LITIGATING HUMAN RIGHTS IN WESTERN AUSTRALIA: LESSONS FROM THE PAST

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Abstract

It is virtually a truism that the present is largely shaped by the past. This article proceeds on the assumption that to appreciate the contemporary role of courts in protecting human rights in Western Australia much can be learnt by exploring particular examples of litigation in the last quarter of the twentieth century. The cases in this study engaged some of the major civil liberty issues of the time in a difficult and unpromising judicial climate. It thereby seeks to derive lessons from past experience for consideration and reflection by the present generation of practitioners. It indicates novel kinds of arguments that were advanced in the context of some of the major political issues of the era, such as the repression of political dissent through the use of s 54B of the *Police Act 1892* (WA) and the assertion of aboriginal resistance at Noonkanbah station. It concludes that despite it being highly unlikely that WA will adopt a statutory Charter of Rights, other recent developments in modes of statutory construction incorporating beneficial interpretive presumptions and implications, recently developed by the High Court, have contributed to a significant enhancement of the capacity of counsel to advance human rights arguments in a more receptive judicial culture.

I INTRODUCTION

Reflection on the past can be both interesting and illuminating. The Spanish-American philosopher, George Santayana remarked somewhat negatively: 'Those who cannot remember the past are condemned to repeat it.'[1] One need not go so far to appreciate that we can have a better

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1 George Santayana, *The Life of Reason, Volume 1, Introduction and Reason in Common Sense* (Scribner's, 1905), 284.

understanding of our contemporary institutions when we have regard to the sagas of earlier times.

A *The Article's Objectives*

This article is primarily an attempt to look back on an era stretching from around 1979 to the turn of the 21st century in which members of the legal profession of Western Australia ('WA') in a diverse suite of cases sought to vindicate human rights standards by engaging in litigation intended to defend, protect or promote those rights. It assumes that legal wisdom is not confined to fine-print analyses of reported cases disembodied from their narratives and the factual circumstances presented in the milieu of the personalities, politics and societal differences of the times. It presents a tableau of cases that, in the words attributed to Sir Thomas More, 'show[s] [us] the times'[2] in the sense of locating them in the temporal context in which that litigation took place and the kinds of judicial responses that one could then expect to meet. Pertinent in the latter respect were repressive legislation to stifle dissent, particularly in a general climate of disadvantage affecting the state's Aboriginal inhabitants. It does so with a view to drawing certain parables.[3] In that sense it is essentially descriptive. The specific cases present a chronicle, admittedly selective and subjective, recalling innovative arguments and those advancing them. They were not representative of any norm.

Reaching beyond the descriptive, this article pursues a number of secondary and tertiary analytic objectives. The first is to explore whether the principles and presumptions then available under constitutional provisions, general common law and statute were adequate to protect an individual's human rights. It will be shown, however, that forced otherwise to rely on the prevailing interpretive principles counsel had to deploy novel arguments that tended to 'push the envelope' and embrace alternative constructional models.

This prompts a consequential question: if arguably not sufficient then, have changes in constructional precepts in the ensuing years, such as the mitigating effect of the emerging principle of legality[4] resulted in

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2 The quotation is drawn from Robert Bolt's play *A Man for All Seasons* in which More responds to Norfolk who protests that More has trapped him into showing disloyalty to the King: 'I show you the times.'

3 The notion of educative legal parables is taken from Michael Kirby, 'Ten Parables for Freshly-Minted Lawyers' (2006) 33 *University Western Australia Law Review* 23.

4 See, for eg, *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, 329 [21] (Gleeson CJ); *South Australia v Totani* (2010) 242 CLR 1, [31] (French CJ); *Momcilovic v The Queen* (2011) 245 CLR 1, 46-47 [43] (French CJ). See also, Chief Justice French, 'The Common Law and the Protection of Human

outcomes that are more sensitive to human rights considerations in contemporary proceedings?

Expanding the analysis beyond this inter-temporal comparison of procedural and evidentiary tools deployed by counsel then and potentially now, this article also locates the selected cases in the context of emerging human rights principles derived from international instruments that were coming to play a role in Australian jurisprudence from 1975 onwards. These include, notably, *The International Convention on the Elimination of All Forms of Racial Discrimination 1965* ('*Race Discrimination Convention*'), *The International Covenant on Civil and Political Rights* 1966 ('*ICCPR*') and more recently *The Convention on the Rights of the Child 1991* ('*CROC*'). The issue addressed is first, whether any of those Conventions were advanced in the cases studied in a way that informed the statutory constructions adopted by the relevant courts. Secondly, and more directly, looked at in retrospect, would the outcomes of any of the cases studied conceivably have been different if those conventions had been *directly incorporated* into Australian law,[5] either federal or state, so as to shape the results to accord more approximately to the international human rights standards? This article, where appropriate will identify relevant provisions in these instruments that could have shaped the exercise of judicial leeway in the cases analysed.

This latter question has a particular relevance to the situation where moves have been made in the last decade at Commonwealth, state and territory levels to adopt statutory bills or charters of rights. Given that WA has declined to take such a course of action, the further question impliedly arises: if a charter of rights incorporating, say, the *ICCPR* had been available in Western Australia in the period under examination would it have affected any particular judicial determination? In other words, would direct adoption of international human rights standards have afforded greater protection than the common law tradition? Implicitly, an affirmative answer would bolster arguments for the adoption of such a charter.

Rights' (Address to the Anglo-Australasian Lawyers Society, Sydney, 4 September 2009); Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35 *Melbourne University Law Review* 449.

5 Lacking statutory ratification, provisions in an international instrument do not have any immediate and direct legal effect in Australian municipal law: *Polites v Commonwealth* (1945) 70 CLR 60; *Bradley v The Commonwealth* (1973) 128 CLR 557 at 582 and *Simsek v MacPhee* (1982) 148 CLR 636. They may also provide guidance in construing ambiguous provisions in statutes or constitute a matter which should properly be taken into account in making administrative decisions: see *Minister of State for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286-288, [25]-[28] (Mason CJ and Deane J); *Re East; Ex parte Nguyen* (1998) 196 CLR 354, 380-381, [68] (Kirby J).

Finally, at the tertiary level, the article raises an issue that combines some of the elements of the overall analysis. Given that judicial approaches and attitudes at different times are capable of shaping the outcomes of cases, particularly in terms of statutory interpretation, would the adoption of a bill of rights, if nothing else, be valuable in promoting a *judicial culture* that is more sensitive to human rights values?

In recounting these cases the object is not to evaluate whether a particular human rights argument directly achieved a successful outcome. Certainly where that happens a person's rights are preeminently recognised and protected through the judicial process. Even if, on the other hand, the outcome is unsuccessful, a court ruling may draw attention to some deficiency in the legal regime that requires redress.

B *The Limits of this Analysis*

It is necessary to express a significant caveat at the outset. Although grouped into categories having common subject-matters, the selection of cases is admittedly disparate and statistically too small to draw well-founded objective conclusions. They do not permit the drawing of precise doctrinal boundaries that would allow one more confidently to predict, for example, that adopting a state bill of rights would positively enhance recognition of human rights in Western Australia. Such an empirical quantification is beyond the scope of this paper. An attempt will certainly be made where appropriate to identify a relevant human rights norm that might have been invoked to determine or sway a particular outcome. However, no firm conclusions will be drawn about whether a case would have been determined differently had a state bill of rights been in place at the time. For the reasons mentioned, such counterfactual analysis would be inherently problematic given the sparseness and diversity of the cases considered. This is true even if one can legitimately contend that the arguments in any one of the cases studied might have been more sympathetically received in contemporary proceedings.

What the study is intended to stimulate, however, is a realisation of the fragility of human rights at a time in recent history and the necessity for the maintenance in the profession of a willingness to advance arguments, even of an innovative kind that draw upon contemporary international human rights standards, whether or not assisted by the state's adoption of a bill of rights.

C *The Tentative Conclusions to be Drawn*

The article concludes basically that although most of the rights-focused arguments advanced in the period studied were largely ineffectual at the time, appropriate variations in some of them would be more

sympathetically received in contemporary proceedings. This is firstly, at the level of common law presumptions. Due to the principle of legality, state laws potentially infringing human rights are now subject to closer scrutiny than would have been the case in the period after 1979.

Further, doctrinal advances in the jurisprudence of the High Court regarding implied limitations on state laws restricting political speech now afford greater protection to expression of dissent than formerly. This is complemented by a greater willingness, judicially, to have regard to international human rights standards even if it is not directly adopted in a bill of rights. While concepts drawn from international principles were regarded by magistrates and judges in the past as somewhat suspect, they are now unarguably very much part of the vocabulary of any practising human rights lawyer.

Regarding the adoption of a bill of rights, while a reconsideration of the cases studied in this article is empirically insufficient to establish a need for the adoption of a bill of rights in WA, the alternative conclusion that a bill of rights would *not* make a difference equally cannot be sustained. In the result, that question remains open to further debate. To the extent that this article prompts a reconsideration of the *status quo* it will contribute to the continuation of that dialogue.

II The Contemporary Human Rights Ethos in Western Australia: An Opportunity Declined

The period spanning 2004 to 2007 was initially promising for those who advocated incorporating human rights standards into Australian domestic law. The enactment, in 2004, of a *Human Rights Act* by the Australian Capital Territory ('the ACT Act'),[6] followed by the Victorian *Charter of Human Rights and Responsibilities 2006* ('the Victorian Charter')[7] augured well for presenting defences against criminal

6 *Human Rights Act 2004* (ACT). For the Act's background see Andrew Byrnes, Hillary Charlesworth and Gabrielle McKinnon, (eds) *Bills of Rights in Australia (*UNSW Press, 2009); *The Human Rights Act 2004 (ACT): The First Five Years of Operation*, Report of the ACT Human Rights Research Project, Canberra, 2009, concluding that the Act created no surge of litigation, probably having a greater impact upon the executive and legislative arms of government.

7 *Charter of Human Rights and Responsibilities 2006* (Vic). Regarding the Charter see George Williams, 'The Victorian Charter of Human Rights and Responsibilities: Origins and Scope' (2006) 30 *Melbourne University Law Review* 880; Simon Evans and Caroline Evans, 'Legal Redress under the Victorian Charter of Human Rights and Responsibilities' (2006) 17 *Public Law Review* 264. For its impact, see *Victoria's Charter of Human Rights and Responsibilities in Action, Case Studies from the First Five Years of Operation* (Human Rights Law Centre, Melbourne, 2012) concluding it has succeeded in promoting human rights in Victoria.

charges and arbitrary administrative actions that violated international human rights principles. Each instrument modestly stopped short of legislating for the actual invalidation of laws found to be contrary to those standards. Instead, they adopted alternative means of creating a culture-promoting awareness of the relevant principles. These included parliamentary scrutiny of bills that potentially infringed human rights, directions to public administrators requiring them to consider those rights when exercising executive discretion and the use by courts of declarations of incompatibility[8] after judgments were found to be inconsistent with them. By such means the supremacy of Parliament to enact, or fail to repeal, laws transgressing human rights was maintained.

Following this early flush of success, other governments appeared ready to follow the trend.[9] The Commonwealth, following the election of the Rudd Government in 2007 seemed favourable to enacting appropriate national legislation. In 2008 it established the National Human Rights Consultation Committee chaired by Father Frank Brennan. In its report the Committee recommended that Australia adopt a federal human rights Act.[10]

However, the prospect of further extension of bills of rights beyond the two initial jurisdictions quickly faded.[11] On the Federal level, the Attorney-General responded to the Committee's report in April 2010 by launching 'Australia's Human Rights Framework' which fell short of the legislation proposed by the Committee. The *Human Rights Parliamentary Scrutiny Act 2011* (Cth) partially implements the Framework by establishing a Parliamentary Committee on Human Rights to examine bills for compatibility with human rights.

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8 A judicial finding of inconsistency with the Charter does not alter the legal outcome if the legislation clearly abrogates Charter standards. A certificate of incompatibility informs the government and legislature about the inconsistency leaving it to them to realign the offending law with the Charter. For the constitutional effect of such declarations see *Momcilovic v The Queen* (2011) 245 CLR 1.

9 Regarding these developments, see R French, 'The Constitution and the Protection of Human Rights' (Speech delivered at Edith Cowan University, 20 November 2009) <http://www.hcourt.gov.au/publications/speeches/current/speeches-by-chief-justice-french-ac>.

10 National Human Rights Consultation Committee, *National Human Rights Consultation Report* (2009). Discussed by HP Lee, 'The Federal Human Rights Act and the Reshaping of Australian Constitutional Law' (2010) 33 *University of New South Wales Law Review* 88; Michael Kirby, 'An Australian Charter of Rights – Answering some of the critics' (2008) 31 *Australian Bar Rev* 149; Bede Harris, 'The Bill of Rights Debate in Australia – A Study in Constitutional Disengagement' (2009) 2 *Journal of Politics and Law* 1.

11 Regarding the human rights project in Australia see Peter Bailey, *The Human Rights Enterprise*, (LexisNexis, 2008).

In WA, the Labor Government established a consultative committee.[12] After receiving many public submissions it recommended legislation similar to the Victorian Charter.[13] The Government then backed away, arguing that it would be more appropriate to see what emerged regarding the Commonwealth proposal for a national Act.[14] Before that was determined, Labor was replaced by a Coalition Government implacably opposed to any human rights legislation.

For those seeking a change in the legal rights culture in WA this failure was singularly disappointing. For those engaged in litigation the abandonment of a rights agenda simply meant that nothing had changed. With no alteration in the *status quo* they were left with the standard arguments with which they had always sought to vindicate the civil liberties of their clients. Given these backtrackings the larger question identified previously arises: absent a charter of rights, are the principles and presumptions available under the constitutional,[15] statutory and common law adequate to protect an individual's human rights?

III The Influence of International Law

Central to any discussion about whether a charter of rights could have affected outcomes of particular cases is the issue: what standards, derived either from Australian constitutional law or international human rights instruments, should provide benchmarks for judicial guidance in determining contentious cases? For general purposes, as mentioned above, it is accepted that the *ICCPR* establishes principles that can appropriately apply in Australian municipal law. Touching Aboriginal or minority-group disadvantage the *Race Discrimination Convention* is most relevant. Where children are affected it is the *CROC.*

IV Catalogue of Cases

The cases to be discussed are arranged in the following categories:

A Cases concerning Aboriginal disadvantage;
B Protection of democratic human rights;

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12 See Jim McGinty, 'A Human Rights Act for Australia' (2010) 12 *University of Notre Dame Australia Law Review* 1.

13 *A WA Human Rights Act*: *Report of the Consultation Committee for a Proposed WA Human Rights Act* (Government of Western Australia, November 2007).

14 The Parliament of Australia: *Bill of Rights Guide* states that, regarding Western Australia: 'When releasing the report the WA Attorney General Jim McGinty stated that he preferred a national rather than a State law.' <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Browse_by_Topic/law/billofrights>.

15 This includes the *Commonwealth Constitution* and the *Constitution Act 1889* (WA).

specifically,

1) freedom to protest and hold demonstrations under statutory restriction, including about environmental issues;
2) freedom of political communication under the State and Commonwealth Constitution;
3) the right to vote;
4) the right *not* to vote;
5) the right to participate equally in State elections

C Quasi-constitutional arguments directed to upholding the rule of law; and

D Constitutional protection of the Supreme Court.

The cases in this survey cover a spectrum commencing in the late 1970s. At that time there was an ensemble of lawyers prepared to take on controversial and often unpopular human rights cases. They included Toohey QC, McCusker QC, Olney QC, Temby QC, Seaman QC, Robert French, Graham McDonald, Steven Churches, Steven Walker, Peter Dowding and Phil Vincent.[16] In latter days it has comprised, among others, McIntyre SC, Barker QC, Donaldson SC, Howard SC, Archer SC, John Cameron, Robert Lindsay, Hannes Schoombie, Richard Hooker, James Edelman, Karen Farley and Kathleen Foley. Collectively, they represent the profession's long-standing tradition of service *pro bono publico*.

On a practical note a significant impetus, historically, to pursuing equality of aborigines before the law, was the establishment of the Aboriginal Legal Service ('ALS') in 1974.[17]

A *Attempting to Redress Aboriginal Disadvantage and Discrimination*

It is appropriate that this survey should begin with litigation directed to ameliorating the legal suppression of Aboriginal inhabitants of Western Australia. Collectively they have comprised the most disadvantaged

16 This survey does not consider challenges of the normal evidentiary objections such as those undertaken by McCusker QC in *Mickelberg v R* (1989) 167 CLR 259 and *Mallard v R* (2005) 224 CLR 125, although, notably, in the latter Kirby J at 154-155 referred to international fair trial standards.

17 The ALS was the initiative of the New Era Aboriginal Fellowship in 1973-74. Prominent in its foundation were Ron Wilson, Robert French, Fred Chaney, George Winterton, Peter Dowding and Graham McDonald. Regarding its establishment see Fiona Skyring, *Justice: A History of the Aboriginal Legal Service of WA* (UWA Publishing, 2011). It made an immediate mark with the appointment of Toohey QC to its Port Hedland office.

segment of the community.[18] Ironically, much of this disadvantage flowed from paternalistic policies towards aborigines enshrined in legislation that 19th and early 20th century Western Australian governments considered to be 'for their own good'.[19]

The principal statute was the *Aborigines Protection Act 1886* (WA) which established the Aboriginal Protection Board with responsibility for Aboriginal welfare. This Act was superseded by the *Aborigines Act 1897* (WA). It provided for the appointment of a Chief Protector with prime responsibility for administering the regime controlling aborigines. The *Aborigines Act 1905* (WA), ironically described as a law for the 'better protection and care' of aborigines, empowered the Governor to declare areas of the State to be prohibited to Aboriginal people and to allow the Chief Protector, as guardian of Aboriginal and 'half-caste' children, to remove them from their families and place them with institutions. It also permitted the removal of Aboriginal people to special reserves, preventing their contact with the white community.[20] Even the benign-sounding *Native (Citizenship Rights) Act 1944* (WA) which permitted Aboriginal people to apply for citizenship was conditional on their relinquishment of family connections.[21]

The *Native Welfare Act 1954* (WA) ameliorated some of the most pernicious discriminatory features of the previous regime but still permitted the removal of children from their parents. Similarly, although the *Electoral Act Amendment Act 1954* (WA) allowed some Aboriginal people to vote it required applicants to renounce their native

18 See Peter Biskup, *Not Slaves, Not Citizens: The Aboriginal Problem in Western Australia 1898-1954* (University of Queensland Press, 1973); Geoffrey Bolton, 'Black and White after 1897' in CT Stannage (ed) *A New History of Western Australia* (UWA Press, 1981) 125.

19 See Sharon Delmege, 'A Trans-Generational Effect of the Aborigines Act 1905 (WA): The Making of the Fringedwellers in the South-West of Western Australia' [2005] 12 *Murdoch University Electronic Journal of Law* 6 < http://www.murdoch.edu.au/elaw/Issues/v12n1_2/Delmege12_1.html>.

20 The deleterious impacts of the Act were particularly evident during the tenure of AO Neville as Chief Protector 1915-1940.

21 Here citizenship should not be equated with the internationally accepted concepts of either 'British Subject' or 'Australian National', subject matters that were within the purview of the Imperial and Commonwealth governments. Citizenship instead related to a bundle of rights and privileges, such as the right to vote in state elections, move freely around the State and own property which were essentially topics within state jurisdiction. Under s 7(a) a citizenship certificate conferring access to such rights could be cancelled if the holder did not adopt 'the manner and habits of civilized life'.

connections.[22] In light of such adversity it was not surprising that courts were seen in the last quarter of the 20th century as a source for generating human rights.

As a reference point for comparison, the principal international treaty dealing with matters of race is the *Race Discrimination Convention* which relevantly entered into force in Australia on 30 October 1975. Article 1 defines 'racial discrimination' in terms of restrictions or preferences based on race, colour, national or ethnic origin which are designed or have the effect of impairing the enjoyment or exercise of any human right or fundamental freedom on the same footing as other persons. As a party, Australia is obliged to take measures, including legislative, to prevent such discrimination. The Commonwealth enacted the *Racial Discrimination Act 1975* pursuant to that obligation. Its main provisions are s 9 which declares racial discrimination in Australia to be unlawful and s 10 which provides that members of racial or ethnic groups shall enjoy the right to equality before the law in matters such as owning property, accommodation, education and employment. The Convention therefore forms part of Australian domestic law. A state law transgressing the Act is taken to be invalid by virtue of s 109 of the *Commonwealth Constitution*.

1 *The Noonkanbah Cases: Resisting Government Imposition*

For illustrative purposes, two separate although interconnected suites of cases will be discussed. The first group challenged decisions made in 1979-1980 by the State government led by Sir Charles Court authorising exploratory drilling for oil at an Aboriginal sacred site, Pea Hill, on Noonkanbah station in the Kimberley. The second suite involves a constitutional claim under s 70 of the *Constitution Act 1889* (WA) ('CA') which appropriated 1% of annual state revenues for the welfare of Aboriginal inhabitants of Western Australia. The common link between the two contentious matters was that members of the Aboriginal community at Noonkanbah were stiffened in their resistance to government action detrimentally affecting them because of an enduring belief that aborigines had been unlawfully deprived of the 1% appropriation by s 70's repeal in 1905.

22 From the mid-1950s this adverse legislative trend was redirected towards a more beneficial administration of Aboriginal affairs. The *Electoral Act Amendment Act 1954* (WA) enabled Aboriginal people to vote, the *Aboriginal Affairs Planning Authority Act 1972* (WA) replaced previously restrictive native welfare legislation while the *Aboriginal Heritage Act 1972* (WA) provided some protection for Aboriginal sacred sites, although subject ultimately to governmental discretion.

(a) Noonkanbah: The Struggle to Protect Aboriginal Land

In 2007 the Federal Court handed down its determination in *Cox on behalf of the Yungngora People v Western Australia*.[23] As featured on television Justice French (as he then was) stood in a marquee adjacent to the Fitzroy River and handed a copy of his judgment to an Aboriginal elder, Dickey Cox. This granted native title to the Yungngora People residing on the property. It was appropriate that Dickey Cox should represent his community. Two decades before he was one of the defendants who had sat down on a road into Noonkanbah station in 1980 to obstruct the passage of trucks carrying drilling equipment to Pea Hill to explore for oil. Pea Hill was held by the Aboriginal community to be a particularly important religious site and to drill into it was especially insensitive and offensive to them.[24]

In the preceding year members of the Yungngora community took two public law actions to stop the drilling. Although the oil company was equivocal about the project the State Government required it to go ahead. A report prepared by the trustees of the Western Australian Museum under the *Aboriginal Heritage Act 1972* (WA) recommended against drilling. Notwithstanding, the relevant Minister directed the Trustees not to oppose it. He then purported to give the requisite consent under the Act himself.

On examining the relevant authorisation it became evident that, amazingly, the Minister had consented to drilling in the wrong location. Ian Temby QC argued in the Supreme Court that drilling on the Pea Hill site was therefore unlawful. In *Noonkanbah Pastoral Co Pty Ltd v Amax Iron Ore Corporation*[25] the Aboriginal corporation leasing the station was initially granted an interim injunction preventing Amax entering the property. When the matter came on for full hearing the Government produced a new consent to the drilling, this time on the correct site. Brinsden J then dismissed the application. The action was not without its beneficial effects. In the time taken to hear the matter the wet season had begun and the dirt tracks in the Kimberley on which the heavy convoy had to proceed became impassable.[26]

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23 [2007] FCA 588.

24 For a general overview of the Noonkanbah disputes see Quentin Beresford, *Rob Riley: An Aboriginal Leader's Quest for Justice* (Aboriginal Studies Press, 2006) 106-118.

25 (Unreported, Supreme Court of Western Australia, Brisden J, 21 and 27 June 1979).

26 These events are recounted in Steven Hawke and Michael Gallagher, *Noonkanbah: Whose Land, Whose Law,* (Fremantle Arts Centre Press, 1989); Beresford, above n 24, 104-107, and David Ritter, 'The Fulcrum of Noonkanbah', The Australian Public Intellectual Network, 8 April 2013.

Inevitably, arrangements were made the following year to undertake the drilling operation. The community again sought and initially was granted an injunction to prevent the drilling.[27] The plaintiffs' key submission was that the decision under the *Aboriginal Heritage Act 1972* (WA) consenting to drilling entailed racial discrimination contrary to the *Racial Discrimination Act 1975* (Cth) ('*RDA*'); consequently under s 109 of the *Commonwealth Constitution* the *RDA* overrode the State law authorising drilling. This was a somewhat adventurous proposition when it is remembered that it was advanced two years before a similar proposition was upheld in *Koowarta v Bjelke-Petersen.*[28] It also anticipated by nearly 10 years the decision in *Mabo v Queensland (No 2)*[29] that s 10 of the *RDA*, in guaranteeing equality before the law of Aboriginal landholders with other landholders, giving effect to article 5(d)(v) of the *Race Discrimination Convention*, did override and invalidate inconsistent state laws.[30]

Given the relative novelty of the argument at the time, it is perhaps not surprising that Wallace J elected to dissolve the interlocutory injunction.[31] He did this on the balance of convenience which, as he saw it, weighed in favour of not impeding the very expensive drilling program. What this demonstrates is not that recourse to the relevant international standard was legally untenable; rather, that the judicial culture of the time was not conducive to accepting it. It therefore exemplifies the problems of inter-temporal interpretive methodology.

Unrestrained by an injunction, the convoy then proceeded on the long journey to the Kimberley. Sporadic attempts by unionists and others to block its progress were thwarted by an extensive police escort. As it approached the pastoral lease, 20 Aboriginal men, after prolonged community deliberation, sat down in a group on the road into the station. With their consent, several white clergymen joined them. When the protesters refused to obey an instruction from a police inspector to leave they were forcibly dragged off the road, arrested and charged with various offences. The main one was obstructing traffic on a public road contrary to the *Road Traffic Act 1974* (WA). All this was recorded by television crews in attendance.[32]

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27 I appeared for the community.

28 (1982) 153 CLR 168.

29 (1992) 175 CLR 1.

30 Article 5(d)(v) protects the civil right of everyone, without distinction based on race, to enjoy the right to hold property alone or in association with others.

31 *Yungngora Association Inc v Amax Iron Ore Corporation* (Unreported, Supreme Court of Western Australia, Wallace J, 7 March 1980).

32 Films portraying the protest include *Dirty Business, How Mining Made Australia* (SBS documentary, January 2013); *On Sacred Ground* (Film Australia, 1980).

The trial took place in the Fitzroy Crossing Court of Petty Sessions. The presiding magistrate was a well-known Kimberley identity named, perhaps ironically, Dr John Howard. Phillip Vincent was briefed by the ALS to appear for the Aboriginal defendants and I represented the clergy. The police prosecutor then proceeded to prove the Crown case. This consisted of evidence from police officers concerning the defendants' refusal to remove themselves from the road when directed. A copy of the *Government Gazette*[33] was produced to prove that a designated track on the station had been proclaimed by the Governor as a 'public road'. No further evidence was given about the public status of the track.

At the end of the police case I turned to Phillip Vincent and said: 'Phil they've blown it. They haven't produced a surveyor to connect the map with the bush track. We should make an immediate no case submission.' Phillip, in his wisdom, gave me an important lesson about understanding what one's clients, especially aborigines, seek. He said: 'All my defendants want their day in court. They want to explain what they did and why. Even if sentenced to jail they must tell the pollies and the public their stories.'

So for a further day and a half in the hot Kimberly monsoon each of the Aboriginal defendants took their turn to tell, in moving terms, their stories. After this, defence counsel took the point about the non-correspondence of the police evidence and the track's gazettal. The Magistrate upheld this objection. He dismissed the charges but nevertheless took the opportunity to tell the defendants they had only got off on a technicality and really had done 'a very bad thing'.

Several points can be drawn from these cases. First, constitutional arguments were starting to emerge as collateral means of challenging government executive action arguably infringing human rights. Resort to the Commonwealth's *RDA* was later to become a prominent feature of litigation engaging aborigines throughout Australia.[34]

Secondly, although unsuccessful the second attempt to secure an injunction against the mining operation was an early precursor of the

33 No 40, 10 June 1980.

34 Most notably in *Mabo v Queensland (No 2)* 1992 175 CLR 1; *Viskauskas v Niland* (1983) 153 CLR 280; *Western Australia v The Commonwealth* (*Native Title Act Case*) (1995) 183 CLR 373. While greater international recognition of the rights of indigenous people to maintain their dignity and transmit their religious and traditional culture is now afforded by articles 13-15 of the *UN Declaration on the Rights of Indigenous Peoples 2007* no Australian legislation purports to give direct effect to that Declaration.

way in which international law treaties could be invoked. The chances of such arguments succeeding were then fairly remote, although not unarguable. Yet while human rights principles were less well received in 1970, later cases have increasingly demonstrated that with an 'internationalisation' of domestic common and statutory law their rights-based arguments are more sympathetically regarded.[35] If full effect had been given to s 10 of the *RDA* (arguably a 'mini-Bill of Rights') it would have ensured a different result in the road-train injunction case.

International law, however, played no part in the road-obstruction case where the defendants prevailed using a classic criminal law defence. Possibly, as discussed below, an interpretive argument could have been mounted on the right to freedom of political expression guaranteed in article 19(2) of the *ICCPR* but it is likely that a court then, and probably even now, would reject a defence to a charge of obstructing a public road on the basis that it would be a *disproportionate mode* of expressing opposition to government-authorised action. This is so even if legal force had been given to article 19 by a bill of rights.[36]

Thirdly, it is always important to see things from the client's point of view; to be aware of the personal and political aspects of the case, not viewing it in purely legal terms. Finally, in the long-term, contentious issues such as those involved in the Noonkanbah saga can only be settled satisfactorily by political solutions, as occurred 27 years later with the 2007 Federal Court native title decision.

2 *The 1% of Revenue Issue*

As mentioned above, the Noonkanbah dispute fused with another long-running issue agitating Western Australian aborigines, the repeal of s 70 of the *CA* appropriating one percent ('1%') of State revenue for their welfare. It was included in the *CA* at the paternalistic insistence of imperial authorities at Westminster concerned about the plight of the colony's indigenous people. This was, however, very much against

35 This process entails both the statutory adoption of human rights norms and requirements to exercise administrative discretions consistently with them: see James Crawford, 'International Law in the House of Lords and the High Court of Australia 1996-2008: A Comparison' (2009) 28 *Australian Yearbook of International Law* 1; Michael Kirby, 'Domestic Implementation of International Human Rights Norms' (1999) 5 *Australian Journal of Human Rights* 109. A major impetus to applying treaties has been claims to refugee status under the *Migration Act 1958* (Cth) incorporating the *Convention Relating to the Status of Refugees 1951*.

36 In that regard see *Levy v Victoria* ('*Duck Shooting Case*') (1997) 189 CLR 540 where the High Court held that freedom of political expression was subject to proportionate limitations under Victorian law designed to protect human safety.

the wishes of the colonial government, led by Sir John Forrest. They saw it as a slur on their integrity in dealing with Aboriginal affairs. As soon as was politically feasible, the State Parliament, with the approval of the British Government, repealed the provision in 1905.[37] Naturally, the native inhabitants for whose benefit it had been included in the *Constitution* were not consulted.

Nevertheless, its repeal continued in a subterranean way to rankle with Aboriginal groups throughout WA. It surfaced in the 1940s in a strike by Aboriginal workers in the Pilbara bringing it to the notice of a remarkable 'white-fella', Don McLeod, who spent most of his life in Aboriginal communities.[38] He espoused the issue of the constitutional validity of the repeal and made a number of representations to State governments. He contended that the repeal had not taken place in accordance with various restrictive law-making procedures applying to WA under 19th century Imperial legislation.

In 1980, McLeod took part in a ceremony at Noonkanbah station in which a proclamation was read purporting to constitute repossession by the Aboriginal inhabitants of their title to the area. It cited the failure of successive State governments to honour their obligations under s 70 to pay the statutory 1%. This claim was peremptorily dismissed as racist by the then State Premier, Sir Charles Court.[39] The Aboriginal grievance over s 70 also arose several years later in evidence given in the Aboriginal Land Inquiry conducted by the late Paul Seaman QC.[40]

McLeod persisted in his contention that s 70 had been invalidly repealed. Encouraged by an article I wrote[41] he instructed Dr Steven Churches to challenge its repeal in the Supreme Court.[42] The central objection was that due to a complex combination of provisions dating back to the *Australian Constitutions Act 1842* (Imperial), made applicable to Western Australia by s 5 of the *Western Australia Constitution Act 1890* (Imp), s 70 could only be repealed if a copy of the repeal Bill was reserved by the Governor and laid before both Houses of the Westminster

37 This was achieved by the *Aborigines Act 1905* (WA).

38 Don McLeod, *How the West was Lost: The Native Question in the Development of Western Australia* (D McLeod, 1984).

39 See Steven Hawke and Michael Gallagher, above n 26.

40 Paul Seaman QC, *The Aboriginal Land Enquiry* (WA Government Printer, 1984).

41 Peter Johnston, 'The Repeals of Section 70 of the Western Australian Constitution Act 1889: Aborigines and Governmental Breach of Trust' (1989) 19 *University of Western Australia Law Review* 318.

42 For background see Steven Churches, 'WA's Section 70 - Imperial Promises, Colonial Breaches' (1995) 3(74) *Aboriginal Law Bulletin* 8.

Parliament. This had not been done regarding the *Aborigines Act 1905*. Hence it was of no legal effect. As a corollary, the State Government's obligation to appropriate the 1% continued to operate.

The case went to the High Court on two occasions[43] after a protracted battle in the Supreme Court where the State raised many procedural objections. These included the plaintiffs' lack of standing, their failure in 1905 to give three months' notice under the *Crown Suits Act 1947* (WA) of their intention to sue the State, and non-compliance with limitation periods.[44] The plaintiffs responded by raising various arguments, including that the *Crown Suits Act* did not apply to constitutional matters in federal jurisdiction,[45] and that the *Australia Act 1986* (WA) was invalid. The Supreme Court did not accept these arguments. When the High Court finally came to hear the matter in 2001 it held, in *Yougarla v Western Australia*[46] that the procedural restrictions regarding the repeal of s 70 in obscure and distant-in-time Imperial statutes had ceased to apply to the Colonial Legislature by the end of the 19th century.[47]

Much was made at the time in Western Australian newspapers that if the suit was successful it would present an economic catastrophe requiring the payment of almost $1 billion to WA aborigines. This was a widely-held misunderstanding of the plaintiffs' case. They had instructed their legal representatives to abandon any financial claim. They only wanted a declaration giving curial recognition to an unconstitutional breach of trust by Imperial and colonial white politicians. Ironically, it was the abandonment of the financial claim that had led the State Full Court to hold that the plaintiffs lacked standing because they had no financial interest in the outcome.[48]

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43 The first was *Judamia v State of Western Australia <http://www.austlii.edu.au/au/other/hca/transcripts/1996/P40/1.html>*.

44 The State's reliance on technical defences such as standing, justiciability and limitations is discussed in Peter Johnston, 'Pape's Case: What does it say about Standing as an Attribute of "Access to Justice"?' (2010) 22 *Bond Law Review* 2.

45 In *British-American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30 the High Court upheld virtually the same argument presented for the Aboriginal plaintiffs.

46 (2001) 207 CLR 344, summarised in Stephen Gageler, 'The High Court on Constitutional Law: The 2001 Term' (2002) 25 *University of New South Wales Law Review* 194.

47 See Peter Johnston, 'Waiting for the Other Shoe to Fall: The Unresolved Issues in *Yougarla v Western* Australia' <http://www.gtcentre.unsw.edu.au/publications/papers/87.asp>.

48 *Yougarla v Western Australia* (1998) 146 FLR 128 (Murray J); (1999) 21 WAR 488 (Full Court).

Because the case concerned a general grant of revenue to be used beneficially for aborigines as a whole it did not engage in any specific human rights, such as rights to property, education and the like, although they were implicit in the purpose of s 70 as directed to the maintenance of the Aboriginal inheritance of the colony. Further, even accepting that the *ICCPR* is predicated on the recognition of the *inherent dignity* of the human person,[49] it would have been anachronistic to have attempted invoking that international instrument as conditioning the operation of the relevant restrictive legislative procedures in the *Constitution Act.*[50] Hence recourse to a bill of rights could not have been productively used to bolster an argument that strict observance of the constitutional restrictions would have served to promote the rights of indigenous peoples to compensation for the wrongs they have suffered.[51] The action may have highlighted a racially-based breach of political trust but was insusceptible of providing a legal remedy.

A broader moral can be drawn from this episode. Arguments may be strictly logical but are less likely to succeed if one is relying on archaic colonial and imperial legislation. They are subject to the march of time and the world of *realpolitik*. In retrospect, it was perhaps too much to expect a court to uphold constitutional limitations imposed in the different context of the 19th century as binding the State Parliament a century later.[52] *Yougarla* exemplifies the point made by the late constitutional sage, Geoffrey Sawer that students of logic may have occasion to criticise High Court determinations but one should always allow for a degree of pragmatism in the outcomes.[53]

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49 See the Preamble to the Covenant.

50 In *Kruger v Commonwealth* (*Stolen Generations Case*) (1997) 190 CLR 1 the High Court majority proceeded on the basis that although based on false premises about the need for Aboriginal children to be separated from their families, the legislation should be read in the inter-temporal context of its enactment.

51 On the other hand, any submission that s 70 was itself an exercise of racial discrimination favouring aborigines over other inhabitants of the State could have been met, for contemporary purposes, with the argument that the appropriation of 1% represented a 'special measure' that is consistent with the *Race Discrimination Convention*: see *Gerhardy v Brown* (1985) 159 CLR 70 and now *Maloney v The Queen* [2013] HCA 28.

52 In *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 the High Court applied an absolute majority provision originating in the 19th century. Whether *Marquet* is consistent with other decisions is noted below, n 107.

53 *Yougarla v Western Australi*a (2001) 207 CLR 344; Geoffrey Sawyer, *Australian Federalism in the Courts* (Melbourne University Press, 1967) 164. Regarding the dangers of extended logic, see *Assistant Commissioner Condon v Pompano Pty Ltd* [2013] HCA 7; (2013) 295 ALR 638, 677 [137] (Hayne, Crennan, Kiefel and Bell JJ).

3 *The Swan Brewery Cases*

Litigation concerning the Government's decision to permit commercial development of the Swan Brewery also provoked a struggle to achieve recognition of an iconic site of great significance in Aboriginal heritage. Protection of the site was pursued through the statutory scheme under the *Aboriginal Heritage Act 1972* (WA). The site was accepted as a Dreaming Site associated with the presence of a mythic figure, the Waugal. The relevant Minister gave permission to the Western Australian Development Corporation, a statutory body, to proceed with the development. Robert Bropho, a prominent Aboriginal figure sought an injunction to prevent development on the basis that consent had not been given by the Western Australian Museum Trustees as required under the *Aboriginal Heritage Act 1972* (WA).

The Government's response was that the Act did not apply to statutory authorities that enjoyed the immunities of the Crown. That contention was upheld in the Supreme Court at first instance and on appeal; however, the High Court upheld Mr Bropho's submission that the Act *did apply* to land occupied by the State.[54] Adopting a flexible approach to statutory construction, the Court held that the general protective purpose of the legislation would be frustrated if Crown lands, comprising 93% of the State, were exempt from the operation of the Act.[55]

This beneficial approach to construction represented a shift to a more contemporaneous appreciation of societal values in contradistinction to the Supreme Court's adoption of a strict interpretation of Crown immunity more in tune with the colonial times. The decision reflected an emerging trend in common law methodology of reading statutory provisions in a way that is least likely to abrogate fundamental human rights unless a contrary intent is manifested clearly in unambiguous language. Described as 'the principle of legality' it has increasingly become a feature of the French Court's constitutional adjudication.[56] It has been extensively discussed most recently in *Lee v New South Wales Crime Commission*[57] where the Court, while recognising its force particularly when allied with other 'fundamental' common law protections such as the presumption of innocence, acknowledged that as a presumption it has no absolute

54 Dr Churches was counsel for Bropho.
55 *Bropho v Western Australia* (1990) 171 CLR 1.
56 See above n 4.
57 [2013] HCA 39.

force in preventing abrogation of common law rights.[58] It can be overcome by explicit and clear abrogation. The principle is also now well-entrenched in statutory construction by state Supreme Courts.[59]

The beneficial presumption applied in *Bropho v Western Australia* sufficed to mitigate an over-inclusive operation of the State's immunity from the application of the *Aboriginal Heritage Act 1972* (WA). Recourse to similar arguments such as that the Act should be read to avoid any discriminatory disadvantage to Aboriginal identity was unnecessary and not attempted. It is questionable whether at the time it was decided in 1990 even the High Court would have been prepared to construe the state Act otherwise than in its express terms. However, had a state bill of rights been available the relevant courts would have had to have regard to international norms. How they would have specifically reacted to a legislative direction to interpret state laws in accordance with international norms must, however, remain conjectural.

Ironically, Bropho's triumph in the end came to naught. The relevant Minister, Carmen Lawrence, rejected the recommendation of the Trustees to preserve the Aboriginal values of the site, deciding instead that the Brewery building should be developed to preserve its 'national heritage assets'. Initially, Bropho succeeded before a single Supreme Court judge in obtaining an injunction against implementing the Minister's determination.[60] This was on the basis that it had not been made according to procedural fairness. That decision was overturned on appeal.[61] The Full Court ruled that the plaintiff *lacked standing* to challenge the Minister's decision as he *only* had *a spiritual interest* of an emotional or intellectual kind and was not directly affected himself. He had no special interest requiring protection.[62] The outcome is again consistent with the narrow approach taken to public interest cases by the Supreme Court at that time.[63] Reconceived in contemporary terms, however, it may reasonably be contended that the special Aboriginal

58 As held in *Lee v New South Wales Crime Commission* [2013] HCA 39, statutory language may leave open only an interpretation or interpretations which infringe one or more rights or freedoms: [29], [45], [56] (French CJ); [126] (Crennan J); [171], [220]-[222] (Kiefel J); [307]-[311], [317] (Gageler and Keane JJ). Significantly, Gageler and Keane JJ see a close parallel between the principle of legality and the interpretive approach of the Court in *Bropho v Western Australia* (1990) 171 CLR 1.

59 For example, *DPP (Western Australia) v White* [2009] WASC 62, [50] (Jenkins J).

60 *Bropho v Western Australia* (Rowland J) (1990) 21 ALD 730, 735.

61 *Western Australia v Bropho* (1991) 5 WAR 75, applying *Onus v Alcoa* (1981) 149 CLR 27.

62 See Steven Churches, 'Aboriginal Heritage in the Wild West - Robert Bropho and the Swan Brewery Site' (1992) 1(56) *Aboriginal Law Bulletin* 9.

63 See Johnston, above n 41.

relationship with land if recognised in a bill of rights could provide the basis for an enlarged concept of standing that extends beyond purely financial and economic considerations.

B *Protection of Democratic Human Rights*

This section examines cases involving a fundamental right[64] that lies at the heart of the democratic enterprise, the right to express political views departing from orthodox and popular dogma. For society to change this is a necessary condition for adapting legislative structures to accommodate emerging societal changes.

The relevant benchmark provisions of the *ICCPR* are articles 18, 19, 21 and 22. Article 18 ensures that everyone has the right to freedom of thought, conscience and religion, including the freedom to manifest one's belief free from coercion. Article 19 guarantees the right to hold opinions without interference, and freedom of expression including receiving and imparting information and ideas of all kinds. Articles 21 and 22 recognise the right of peaceful assembly and freedom of association, including joining trade unions. These freedoms are not absolute and may be subject to necessary limitations prescribed by law in the interests of national security or to protect public safety, order, health, morals or the fundamental rights and freedoms of others.

1 *Freedom to Protest (including about Environmental Issues)*

Section 54B *Police Act 1892* (WA) represents the most notorious attempt to suppress freedom of political discussion in Western Australia. It was introduced in the 1970s by the government led by Sir Charles Court.[65] Essentially, it required anyone who proposed holding a meeting of more than three people in a public place to discuss a matter of public interest to obtain a permit from the Commissioner of Police at least seven days before the meeting. Requiring executive approval so long before a meeting had a major inhibitive effect on political demonstrations. Literally construed it could have applied to Sunday

64 The concept of 'fundamental' is logically contentious. It assumes that particular irreducible norms apply to restrict the constitutional operations of government within legal constraints, and that those norms do not depend on statute for their existence; see Sir John Laws 'Is the High Court the Guardian of Fundamental Constitutional Rights?' (1992) 18 *Commonwealth Law Bulletin* 1385. Whether a particular right falls within the category of 'fundamental' is debatable. The core group including freedom of speech may be assumed nevertheless to have a wide degree of universality.

65 By the *Police Act Amendment Act 1976* (WA).

church services. The provision was introduced soon after opposition to the Vietnam War reached its peak. Its enactment provoked considerable public opposition. Ironically, many 'illegal' public meetings were held to protest it. Many protesters when charged pleaded not guilty. A group of lawyers soon formed to provide *pro bono* services, presenting various innovative arguments challenging these prosecutions.

(a) Using International Norms to Construe Domestic Laws

When a Uniting Church minister was charged in the Roebourne Court of Petty Sessions with addressing a public meeting without obtaining a permit, the *Roebourne Protest case*[66] I submitted that s 54B *Police Act 1892* (WA) should be interpreted in the light of article 19 of the *ICCPR*. As indicated above article 19 guarantees freedom to express political views subject to permissible restrictions. The defendant contended that police officers when deciding to intervene in political meetings should only give directions to disperse a crowd if there was some *threat* to *public safety*.

Arguments that discretionary powers under *Commonwealth* legislation should be interpreted according to international standards were later accepted by the High Court. In the mid-1990s, Dr Churches pioneered an argument that Commonwealth decision-makers when making deportation decisions under the *Migration Act 1958* (Cth) should reasonably be expected to take into account the consequences for the deportee's children. This expectation was founded on the fact that Australia had become party to the *CROC*. A majority of the Court upheld that argument.[67]

That Commonwealth Acts should be read in the light of relevant international treaties has considerable strength when dealing with Commonwealth laws. In the *Roebourne Protest case*, the argument was

66 *Colin De La Rue and s 54B of the Police Act* (Unreported, Roebourne Police Court Prosecution, May 1980). I represented the defendant.

67 In *Minister of State for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273, [26] (Mason CJ and Deane J) stated that where a statute is ambiguous courts should favour the construction which accords with Australia's international obligations, at least in cases in which legislation is enacted following ratification of the relevant instrument. See Wendy Lacey, 'Judicial Discretion and Human Rights: Expanding the Role of International Law in the Domestic Sphere' (2004) 5 *Melbourne Journal of International Law* 108 and Simon McKenzie, 'Implementing Human Rights Norms: Judicial Discretion and the Use of Unincorporated Conventions' (2009) 28 *University of Tasmania Law Review* 139.

stretched to encompass laws made by the State Parliament. Was that a bridge too far?[68]

The status of international instruments under state laws has eluded definitive treatment. In *Collins v South Australia*[69] Millhouse J was prepared to accept that Article 10 of the *ICCPR* requiring prisoners to be treated with humanity and dignity shaped the way state prison regulations should be administered. However, his decision was predicated on the fact that the *ICCPR* had been enacted as Commonwealth law as a schedule to the *Human Rights and Equal Opportunity Commission Act 1987* (Cth) a proposition that is otherwise rejected.[70] Kirby J in *Coleman v Power*[71] was more favourably disposed towards *reading* a Queensland vagrancy law *in the light of the freedom of expression* under article 19 of the *ICCPR* but his view is discordant with that of Gleeson CJ,[72] who failed to see how a 1931 state Act could be read in the light of a Covenant that was not ratified by Australia until 1980. The Chief Justice makes a strong objection, but does not exclude the possibility that state laws enacted after the *ICCPR* are open to interpretation according to its standards.[73]

The magistrate hearing the Roebourne charge appeared disconcerted by the nature of this plea. He was in unfamiliar territory with international law principles advanced as part of the defence. Without ruling on the legal submissions he readily upheld a second, evidentiary submission that having regard to the noise at the meeting, the prosecution had not

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68 In *Ribot-Cabrera v The Queen* [2004] WASCA 101 it was accepted that treaty obligations may be relevant considerations which can, but do not have to be taken into account in exercising a statutory discretion. In *Wilson v Francis, Minister for Corrective Services* [2013] WASC 157, [122]-[125] Martin CJ, applying *Minister of State for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273, distinguished between using international instruments in *interpreting* an ambiguous domestic law and holding the law *invalid* by reason of inconsistency with human rights norms.

69 [1999] SASC 257; 2009) 74 SASR 200.

70 *Dietrich v R* (1992) 177 CLR 292, 304-306, [17]-[18] (Mason CJ and McHugh J); *Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri* (2003) 126 FCR 54, 89-92, [140 (Black CJ, Sundberg and Weinberg JJ); *Minogue v Human Rights & Equal Opportunity Commission* (1999) 84 FCR 438, [36] (Sackville, North and Kenny JJ).

71 (2004) 220 CLR 1, 71-74, [240]-[244] (Kirby J).

72 *Coleman v Power* (2004) 220 CLR 1, 7-10 [17]-[24] (Gleeson CJ); see similarly *Western Australia v Ward* (2002) 213 CLR 1, [954]-[963] (Callinan J).

73 For support that these principles of statutory interpretation apply to state legislation see *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 384 (Gummow and Hayne JJ); *Cornwell v The Queen* (2007) 231 CLR 260; *H v The Queen* (2002) 26 WAR 19, [17] (Malcolm CJ) and *Wilson v Francis, Minister for Corrective Services* [2013] WASC 157, [124] (Martin CJ).

established beyond reasonable doubt that the reverend gentleman had heard the Police Inspector's direction to desist from addressing the meeting. Accordingly, the magistrate found him not guilty, avoiding any legal conundrums regarding the *ICCPR*.[74]

(b) Invoking Constitutional Defences in Protest Cases

On another occasion the late Robert Riley, a much respected leader of the Aboriginal community was charged with contravening s 54B *Police Act 1892* (WA) by addressing an unlawful meeting from the steps of the General Post Office ('GPO') in Forrest Place.[75] At that time it was a much used venue for public discussion. The defendant submitted at first instance and on appeal that the location on the steps of the GPO was property of a Commonwealth Department that had been *transferred* from the colony of Western Australia at Federation. It was therefore, by virtue of s 52(ii) of the *Commonwealth Constitution*, an area in which Commonwealth law applied to the exclusion of State law. Accordingly, the *Police Act 1892* (WA) could not be enforced on that property.[76] Secondly, it was submitted that any disturbance within the precincts of the GPO fell within the *Public Order (Protection of Persons and Property) Act 1971* (Cth) which 'covered the field' so that, by virtue of s 109 of the *Commonwealth Constitution*, the State provision was invalid.

The Supreme Court held in *Riley v Hall* that even if the speaking had occurred within the confines of such a Commonwealth area the sound waves had reached members of the public in Forrest Place and therefore the offence had been committed where the audience was located.[77]

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74 Even if a present-day court might read provisions like s 54B *Police Act 1892* (WA) more benignly in light of the *ICCPR* right to freedom of expression still present difficult interpretive issues: see *Momcilovic v The Queen* (2011) 245 CLR 1 and *Victorian Toll v Taha* [2013] VSCA 37. Similarly, *X v General Television Corporation Pty Ltd* [2008] VSC 344 (Vickery J) illustrates the need for courts to balance the right of free speech entrenched under s 15 of the Victorian Charter (which is not absolute) and the need to give effect to reasonably necessary lawful restrictions, such as the protection of others' reputation.

75 I represented the defendant with Graham McDonald, the Principal Legal Officer of the ALS.

76 This was a variation on the proposition that State laws do not apply in 'Commonwealth places' within the meaning of section 52(i) of the *Constitution*. The *Commonwealth Places (Application of Laws) Act 1970* (Cth) was enacted to overcome the vacuum effect of s 52(i) by applying the provisions of State laws in 'Commonwealth places' as if they were federal laws. To outflank that Act the defendant submitted that the GPO precincts were subject to paragraph (ii) of s 52 which makes the Commonwealth's legislative power over property of 'transferred departments' exclusive.

77 (Unreported, Supreme Court of Western Australia, 4 June 1981). See Beresford, above n 24, 95-96. See also Howard Smith, 'Section 54B And Civil Liberties Campaign' (1980) 5 *Legal Services Bulletin* 291.

Exclusive Commonwealth powers also featured in the defence of anti-nuclear demonstrators in 1984 who protested on a US Navy vessel visiting Fremantle pursuant to arrangements under the *ANZUS Treaty 1951* and the *Defence (Visiting Forces) Act 1963* (Cth). They were charged with hindering a police officer contrary to s 20 of the *Police Act 1892* (WA).The defendants submitted in the Fremantle Police Court that matters taking place on a foreign warship concerned Australia's defence and external affairs within the meaning of placita 51(vi) and (xxix) of the *Commonwealth Constitutio*n. As such, they were *exclusively* a Commonwealth concern[78] and could not be the subject of State laws.[79] The magistrate in *Fremantle Warship* rejected this argument.[80] He found in any event that the demonstration involved activities on the wharf which fell within the territorial jurisdiction of the State.

Another quasi-constitutional defence was advanced against charges arising from a political protest that took place within the precinct of the State Parliament. On 15 May 1997 trade unionists protesting against the introduction of controversial industrial legislation obstructed the entry into Parliament House of the President of the Legislative Council, Clive Griffiths. They were charged under s 55 of the *Criminal Code* with interfering with the free exercise by a member Parliament of his duties as a member.

A year before the President had been appointed as the Agent General in London under the *Agent General Act 1895* (WA). His commission, issued at the same time, specified that his appointment was to commence on 1 January 1997. When it became evident that the Government needed his vote to ensure that the controversial industrial legislation would pass the Legislative Council in the first half of 1997 his commission was 'cancelled' and a fresh commission issued for a four-year term commencing on 2 June 1997. The unionists took the point in the District Court that by reason of his original appointment, Mr Griffiths had ceased to be a member of the House by virtue of s 34(1)(a) of the *Constitution Acts Amendment Act 1899* (WA) (*CAAA*) which disqualified the holder of the office of Agent General from being a member of either House.

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78 Drawing on dicta in *New South Wales v The Commonwealth* (1975) 135 CLR 337 about the States lacking international personality.

79 *Reid v Hutchinson* (Unreported, Fremantle Police Court, January 1985) ('Fremantle Warship'). In *Zentai v Republic of Hungary* (2006) 153 FCR 104, 114, Siopis J avoided deciding a similar submission that state Magistrates could not perform Commonwealth extradition functions, holding magistrates were acting *personally* and *not as state officers*.

80 *Reid v Hutchinson* (Unreported, Fremantle Police Court, January 1985) ('Fremantle Warship').

At first instance the District Court ruled in favour of the unionists and directed the jury to acquit them. On appeal, in *R v Jones*[81] the acquittals were reversed, the Supreme Court holding the Governor had power to cancel the original appointments when he did. As a matter of statutory construction the prerogative power vested in him was held to be unaffected by the express provisions in the *Agent General Act* relating to appointment or removal from office.

This conclusion was reached having regard solely to the provisions of the Act without taking into account the *constitutional purpose* behind s 34 of the *CAAA*. That provision incorporated the principle, enshrined in the British Parliament from the late 17th century that members of Parliament should be able to discharge their parliamentary duties free from executive influence and temptation from the offer of appointments to 'offices of profit'. The Court inferentially confined the operation of s 34 to the period in which a member actually held an office rather than occasions when such an office was promised but could be withdrawn by executive decision should the government's interests not be served by the Member in the meantime.[82]

(c) Using Constitutional Defences to Protect the Environment

In ways similar to opposition to the Vietnam War and assertion of Aboriginal rights, environmental causes also engendered resistance to charges arising from demonstrations. In the late 1970s environmental issues moved to centre stage of political protest. Three organisations sought to publicise what they saw as deleterious government management of native forests in Western Australia. They were the South West Forests Defence Foundation which focused on legal action, the Campaign to Save Native Forests which tended towards political action, including demonstrations, and the Conservation Council of Western Australia which largely lobbied government for changes in environmental policy. Their activities spawned demonstrations calculated to bring to public notice the deficiencies of government forestry practices.[83] Again innovative constitutional arguments were advanced in the ensuing litigation.

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81 [1999] WASCA 194.

82 The purposive nature of disqualification provisions was considered in *Sykes v Cleary* (1992) 176 CLR 77 with respect to s 44(i) of the *Constitution*.

83 For a history of these movements see Ron Chapman, *Fighting for the Forests*: *A History of the Western Australian Forest Protest Movement 1895-2001* (PhD Thesis, Murdoch University, 2008).

A focal point for resistance was the establishment by Alcoa of Australia Ltd (Alcoa) of a bauxite refinery at Wagerup. This was done pursuant to the *Alumina Refinery (Wagerup) Agreement Act 1978* (WA) (*Wagerup Agreement Act*). That Act 'ratified' an agreement between the company and the State Government authorising the construction of the refinery. It imposed certain environmental obligations requiring the approval of the Government. On 18 October 1978, the Premier, Sir Charles Court, wrote to the company advising that its environmental management program 'was approved'. That advice opened the way for the company to commence construction. When this happened protestors largely drawn from the Campaign to Save Native Forests stood in the way of earthmoving equipment preventing further activity. They were prosecuted under s 67 of the *Police Act 1892* (WA). It makes it an offence to cause a person to abstain from carrying out an activity pursuant to a law of the State that the person was empowered to do 'by virtue of a licence, permit or authorisation' issued under that law. The defendants were charged that they had, without lawful authority, obstructed Alcoa from establishing the refinery pursuant to the *Wagerup Agreement Act*.

On the facts the prosecution could clearly establish obstruction. The defendants were convicted at first instance and appealed to the Supreme Court. In *Margetts v Campbell-Foulkes*[84] the defendants raised two legal objections why the prosecutions could not be sustained.[85] In the first place, it was submitted by their counsel, Robert French, that the activities of Alcoa were *not authorised* by *a 'law* of Western Australia'. This was because the *Wagerup Agreement Act* only 'ratified' an agreement without providing that it had 'the force of law'.[86] The second objection was that the Premier's letter did not constitute a 'licence permit or authorisation issued under the Act' empowering the company to proceed with construction. The Full Court found that it unnecessary to address the first objection, avoiding any constitutional issue that it entailed. It was sufficient to dispose of the appeal on the second ground. The Court ruled that the letter merely furnished advice of government approval and otherwise had no legal effect. It neither permitted nor authorised anything.[87]

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84 (Unreported, WASC, 29 November 1979, FC). I was co-counsel with Mr French.

85 See Peter Johnston and Robert French, 'Environmental Law in a Commonwealth State Context – The First Decade' (1980) 2 *Australian Mining and Petroleum Law Journal* 77; also Robert French, 'Pest or Protector – The Environmental Defence Lawyer in 2010' in *Impact,* (Environmental Defender's Office (NSW), 2010) Issue 89 '*Public Interest Environmental Law: Australia 25 Years On*', 3.

86 This argument relied on *Sankey v Whitlam* (1978) 142 CLR 1.

87 This article does not explore the use of collateral *civil actions*, such as *The Conservation Council of Western Australia v Aluminium Company of America*, 518 F Supp 270 (1981) and *Glorie v WA Chip and Pulp Co Pty Limited* (1981) 55 FLR 310 to raise public environmental consciousness. In the former the WA Conservation

(d) Reflection on Political Protest Cases

In contrast to the protest cases considered in the previous section, *Margetts v Campbell-Foulkes* indicates how a strict approach to statutory construction *could yield* a successful outcome in a case where the central constitutional issue did not need to be decided. *Riley v Hall*, *Fremantle Warship* and *R v Jones* on the other hand essentially sought to vindicate indirectly the right to freedoms of expression and assembly but without success. They demonstrate that conceptually difficult constitutional defences were at the time and probably still would be difficult to sustain. The prevailing canons of statutory interpretation were not conducive to arguments based on presumptions akin to the principle of legality, favouring strict construction of criminal provisions where civil liberties were engaged. On an inter-temporal analysis it is far from clear that a bill of rights would have produced a different outcome, given the judicial culture. Arguably it might have a more influential effect now.

Felicitously, the narrative concerning the much criticised s 54B *Police Act 1892* (WA) had a happy ending. Most s 54B charges resulted from meetings protesting against it. Because of the willingness of lawyers to represent defendants in case after case eventually the higher administration of the Police Force determined to put an end to it. Too much police time and effort were being used. The number of charges quickly declined. Section 54B quietly faded into desuetude. Eventually with the election of a Labor Government in 1983 it was repealed.[88]

2 *An Emerging Alternative: Constitutionally-Based Protection of Political Communication and Associated Freedoms*

Civil liberty lawyers were greatly encouraged when in 1992-1994 the High Court recognised that Commonwealth and State laws inhibiting freedom of political discussion could be invalid as being beyond

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Council brought an extraterritorial anti-trust claim under US law alleging damage resulting from Alcoa's activities in Western Australia. The US Court in which the action was brought held it had no jurisdiction. In *Glorie*, an action under s 52 of the *Trade Practices Act 1974* (Cth) was instituted claiming that an industry-promoted film supporting the use of cool-season burns and clear-felling as not causing lasting damage to forest ecology was deceptive and misleading. The claim was dismissed on the basis that the ecological effects were matters of evaluation on which opinions could differ. For commentary see Johnston and French above, n 85.

88 Repealed by the *Public Meetings and Processions Act 1984* (WA).

legislative power.[89] More specifically, an *implication* could be drawn from ss 7 and 24 of the *Constitution* which require Members of Parliament to be 'chosen by the people', that electors' *freedom to choose* cannot arbitrarily be restricted by laws that interfere with their capacity to choose *knowledgeably*. Political discussion could not therefore be unreasonably curtailed.[90] The Mason High Court thus gave a new impetus to the concept of implied constitutional freedoms.[91]

Notwithstanding this promising development, the difficulty in WA of relying on implied protections in the late 20th century can be illustrated by *Registrar v Communications, Electrical, Postal and Allied Workers Union* ('*Union Donations*').[92]

The *Industrial Relations Act 1979* (WA) provided that under union rules donations could only be paid to political organisations, such as the Australian Labor Party ('ALP'), out of special funds comprising members' *voluntary* contributions. Union officers making political donations out of general union funds were liable to severe penalties. In practical terms this stifled union support for the ALP by restricting the amounts that unions could lawfully donate. Application was made to the WA Industrial Commission to disallow certain non-complying union rules. The Commission refused, holding that the restriction contravened the implied freedom of political communication. The State appealed its decision.

The union contended that the Act imposed a substantial practical restriction upon the financial assistance available to political parties for advertising. The Court, upholding the State's appeal, concluded that the Act did not burden the freedom of communication about political matters in its terms, operation or effect, and even if it did, it was a reasonable and

89 See *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Hogan v Hinch* (2011) 243 CLR 506 and more recently *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3; (2013) 87 ALJR 289 and *Monis v The Queen* [2013] HCA 4; (2013) 87 ALJR 340. See also James Stellios, 'Using Federalism to Protect Political Communication: Implications from Federal Representative Government' (2007) 31 *Melbourne University Law Review* 239.

90 For commentary see Dan Meagher, 'The Protection of Political Communication under the Australian Constitution' (2005) 28 *University of New South Wales Law Journal* 30 and Elisa Arcioni, 'Developments in Free Speech Law in Australia: *Coleman* and *Mulholland*' (2005) 33 *Federal Law Review* 333.

91 Deriving implied rights to effectuate representative democracy only yields a *systemic protection* of Australia's electoral processes. It does *not confer individual rights* promoting freedom of speech; see Sir Anthony Mason, 'The Interpretation of a Constitution in a Modern Liberal Democracy', in *Interpreting Constitutions: Theories, Principles and Institutions*, Charles Sampford and Kim Preston (eds) (Federation Press, 1996) 13, 23-25.

92 [1999] WASCA 170 (WA Industrial Appeal Court). I represented the respondent.

proportionate means of providing transparency about how union funds were used.[93] Arguably, the decision exhibits a formal, literalist view of the legislation and ignored the reality of the scheme's inhibitive effect.

While the free political communication principle has been found to apply to laws of other states,[94] the implied freedom seems to have had virtually no impact in Western Australia outside the field of defamation law.[95] Counsel who defended s 54B *Police Act 1892* (WA) charges in the past may well have had a field-day if the freedom had been 'discovered' earlier and applied in political protest cases.

The vagaries of relying on beneficial interpretation according to the principle of legality to protect political communication may be compared to the constitutionally entrenched freedom of political communication. That implied 'freedom', while more directly accessible, is, however, of indeterminate and limited character.[96] It is only likely to yield positive results where a state or Commonwealth law is egregiously and manifestly excessive in burdening political discourse.[97] Given their open texture

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93 Ibid [34]-[35] (Kennedy J), [88]-[89] (Scott J). Regarding campaign financing see Keith Ewing, 'The Legal Regulation of Electoral Campaign Financing in Australia: A Preliminary Study' (1992) 22 *University of Western Australia Law Review* 239; Anne Twomey, *The Reform of Political Donations, Expenditure and Funding* (Department of Premier and Cabinet, NSW, 2008) and Deborah Class and Sonia Burrows, 'Commonwealth Regulations of Campaign Finance - Public Funding, Disclosure and Expenditure Limits' (2000) 22 *Sydney Law Review* 477. The High Court in *Unions NSW v New South Wales* [2013] HCA 58 held invalid a NSW law that restricted union donations to political parties such as the ALP on the basis that it was contrary to the implied limitation on political communication.

94 See eg *Coleman v Power* (2004) 220 CLR 1 upholding a challenge to a Queensland law restricting criticism, even insulting, of police.

95 Eg, *Nationwide News Pty Ltd v International Financing Pty Ltd* [1999] WASCA 95; *The Buddhist Society of Western Australia Inc v Bristile Ltd* [2000] WASCA 210.

96 As recognised by Michael McHugh, 'Does Australia Need a Bill of Rights?' (Speech delivered at the New South Wales Bar Association, Sydney, 8 August 2007, 9): 'While the drawing of implications from the Constitution may be one way of bolstering rights protection in Australia, it provides, at best, a constrained form of protection and is in no way a substitute for a comprehensive and express Bill of Rights.' Regarding implied limitations generally see Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23 *Melbourne University Law Review* 668; Jeremy Kirk, 'Constitutional Implications (I): Nature, Legitimacy, Classification, Examples' (2000) 24 *Melbourne University Law Review* 645; William Buss, 'Alexander Meiklejohn, American Constitutional Law, and Australia's Implied Freedom of Political Communication' (2006) 34 *Federal Law Review* 422 and Jeff Goldsworthy, 'Constitutional Implications Revisited' (2011) 30 *University of Queensland Law Journal* 9.

97 Recent decisions of the High Court are equivocal: see *Monis v The Queen* [2013] HCA 4; (2013) 87 ALJR 340 (Court divided) and *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3; (2013) 87 ALJR 289 (state law not infringing freedom). *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 295 ALR 638 indicates States are now tailoring criminal statutes circumspectly to accommodate *Kable v DPP (NSW)* 189 CLR 51.

the same could probably be said about invoking arguments based on freedoms set forth in articles 18 and 19 of the *ICCPR* if enacted in a bill of rights.[98]

3 *The Constitutional Right to Vote*

An essential element of the democratic process is the right to *participate in choosing* those who are to represent the community in the legislature. This is recognised in article 25 of the *ICCPR* which provides that every citizen has the right without distinction based on race, nationality, political opinion or religion to vote without unreasonable restrictions.[99]

Sharing in that process depends on the relevant electoral laws determining who is *eligible* to vote. In the extreme, this could be confined to a narrow oligarchy. Under Australian electoral laws the franchise, as developed over the last 150 years, now approaches universality. Nevertheless, in the margins, some persons are still excluded. The question then is: Do they have any constitutional basis to claim an entitlement to vote?[100] Are there no constitutional limitations, either *procedural* or *substantive*, precluding disqualification? Regarding *legislative process*, can a person be disqualified by legislation that has only been enacted by ordinary or simple majorities in each House of Parliament?

In Western Australia the *CA* requires that certain changes to the electoral system may only be made if more demanding restrictions on the passage of legislation are complied with. Under s 73 of the *CA* certain legislative amendments have to be passed by an absolute majority of

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98 Reliance on constructional presumptions against interference with fundamental rights and freedoms may nevertheless yield a positive outcome where application of the implied freedom may not (for example where anti-protest regulations are held to be compatible with freedom of political speech as appropriate and adapted to achieving the legitimate end of preventing obstruction and injury). Contrast *Evans v New South Wales* (2008) 168 FCR 576 with *Levy v Victoria* (1997) 189 CLR 579, *O'Flaherty v City of Sydney Council* [2013] FCA 344 and *Muldoon v Melbourne City Council* [2013] FCA 994.

99 The specific right of prisoners to vote is one aspect of the rights under articles 10 and 25 of the *ICCPR* to be treated with humanity, dignity and respect while in detention (UN Human Rights Committee, 18 December 2006). Outright disenfranchisement based on criminal conviction has been ruled to be a disproportionate denial of the right of prisoners to vote: *Hirst v United Kingdom*, no. 74025/01, ECHR (2005); [2005] ECHR 681.

100 On the right to vote see Anne Twomey, 'The Federal Constitutional Right to Vote in Australia' (2000) 28 *Federal Law Review* 45; Bryan Mercurio and George Williams, 'The Australian Diaspora and the Right to Vote' (2005) 32 *University Western Australia Law Review* 1; Anthony Gray, 'The Guaranteed Right to Vote in Australia' (2007) 7 *Queensland University of Technology Law Journal* 178.

the total members in each House. In addition, under s 73(2)(c) some electoral legislation also requires approval by voters. In those instances a referendum is the ultimate democratic sanction. These restrictive procedures, sometimes called 'manner and form' requirements,[101] only bind later Parliaments if entrenched against simple amendment.[102]

Section 73(1) of the *CA* was invoked in a challenge to changes to the State's *Electoral Act 1907* in 1979 that deprived certain prisoners of their entitlement to vote. A prisoner in Fremantle jail, Peter Wilsmore, faced with losing that right, sought a declaration that the amendments were unconstitutional. He contended[103] that disqualifying certain persons from eligibility to vote also meant they could not stand for election as members of either House. To change the qualifications of members in turn entailed an 'alteration' in 'the Constitution of [the] House'. By virtue of s 73(1) such a change could only be made if passed by absolute majorities in each House. It was submitted that the relevant bill, not having been passed in one House with the requisite majority, had not complied with s 73(1) and was invalid. The case ascended the curial ladder from the Supreme Court (where the plaintiff lost)[104] Full Court (won by 2-1 majority)[105] to the High Court which in *Western Australia v Wilsmore* ('*Wilsmore*') held them to be valid.[106]

Wilsmore, in holding that a manner and form restriction imposed in colonial times should not be rigorously enforced, appears consistent with canons of construction then current, divorced from any recognition of a human rights dimension. Twenty years later in *Attorney-General (WA) v Marquet* ('*Marquet*')[107] the High Court upheld a challenge to electoral redistribution amendments, finding them to be contrary

101 See Gerard Carney, 'An Overview of Manner and Form in Australia' (1989) 5 *Queensland University of Technology Law Journal* 69.

102 Regarding 'double entrenchment' see *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394.

103 Represented by Robert French and myself.

104 *Wilsmore v Western Australia* (Unreported, Supreme Court of Western Australia, Brisden J, 15 February 1980) 23.

105 [1981] WAR 159. An attempted appeal to the Privy Council was held incompetent: *Western Australia v Wilsmore* [1981] WAR 179.

106 (1982) 149 CLR 79. The decision turned not on the arguments outlined above but on a narrower point; s 73(1) only applied to provisions *still found* in the *Constitution Act*. The relevant provisions having been transplanted from that Act to the *Electoral Act*, s 73 had no application.

107 (2003) 217 CLR 545. Whether *Marquet* is consistent with *Wilsmore* is conjectural; see Peter Johnston, 'Method or Madness: Constitutional Perturbations and Marquet's Case' (2004) 7 *Constitutional Law and Policy Review* 25; also Jeffery Goldsworthy, 'Manner and Form Revisited: Reflections on Marquet's Case' in *Law and Government in Australia*, Matthew Groves (ed), (Federation Press, 2005) 18.

to manner and form provisions introduced in the 1890s. *Marquet* mandated strict compliance with absolute majority requirements applying to amendments to the *Electoral Distribution Act 1947* (WA). They sought to reduce electoral disparities in different parts of the State by ensuring each vote should have approximately the same value. The result ironically preserved an anti-democratic system based on inequality. Electoral malapportionment is explored below in relation to *McGinty v Western Australia*.

Synchronistically, recent decisions concerning the exclusion of certain groups including prisoners from the franchise,[108] and preventing segments of the community from voting by closing electoral rolls early,[109] indicate the current High Court is prepared to draw from the concept 'chosen by the people' a strong limitation on Commonwealth (and arguably state) laws restricting participation in the popular vote.[110]

Accordingly, one can ask if *Wilsmore* might now be determined differently, especially if instead of s 73(1) the plaintiff were to rely on s 73(2)(c) of the *CA*.

4 *The Right Not to Vote*

The counterpart to the right to vote is the right *not* to vote.This overlaps with the issue of whether voting should be compulsory. Longstanding High Court authority confirms that disapproval of the candidates for election is no basis for refusing to vote.[111] Further, there is no constitutional bar to compulsory voting.[112]

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108 *Roach v Electoral Commissioner* (2007) 233 CLR 162. In Australia, prisoners serving more than a three-year sentence are currently suspended from voting under the *Electoral and Referendum Amendment (Enrolment and Prisoner Voting) Act 2011* (Cth). This is compatible with the international norm considered in *Scoppola v Italy* (*No 3*) [2012] ECHR 868 where the European Court of Human Rights held that disqualification for a conviction attracting a five year sentence was not disproportionate.

109 *Rowe v Electoral Commissioner* (2010) 243 CLR 1.

110 Regarding article 25 of the *ICCPR* the High Court in *Rowe v Electoral Commissioner* (2010) 243 CLR 1 had no recourse to international standards. Similarly in *Roach v Electoral Commissioner* (2007) 233 CLR 162 the majority decision was not affected by them. Hayne J, dissenting, explicitly rejected them as irrelevant on the ground that they were too general to provide the Court with any determinative direction: at 220-221, [163]-[166].

111 *Judd v McKeon* (1926) 38 CLR 380.

112 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 202 [64] (McHugh J); *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 51 [132] (Gummow and Bell JJ), 51 [219] (Hayne J); also *Holmdahl v Australian Electoral Commission (No 2)* [2012] SASCFC 110.

The right to abstain from voting on religious grounds was tested in *Blakeney v Coates*.[113] A member of the Jehovah's Witnesses failed to vote at a State election contrary to s 156 of the *Electoral Act 1907* (WA). The Chief Electoral Officer (CEO) required him to provide a 'valid and sufficient excuse' for his failure. He asserted that to vote would be contrary to his religious belief that Jehovah was his *exclusive* source of governance and this barred him voting for *any* political party. The CEO rejected this reason. Blakeney was convicted at first instance of failing to vote.

On appeal, the Full Court upheld the conviction as correctly interpreting the *Electoral Act.* Construed strictly, the only grounds for asserting a valid excuse related to *physical* impossibility or impediments. They were the only exceptions expressed in s 156 of the Act. Even on a wider view that the CEO could consider other matters, religious objections did not qualify. Other provisions specifically permitted postal voting for persons whose religious beliefs prevented them attend polling places on the Sabbath. In light of those express exceptions, no other religious objections could be countenanced.[114]

The Full Court explicitly disclaimed that freedom of religion was relevant to interpreting the Act. It was recognised that freedom of religion under s 116 of the *Commonwealth Constitution* might provide a constraint on Commonwealth laws but had no application to state laws.[115] The Court's strict interpretation might have been different had regard been had to charter-based religious freedom.[116] The permitted exemptions from voting would not have been so narrowly construed.

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113 (Unreported, WA Full Supreme Court, 22 September 1982).

114 *Blakeney v Coates* (Unreported, WA Full Supreme Court, 22 September 1982) 7 (Wickham J), 6 (Wallace J). Interestingly, Wickham J observed that the CEO in his discretion could decide *not to prosecute* the plaintiff, inferring that religious beliefs *could* be relevant in that respect.

115 This anachronistic interpretive methodology can be contrasted with the High Court's current emphasis on reading penal provisions in the way that least interferes with common law rights; see *Coco v R* (1994) 120 ALR 415. There is, however, no common law right to religious freedom: *Grace Bible Church v Reedman* (1984) 36 SASR 376. Regarding s 116 see *Adelaide Company of Jehovah's Witnesses Incorporated v Commonwealth* (1943) 67 CLR 116.

116 A recent decision of the Victorian Court of Appeal, *Victorian Toll v Taha* [2013] VSCA 37 illustrates that a 'unified' approach to interpretation of penal provisions combining both the principle of legality and the direction in s 32 of the Victorian Charter to construe Victorian statutes to avoid, where possible, interference with specified human rights, effectively elevates the protective jurisdiction of the Supreme Court. A similar approach to *Blakeney v Coates* (Unreported, WA Full Supreme Court, 22 September 1982) based on the right to free enjoyment of religious opinion, would probably now produce a contrary outcome.

5 *Equality of Participation in Voting: McGinty's case*

The 1992 High Court representative democracy decisions opened a new constitutional perspective. They stimulated a further challenge to electoral malapportionment. *McGinty v Western Australia* ('*McGinty*')[117] sought to establish that the expression 'chosen by the people' implicitly entailed a standard of approximate equality of participation in the voting process, sometimes referred to as 'one person-one vote'. The case did not concern the right to vote itself. It assumed that a person was qualified to vote. The objection was directed to systemic malapportionment whereby voters did not share the right to vote equally.

That question had previously arisen in *Burke v Western Australia.*[118] There, the focus was on s 73(2)(c) of the *CA*. It required electoral laws providing that Parliament could be composed of members *other than* members '*chosen directly by the people*' to be approved by a referendum. Section 73(2)(c) arguably operated by reference to the similar notion in the *Commonwealth Constitution*. Dicta in *Attorney-General (Cth) (Ex rel McKinlay) v Commonwealth*[119] suggested that under Commonwealth law, while deviations of up to 10% from an electoral quota did not infringe that notion, substantially greater malapportionment between votes in different electorates, such as 3:1, could contravene the constitutional norm. The Supreme Court rejected these arguments, holding that s 73(2)(c) only ensured that voters elected their representatives *directly* (rather than indirectly such as by a council of delegates).[120]

The plaintiffs in *McGinty*, fortified by the 1992 'representative government' cases,[121] argued that the principle of representative democracy enshrined in ss 7 and 24 of the *Commonwealth Constitution* and s 73(2)(c) of the *CA* mandated *approximately* equal number of voters in metropolitan and country electorates. It was submitted that the State electoral laws contravened that notion of equality implied in the Commonwealth and State constitutions.

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117 (1996) 186 CLR 140.

118 (1982) WAR 248. I was junior counsel with Temby QC.

119 (1975) 135 CLR 1.

120 *Burke v Western Australia* [1982] WAR, 252-253 (Burt CJ).

121 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106.

The High Court, as the Supreme Court had done in *Burke v Western Australia*, rejected these arguments.[122] In so doing it interpreted the state and Commonwealth constitutions in a way that could not yield to importing international standards.[123] Notwithstanding that lack of success, the plaintiffs in both cases achieved recognition that gross malapportionment, virtually confined to WA in the latter part of the 20th century, still continued to distort electoral equality. Ultimately, after an aborted attempt to secure passage of bills to correct the imbalance[124] the matter was resolved *politically* in 2005 with the passing of legislation substantially reducing malapportionment.[125]

C *Quasi-Constitutional Arguments Upholding the Rule of Law*

Several cases sought to vindicate the rule of law, the principle that the 'Crown' (synonymous with government) is *not exempt* from the laws of the land. Two cases from the period under review demonstrate that arguments promoting that principle could succeed in the absence of a charter of rights. The first concerns the most fundamental of all rights, the liberty of the subject. Again, Peter Wilsmore was the protagonist. The second case entails holding the exercise of police power to account.

1 *Wilsmore v Court*

In 1974, Wilsmore was tried for wilful murder. The jury returned a special verdict pursuant to s 653 of the *Criminal Code 1913* (WA) (*CC*) of not guilty on account of unsoundness of mind. That verdict rendered him liable to be detained indefinitely 'during the Governor's pleasure'. He decided after some years to test the legality of his continuing detention in Fremantle Prison. There was strong psychiatric evidence indicating

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122 Regarding the effect of *McGinty* on the constitutional right to vote see Anthony Gray, 'The Guaranteed Right to Vote in Australia' (2007) 7 Queensland University of Technology Law Journal 178; Greg Carne, 'Representing Democracy or Reinforcing Inequality?: Electoral Distribution and McGinty v Western Australia' (1997) 25 *Federal Law Review* 351; George Williams, 'Sounding the Core of Representative Democracy: Implied Freedoms and Electoral Reform' (1996) 20 *Melbourne University Law Review* 848; D Ball, 'The Lion that Squeaked: Representative Government and the High Court: McGinty v The State of Western Australia' (1996) 18 *Sydney Law Review* 372 and Nicholas Aroney, 'Representative Democracy Eclipsed? The *Langer, Muldowney* and *McGinty* Decisions' (1996) 19 *University of Queensland Law Journal* 75.

123 This was because the fundamental limitation on a state law depended on implications drawn from *entrenched* provisions of the respective constitutions (s 128 Commonwealth Constitution; s 73 *CA*). The outcome therefore was determined solely by reference to constitutional interpretation.

124 These were held invalid in *Attorney-General (WA) v Marquet* (2003) 217 CLR 545.

125 *Constitution and Electoral Amendment Act 2005; One Vote One Value Act 2005.* These Acts amended the *CAAA* and repealed the *Electoral Districts Act,* removing the worst features of malapportionment in WA.

that he was no longer of unsound mind and a danger to the public. His appeals to the Governor for release were rejected by the Government. He then instituted an action in the Supreme Court, *Wilsmore v Court*,[126] claiming that the Ministers comprising the Executive Council, having regard to that medical evidence, should advise the Governor to terminate his detention.

The State objected that the Governor, as the Queen's representative was not amenable to suit in the Queen's courts.[127] The plaintiff, represented by Robert French,[128] contended that the Crown's immunity from suit only applied where a court was moved to grant *coercive* process, such as a writ of mandamus. Relying on *Tonkin v Brand*[129] the plaintiff submitted that the Court could grant a bare, non-coercive declaration informing the Queen's Ministers of their legal duties. Fortuitously, two recent High Court decisions, *R v Toohey; Ex parte Northern Land Council*[130] and *FAI Insurances Ltd v Winneke*[131] established that there was no constitutional immunity necessarily shielding the Queen's representatives from suit.

The Supreme Court, significantly, rejected the State's objection to jurisdiction, holding the Queen's representative *could be sued* in an appropriate case.[132] The Court held, however, that having regard to the *nature* of the Governor's discretionary power under the *Criminal Code*, evaluative decisions about releasing possibly dangerous prisoners were solely for the Governor's determination. It was not the Court's function to direct Ministers in that regard.

2 *Webster's case*

The Websters had instituted proceedings claiming damages against a Police Officer, Sergeant Lampard for wrongfully threatening them with arrest. In his defence Sergeant Lampard invoked a statutory defence under s 138 of the *Police Act 1892* (WA) providing that actions could not lie against a police officer carrying out duties under the Act unless

126 [1983] WAR 190.

127 See *R v Governor of South Australia* (1907) 4 CLR 1497 (prerogative relief refused against a state Governor).

128 I was co-counsel.

129 [1962] WAR 2. For an analysis see Peter Johnston '*Tonkin v Brand*: Triumph for the Rule of Law', in *State Constitutional Landmarks*, George Winterton (ed), (Federation Press, 2006) 211.

130 (1981) 151 CLR 170.

131 (1982) 151 CLR 342.

132 Affirming *Tonkin v Brand* [1962] WAR 2. Regarding judicial review of Governors' decisions see *Halden v Marks* (1996) 17 WAR 447 and *Prisoners Review Board v Freeman* [2010] WASCA 166, [172] (Murphy J).

there was direct proof of malice. The defendant sought to have the claim struck out on the basis that, having regard to affidavit evidence, there was no case to answer as he was acting in good faith as a police officer. At first instance, a Master of the Supreme Court found that on the evidence the plaintiffs could not succeed and struck out the claim. On appeal, the Full Supreme Court confirmed that holding.[133]

On further appeal in *Webster v Lampard*, the High Court held for two reasons that the Master had erred in striking out the action.[134] First, whether the particular defence was likely to succeed could only be properly tested at a hearing involving cross-examining witnesses. Summary dismissal was therefore inappropriate. Secondly, the Master and the Full Court had erred in holding that the plaintiffs bore the onus of proof in establishing that the defendant had not genuinely acted in the execution of his duty.

The Court emphasised that as a matter of general principle, in construing provisions protecting public officers from suit where their defence was subject to defeasance in the event of illegality or dishonesty, the onus was on *the defendant* to prove facts bringing the case within the protection. As stated by McHugh J:

> Because the exercise of power for an improper purpose … is not a lawful exercise of the power … a defendant who uses a power for an improper purpose … is not entitled to the protection of a statutory immunity against a claim arising from the wrongful exercise of power.[135]

The defence of statutory protection should therefore fail unless the defendant can prove he was honestly exercising the power. Given the Supreme Court had wrongly construed the legislation, the appeal succeeded.

Concerning the rule of law, both *Wilsmore v Court* and *Webster v Lampard* illustrate how the respective courts were disinclined to allow a free rein to state executive power. In the former although the Supreme Court was not prepared to substitute its evaluation for that of the executive it left open the possibility that in a proper case, such as failure to comply with mandatory procedures, courts could intervene to test the legality of imprisonment. In *Webster v Lampard* the High Court ensured that abuses of police power should not readily attract statutory immunity, allowing police officers summarily to escape judicial scrutiny for their arbitrary acts. Each case thereby affirmed the rule of law.

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133 (1992) 7 WAR 296.
134 *Webster v Lampard* (1993) 177 CLR 598.
135 Ibid 620.

D *Constitutional Entrenchment of the Supreme Court as the Bastion of Liberty*

Essential to the maintenance of any human rights regime is the independence and impartiality of state courts. In 1996 the High Court in *Kable v DPP* (NSW) (*Kable*)[136] held that States could not impose non-judicial functions upon their Supreme Courts that were incompatible with the maintenance of the Courts' *impartiality* and *independence*.[137] After an uncertain start[138] *Kable* has now spawned a significant progeny of cases[139] in which the High Court has struck down laws interfering with the 'institutional integrity' of state courts.

Kable was anticipated in Western Australia. Two years before, in *S (A Child) v The Queen*, ('*S*')[140] an action based on both the Commonwealth and state constitutions was initiated in the Supreme Court challenging a State law providing that juvenile offenders convicted on three separate occasions should not be released from imprisonment after their sentences had expired. Instead, the Supreme Court was to review the juvenile's circumstances at six monthly intervals and determine whether they should be released. In *S* the detainee submitted that the *Commonwealth Constitution* impliedly mandated the independence of state courts. Alternatively, s 73(6) of the *CA* entrenched the Supreme Court as an independent institution.[141] Further, the role imposed on the Court in reviewing juvenile offenders was *incompatible* with maintaining that independent character.

It was also submitted that given ambiguity in the State Constitution the Court could have regard to relevant conventions, including that concerning the *CROC* and favour an interpretation consistent with international standards. A similar argument was accepted in *Mabo v*

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136 189 CLR 51

137 This was because state courts vested with federal jurisdiction under Chapter III of the *Constitution* have to satisfy a reasonable standard of independence in order to exercise that jurisdiction.

138 At first, *Kable* seemed a false start when early challenges invoking it failed. See Peter Johnston, 'State Courts and Chapter III of the Commonwealth Constitution: Is Kable's Case Still Relevant?' (2005) 32 *University Western Australia Law Review* 211.

139 Commencing with *International Finance Trust Company Limited v NSW Crime Commission* (2009) 240 CLR 319.

140 (1995) 12 WAR 392. I was counsel.

141 The argument that implications of judicial independence can be drawn where some state Constitutions, such as those of Western Australia, Queensland and South Australia *entrench judicial review* under their Supreme Courts should be distinguished from the broader proposition that state Constitutions do not mandate an equivalent 'separation of powers' as in Chapter III, for which *Nicholas v Western Australia* [1972] WAR 168 is traditionally cited.

Queensland (*No 2*)[142] where common law principles were applied to avoid infringing those standards.[143]

These arguments received short shrift from the Court. The Court rejected the argument that the proposed constitutional constraint on the powers of the Supreme Court to order mandatory detention of juveniles, even if only for a very minor third offence, should be read to comport with the *CROC*. The Court held there was no guarantee that the Supreme Court could not be altered as the State Parliament saw fit, including even its abolition under s 57 of the *Constitution Act*.[144] Two years later, the High Court in *Kable* held that the Commonwealth Constitution did protect the independence of state courts.[145] That decision cemented the central role of the Supreme Court standing between the legislature and government, on the one hand, and the individual on the other where the civil liberties of the subject are at stake.

V Lessons For Today

In summary, these points can be made. First, civil rights litigation even if unsuccessful can play an important role in awakening public awareness to human rights issues. This can be a factor in changing political attitudes and stimulate reform of State laws.

Secondly, while lawyers acting for defendants have ethical responsibilities not to present unmeritorious submissions, the cases examined in this article lent themselves to some innovative arguments which while they may not have immediate traction in the course of time may attract acceptance. This is particularly so where common law canons

142 (1992) 175 CLR 1.

143 Common law principles may change over time and adapt to international limitations; see *Nulyarimma v Thompson* (1999) 165 ALR 621; 96 FCR 153; Ivan Shearer, 'The Relationship between International Law and Domestic Law' in Brian Opeskin and Donald Rothwell (eds), *International Law and Australian Federalism* (Melbourne University Press, 1997) 5; Douglas Guilfoyle, 'Nulyarimma v Thompson: Is Genocide a Crime at Common Law in Australia?' (2001) 29 *Federal Law Review* 1; Andrew Mitchell, 'Genocide, Human Rights Implementation and the Relationship between International and Domestic Law: Nulyarimma v Thompson' (2000) 24 *Melbourne University Law Review* 15; Henry Burmester and Susan Reye, 'The Place of Customary International Law in Australian Law: Unfinished Business' (2000) 21 *Australian Year Book of International Law* 39. Regarding the internationalisation of common law see also David Dyzenhaus, Murray Hunt and Michael Taggart, 'The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation' (2001) 1 *Oxford University Commonwealth Law Journal* 5.

144 To the contrary see now *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

145 *S (A Child) v The Queen* also anticipated by a year the *incompatibility* principle in *Grollo v Palmer* (1995) 184 CLR 348.

of statutory construction more accommodating to individuals' rights have evolved in the last two decades. Many of the cases studied were affected by modes of strict construction prevailing in the latter part of the 20th century. Led by the present High Court, the development of the *principle of legality* now provides greater leeway for interpretive presumptions incorporating human-rights values. This in turn allows recourse to international standards, especially under the *ICCPR,* the *Race Discrimination Convention* and the *CROC*. Concomitantly, while judges were less familiar with international law principles in the period under review, that is no longer true. The judicial culture is now, arguably, both more familiar with and more understanding of the principles derived from those Conventions.

Thirdly, *constitutional arguments* concerning the rights of individuals generally have had a poor record. It is difficult to construct arguments based on non-libertarian 19th century constitutional provisions, divorced from their colonial origins, to fit current human-rights conceptions. More optimistically, cases like *Wilsmore*[146] and *Webster*[147] exhibit a heightened sense of the quasi-constitutional *rule of law* whereby courts are more likely to give stricter scrutiny to executive action.

Ironically, the right to reasonable protest is now secured through the *implied constitutional* freedom of political communication recognised by the High Court. Although constrained by considerations of reasonableness, it provides a kind of surrogate protection in the absence of Commonwealth or state laws giving effect to the *ICCPR*'s freedom of speech, religion and association provisions.

Finally, while Western Australia is no longer contemplating a charter of rights it is reasonable to ask, given past experience, whether such legislation would be beneficial. On the basis of the cases studied no definitive answer is possible. Arguably a *human rights Act* promoting freedom of expression and religion might have made a difference in cases like *Noonkanbah (Injunction case)*,[148] *Roebourne Protest case*,[149] *Riley*,[150] *Union Donations*[151] and *Blakeney*.[152] Possibly it

146 *Wilsmore v Court* [1983] WAR 190.

147 *Webster v Lampard* (1993) 177 CLR 598.

148 *Noonkanbah Pastoral Co Pty v Amax Iron Ore Corporation* (Unreported, Supreme Court of Western Australia, Brisden J, 21 and 27 June 1979).

149 *Colin De La Rue and s 54B of the Police Act* (Unreported, Roebourne Police Court Prosecution, May 1980).

150 *Riley v Hall* (Unreported, Supreme Court of Western Australia, 4 June 1981).

151 *Registrar v Communications Electrical Post and Allied Workers Union ('Union Donations')* [1999] WASCA 170 (WA Industrial Appeal Court).

152 *Blakeney v Coates* (Unreported, WA Full Supreme Court, 22 September 1982).

might have provided confirmatory force in *Margetts*[153] *Bropho* (*HC*), *Wilsmore*[154] and *Webster*.[155] It is unlikely to have affected cases like *Jones*, *Wilsmore*[156] (voting), *McGinty*[157] and *S*[158] as they were argued on strictly constitutional grounds. As stated previously, no cogent case can be made out that the bill of rights would have *no* beneficial effect.

Certainly, from the perspective of those who seek to advance civil rights arguments a Bill of Rights would provide a more direct and explicit approach to addressing such issues by establishing a point of reference even if only in relation to statutory interpretation. It would enable the merging of common law interpretive methodologies focussed on textual particularity with continental-modalities founded on abstract general principles.[159] The encouragement of a 'rights culture' alone would be likely to have a significant, if not spectacular, outcome in future litigation.[160] Whether or not a society chooses to enshrine fundamental rights in a constitutional document, a strong judiciary anchored firmly in the rule of law has a vital role to play in preserving fundamental rights. Here, the 'Rule of Law' is not just an empty, rhetorical euphemism, nor simply a procedural concept without moral substance. It can be seen as an organising principle ensuring limitations on arbitrary state power. As such, it is an indispensable instrument of democracy.[161]

153 *Margetts v Campbell-Foulkes* (Unreported, WASC 29 November 1979, FC).

154 *Wilsmore v Court* [1983] WAR 190.

155 *Webster v Lampard* (1993) 177 CLR 598.

156 *Wilsmore v Court* [1983] WAR 190.

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

158 *S (A Child) v The Queen* (1995) 12 WAR 392.

159 See above n 116 concerning the evolution of a 'unified' approach to statutory construction.

160 The influence of a change in judicial attitudes is explored in Paul Fairall and Wendy Lacey, 'Preventative Detention and Control Orders under Federal Law: The Case for a Bill of Rights' (2007) 31 *Melbourne University Law Review* 1072.

161 Hon Rosalie Abella, 'International Law and Human Rights: The Power and the Pity' (2010) 55 *McGill Law Journa*l 871, 877-878.