party⁵⁴. To provide the constitutional foundation for these Bills the external affairs power in the Constitution was invoked⁵⁵. By that provision, the Federal Parliament is empowered to enact laws designed to give effect to Australia's international obligations under treaties that had been ratified by it⁵⁶. Given the broad potential ambit of the proposed federal laws on rights, they proved highly controversial. They were strongly opposed by several of the States. This led to its being stalled in the Australian Senate. When their proponents (respectively Senator L.K. Murphy and

⁵² Such as the protection against federal acquisitions of property except on "just terms". See *Australian Constitution*, s51(xxxi). Cf. *Wurridjal v The Commonwealth* (2009) 83 ALJR 399 at 463-464 [303]-[309].

⁵³ Such as the right to trial by jury of indictable federal offences. It has been held (albeit with a consistent stream of contrary opinions) that this provision in the Australian Constitution, s80, does not contain an implied restriction on legislative attempts to render the guarantee nugatory by defining "indictable" crimes narrowly: see *The King v Archdall: Ex Parte Carrigan and Brown* (1928) 41 CLR 128 at 139-140; *Kingswell v The Queen* (1985) 159 CLR 264 at 276; cf. at 298 per Deane J; *Cheng v The Queen* (2000) 203 CLR 248 at 292; cf. at 306.

⁵⁴ Human Rights Bill 1974 (Cth); Human Rights Bill 1984 (Cth).

⁵⁵ *Australian Constitution*, s51(xxix).

⁵⁶ *Tasmania v The Commonwealth (Tasmanian Dam Case)* (1983) 158 CLR 1.

Mr. G.J. Evans) left politics, the idea of federal legislation for a national statute of universal rights based on the ICCPR moved to the back burner.

In 1988, an attempt was made to introduce into the federal Constitution a series of guarantees to govern State law-makers equivalent to provisions already appearing in the federal Constitution (trial by jury; religious freedom; just terms for acquisitions of property). However, even this seemingly innocuous provision was rejected at a constitutional referendum held in December 1984. It did not attract a majority in any of the States. The national vote on the proposal was 30.33% of the electors *for* the amendment and 68.195% *against*⁵⁷. Securing amendment of the federal constitution in Australia is notoriously difficult. In part, this is because of the double majority (of the people and of the States) required by s128 of the Constitution⁵⁸.

Following the federal referendum defeat in 1988, the spotlight for reform in this respect, shifted to the sub-national jurisdictions of Australia, the States and Territories. In 2001, an enquiry was conducted by the Standing Committee on Law and Justice of the New South Wales Parliament. It addressed a proposal that a Bill of Rights should be enacted for that State. The proposal was strongly opposed by the Labor Premier of the State (Mr. R.J. Carr). His opposition made its adoption unlikely. So it proved. The Committee acknowledged “failures by NSW governments to address individual and at times systemic problems”. It agreed that “the common law is not a sufficient protection of individual

⁵⁷ Results of the Constitutional Referendum appear in T. Blackshield and G. Williams, *Australian Constitutional Law and Theory* (3rd Ed., Federation Press, Sydney, 2003) 1308.

⁵⁸ Since federation in 1901, there have been 44 proposals considered at referendum and only 8 have succeeded. Blackshield and Williams, *ibid.*, 1301.

rights in the absence of legislative action”⁵⁹. Nevertheless, the Committee did not support the enactment of a statutory Bill of Rights for the State.

Whilst accepting that such legislation “could lead to some improvement in human rights protection in some instances ...”, the parliamentary committee decided that “the cost of this uncertain marginal improvement is a fundamental change in the relationship between representative democracy, through an elected Parliament, and the judicial system”. It went on to say, in words that were later to become a *mantra* for opponents of comprehensive legislative protection of human rights in Australia:⁶⁰

“The independence of the Judiciary and the supremacy of Parliament, are the foundations of the current system; both begin to alter under a Bill of Rights. A Bill of Rights would increase the responsibility of the Judiciary to protect human rights, giving it a role that should primarily be the responsibility of Parliament. ... Inadequacies in the protection of human rights may exist in New South Wales but the Committee believes that the Bill of Rights as a solution raises more problems than it resolves. It is preferable that Parliament become a more effective guardian of human rights rather than handing this role over to an unelected Judiciary.”

Fear was expressed that the introduction of a State Bill of Rights in Australia could politicise the judiciary and make, unlike in the past, future judicial appointments dependent on the judges’ political views rather than their legal skills. No satisfactory explanation was given as to how this defect had been avoided in the many other countries that provided for bills of rights.

⁵⁹ NSW Parliament, Standing Committee on Law and Justice, Report No.16, *A NSW Bill of Rights* (October 2001), 110 [par.7.3].

⁶⁰ *Ibid*, 110 [7.5], 113 [7.19].

The acknowledgement by the New South Wales committee of systemic weaknesses in the protection of universal rights proved to be skilful politics. Yet nothing was suggested, or adopted, to cure the identified defects. Nothing has occurred in the parliamentary system of New South Wales to enhance respect for the State Parliament or to increase its effectiveness as a guardian of basic rights. In particular, nothing systemic has been done for the protection of minorities that are unpopular or lack electoral clout.

This defect in the legal position in New South Wales was illustrated vividly in proceedings that came before the High Court of Australia challenging (and seeking to override) the effective ‘confiscation’ of miners’ property without ‘just terms’ under a State law that lacked the protections required of federal legislation by the national Constitution⁶¹.

The proceedings involved a head-on challenge by mining interests to the Diceyan theory as it applied to State Parliaments in Australia. The challenge did not succeed. In my reasons, I concluded that the solutions to the complaints were political, not legal⁶². The limits of common law judicial inventiveness were reached and they could not be exceeded. However, the claimants, were wealthy mining land owners. Their appeal to their basic property rights fell on deaf ears, both in the State Parliament and in the electorate. No change in the law has ensued. No effective political remedy is available. Any perceived injustice or inequality of treatment must just be borne. An arguable injustice attracts no remedy.

⁶¹ *Durham Holdings Pty Ltd v State of New South Wales* (2001) 205 CLR 399.

⁶² (2001) 205 CLR 399 at 427-429 [60]-[66]. See also *Building Construction Employees and Builders’ Labourers Federation of NSW v Minister for Industrial Relations* (1986) 7 NSWLR 372 at 404-405 (NSWCA).

Despite the foregoing negative outcomes, in two sub-national jurisdictions of Australia (the Australian Capital Territory⁶³ and the State of Victoria⁶⁴) the legislature has enacted laws similar to the HRA 1998 of the United Kingdom. These laws have attracted an increasing number of cases in the courts. Necessarily, in their application these decisions are confined to the State or Territory laws concerned. They do not apply to federal legislation or to federal governmental practices.

National consultation on rights: To meet this perceived defect, in December 2008, following the election of a new federal Labor government in Australia a year earlier, the Federal Attorney-General (Mr. Robert McClelland), on the sixtieth anniversary of the adoption by the General Assembly of the UDHR, launched a national consultation about the adequacy of Australia's legal recognition and protection of human rights and responsibilities⁶⁵. The government appointed a committee chaired by Professor Frank Brennan (a Jesuit priest and law professor). The task of the committee was to undertake an Australia-wide community consultation. Its purpose was to decide whether human rights deserving of protection and promotion in Australia were currently being sufficiently protected and promoted. If not, the committee was asked to explore how this could be better attained.

The resulting national consultation proceeded over a year, attracting an unprecedented community engagement. It resulted in more than 30,000 submissions. All but a small fraction were in favour of a recommendation for a national charter of rights for Australia. The terms

⁶³ *Human Rights Act 2000 (ACT)*. See also *Human Rights Act 2003 (ACT)*.

⁶⁴ *Charter of Human Rights and Responsibilities Act 2006 (Vic)*. A draft Human Rights Bill 2007 (WA) was produced but held over pending the national consultation. It has not proceeded.

⁶⁵ Australia, National Human Rights Consultation, *Engaging in the Debate* (2009) 1.

of reference of the committee excluded a proposal for a constitution model, with power in the courts to invalidate legislation. This being so, effectively, the committee's investigation was limited to whether legislation was required, (either a general charter and/or particular statutes). Or whether other measures would be sufficient (such as the creation of a parliamentary committee, educative measures and administrative re-arrangements).

The national consultation had before it a commitment expressed in the electoral platform of the Australian Labor Party issued prior to the 2007 election. This obliged the government to “adhere to Australia’s international human rights obligations [and to] seek to have them incorporated into the domestic law of Australia”⁶⁶. As in the case of the New Zealand initiative that led to its *Bill of Rights Act*, the Australian consultation followed a period where the previous conservative government of Mr. John Howard was perceived by some Australians as having departed from respect for human rights, both in its engagement with multilateral United Nations agencies and in domestic policy and legislation. Special mention was repeatedly made during the consultation, of the treatment of refugee applicants and especially in the 2001 *Tampa* affair⁶⁷. Even a noted opponent of a proposed human rights charter in Australia (Cardinal George Pell) conceded that the incident – which involved refusal to receive into Australia refugee applicants rescued on the high seas by a Norwegian vessel -

⁶⁶ Australian Labor Party, *National Platform and Constitution* (2007), Ch.13 [7].

⁶⁷ The *Tampa* affair is described in M. White, “Tampa Incident: Shipping, International and Maritime Legal Issues and Subsequent Legal Issues” (2004) 78 *Australian Law Journal* 101, 249.

“highlight[ed] where the limits of the ethic of a fair go among the majority can be encountered”⁶⁸.

In the end, apparently to the surprise of some political quarters and media interests, the national consultation recommended that a national charter of human rights should be enacted for Australia by the Federal Parliament. The committee proposed that the legislation should list economic and social rights as well as civil and political rights. However, it proposed that the charter should provide remedies in the courts by way of a declaration in the event that civil and political rights (only) were found not to have been respected. The recommendation also included the legislative enactment, akin to s6 of the New Zealand Act and s3 of the HRA 1998, to promote the interpretation of federal laws consistently with the provisions of the proposed charter.

As tends to happen in such matters in Australia, the Committee’s recommendations were criticised by both sides in the debate. Leading State and federal politicians attacked what they saw as an unacceptable transfer of legislative power to the judiciary. In this respect, the criticisms followed the lines of the earlier New South Wales parliamentary report. Those who had hoped for the enactment of a constitutional provision with judicial power to invalidate inconsistent laws were bound to be disappointed because that was out of contention. Those who hoped for remedies for breaches of economic and social rights were highly critical of the failure of the Brennan committee to include remedies for such breaches in its proposals⁶⁹. Sections of the

⁶⁸ Cardinal G. Pell, “Four Fictions: An Argument Against A Human Rights Charter” (2008). See National Human Rights Consultation, *Engaging in the Debate* (2009), 110.

⁶⁹ K. Young and R. Thilagaratnam, “Big Question is Whether Government Will Adopt A Human Rights Act”, *Canberra Times*, 10 December 2009, 21.

media which had (for the most part) opposed the idea of a national charter of rights (the publications of the former Australian citizen, Rupert Murdoch, being the most strident) were not only overjoyed at the “collapse of the push for a national charter of rights”⁷⁰. They repeatedly reported the insignificance of the consultation and what they saw as its lack of political supporters⁷¹; the lack of any real need for such a measure in a nation so well governed as Australia was said to be; the fear of affording too much power to lawyers and judges; and even the suggested isolation of the judges and lawyers in the jurisdictions that had enacted a charter (the ACT and Victoria) and the difficulty they would now have in attaining federal judicial appointment. Inferentially, this difficulty would arise because their law was now ‘on the nose’ and out of line with the orthodoxy of the rest of Australian law⁷².

In the antipathy of the strident campaign waged by such media outlets against a national human rights charter, Australians saw a reflection of some of the debates in Britain at the time of the introduction of the HRA 1998. What was missing in the Australian debates was the presence of a political champion of the measure, the role played in the United Kingdom by the then popular and newly elected Prime Minister, Tony Blair.

The *quietus* was finally administered to the proposal for an Australian charter on 21 April 2010 when the Attorney-General, who had launched the national consultation amidst high hopes seventeen months earlier, announced the rejection of the key proposals of the Brennan committee:

⁷⁰ G. Henderson, “Human Rights Act Slips Down the List”, *Sydney Morning Herald*, 26 January 2010, 11.

⁷¹ C. Merritt, “State Charter Lawyers on Path to Isolation”, in *The Australian*, 19 February 2010, 27; C. Merritt, “State out on a Limb, Warns Craven”, *The Australian*, 26 February 2010, 34.

⁷² Statement by Attorney-General R. McClelland, “Australian Human Rights Framework”, 21 April 2010 (unpublished).

namely the enactment of a charter of rights and the adoption of a legislative interpretative principle.

Framework not charter. Instead of proposing a charter, the Australian government announced what it described as a “Framework” for better human rights protection in Australia. This “Framework” comprised five parts. They were:

- (1) A re-affirmation of the nation’s commitment to international human rights obligations;
- (2) A new emphasis and expenditure on human rights education across the community;
- (3) An enhancement of domestic and international engagement on human rights issues;
- (4) An improvement in domestic human rights protections, including greater parliamentary scrutiny; and
- (5) The achievement of greater respect for human rights principles within the community, including by the reform of current anti-discrimination legislation.

Needless to say, the foregoing innovations, although admirable on their own, did not satisfy those who had been hoping that Australia would at last take a step to join the rest of the civilised world with comprehensive human rights legislation. The expenditure of over \$12 million on education initiatives to promote a greater understanding of human rights was welcomed. However, necessarily, it would do nothing to afford redress to those for whom the political process and other present legal remedies were unavailing. The proposed establishment of a new parliamentary joint committee on human rights within the Australian Parliament “to provide greater scrutiny of legislation for compliance with

... international human rights obligations”⁷³ might be welcomed. However, as one commentator, Professor George Williams, observed: “It will make little difference to the protection of human rights at the community level. It will even more starkly demonstrate how self-regulation by politicians, when it comes to human rights, is the problem, and not the solution”⁷⁴.

The promise of reform of anti-discrimination legislation, including the rationalisation of current laws in a single statute, has obvious advantages. But it was quickly noted that there were no new proposals for protection of minorities presently falling outside present federal law, including a general protection against discrimination on the grounds of a person’s sexual orientation. The commitment to reinforce engagement with international human rights obligations was certainly to be applauded. However, it could not escape criticism addressed to the suggested difference between governmental rhetoric and the actuality. Particularly so because the announcement closely coincided with another, envisaging mandated delays in administrative consideration of refugee applications originating from Afghanistan and Sri Lanka. The basis for such delays, whilst the applicants were typically held in immigration detention, found no foothold in national obligations assumed by Australia under the *Refugees Convention and Protocol*. Instead, it appears to be based on considerations of political expediency in the face of electoral sensitivities about the arrival of “boat people” and the approach of a national election in late 2010.

⁷³ G. Williams, “Human Rights: People With Power Don’t Want To Give It Up”, *Sydney Morning Herald*, 27 April 2010, 13.

⁷⁴ *Ibid*, *loc cit*.

Comparing the extensive documentation of the national consultation, released by the Brennan committee⁷⁵, and the Framework announced by Ministers, it is difficult to sustain the contention that Australia has no need, and no demand, for a charter of rights. The documentation connected numerous areas of unrepaired disadvantage of, and discrimination towards, minorities. It did this in the case of indigenous people; racial minorities; non-citizens; people of minority sexual orientation and gender identity; women; and the failure of present protections to address problems of homelessness, police shootings, inadequate health care, prison conditions, arbitrary and extended detention, discrimination in police practice governing the use of arrest, official targeting of particular groups, limitations on free express and freedom of assembly and association, inequality in the administration of immigration law, defects in protection of children, and significant failings in protection of individual conscience and religion in Australia.

Obviously Australia remains a generally well governed and diverse society with significant legal protections for human rights, protected by democratic elections and the rule of law administered in independent courts. Still, according to the former Chief Justice of the High Court of Australia (Sir Gerard Brennan):

“The exigencies of modern politics have sometimes led Governments to ignore human rights in order to achieve objectives which are said to be for the common good.”⁷⁶

A charter of rights, the interpretive principle and a provision for declaratory orders would not have cured every defect or gap in the

⁷⁵ Especially The NGO submission to the Human Rights Committee, *Freedom, Responsibility, Equality, Dignity and Action* (2009).

⁷⁶ F.G. Brennan, “The Constitution, Good Government and Human Rights”, Human Rights Law Resource Centre, 12 March 2008, unpublished, quoted in *Engaging in the Debate*, above n65, 4.

Australian legal system. But influential upon the recommendation of the Australian national consultation were the reported findings of the British Institute of Human Rights⁷⁷ concerning the material operation of the HRA 1998. This suggested that:

- “(i) The language and ideas of human rights have a dynamic life beyond the court room and empower a wide range of individuals and organisations to improve people’s experience of public services and their quality of life generally;⁷⁸
- (ii) Human rights are an important political tool for people facing discrimination, disadvantage or exclusion, and offer a more ambitious vision of equality beyond just anti-discrimination;
- (iii) Human rights principles can help decision-makers and others see seemingly intractable problems in a new light; and
- (vi) Awareness-raising about human rights empowers people to take action.”

Rejection of the charter. So why did politicians on both sides of Australia’s major political groupings, supported by large sections of the media, oppose the recommendations proposed by the national consultation? Doubtless, the basis of much of their opposition would have been similar to the resistance that arose over the proposal for the HRA 1998 in Britain. In part, it was just a resistance to new ideas. In part, it appears to have been a case of the traditional hostility to the very notion that human beings have universal rights which should be respected. This resistance was previously common in English-speaking democracies outside the United States. In part, it was the objection of non-lawyers to any perceived enlargement of the power of lawyers.

⁷⁷ British Institute of Human Rights, *The Human Rights Act: Changing Times* (2007), 10. See *Engaging in the Debate*, above n65, 5.

⁷⁸ In the Australian Capital Territory, it was recorded that there had been a “small, but growing impact beyond government”. See ACT Department of Justice and Community Safety, *Human Rights Act 2004 – 12 Month Review – Report* (2006).

Courts are amongst the few sources of power in society that do not succumb to the seductions or bullying of politicians or of the media. In part, the resistance in Australia can also be traced to some who have a genuine admiration for the parliamentary institution; but fail to grasp its need for an occasional stimulus to require it to address injustices towards unpopular and forgotten minorities. In part, it is simply the crude fact that those who presently enjoy power in a society such as Australia (politicians and media) are reluctant to surrender any part of that power lest that surrender later come back to bite them in the form of a court proceeding that declares the need for a response in respect of their conduct that breaches or ignores universal human rights.

As Professor George Williams put it, in his comment on the outcome of the national consultation, in the matter of human rights protection “people with power don’t want to give it up”. They do not relish the idea of independent courts responding to complaints of otherwise powerless individuals and making interpretative endeavours to respond to their complaints or declarations of a public kind that cannot be easily swept under the carpet.

Far from undermining the parliamentary institution or process, the recommendation of the Australian consultation, based in part on the New Zealand and United Kingdom models before it, was aimed at enhancing the capacity of parliament to work more responsively to the concerns of ordinary people. Given the way in which a parliamentary institution in all Westminster democracies has fallen under the power of executive government and the discipline of party whips, the need for renewal of the parliamentary institution is plain. That need has been

acknowledged, and in part met, in New Zealand and the United Kingdom. In Australia, once again, it has been rebuffed.

UN Human Rights Committee: In rejecting the charter idea, the Australian government announced that the proposal would be reconsidered in 2014. Meantime, Australia has to get by without a human rights charter. It has a few human rights protections in its national or State constitutions. But it is not subject to any regional human rights treaty for Asia and the Pacific. Alone of the geographical regions of the world, Asia and the Pacific has no human rights treaty, commission or court. What we are therefore left with is a semi-pure Diceyan model of supreme (but not sovereign) legislatures, responding to perceived majority opinion and occasionally, but not necessarily, to minority demands.

The only external human rights *stimuli* that are provided in the case of complaints against Australia derive from the reports of United Nations human rights rapporteurs and agencies⁷⁹, including the Human Rights Committee established under the *International Covenant on Civil and Political Rights* (ICCPR). A recent report of that committee gave an indication of the opinion of independent external experts about the adequacy of the present Australian legal 'framework' for upholding the international obligations to which Australia has subscribed under the ICCPR.

⁷⁹ Such as the report of the Special Rapporteur on the Human Rights and Fundamental Freedoms of Indigenous People (James Anaya, Geneva, 27 August 2009). See also A. Vivian, "Some Human Rights are Worth More Than Others – The Northern Territory Intervention and the Alice Springs Town Camps" (2010) 35 *Alternative Law Journal* 15.

In *Robert John Fardon v Australia*⁸⁰, decided shortly before the announcement of the government's response to the national consultation on human rights, the Human Rights Committee found that a communication submitted to it by Mr. Fardon was sustained. His continued detention beyond his fourteen year term of imprisonment was held to be "arbitrary". It was thus held to be contrary to Article 9 paragraph 1 of the ICCPR⁸¹.

Earlier, in the High Court of Australia, Mr. Fardon had challenged the constitutional validity of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld). Without a constitutional bill of rights to which he could appeal Mr. Fardon argued that the Queensland statute was incompatible with the Australian Constitution. He submitted that, the law attempted to impose upon the Queensland Supreme Court an obligation that was incompatible with the judicial function envisaged by the Constitution.

A line of constitutional cases in the Australian courts has decided that State parliaments may not confer on judges of State courts functions that would make them inappropriate receptacles for the conferral of federal jurisdiction under the Constitution⁸². In the High Court of Australia, Mr. Fardon submitted that the impugned Queensland Act was such a provision. In effect, it permitted the Supreme Court to keep a prisoner detained after he had completed serving his criminal sentence on the basis that a later court "is satisfied the prisoner is a serious danger to the community".

⁸⁰ CCPR, 12 April 2010, C/98/D/1629/2007.

⁸¹ *Ibid*, par [7.3].

⁸² *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51

In the High Court of Australia, I accepted Mr. Fardon's submission. I did so, in part, by reference to the exceptional character of the Queensland law providing for a civil commitment to prison (not to a mental hospital or other specialised institution for treatment). But I also referred to the difficulty, or impossibility, of securing an accurate or objective prediction of criminality, whether by a judge or other official⁸³. In the course of my reasons, I referred to the dangers of "phenomenological punishment" of the kind introduced in Germany during the Third Reich⁸⁴. Accused persons were punished not for what they had *done*, but for whom they *were*.

The majority of the Australian High Court found no constitutional flaw in the Queensland law, measured against the opaque and non-specific language of the Australian Constitution. They upheld the orders made against Mr. Fardon under the Queensland Act⁸⁵. The Act was held not to impair the institutional integrity of the Supreme Court of Queensland in such a fashion as to be incompatible with that court's capacity to exercise federal judicial power.

The United Nations Human Rights Committee was, of course, untroubled by the considerations that were addressed by the Australian courts. It simply looked to whether Mr. Fardon had suffered double punishment without further determination of any criminal guilt or arbitrary punishment for preventive reasons contrary to the ICCPR, upon which the Human Rights Committee has a developed jurisprudence. In the result, the Committee concluded that the Queensland law was arbitrary. It therefore constituted a violation of Article 9 paragraph 1 of the ICCPR.

⁸³ *Fardon v Attorney-General (Q)* (2004) 223 CLR 575.

⁸⁴ (2004) 223 CLR 575 at 645 [187] citing J. Grunberger, *A Social History of the Third Reich* (1971), 123.

⁸⁵ Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ.

The Committee appears to have been influenced (as I had earlier been) by the fact that the further detention ordered against Mr. Fardon subjected him to a heavier penalty than was applicable at the time when his original criminal offence was committed; that the prediction of further offences was “inherently problematic”; and that Australia had failed to demonstrate that Mr. Fardon’s rehabilitation could not have been achieved by means less intrusive than continued imprisonment, effectively in the same cell in which he had served his criminal punishment.

Doubtless, the Human Rights Committee was aware (as I was) of the dangers of populist legislation, pandering to community fears. There are relatively few who will speak in society for prisoners like Mr. Fardon. Fortunately, a number of university lawyers took his case *pro bono* to the Human Rights Committee. By the orders of that Committee, Australia was required, within 180 days, to provide information to the Committee on the measures it intended to take to give effect to the Committee’s views.

GETTING BY WITHOUT A CHARTER

Constitutional implications: The result of the position that has now been arrived at in Australia, illustrated by the *Fardon* case, is that there is no national charter or other law equivalent to the HRA 1998 of the United Kingdom. Still less is there a constitutional provision equivalent to those adopted in India, Canada and South Africa. Australians have to get by with what is still, essentially, the 19th century model favoured by Dicey. This rests on what a former Chief Justice of the High Court of Australia (Sir Anthony Mason) has declared to be a “romantic” notion

about the capacity of modern parliaments to respond and to correct departures from fundamental human rights⁸⁶.

Of course, this does not mean that Australians are left without remedies in the courts. Occasionally, just as the High Court spelt out from Chapter III of the Constitution (dealing with the Judicature), an implied right to object to legislation that conferred on State courts functions deemed incompatible with that chapter, other provisions in the Constitution have been construed, expressly or impliedly, to give rise to justiciable rights which, in other countries, would be dealt with in a charter or bill of rights.

Thus, in a series of decisions of the High Court of Australia, culminating in *Lange v Australian Broadcasting Corporation*⁸⁷, the Court has upheld an argument that the detailed constitutional provisions for the election of the Federal Parliament forbade the enactment of federal laws that would unreasonably impede free communications on matters of politics and economics, essential to the effective operation of a parliamentary democracy.

More recently, in a case decided shortly before my retirement from the High Court, *Roach v. Electoral Commissioner*⁸⁸, the Court struck down as invalid provisions in a federal statute purporting to exclude all prisoners in Australia from an entitlement, as citizens, to vote in federal elections. Although unable to invoke any express provision of the Constitution upholding a basic rights of electors, an inference was drawn

⁸⁶ A.F. Mason, "Democracy and the Law: The State of the Australian Political System" (November 2005), *Law Society Journal (NSW)*, 68 at 69.

⁸⁷ (1997) 189 CLR 520.

⁸⁸ (2007) 233 CLR 162.

from the constitutionally prescribed system of representative government that the ambit of the disqualification imposed by the legislation was too wide. This was so because it operated without proper (or any) regard to the culpability of the offender. In conventional human rights jurisprudence, the law would be described as disproportionate to the legitimate ends of such legislation and thus arbitrary.

There were strong dissents to this outcome in the High Court. Justices Hayne⁸⁹ and Heydon⁹⁰ emphatically rejected the references in the majority's opinions to earlier decisions of the Supreme Court of Canada in *Sauvé v Canada (Chief Electoral Officer)*⁹¹ and to *Hirst v United Kingdom (No.2)*⁹². The latter was a decision of the European Court of Human Rights addressed to similar disenfranchising legislation in the United Kingdom. Whilst the judges in the majority (including myself) did not treat the overseas judicial opinions as binding, or even directly applicable, they did assist them as background in understanding the arguments of the contesting parties. They also helped to offer an appreciation of some of the issues of principle that were raised by the case. Despite some rear-guard action by conservative lawyers, it is impossible, and undesirable in the contemporary world, to close the judicial mind to opinions expressed on analogous problems in other jurisdictions.

Sometimes, in default of constitutional arguments in Australia, those who seek relief in the courts are pressed back to arguments of statutory construction, addressed to the meaning of the relevant federal or state

⁸⁹ (2007) 233 CLR 162 at 221 [166]ff.

⁹⁰ (2007) 233 CLR 162 at 224-5 [181].

⁹¹ (2002) 3 SCR 519 at 585 [119]. See (2007) 233 CLR 162 at 177 [13] per Gleeson CJ.

⁹² (2005) 42 EHRR 41.

enactment. In one such case, an argument arose as to whether the State legislation in question should be construed strictly by reference to what the legislators who enacted it would have taken its language to mean. Or whether the legislation would be construed by reference to contemporary perceptions of human rights, so as to avoid serious infringement of such rights.

This was an issue that arose in *Coleman v Power*⁹³. It concerned a provision of the Queensland *Vagrants, Gaming and Other Offences Act* of 1931. Chief Justice Gleeson (who dissented) expressed the view that legislation could not be construed by reference to the ICCPR because that treaty was made (and ratified by Australia) long after the legislation was enacted in 1931. I rejected that approach. I considered that the statute should be construed conformably with the implied constitutional freedom of communications and that, because the Queensland Act applied for an indefinite time and to changing circumstances, it was subject to the changing expectations of society and hence to the application of international law.

In reaching my view in *Coleman*, I referred to decisions of the House of Lords in *Fitzpatrick v Sterling Housing Association Ltd*⁹⁴ and *Ghaidan v Godin-Mendoza*⁹⁵. Australian courts are no longer bound by the decisions of the Privy Council, still less of the House of Lords (or now the Supreme Court of the United Kingdom). Nevertheless, powerful reasoning in United Kingdom courts, powerfully expressed, continues to have an impact upon judicial minds far away. Such was the case in *Coleman v Power*.

⁹³ (2004) 220 CLR 1.

⁹⁴ [2001] 1 AC 27.

⁹⁵ [2004] 2 AC 557. See also F.A.R. Bennion, *Statutory Interpretation: A Code* (4th Ed) 2002, 779.

Strict reading of legislation: A particularly vivid illustration of the difficulties faced by a country without a constitutional or even statutory charter of universal rights arose in the High Court of Australia in *Al-Kateb v Godwin*⁹⁶. That was a proceeding where a refugee applicant had been detained for five years awaiting final determination of his claim to refugee status in Australia. Eventually, he invoked a provision of the *Migration Act 1958 (Cth)* by which he could terminate his detention by requesting the Minister to return him to his country of nationality. In the event, the Minister could not do this because, although he had been born in Kuwait, his nationality was Palestinian. Israel would not allow him passage to Gaza. Kuwait would not receive him. Accordingly, on the Minister's theory of the Act, he could be detained in Australia indefinitely.

A minority of the High Court of Australia (Gleeson CJ, Gummow J and I) concluded that the Act should be read down so as to be inapplicable to the factual circumstances of Mr. Al-Kateb's case. The Act had not dealt specifically with the instance of a stateless person. Accordingly, given the scheme of the Act, it should not be taken to apply to it a regime involving indefinite detention. If it did, Gummow J and I concluded, it would present serious constitutional difficulties for its validity. This was so given that long-term detention is ordinarily reserved in federal jurisdiction in Australia to judicial orders, not blanket legislative provisions or administrative determinations. The majority of the High Court⁹⁷, however, was unconvinced by these arguments. They rejected

⁹⁶ (2004) 219 CLR 562.

⁹⁷ McHugh, Hayne, Callinan and Heydon JJ.

the submissions in favour of a narrow reading. By inference, they dismissed any constitutional objection.

In his reasons in *Al-Kateb*, McHugh J specifically addressed the absence of effective human rights protection in Australia⁹⁸:

“Eminent lawyers who have studied the question firmly believe that the Australian Constitution should contain a Bill of Rights which substantially adopts the rules found in the most important of the human rights instruments⁹⁹. It is an enduring – and many would say a just – criticism of Australia that it is now one of the few countries in the Western world that does not have a Bill of Rights. But, desirable as a Bill of Rights may be, it is not to be inserted into our Constitution by judicial decisions drawing on international instruments that are not even part of the law of this country. It would be absurd to suggest that the meaning of a grant of power in s51 of the Constitution can be elucidated by the enactments of the parliament. Yet those who propose that the Constitution should be read so as to conform with the rules of international law are forced to argue that rules contained in treaties made by the executive government are relevant to the interpretation of the Constitution. It is hard to accept, for example, that the meaning of the trade and commerce power can be affected by the Australian government entering into multi-lateral trade agreements. It is even more difficult to accept that the Constitution’s meaning is affected by rules created by the agreements and practices of other countries. If that were the case, judges would have to have a “loose-leaf” copy of the Constitution. If Australia is to have a Bill of Rights, it must be done in the constitutional way – hard though that its achievement may be – by persuading the people to amend the Constitution by inserting such a Bill.”

Limits to beneficial construction: Sometimes, upon analysis, the provisions of legislation are so clear that even a grave offence to the universal principles of human rights cannot be invoked to secure a beneficial or rights-respecting construction. This was the conclusion

⁹⁸ (2004) 219 CLR 562 at 594 [73].

⁹⁹ See e.g. George Williams, *The Case for an Australian Bill of Rights* (2004).

reached by a unanimous decision of the High Court of Australia in *Minister for Immigration and Multicultural and Indigenous Affairs v B*¹⁰⁰.

In that case, the Family Court of Australia, acting under the *Family Law Act* 1975 (Cth), had exercised powers (granted to it in general terms in respect of children) to release children of refugee applicants from detention. Those children had been detained upon their arrival, with their parents, in Australia, without appropriate visas. The Family Court accepted a submission that the otherwise applicable provisions of the *Migration Act* should be “read down”, so as not to apply to the children. In reinforcement of that argument, reference was made by that Court to Australia’s ratification of the *Convention on the Rights of the Child* and the provisions of that Convention providing that any detention of a child must be a “last resort”¹⁰¹. On the Minister’s argument, if the federal legislation were valid, it provided for such detention as a “first resort”.

Attractive though that children’s argument might have been to me, there were several legal impediments in the way of its acceptance. The first was that the legislation made express and detailed provision for the searching of children in detention. This indicated that the Parliament had expressly referred to, and provided for, child detention. As well, the parliamentary record showed that departmental officers had drawn the possible breach of the Child Convention to the notice of Parliament. Yet Parliament had pressed on with the challenged provisions.

¹⁰⁰ (2003) 219 CLR 365.

¹⁰¹ *United Nations Convention on the Rights of the Child*, article 37(b) [“the detention of a child shall be ... used only as a measure of last resort and for the shortest appropriate period of time: see [1991] *Australian Treaty Series* No.4].

In these circumstances, I could not give the legislation the beneficial construction which the Family Court had adopted. The power of detention had to be upheld. This was so, although it resulted in a judicial endorsement of a statutory provision that appeared to be in breach of a fundamental principle of universal human rights. Moreover, that provision was one that Australia had accepted by its ratification of the Child Convention¹⁰².

Techniques of statutory construction can therefore only take a judicial decision-maker so far. Inclinations respectful of human rights can only afford occasional assistance. In the end, if the law is clear, valid and applicable to the case, it is the duty of any court to give effect to it. So, in that case, did I and all other judges of the High Court of Australia.

Common law elaboration: In matters of common law elaboration, the High Court of Australia has frequently endorsed a principle that permits reference to be made to universal human rights when deciding the content of a past rule of the common law. This was done by the court in *Mabo v Queensland [No.2]*¹⁰³. That was a challenge by Australian Aboriginals to the earlier holdings of Australian courts, and of the Privy Council¹⁰⁴, rejecting claims that Australian Aboriginals enjoyed ownership of their traditional land. Although the case was not, in a conventional sense, constitutional (in that it did not involve an interpretation of the written constitution of the Commonwealth or the States), it was constitutional in a broader sense. It touched upon a fundamental question of the relationship between the descendants of the

¹⁰² (2003) 219 CLR 365 at 421 [156]ff.

¹⁰³ (1992) 175 CLR 1.

¹⁰⁴ *Cooper v Stuart* (1889) 14 App Cas 286 at 291 per Lord Watson referred to in *Mabo* (1992) 175 CLR 1 at 37ff.

British and other settlers in Australia and the indigenous people of the continent.

In the course of his reasons, upholding the submissions of Mr. Mabo that the previous statement of the common law could not stand consistently with contemporary universal principles of human rights (especially as those principles forbid racial discrimination), Brennan J affirmed the inevitable influence upon the content of Australia's common law of the principles of universal human rights law. In a sense, this opinion was an affirmation of the *Bangalore Principles* which had been adopted by Commonwealth judges in 1988. Brennan J said¹⁰⁵:

“The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the *International Covenant on Civil and Political Rights* ... brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organisation of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.”

Gaps in legal protection: In a more recent decision, *Wurrudjal v The Commonwealth*¹⁰⁶, the limits of the *Mabo* interpretive rule were revealed. *Wurrudjal* was a case that challenged the constitutional validity of federal legislation of 2007 providing for military and police intervention into Aboriginal communities and homes in the Northern

¹⁰⁵ (1992) 175 CLR 1 at 42 (with the concurrence of Mason CJ and McHugh J).

¹⁰⁶ (2009) 83 ALJR 399.

Territory of Australia. The challenge came in the form of a demurrer. The High Court of Australia divided. I favoured a view that the Aboriginal complaints were legally arguable and that the plaintiffs should have their claim heard in full by the court. The majority of the Court rejected the contention. They dismissed the proceedings.

In the course of my reasons, I observed that¹⁰⁷:

“If any other Australians, selected by reference to their race, suffered the imposition on their pre-existing property interests of non consensual five year statutory leases, designed to authorise intensive intrusions into their lives and legal interests, it is difficult to believe that a challenge to such a law would fail as legally unarguable on the ground that no “property” had been “acquired”. Or that “just terms” had been afforded, although those affected were not consulted about the process and although rights cherished by them might be adversely affected. The Aboriginal parties are entitled to have their trial and day in court. We should not slam the doors of the courts in their face. This is a case in which a transparent, public trial of the proceedings has its own justification.”

In the course of his reasons, French CJ, newly appointed as Chief Justice of the High Court of Australia, described my reasons as involving “the gratuitous suggestion [that] the outcome of this case [is] based on an approach less favourable to the plaintiffs because of their Aboriginality”¹⁰⁸. In response, I observed¹⁰⁹:

“The issue for decision is not whether the “approach” of the majority is made on a basis less favourable because of aboriginality. It is concerned with the objective fact that the majority rejects the claimants’ challenge to the constitutional validity of the federal legislation and that is incontestably less favourable to them upon the basis of their race and does so in a ruling on a demurrer. Far from being “gratuitous”, this reasoning is

¹⁰⁷ (2009) 83 ALJR 399 at 445 [214].

¹⁰⁸ (2009) 83 ALJR 399 at 408 [14].

¹⁰⁹ (2009) 83 ALJR 399 at 445 [215].

essential and, in truth, self-evident. The demurrer should be overruled.”

This was the last decision that I delivered in the High Court of Australia, indeed as a member of the Australian judiciary. It was handed down on my last day of service. It involved a case whose order affirmed federal legislation, enacted within eight weeks of the general election in 2007. The legislation was propounded without consultation or expert assessment and was seriously disrespectful of a class of people selected by reference to a racial criterion. When politicians and media interests in Australia assert that the nation does not need a charter or other national protection for human rights, and that all such matters can be safely left to Parliament and to the people as electors, I am afraid that the evidence, including recent evidence, proves the contrary.

The need for remedies: Perhaps it takes an empathy born of experience discrimination, or sensitivity to its sting, to make lawyers and judges alert to the need for a charter of rights. That empathy can derive from sex, race, age, disability, health condition or religion. In my case, it derived from sexual orientation. Those who have never felt discrimination may not be so alert of the need for remedies. Those who have will be less convinced that remedies are unnecessary; especially so where the remedy proposed reserves the last word to the elected representatives in Parliament, stimulated by the quiet ,calm voice of the independent judiciary.

I congratulate the Parliament and people of the United Kingdom on the tenth anniversary of the *Human Rights Act*. I remain of the view that it

has important lessons for a wider world. Those lessons extend to lawyers and judges (and other citizens) in Australia.
