ELEVENTH WILFRED FULLAGAR MEMORIAL LECTURE: THE CONSTITUTIONAL PROTECTION OF HUMAN RIGHTS

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It is a great pleasure for me to be given the opportunity to pay my small tribute to the memory of Sir Wilfred Fullagar. I had not known Sir Wilfred before he was appointed to the High Court, although I was of course aware that he enjoyed a great reputation at the Bar and on the Bench of the Supreme Court of Victoria. However, thereafter his career and mine ran in a way in parallel. He came to the High Court in 1950, not very long after I had first appeared before it. His death occurred in 1961, the year in which I went to the Bench. So for most of the time when I was appearing before the High Court as counsel, Sir Wilfred was one of its number. He was an exemplary judge, always patient and good-humoured and never talkative. But he was more than that; he was a great judge. His judgments had an illuminating quality. They threw a clear light on the nature and operation of the principle according to which they were decided, and thus provided a plain guide to the solution of other cases. Those who subscribe to the modern heresy, that all that matters is the result of a case, and that the quality and character of a judge should be assessed solely by having regard to the conclusion which he reaches, no matter by what reasoning he attains it—a heresy that if accepted as orthodox would lead the law back to a wilderness of single instances—would do well to read his judgments. But of course we all benefit by reading them. As Sir Owen Dixon said in the high tribute which he paid to Sir Wilfred after his death, his influence "broad and deep continueth".

When a citizen of the United States thinks of the Constitution of his country, he thinks first of what he would call the Bill of Rights, the provisions of the various constitutional amendments that are designed to protect and enforce the rights and freedoms of the people of that nation. It is those provisions that make the American citizen regard his Constitution as an almost sacred text, a heritage of which he has cause to be proud. Even an educated American may be surprised to discover that the Australian Constitution contains no similar protection for the rights of Australians. He tends to be sceptical of the proposition that judges, by interpreting statutes in the light of common law principles that favour the rights and freedoms of the individual, can safeguard rights if a legislature is determined to deny them.

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For over a century the position of the United States, with a charter of rights guaranteed by its constitution, was unusual. Since World War II that has changed. During that war those in power in Germany and Russia carried out murder and torture on a scale so large as to be almost beyond comprehension. They consigned millions to slavery. Often victims were chosen on the ground of race. After the war, statesmen responsible for the conduct of international affairs naturally sought to prevent the recurrence of such evils. The Charter of the United Nations expresses as one of the objects of that organization the promotion and encouragement of respect for human rights and fundamental freedoms. There followed many international conventions, and some regional conventions, for the protection of such rights and freedoms. No doubt under the influence of the United Nations, hundreds of nations, by their laws or their constitutions, declared or guaranteed fundamental rights and freedoms. Not all of these guarantees can be said to have been either sincere or effective. Albania, Chad, El Salvador, Haiti and Khmer Republic were some of those countries which adopted bills of rights. Further, the newly emerging countries which had formerly been British colonies one by one adopted constitutionally protected bills of rights. These were not always the same in form; some provided a way of escape from the constitutional limitations, particularly in times of emergency. Professor de Smith has given an interesting account of this constitutional development in chapter 5 of his book *The New Commonwealth and its Constitutions* (London, Stevens & Sons, 1964). Unfortunately, not all of these constitutions were effective in preventing oppression. Great Britain and New Zealand and at first Canada did not follow this constitutional example set by the former colonies, and of course Australia has not done so. However, Canada, has this year, 1982, adopted a constitution in the forefront of which is a Charter of Rights and Freedoms. The traditional view of those trained in the common law, except in the United States, has tended to agree with Bentham that "natural and imprescriptible rights" is "rhetorical nonsense—nonsense upon stilts . . .[1] but we must recognize that internationally this now seems to be the minority view; a bill of rights has become the norm. That does not mean that the majority is necessarily right. It may be, to use the words of Professor de Smith, that we have witnessed "yet another manifestation of that familiar process in which the deplorable becomes recognized as the inevitable and is next applauded as desirable".[2] But it does mean that it is worth considering our position.

Of course there are numberless ways in which rights and freedoms may be protected by the law. Particular rights are protected by various rules of the common law, and by statute. One method of attempting to secure general

1 "Anarchical Fallacies", in 2 *Works of Jeremy Bentham* (ed. Bouring) 497, 501 cited in de Smith, op. cit., 164.
2 Ibid., 163.

recognition of rights and freedoms, recently adopted by the Commonwealth Parliament, has been to set up a Commission, charged with the functions of examining and reporting on laws and practices that may be inconsistent with rights and freedoms recognized in the International Covenant on Civil and Political Rights, or declared by certain Declarations of the United Nations or recognized or declared by any relevant international instrument.[3] However this lecture is concerned with the questions that arise in relation to the protection of rights and freedoms by means of a charter of rights which is constitutionally entrenched. Henceforth when I use the expression "bill of rights" that is what I shall mean.

The question whether a bill of rights should be included in a constitution, and if so how it may effectively be entrenched, raise issues of political science and of law which are of fundamental importance. Although I shall discuss these questions, I do not think it appropriate to suggest a definitive answer to them even if I were able to do so. It is first necessary to inquire what are the human rights and fundamental freedoms—I shall refer to them simply as rights—which the proponents of a bill of rights wish to safeguard, and against what interference they are intended to be protected. Of course it is contemplated that the protection will extend to some rights already recognized by the law, but the theory on which a bill of rights is justified must be that there are some rights which the state should have no power to affect. These may be called moral rights; rights recognized by the general conscience of mankind, by common right and reason or by natural law. In some cases the affirmation of a moral right of this kind may entail the denial of a legal right. That may be viewed with equanimity, but things become more difficult when two fundamental moral rights come into conflict. No doubt it is intended that the rights should be protected from encroachment from any source, although what is mostly feared is interference by the state. Such interference may result from administrative or legislative action—even, it has been suggested, from judicial action, as when judges apply a rule of the common law that is inconsistent with a fundamental moral right. However, it is obvious that constitutional protection of this kind, assuming that it is necessary, will be most needed against legislative action, at least in Australia. If the laws themselves establish the rights which it is sought to protect, there is ample machinery in Australia to ensure that the rights are enforced, even against the state.

The question then is why it should be thought necessary, in a democracy, to place some rights beyond the power of the legislature to affect. More than one answer to this question may be gleaned from a study of the voluminous literature on the subject. There has been in the United Kingdom a vigorous controversy as to the need for a bill of rights in that country. The view that the constitution of the United Kingdom should be revised so

[3] *Human Rights Commission Act* 1981, (Cth.).

as to afford safeguards against the erosion of human rights has eminent supporters.[4] Lord Scarman is an eloquent exponent of that view, which he expressed in the ninth of these memorial lectures.[5] Not all of the protagonists of a bill of rights share the same views on other matters, and their reasons for supporting a bill of rights are not always the same. There may be some truth in the following remarks of one commentator:

> "The radicals hope that such increased power would be seized by the judges to accomplish radical change. . . . The conservatives hope (more realistically) that a judiciary enhanced in power would act as a brake on a legislative programme designed to bring about social change."[6]

In Australia also the matter has been the subject of public debate, although it can hardly be said that the topic has fired the imagination of the ordinary Australian citizen. An examination of the Australian writings on the subject reveals that in Australia support for a bill of rights is given for a diversity of reasons.

One powerful motive for seeking constitutional protection for a bill of rights is the fear of what Lord Acton called "the tyranny of the majority". In a society which has a constitution which is unitary and uncontrolled, the legislature, being sovereign, can do anything. A party which has gained control of such legislature may be able to secure perpetual power for itself by passing legislation to gerrymander the electoral boundaries, deprive citizens of particular races or classes of the vote or prolong indefinitely the life of the legislature. Without going to those lengths the legislature might by legislation bring about fundamental and irreversible changes in society —changes that might be opposed by a substantial minority or even a majority of the citizens. It is the fear of what Lord Hailsham has called an "elected dictatorship" that has led some to support the notion of a constitutionally protected bill of rights.

However, fear that a tyrannous majority will go so far is not necessary to justify support for a bill of rights. A less pessimistic prophesy is that a majority may exercise its power so as to deny human rights to minorities, or to individuals of particular classes (such as aliens), even though it does not do anything so drastic as to subvert representative government or effect a revolution in society. Injustice may particularly be wrought if a society is racially divided, or suffering from a serious economic depression or if for some other reason the "times are abnormally alive with fear and prejudice".[7] In the nature of things a bill of rights is likely to check legislative excesses and to afford some protection for civil rights. It may, in addition, set

[4] See M. Zander, *A Bill of Rights?* (2nd ed., Surrey, Great Britain, Enta Print Ltd, 1979) chap. 1.
[5] Lord Scarman, "The Common Law and the Twentieth Century—Happy Marriage or Irretrievable Breakdown?" (1980) 7 *Mon. L.R.* 1.
[6] I. W. Duncanson, "Balloonists, Bills of Rights and Dinosaurs", [1978] *Public Law* 391, 397.
[7] Lord Scarman, "English Law—The New Dimenson, (London, Stevens, 1974) 13.

minimum standards to which governments will adhere and which the community will expect should be observed.

A further, and quite different, reason suggested for the enactment of a bill of rights is that it would serve as a possible means of reforming the law generally. Here it is not the excesses of the legislators, but the errors resulting from judicial decision, for which a bill of rights will provide a remedy. Mr Justice Kirby has expressed himself in favour of this view.[8] He gives, as an example of a denial of justice, the decision in *Dugan* v. *Mirror Newspapers Ltd*,[9] where the High Court held that a person convicted in New South Wales of a felony in respect of which he had been sentenced to death, but who was spared that penalty on condition that he be kept in penal servitude for life, could not, while he was still serving the sentence, maintain a civil action for libel. He refers also to the case of *Golder*, who obtained a declaration from the European Court of Human Rights that a refusal to allow him, while serving a sentence of imprisonment, to consult a solicitor amounted to a denial of his rights under the European Convention. Lord Scarman, in his Ninth Wilfred Fullagar lecture,[10] also referred to that case, and to *Attorney-General* v. *Times Newspapers*,[11] in which the European Court held that the English law of contempt as applied by the House of Lords was an infringement of freedom. The cases to which Lord Scarman refers are controversial cases,[12] but I would not enter upon the controversy. The fact that the United Kingdom adheres to the European Convention may provide a reason why that country should adopt a bill of rights founded on that Convention. As an Australian I cannot comment on that aspect of that matter. However, no such consideration applies to Australia. Perhaps I may venture to say that the fact that the common law requires a decision such as that in *Dugan* v. *Mirror Newspapers Ltd* hardly provides a strong argument in favour of a major constitutional change.

Another question on which supporters of a bill of rights are not entirely agreed is what sort of rights should be protected. Certainly there is general agreement that civil and political rights should be included, and it may be that the protection of fundamental political rights is the main aim that some would hope to achieve. The question of the protection of economic and social rights is more controversial. To give effect to such rights the courts may have to formulate economic and social policies, and to require positive action, including the expenditure of public money. Some courts have not shrunk from taking measures of that kind. When rights are spoken of in this context, it is civil and political rights that are usually meant, but social and economic rights have sometimes been found embraced by words which at

[8] M. D. Kirby, "Human Rights: The Challenge for Law Reform" (1976) 5 *U. Tas. L.R.* 103.
[9] (1978) 142 C.L.R. 583.
[10] (1980) 7 *Mon. L.R.* 8-9.
[11] [1974] A.C. 273; (1979) 2 E.H.R.R. 245.
[12] See (1978) 94 L.Q.R. 512.

first sight seemed to refer to civil rights of the kind with which lawyers were traditionally acquainted.

What then are the disadvantages of a bill of rights? First, it is sometimes suggested that permanently to fetter the power of the legislature would be incompatible with the principles of democratic government. It would not seem to me undemocratic to adopt, by democratic means, a constitution which did no more than place checks on the power of a governing majority to use its power oppressively. The position may however be different if the checks are so rigid that it is virtually impossible to remove them when they are seen to be thwarting the will, not merely of a transient majority, but of the community as a whole. A bill of rights, like any other statute, is a creature of its time. Some of the rights which it protects may be regarded as of fundamental and enduring value. Others reflect contemporary values which are ephemeral. The Constitution of the United States provides us with examples. The Second Amendment provides that the right of the people to keep and bear arms shall not be infringed. If this guarantee has any effect in contemporary America, it must surely be a harmful one. The Seventh Amendment requires that in suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved. Even if this article contained a proviso requiring adjustment of the amount to keep pace with inflation its value might have been thought doubtful. Certainly no one would nowadays think that either of those amendments protected a fundamental right approved by the general conscience of mankind. But they remain in the Constitution, which is easier to amend than that of Australia. Perhaps they support the argument that it is possible that a provision in a bill of rights may frustrate or delay reforms upon which the community is generally agreed. The argument that a bill of rights cannot be reconciled with a democratic system of government has more force when the effect of the bill of rights is not merely to restrain the state from infringing civil liberties, but also to enable the courts to formulate and enforce new social or economic policies.

Some of the other arguments advanced against a bill of rights need be mentioned only briefly. It is suggested that the minimum guarantees which a bill of rights provides might be regarded as the maximum, or at least that a government might use their presence as an excuse for not extending rights further than the bill of rights requires. There is no doubt that the presence of a bill of rights is likely to cause a multiplicity of actions in the courts. This may seem a considerable advantage to the legal profession, but its value to society may be doubted when the courts are already overloaded with work.

There are, however, two further arguments against the entrenchment of a bill of rights which go together and require more detailed consideration. The first is that the effect which the words of a bill of rights will ultimately have is completely unpredictable. The second is that the judiciary may be

damaged if required to enforce and apply a bill of rights. The provisions of bills of rights tend to be expressed in terms of broad generality, although it is of course not necessary that this should be the case. Where that is so the court is left to exercise a very wide discretion in giving meaning to their provisions. The history of the application of bills of rights shows that it is difficult to prophesy the manner in which any particular provision will be applied. We hardly need to go beyond our own Constitution for illustrations. One may compare the limited scope given to s. 80 (in relation to trial by jury) with the effect given to s. 92. The history of the construction of the Bill of Rights in the United States Constitution has shown that a complete change in the attitude to some questions has taken place during this century. The words of the Fifth Amendment, which provide that no person shall be deprived of life, liberty or property, without due process of law, were in 1856 held to have the effect that Congress could not declare a territory free of slavery, because that would deprive slave owners of their property in the slaves.[13] The same provision, in the first two decades of this century, was held to render invalid laws fixing maximum hours of work[14] and minimum wages,[15] on the ground that they interfered with liberty of contract. Those cases of course no longer represent the law. A similar reversal of judicial opinion was displayed in *South Carolina State Board of Education* v. *Brown*[16] which declared that the provision of separate, but equal, educational facilities for children of different races was a denial of the equal protection of the laws, although previous decisions had reached a contrary conclusion. The approach of the Supreme Court to the construction of the Bill of Rights during the last few decades has been liberal and adventurous. The Supreme Court of Ireland has displayed a rather similar spirit although the power of the Irish Parliament to enact emergency legislation that does not conform to the bill of rights has weakened the effect of the guarantees.[17] On the whole the Supreme Court of Canada has been much more conservative.[18] Perhaps one example will suffice to show how different a meaning may be attributed to the same or similar words, depending on the attitude of the court. The German Basic Law protects the right to life. In 1975 the German Federal Constitutional Court interpreted this to include the life of an unborn baby and declared the laws permitting abortion to be unconstitutional and invalid in most respects.[19] The Fourteenth Amendment to the United States Constitution also protects the right to life. That Constitution does

[13] *Dred Scott* v. *Sandford* (1856) 19 How. 393, 450.
[14] *Lochner* v. *New York* (1905) 198 U.S. 45.
[15] *Adkins* v. *Children's Hospital* (1923) 261 U.S. 525.
[16] (1968) 393 U.S. 222.
[17] See the examples given by Kenny J. in "The Advantages of a Written Constitution Incorporating a Bill of Rights" (1979) 30 *N.Ir.L.Q.* 189, 195 et seq., and see "Do We Need a Bill of Rights?" (1980, ed. Campbell) 50 et seq.
[18] See *A-G (Can.)* v. *Lavell* (1973) 38 D.L.R. (3d) 481; *R.* v. *Miller and Cockriell* (1976) D.L.R. (3d) 324; and Tarnopolsky, *The Canadian Bill of Rights* (2nd ed., 1975). The Bill of Rights is now contained in the Constitution Act 1982 (U.K.).
[19] See Wallington and McBride, *Civil Liberties and a Bill of Rights*, (1976) 17.

not expressly protect the right to privacy. The Supreme Court has held that a right to privacy is impliedly recognized by the Constitution and that a state law forbidding all abortions expect those for the purpose of sparing the life of the mother infringed that right and was invalid.[20] Indeed the effect of the Constitution was held to be that in the first trimester of a pregnancy the state could not interfere in a decision to abort, in the second trimester the state could regulate the abortion procedure and, in the third trimester, the state could forbid abortions except when necessary to protect the life or health of the mother. These examples make clear what is not surprising—that the effect of a bill of rights depends upon much more on the attitudes of the judges who interpret it than on the words themselves. This is of course the more significant, if the legislature has no power to reverse the decision of the judges, as is the case if the bill of rights is entrenched.

It is because of this that some apprehend that the adoption of a bill of rights will cause some dangers for the judiciary. It is not unnatural for a government to think that it is justifiable to appoint judges who will be sympathetic to its views. It is a short step to the appointment of judges who, the government believes, will carry out its wishes. The danger of the appointment of judges on purely political grounds is the greater if the government strongly holds a policy which may be advanced or frustrated depending on how the bill of rights is interpreted. Of course, the probity and sense of responsibility of a government may lead it to resist temptations of this kind.

Before I attempt to sum up, albeit in an inconclusive way, the arguments for and against a bill of rights, I should proceed to discuss the second question, how a bill of rights may be entrenched so that the legislature may not repeal or amend it at will. The question of how constitutional protection may be given to a bill of rights in the United Kingdom has been the subject of much learned debate. It is a debate to which I shall later briefly refer. However, in Australia there is one very clear means of entrenching a bill of rights, and that is, of course, by amendment to the Constitution. By an amendment made under s. 128 of the Constitution it would be possible to provide a charter of rights binding both the Commonwealth and the states. Of course, experience shows that it is difficult to gain the requisite majorities at a referendum unless all major political parties support it. So far, in Australia, there has not been general support from all political parties for a bill of rights. If an amendment has been procured, it may prove equally difficult to repeal or amend it if the provisions of the bill of rights which it contains prove to be unduly restrictive. It would, however, be possible to include an escape clause, although that would reduce the efficacy of the guarantees. Alternatively, it might be possible to provide for the bill of

[20] *Roe* v. *Wade* (1973) 410 U.S. 113.

rights a special amending procedure, not necessarily applicable to the rest of the Constitution.[21]

The further question arises whether it would be possible, without amending the Constitution, for the Parliament of either the Commonwealth or a state to enact and entrench a bill of rights. The question has two aspects. The first is whether the necessary legislative power exists to enable a bill of rights to be enacted. Clearly both the Commonwealth and the states can pass legislation enacting a bill of rights which will be effective within their respective spheres. The more serious question is whether the Commonwealth has power to enact a bill of rights which would be binding generally throughout Australia. The answer is that no express power to that effect is conferred by the Constitution. It now seems, since the decision in *Koowarta* v. *Bjelke-Petersen and Others*,[22] that the Commonwealth Parliament might, under s. 51(xxvi) of the Constitution, enact a bill of rights for the people of a particular race such as the Aboriginal race. It may appear from the decision of the majority in that case that, subject to no very restrictive qualifications, the Commonwealth Parliament also has power under s. 51(xxix) (the External Affairs power) to give effect to an international convention to which Australia is a party and which provides for the recognition and enforcement of civil rights.

The second aspect of the question is whether, assuming that either the Commonwealth or a state passed a law containing a bill of rights, it could effectively provide that the law should not be amended except by a special majority, for example, two-thirds or three-quarters. This question has been much discussed in the United Kingdom. The orthodox view is that no Parliament can bind its successors; as Dicey said, Parliament has "the right to make or unmake any law whatever".[23] It follows that a law which provides that it may not be amended or repealed except by a special majority may itself be amended or repealed by a subsequent law whether or not the later law is passed by the prescribed majority. This is the traditional view. There are, however, opposing views. Professor Heuston has suggested that the rules which identify the sovereign and prescribe its composition and functions are logically prior to it and that the courts have jurisdiction to question the validity of an alleged Act of Parliament on grounds that there has been a failure to comply with the rules which govern the composition and procedure of the Parliament.[24] Other writers have expressed the view that the Parliament must obey any law for the time being in force as to the manner and form in which legislation is to be passed.[25] In support of

[21] See the suggestion by Senator Evans in "Prospects and Problems for an Australian Bill of Rights" 1970-3 *Aust. Y.B. Intl. Law* 1, 7.
[22] Unreported, 11th May 1982.
[23] *Law of the Constitution* (9th ed., London, MacMillan, 1939) 40.
[24] *Essays on Constitutional Law* (2nd ed., London, Stevens, 1964) 6-7.
[25] Some of the literature is cited in Winterton, "Can the Commonwealth Parliament Enach 'Manner and Form' Legislation" (1980) 11 F.L.R. 167; see also Fazal, "Entrenched Rights and Parliamentary Sovereignty" [1974] *Public Law* 295.

the contention that Parliament can bind itself in this way, reliance is sometimes placed on three decisions of the Courts—*Attorney-General for New South Wales* v. *Trethowan*,[26] *Bribery Commissioner* v. *Ranasinghe*[27] and *Harris* v. *Minister of the Interior*.[28] The first of those decisions depended entirely on the effect of s. 5 of the *Colonial Laws Validity Act*, which I shall later mention. I discussed the other two cases in *Victoria* v. *The Commonwealth and Connor*,[29] and there expressed the opinion that the principle on which they rest is that a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law, and that it applies only to a legislature which is governed by an instrument which imposes conditions on the power to make laws. The Parliament of the Commonwealth is governed by such an instrument—the Constitution—but that instrument does not require that any laws should be passed by special majorities. On the contrary, it provides that questions are to be determined by a simple majority in both Houses: ss. 23, 40. The Parliament could not effectively pass any law which required a special majority to amend or repeal it.

The position in the states is different. By s. 5 of the *Colonial Laws Validity Act*, laws respecting the constitution, powers or procedure of a legislature to which that Act applies must be passed in such manner and form as may from time to time be required by any law in force. While that statute remains in force, the validity of a state law requiring that a bill of rights should be amended only by a particular majority would depend on whether the law was held to be one with respect to the constitution, powers and procedure of the legislature or whether it should more properly be characterized as a law providing for a bill of rights.

In short, the Commonwealth Parliament could not entrench a bill of rights without a referendum, and the question whether a state Parliament could do so depends on whether the entrenching provision is held to be a law with respect to the constitution, powers and procedure of the state legislature.

In Canada there has, however, been an interesting constitutional development. In 1960 the Canadian Parliament passed, as an ordinary law, the Canadian Bill of Rights 1960. It contained in s. 2 the following provision:

> "Every law of Canada shall unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared. . . ."

The difficulty about such a provision, according to the traditional view, is

[26] (1931) 44 C.L.R. 394; [1932] A.C. 526.
[27] [1965] A.C. 172.
[28] (1952) 2 S.A.L.R. 428; [1952] 1 T.L.R. 1245.
[29] (1975) 134 C.L.R. 81, 163-4.

that a later statute would prevail over the bill of rights if it appeared on its proper construction to be inconsistent with that law notwithstanding the absence of any express declaration of the kind required by s. 2. In other words, "it is impossible for Parliament to enact that in a subsequent statute dealing with the same subject-matter there can be no implied repeal".[30] The High Court has acted on that principle in two cases.[31] They seem to establish that one statute (not having the force of a constitution) cannot prevent a later statute from operating according to its proper meaning.

However, the Supreme Court of Canada, in an innovative decision in *R.* v. *Drybones*,[32] held that if another statute, inconsistent with the Canadian Bill of Rights, did not contain the declaration required by s. 2 of that statute it was "inoperative", a result which was said to be different from a repeal and was "confined to the particular circumstances of the case in which the declaration is made". The Court was there concerned with an inconsistent statute which had been passed before the Bill of Rights and there was perhaps no difficulty in holding that the Bill of Rights prevailed over it. However, the principle which the Court laid down was intended to apply as well to statutes subsequently passed. The decision treats the Bill of Rights as having almost the force of a constitutional statute rather than merely as an Interpretation Act. This result seems convenient; it preserves flexibility but requires the legislature to acknowledge openly that it intends to derogate from the bill of rights. However, it is difficult to reconcile with formal legal theory. Whether the courts in Australia would adopt the bold approach of *R.* v. *Drybones* if a bill of rights were enacted in terms similar to those of the Canadian statute remains a matter of conjecture.

From what I have said it is apparent that the only way in which Australia can get a bill of rights that will bind the Commonwealth, and will be beyond the power of the Parliament to repeal or vary by an ordinary law, is by constitutional change. Such a change seems unlikely to occur. In any case, is it desirable? That depends on the assessment one makes first of the extent to which civil liberties in Australia are denied or threatened and, secondly, of the degree to which a bill of rights is likely to be effective and beneficial. Australia has in the past shown remarkable stability, and the citizens of this country enjoy more of the fundamental rights and freedoms than most. One may hope that the danger of a conflict between races, classes or sections of society so bitter as to endanger fundamental civil liberties remains remote. If such a danger were perceived—and some have apprehended a threat of that kind in the United Kingdom and Canada—it would be a question whether a bill of rights would avert it. Judge Learned Hand has said, in words often quoted:

[30] *Ellen Street Estates Ltd* v. *Minister of Health* [1934] 1 K.B. 590, 597.
[31] *South Eastern Drainage Board (S.A.)* v. *Savings Bank of South Australia* (1939) 62 C.L.R. 603; *Travinto Nominees Pty Ltd* v. *Vlattas* (1973) 129 C.L.R. 1, 33-5.
[32] (1970) 9 D.L.R. (3d) 473.

> "This much I think I know—that a society so riven that the spirit of moderation is gone, no Court can save; that a society where that spirit flourishes no Court need save; that in a society which evades its responsibilities by thrusting upon the Courts the nurture of that spirit, that spirit in the end will perish."[33]

On the other hand, it is possible that the courts may by preventing a steady erosion of the rights of a minority, prevent the frustration and conflict that causes the spirit of moderation to be destroyed. Had the constitution of Northern Ireland, 50 years ago, included a bill of rights, would the present situation there have arisen? Then it may be thought that even though no grave threat to civil liberties can be seen, there is sufficient likelihood of legislatures making minor inroads upon the rights of the citizens to warrant the protection of a bill of rights. Sometimes a legislature may reach in haste to reverse decisions of the courts affirming rights which they regard as inconvenient. Mr Justice Samuels has referred[34] to the *Evidence (Amendment) Act* 1979 passed in New South Wales to undo in that state the effect of the decision in *Sankey* v. *Whitlam*.[35] Others suggest, rightly or wrongly that sometimes a legislature will mould the electoral laws in a way that suits the purposes of the party in power but deprives some citizens of their full political rights. There may be a case for the constitutional protection of such civil and political rights as are regarded as quite fundamental. Again, the question is whether it is possible to frame a bill of rights which will not in the hands of the courts be given a much wider operation than its framers intended.

There are two aspects of the United States experience that might be considered when one weighs the need for the protection afforded by a bill of rights against the disadvantages its existence may entail. The first is that a vast amount of judicial time is occupied with matters which one might have expected to be dealt with by simple administrative controls. For example, some federal judges do almost nothing but deal with complaints by prisoners that their rights are denied by the conditions of their incarceration. Is the consequence that the prisons in the United States are models for countries which lack a bill of rights? That is a matter of opinion. Other federal judges, particularly those who work near the Mexican border, spend much time in considering whether searches of those suspected of importing drugs comply with the constitutional requirements. Again it is a matter of opinion whether this judicial time is well spent. Secondly, where the Courts have brought about great changes in society, in relation to racial equality for instance, it seems to have usually been the case that the change was one to which the Federal government gave general support, although some state governments strongly opposed it. Experience does not provide

[33] *The Spirit of Liberty, Papers and Addresses of Learned Hand* (1952) 181.
[34] "A Bill of rights for Australia?" (1980) 51 *Australian Quarterly*, 95-6.
[35] (1978) 142 C.L.R. 1.

an answer to the question whether the courts, in reliance on a bill of rights, could effect an important social change to which all governments were opposed.

I would not conclude this discussion without mentioning that in Australia we may already have what appears to be a bill of rights, limited it is true in scope, which is effectivelly entrenched against the states. That is the *Racial Discrimination Act* 1975 (Cth.), or such parts of it as are held to be valid. That Act binds the Commonwealth as well as the states, but whereas it can be amended at will by Commonwealth legislation, state legislation inconsistent with it would be invalid to the extent of the inconsistency by reason of s. 109 of the Constitution. Section 9 of that Act, which was held to be valid by the majority of the Court in *Koowarta* v. *Bjelke-Petersen*,[36] follows the words of the International Convention on the Elimination of All Forms of Racial Discrimination. It is accordingly expressed in terms suitable for the expression of a general principle, but likely to be productive of considerable difficulty when used to state a statutory command. Perhaps the section may give the courts experience in dealing with provisions of this kind, and provide a guide to their utility.

I have of course done no more than intervene indecisively in a continuing debate. I have not felt it right to express any conclusion as to which way the balance of advantages and disadvantages inclines. I cannot, however, agree with those who suggest that without a bill of rights the judges of Australia have failed to play an effective part in protecting the liberties of Australians. A bill of rights may strengthen their hands, but they are by no means impotent without it.

[36] Unreported 11th May 1982.